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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERMS, 1879, 1880, 1881, IN

102, 103, 104, 105 U. S.

BOOK 26,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MORRISON R. WAITE.

ASSOCIATE JUSTICES,

HON. NATHAN CLIFFORD,
HON. NOAH H. SWAYNE,
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. WILLIAM STRONG,
HON. JOSEPH P. BRADLEY,
HON. WARD HUNT,
HON. JOHN M. HARLAN,
HON. WILLIAM B. WOODS,
HON. STANLEY MATTHEWS,
HON. HORACE GRAY,
HON. SAMUEL BLATCHFORD.

ATTORNEYS-GENERAL,

HON. CHARLES DEVENS,
to March 5, 1881; after that
HON. WAYNE MACVEAGH,
to Dec. 19, 1881; after that
HON. BENJAMIN HARRIS BREWSTER.

SOLICITOR-GENERAL,

HON. SAMUEL F. PHILLIPS.

CLERK,

JAMES H. MCKENNEY, ESQ.

REPORTER,

WILLIAM T. OTTO, ESQ.

MARSHAL,

JOHN G. NICOLAY, ESQ.

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ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1879, 1880-1, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

Names of Justices, and whence appointed.	By whom Appointed.	Circuits, 1880-1881.	Commissioned.	Sworn in.	Termination.
Associate JJ.		First.*			
NATHAN CLIFFORD, Maine.	President Buchanan	Me., N. H., Mass., Rhode Island.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died 1881. (July 25.)
HORACE GRAY, Massachusetts.	President Arthur.		1881. (Dec. 20.)	1882. (Jan. 9.)	
		Second.†			
WARD HUNT, New York.	President Grant.	Vermont, Conn., New York.	1872. (Dec. 11.)	1873. (Jan. 9.)	Resigned. 1882. (Feb. 1.)
SAMUEL BLATCHFORD, New York.	President Arthur.		1882. (Mar. 22.)	1882. (April 3.)	
		Third.			
WILLIAM STRONG, Pennsylvania.	President Grant.	New Jersey, Penn., Del.	1870. (Feb. 18.)	1870. (Mar. 14.)	Resigned. 1880. (Dec. 14.)
Chief Justice		Fourth.			
MORRISON R. WAITE, Ohio.	President Grant.	Md., Va., N. C., W. Va., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)	
Associate JJ.		Fifth.			
JOSEPH P. BRADLEY, New Jersey.	President Grant.	Ga., Ala., Fla., Miss., La., Tex.	1870. (Mar. 21.)	1870. (Mar. 23.)	
WILLIAM B. WOODS, Georgia.	President Hayes.		1880. (Dec. 21.)	1881. (Jan. 5.)	
		Sixth.			
NOAH H. SWAYNE, Ohio.	President Lincoln.	Ky., Tenn., Ohio, Mich.	1862. (Jan. 24.)	1862. (Jan. 27.)	Resigned. 1881. (Jan. 24.)
STANLEY MATTHEWS, Ohio.	President Garfield.		1881. (May 12.)	1881. (May 17.)	
		Seventh.			
JOHN M. HARLAN,* Kentucky.	President Hayes.	Ind., Ill., Wis.	1877. (Nov. 29.)	1877. (Dec. 10.)	
		Eighth.			
SAMUEL F. MILLER, Iowa.	President Lincoln.	Minn., Iowa, Mo. Kan., Ark., Neb.	1862. (July 16.)	1862. (Dec. 1.)	
		Ninth.			
STEPHEN J. FIELD,† California.	President Lincoln.	Cal., Or., Nev.,	1863. (Mar. 10.)	1863. (Dec. 7.)	

* From May 2, 1881 to Jan. 30, 1882 *Mr. Justice* Harlan stood also allotted to the First Circuit.
† From Jan. 30, 1882 to Apr. 3, 1882 *Mr. Justice* Field stood also allotted to the Second Circuit.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERMS, 1879, 1880.

Vol. 102.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1879.

83] **Ex Parte AUGUSTUS B. PERRY.**

(See S. C., 12 Otto, 183-186.)

Mandamus—*to inferior court.*

1. This court cannot, by *mandamus*, correct the judicial errors committed by an inferior court in the progress of a cause; that is the office of a writ of error or an appeal, and not of a writ of *mandamus*.
2. The case is not changed because the appropriate remedy may involve an inconvenient delay.

[No. 9, Orig.]

Argued Nov. 17, 1879. Decided Nov. 24, 1879.

PETITION for *mandamus*.

The facts most clearly appear by a reproduction of the petition in full as follows:

To the Supreme Court of the United States:

The petition of Augustus B. Perry, O. H. Perry, John Mosely, William G. Mosely, Ira Allen Lovejoy, George R. Emerson, Calvin G. Peck, O. W. Gilman and George W. Sargent, respectfully shows that your petitioners are libelants in a certain cause in the Circuit Court of the United States for the Southern District of New York against the ship Civilta, her tackle, etc., and the steam-tug Restless, her engine, etc.

That said cause was commenced in the District Court of the United States for the Southern District of New York, by the filing of the libel therein, on December 26, 1872, and that such proceedings were thereafter had, that on May 29, 1873, your petitioners recovered a final decree therein against both vessels for $8,661.91.

That, thereafter, said cause was removed by appeal into the Circuit Court of the United States for the Southern District of New York, and such proceedings were therein had, that, on October 26, 1877, your petitioners recovered a final decree therein against both vessels for $11,400.90.

That, thereafter, an appeal to the Supreme Court of the United States was taken in behalf of said ship Civilta, and was perfected in due form and season so as to operate as a *supersedeas* of said last mentioned final decree as to said ship Civilta.

That notice of an appeal to the Supreme Court of the United States in behalf of said steam-tug Restless was served upon the libelants' proctors, who thereupon extended the time within which an appeal might be taken by said tug Restless, and the time to so perfect it expired January 5, 1878, and no such appeal was taken or security given to perfect the same, and on March 15, 1878, a summary judgment was entered and docketed in favor of your petitioners against John G. Baker, William B. Hatch and Edward P. Hatch, the stipulators on appeal to the circuit court for the steam-tug Restless.

That, thereafter, an appeal to this court in behalf of said tug was filed, and a bond or security on said appeal was filed on behalf of said steam-tug Restless, and thereafter, during the month of September, 1878, a motion was made in said cause in the Supreme Court of the United States on behalf of said steam-tug Restless, which said motion, though in form for a writ of prohibition, was, by consent of all parties, turned into a motion for a stay of proceedings on the judgment against said steam-tug Restless.

That said motion was heard upon the petition of John G. Baker and the affidavit of Robert D. Benedict, and said Supreme Court declined to stay libelants' proceedings and denied said motion by an order duly entered.

That, on the 3d of January, 1879, an order was made by Hon. Samuel Blatchford, in said circuit court, on the affidavit of Edward P. Hatch, one of the debtors in said judgment of March, 15, 1878, to show cause why said judgment of March 15, 1878, should not be vacated and set aside. And on the 4th of January, a further order was made by said Judge, and on the 3d of May, 1879, the said motion of Edward P. Hatch was denied by said Judge, and an order denying the same was duly entered.

That, on the 17th of February, 1879, the said judgment debtors, Wm. B. Hatch and Edward P. Hatch, presented to said court a petition praying that said summary judgment might be set aside, and that the proceedings of the libelants to collect the amount of said decree against said tug Restless might be stayed, and such proceedings were had, that, on the 21st of April, 1879, the prayer of said petition was denied by said court, and an order to that effect was duly entered.

That, thereafter, on May 7, 1879, an execution was issued to the Marshal of the United States for the Southern District of New York, on said summary judgment, against John G.

NOTE.—Mandamus, *when will issue.* See *note* to McCluny v. Silliman, 15 U. S. (2 Wheat.), 369.

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Baker, William B. Hatch and E. P. Hatch, the judgment debtors in said judgment, and on June 13, 1879, a motion was made in said circuit court by your petitioners for an order to the U. S. Trust Company in the City of New York, to pay to said U. S. Marshal, certain moneys deposited in said U. S. Trust Company by Edward P. Hatch, one of the said judgment debtors, under the order of said circuit court. That, on June 16, 1879, said motion was denied and the proceedings of your petitioners and of said marshal under said execution were stayed by an order of said circuit court.

That, thereafter, on June 27, 1879, a motion was made by your petitioners, in said circuit court, upon affidavits, for leave to proceed under said execution, and for other relief, which motion was denied by an order.

And your petitioners further allege that they are informed and believe, that, under the statutes of the United States and the rules and practice of the courts of the United States in such cases made and provided, and the decision and order of the Supreme Court of the United States denying a stay of proceedings as aforesaid, they are entitled to proceed under said execution against said stipulators and judgment debtors; and that the stay of proceedings granted by said circuit court as aforesaid was and is unwarranted and illegal, and an overruling by said circuit court of the decision and order of said Supreme Court hereinbefore set forth, and that your petitioners' only remedy is by invoking the power which this court can exercise by the writ of *mandamus*.

Wherefore, your petitioners pray that this honorable court will be pleased to grant a rule, directed to the Honorable Samuel Blatchford, *Judge* of the Circuit Court of the United States for the Southern District of New York, requiring him to show cause, if any he may have, at a term of this court to be held at the Capitol of the City of Washington, on the —— day of October, 1879, why a writ of *mandamus* from this court should not be awarded and issued to him, commanding him to vacate and set aside the aforesaid order granting a stay of proceedings under said execution, and to make an order directing the payment to the U. S. Marshal, under said execution in his hands, of the moneys deposited in the United States Trust Company, as aforesaid, or why your petitioners should not have such other or further order, writ or relief as may be just.

Dated, New York, October 2, 1879.

Mr. **R. D. Benedict,** for petitioner.

Mr. **John E. Parsons,** opposed.

[186] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

We cannot by *mandamus* correct the judicial errors committed by an inferior court in the progress of a cause. *Ex parte Schwab*, 98 U. S., 240 [XXV., 105]. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting. In the present case it appears that the circuit court has acted on the motion of the petitioner, and denied him what he asked. The object of this proceeding is to obtain from us an order requiring that court to reverse its former decision and grant the relief it has once refused. That is the office of a writ of error or an appeal, and not of a writ of *mandamus*. *Ex parte Flippin*, 94 U. S., 348 [XXIV., 194]; *Ex parte Loring*, 94 U. S., 418 [XXIV., 165]. Neither is the case changed because the appropriate remedy may involve an inconvenient delay. In *Ex parte Whitney*, 13 Pet., 404, it was held that a writ of *mandamus* ought not to be used to correct orders made by a judge in the exercise of his authority, even though such orders "may seem to bear harshly or oppressively upon the party" complaining.

Mandamus *refused*.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH M. FRENCH, *Plf. in Err.*, [131

v.

MARGARET A. WADE, Widow of the late HENRY F. WADE, Jr., Natural Tutrix of her Minor Children, PHILIP D. WADE ET AL.

(See S. C., 12 Otto, 133-134.)

Confiscation Act—effect of on lands—heirs—forfeiture, extent of—purchaser, right of.

1. After a seizure and an adjudicated condemnation and sale, under the Confiscation Act, of the lands of one engaged in rebellion against the United States, there is left in him no estate or interest of any description, which he can convey by deed.

2. The Joint Resolution, passed contemporaneously with the approval of the Act, was intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death.

3. As to him, the forfeiture was complete and absolute; but the ownership, after his death, was in nowise affected, except by placing it beyond his control while living.

4. One who became the purchaser of his own land at a sale under such Act, cannot convey any title to or interest in it, beyond his own life.

[No. 1029.]

Submitted Jan. 12, 1880. Decided Feb. 2, 1880.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The following are the findings of the Circuit Court in this case:

The trial by jury in this cause having been waived, and the cause having been tried on the question of title, as appears by the agreement of record, the court finds the following facts:

1. That Philip D. Wade, Henry F. Wade, Hampton M. Wade, Courtney Wade and Ida A. Wade, are the legitimate children of Henry F. Wade, deceased, and his sole and only heirs at law; and that Margaret A. Wade, their mother, is their duly qualified and appointed tutrix or guardian.

2. That, on the 20th day of January, 1865, the said Henry F. Wade, Jr., the decedent, was seised and possessed in fee of a certain piece of ground, with all the buildings and improvements thereon, and all the rights, ways, privileges, advantages and appurtenances thereunto belonging or in anywise appertaining, situate in the first district of this city, in square No. 156, bounded by Bartholomew (now Clio), Magazine, Melicerte (now Erato) and Camp Streets, formed by the whole of lot No. 7, and half of lot No. 8, as per plan made by Louis Bringier, dated February 9, 1837, and deposited in the office of H. B. Cenas, notary public, and measuring in American measure forty-two feet and

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six inches front on Bartholomew (now Clio) Street by one hundred and seventy-five feet in depth between parallel lines, acquired by the said Henry F. Wade, Jr., from his father, Henry Farlow Wade, by act of donation, passed before Theodore Guvol, notary public, dated May 17, 1860.

3. That on the 20th day of January, 1865, in virtue of an Act of Congress, approved July 17, 1862, entitled "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes," and in virtue of the Joint Resolution of Congress, explanatory thereof, likewise approved July 17, 1862, said property was seized by the Marshal of the United States for the District of Louisiana, under process issuing from the District of Louisiana, in suit No. 7969, entitled *U. S.* v. *One Piece of Ground, Property of Henry F. Wade, Jr.*, in which said property was libeled as forfeited to the United States for the causes therein mentioned, which libel is made part hereof and transcribed on page 45 of this transcript, and that such further proceedings were had in said suit, that May 6, 1865, the said before described property was, by decree of said court, condemned as forfeited to the United States.

4. That, Oct. 21, 1865, said property was sold under and by virtue of said decree of condemnation, and was purchased by the deceased, Henry F. Wade, who, Oct. 30, 1865, by act before J. F. Coffey, notary public, sold the same to the defendant, J. M. French.

5. That Henry F. Wade, the defendant in the confiscation proceeding, the purchaser of the property under the decree therein rendered, and the vendor of the defendant, departed this life in the City of New Orleans, Feb. 24, 1874.

As a conclusion of law from these facts, and considering the Act of Congress and the Joint Resolution aforesaid, and the decision of the Supreme Court in *Bigelow* v. *Forrest*, 9 Wall., 339 (76 U. S., XIX., 696); *Wallach* v. *Van Riswick*, 92 U.S., 202 (XXIII., 478); *Pike* v. *Wassell*, 94 U.S., 711 (XXIV., 807), it is considered that there be judgment decreeing the said minors, Philip D. Wade, Henry F. Wade, Hampton M. Wade, Courtney Wade and Ida A. Wade, represented by their mother and natural tutrix or guardian, Mrs. Margaret A. Wade, be and they are hereby decreed to be the true and lawful owners of the property described in the petition herein, a certain piece of ground, with all the buildings and improvements thereon; and all the rights, ways, privileges, advantages and appurtenances thereunto belonging or in anywise appertaining, situate in the first district of this city, in square No. 156, bounded by Bartholomew (now Clio), Magazine, Melicerte (now Erato) and Camp Streets, formed by the whole of lot No. 7, and half of lot No. 8, as per plan made by Louis Bringier, dated Feb. 9, 1837, and deposited in the office of H. B. Cenas, notary public, and measuring, in American measure, forty-two feet and six inches front on Bartholomew (now Clio) Street, by one hundred and seventy-five feet in depth between parallel lines, and that they recover possession of the same, with costs.

Mr. **B. F. Jonas**, for plaintiff in error.

Mr. **J. A. Campbell**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [133]

We think the court below was right in holding that this case was governed by that of *Wallach* v. *Van Riswick*, 92 U. S., 202 [XXIII., 478], in which we decided that after a seizure and an adjudicated condemnation and sale under the Confiscation Act of July 17, 1862, 12 Stat. at L., 589, of the lands of one engaged in rebellion against the United States, there was "Left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another," p. 208 [475], and that the Joint Resolution passed contemporaneously with the approval of the Act, 12 Stat. at L., 627, was "Intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death." P. 213 [477]. As to him, the forfeiture was complete and absolute; but the ownership after his death was in nowise affected, p. 209 [476], except by placing it beyond his control while living. This case has been followed many times since, *Pike* v. *Wassell*, 94 U. S., 711 [XXIV., 807], and must now be considered as the settled rule of decision in this court.

Wade, by the purchase of his own interest in the property, took the property to hold during his life, the same as any other purchaser. Whatever rights another could have acquired by the purchase, he got, but no more. Another could not, after purchase, have sold and conveyed the interest of the heirs in the property; neither can he. By the condemnation and sale, Wade's estate was separated entirely from that of his heirs after his death, and the heirs are not estopped by his warranty from asserting their title.

As the cause was tried below on the question of title only, and there are no findings in respect to the improvements put on the property by French, we cannot consider whether any allowances should be made to him on that account or not.

Judgment affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NEW ORLEANS NATIONAL BANKING ASSOCIATION, *Appt.*, [121]

v.

NEW ORLEANS MUTUAL INSURANCE ASSOCIATION, NOW THE NEW ORLEANS INSURANCE ASSOCIATION, and MRS. JESSIE LEISY, Testamentary Exrx. of JOHN LEISY, Deceased.

(See S. C., 12 Otto, 121.)

Jurisdiction as to amount.

A writ of error or appeal must be dismissed when it appears from the record, taken as a whole, that

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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the amount actually in controversy between the parties was not sufficient to give this court jurisdiction.

[No. 940.]

Submitted Jan. 20, 1880. Decided Mar. 2, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **J. D. Rouse** and **Wm. Grant**, for appellant.

Messrs. **C. B. Singleton** and *Henry C. Miller*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

From this record it appears affirmatively that the only dispute between the parties is as to the right of the Insurance Company to withhold a transfer of the stock in the pleadings described, until an indebtedness of a stockholder to the Company for $2,074.86 is paid. Such being the case, we have no jurisdiction of the appeal under the rule stated in *Gray* v. *Blanchard*, 97 U. S., 564 [XXIV., 1108], where we held that an appeal or writ of error must be dismissed when it appears from the record taken as a whole, that the amount actually in controversy between the parties was not sufficient to give us jurisdiction.

Dismissed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 174; 110 U. S., 388.

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[64] UNITED STATES, *Appt.*,

v.

HELEN A. PECK, Admrx. of CAMPBELL K. PECK, Deceased.

HELEN A. PECK, Admrx. of CAMPBELL K. PECK, Deceased, *Appt.*,

v.

UNITED STATES.

(See S. C., 12 Otto, 64-66.)

Parol evidence as to contract—non-performance—government contract—assignee in bankruptcy.

1. The subject-matter of a contract may be shown by parol evidence of the surrounding circumstances.

2. The conduct of one party to a contract which prevents the other from performing his part, is an excuse for non-performance.

3. A contractor to deliver wood to the Government is entitled to extra compensation for being required to cut it two miles farther from the place of delivery on the government lands than his contract allowed him to cut it, and for the expense of keeping his teams during the delay caused by such requirement.

4. An assignee in bankruptcy, of a plaintiff, will not be substituted in this court in place of the plaintiff, where the assignee has lain by a long time and allowed the case to go on in plaintiff's name at his expense, and under his management, or that of the creditors for whose use he is prosecuting the same.

[No. 788, 789.]

Submitted Jan. 20, 1880. Decided Mar. 22, 1880.

CROSS appeals from the Court of Claims.

These appeals come from the Court of Claims, and the facts are found in the opinion and in 14 Ct. Claims, 86.

Messrs. **John B. Sanborn** and *Charles King*, for Peck.

Mr. **Edwin B. Smith**, *Asst. Atty-Gen.*, for United States.

Mr. James Hagerman filed a brief in support of a motion to substitute assignee.

Mr. Justice **Bradley** delivered the opinion of the court:

We agree with the Court of Claims in this case, that the defendants, the United States, were not entitled to deduct from the claimant's demand for the wood cut and delivered by him, any amount by reason of his failing to furnish the hay which he contracted to do. The facts disclosed in the case, as found by the court, clearly evince that the parties could not have had in view any other hay than that which was to be found in the region of country bordering on the Yellowstone River. This is corroborated and strengthened by the terms of the contract itself. It explains why authority was given to the claimant to cut hay and wood upon any part of the military reservation at Tongue River Station, outside of a circle of one half mile from the adjutant's office; and why provision was made, entitling him to military protection in the execution of his contract, whenever, from the hostility of the Indians, it might be deemed necessary by the post commander. Everything in the case and in the contract indicates, beyond the possibility of doubt, that the hay to be furnished was that which was procurable in the Yellowstone region, and not hay to be imported from other and distant regions or districts of country which, indeed, it

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NOTE.—*Contracts; performance excused by non-performance of other party or his prevention of performance.*

If the performance of contract is prevented by one of the parties to it, the other party is thereby excused. Marshall v. Craig, 1 Bibb, 379; S. C., 4 Am. Dec., 647; Shep. Touch., 393; Co. Litt., 206, *b*; 207, *a*; 209 *b*; Pow. Cont., 417-419.

If the obligee is the cause of the non-performance of a covenant, the obligor is thereby discharged. Kennedy v. Kennedy, 2 Bibb, 464; S. C., 5 Am. Dec., 629.

Where the whole consideration for any stipulation fails, or where any stipulation becomes incapable of being substantially performed in the manner intended by the parties, by the voluntary act of either of them, the other party is not bound to perform. Kleine v. Catava, 2 Gall., 74; Borden v. Borden, 5 Mass., 67; Jarvrell v. Tarris, 6 Mo., 159; Smith v. Lewis, 24 Conn., 624.

An offer by one party to perform and a refusal by the other to accept services stipulated, are not equivalent to performance. Wood v. Morgan, 6 Bush, 507.

If, before one party has done anything it is ascertained that the other party will not be able to do that which he has undertaken, this will be sufficient reason why the first party should do nothing. Moakley v. Riggs, 19 Johns., 69; Ford v. Tiley, 6 B. & C., 325; Short v. Stone, 8 Q. B., 358; Van Horne v. Dorrance, 2 U. S. (2 Dall.), 304; Taylor v. Mason, 22 U. S. (9 Wheat.), 350.

Where a contract is entire, the first breach is a breach of the whole and discharges the other party from performance. Haskell v. McHenry, 4 Cal., 411; Cullum v. Wagstaff, 48 Pa. St., 300.

One of the parties to a contract cannot complain of a failure to perform on the part of the other, if his own laches or refusal to perform has contributed to defeat the object of the contract. Smith v. Cedar Rapids, etc., R. R. Co., 43 Iowa, 239; Taylor v. Renn, 79 Ill., 181; European, etc., Co. v. Royal Mail Co., 10 C. B. (N. S.), 860; Buffkin v. Baird, 73 N. C., 283; Coulter v. Bd. of Education, 63 N. Y., 365.

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would have been impossible to have thus imported within the limited time in which the contract was to be fulfilled. It was also known to the contracting officer, that the only point on or near the Yellowstone, at which hay in any quantity could be procured, was on the Big Meadows, near the mouth of that river. At this point there was sufficient hay to have enabled the complainant to fulfill his contract. It was known that he relied on this source for the purpose. It was so announced to the quartermaster, and was well understood at the time. It was known, not only that the claimant relied on this source of supply, but that he was making all his arrangements in that view; that he intended forthwith to transport his men, teams, machines and implements to the Big Meadows, in a far distant region, for the purpose of cutting and gathering the hay; and the quartermaster promised him every assistance to aid him in accomplishing his undertaking. Only a brief season of the year remained in which the contract could be fulfilled. Acting on the information which he thus had, and which was principally derived from the quartermaster himself, it was put entirely out of his power to fulfill his contract in any other way, had any other mode of fulfilling it been contemplated. But on arriving at the Big Meadows he found that the local officer at Fort Buford had treated with other parties, who were cutting the hay under a contract which contemplated the supply of the station at Tongue River, the very station which the claimant had contracted to supply. After making the most diligent exploration of the country along the Yellowstone, in constant danger from the savages, no other body of hay could be found, and the season came to an end. These circumstances, it seems to us, make a clear case of the claimant being hindered and prevented by the defendants themselves, from performing the contract on his part. It would be a fraud on him to hold him to the performance of that which he was prevented from performing by the acts of the defendants' agents, in giving to other parties the only hay to be procured on or near the Yellowstone River, and enabling them to supply to the Government, for the use of the station which he was to supply, the very hay which he had relied on, and which he had been encouraged to rely on, in the fulfillment of his contract.

In coming to this conclusion, we do not mean to say that the exigencies of the situation were not such as to excuse the officers for what they did. A distant post, located among hostile savages, was to be furnished with stores and provender. It was a military necessity. The officers could not know that the claimant would be able or would have sufficient energy to fulfill his contract. The Quartermaster-General was located at St. Paul, where the claimants' contract was entered into, and the deputy at Buford was hundreds of miles away. The infrequency of communication and the exigency of the case led to conflicting engagements with different parties. But an innocent contractor should not be made to suffer for these contingencies. If by their occurrence the defendants themselves, through their agents, rendered it impossible for the claimant to perform his engagement, he ought not to be visited with the penalty of non-performance.

[65] We think that the facts of the case clearly bring it within the rules allowing the introduction of parol evidence: first, for the purpose of showing, by the surrounding circumstances, the subject-matter of the contract, namely: hay to be cut and gathered in the region where it was to be delivered; secondly, for the purpose of showing the conduct of the agents of the defendant by which the claimant was encouraged and led on to rely on a particular means of fulfilling his contract until it was too late to perform it in any other way; and then was prevented by these agents themselves from employing those means. The supply of hay which he depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract.

That the subject-matter of a contract may be shown by parol evidence of the surrounding circumstances, see *Bradley* v. *Steam Packet Co.*, 13 Pet., 89; *Thorington* v. *Smith*, 8 Wall., 1 [75 U. S., XIX., 361]; *Maryland* v. *R. R. Co.*, 22 Wall., 105 [89 U. S., XXII., 713]; *Reed* v. *Ins. Co.*, 95 U. S., 23 [XXIV., 348]; 1 Greenl. Ev., sec. 277; Taylor, Ev., sec. 1082. And that the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Cont., sec. 826; *Fleming* v. *Gilbert*, 3 Johns., 527. In the case last cited, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and, having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. *Judge* Thompson said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Had [66] not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond." So when A gave to B a bond to convey certain premises, but they subsequently agreed by parol to rescind the contract, and A thereupon sold the premises to a third person, it was held that, though the bond was not canceled or given up nor any of the papers changed, yet by the parol agreement and the acts of the parties under it the bond was discharged. *Dearborn* v. *Cross*, 7 Cow., 48; and see 2 Cowen & H., Notes to Phillips Ev., 605. The principle involved in these cases is applicable to the present.

As to the remaining points involved in the case, it is only necessary to say that our judgment concurs with that of the Court of Claims except as to two items. We think that the claimant should have been allowed his extra expense in constructing new cabins and quarters for his men for cutting wood at a greater distance from the station, after having constructed sufficient quarters within the limits allowed by the terms of the contract. This extra expense was $1,300,

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and was caused by the order forbidding him to cut wood except at a distance of from two and a half to five miles from the station; whereas, the contract allowed him to cut at any point outside of half a mile.

The other item referred to, is the expense of keeping his teams unemployed for a space of ten days whilst waiting for the arrival of the post commander, after being forbidden to cut wood within the limits of the military reservation. He had reason to expect a modification of the order; and it was modified so as to allow him to cut on the reservation at the distance of from two and a half to five miles from the station. The amount of this expense is found to have been $1,360. This, we think, should have been allowed to him.

On the whole, our opinion is that the decree of the Court of Claims should be affirmed for the full amount of the award made to the claimant, and that an additional amount of $2,660 should be allowed for the two items of extra expense above referred to.

Having disposed of the case on the merits of the appeals, it is necessary to consider a motion which has been made by John W. Hobbs, to be substituted in the cause as the assignee in bankruptcy of Campbell K. Peck, the original claimant.

It appears that on the 31st day of August, 1878, whilst the cause was pending in the Court of Claims, the claimant, Peck, was, upon his own petition, adjudged a bankrupt by the District Court of the United States for the District of Iowa; and in his schedule, under the head "D, unliquidated claims of every nature, with their estimated value," he set out the present claim as follows: "6th. Claim against the Government of the United States of America, on account of contract with B. C. Card, Chief Quartermaster or Commissioner of Department, Dakota, of date August 17th, 1876, held by E. F. Brownell, as collateral, $57,500." And under schedule E, entitled "Property heretofore conveyed for benefit of creditors," he said, "Nothing of this kind, as I do not believe that the property heretofore conveyed to secure the claims of Dodd, Brown & Co., S. Pond, trustee, E. F. Brownell, trustee, J. A. McLean and William Harmon, will realize more than enough to pay off said claims, but possibly the said property may yield more, but cannot now be estimated."

It further appears that Peck, more than ten months before his bankruptcy, in order to secure the parties who advanced him money to enable him to perform his contract with the Government, executed a paper setting apart the money to come to him therefrom as a fund to pay said creditors, and appointing one Edward F. Brownell, trustee, to receive the same when it should be paid, and apply it to the payment of the expenses of conducting the litigation connected therewith, and the balance to the payment of the moneys so borrowed. It was this appropriation of the fund in litigation here, to which reference is made in the schedules annexed to the petition in bankruptcy. Peck always affirmed and stood to this appropriation in good faith during his lifetime, and his administratrix continues to affirm it; and there is no evidence that it was made with any fraudulent intent.

On the 2d day of December, 1879, whilst the case was pending in this court, Campbell K. Peck died, and his widow, Helen A. Peck, was appointed his administratrix, and on the — day of January, 1880, was duly substituted, as such administratrix, in the place of the intestate in these appeals.

During the lifetime of Peck, the assignee in bankruptcy sold his assets, and, amongst other things, this claim against the Government. This sale has been set aside by the District Court of the United States for the District of Iowa.

The assignee now applies to be made party in these cases in place of the administratrix.

It is evident from this brief rehearsal of facts, that there is a controversy about the disposition of the proceeds of this claim, between the creditors for whose benefit the claimant made the appropriation referred to, and the assignee in bankruptcy. This is an original and separate controversy, distinct from the merits of the case on the appeals, and we are not disposed, even if we have the power, to take it up in this collateral way and decide upon the rights of the parties, which we would probably be obliged to do, if we granted the motion now made by the assignee. The latter has lain by ever since August, 1878, when the claimant was declared bankrupt, and allowed the case to go on in his name, at his expense, and under his direction and management, or that of the creditors for whose use he was prosecuting the claim. Costs and expenses have been incurred by them, and arrangements have been made with counsel which have at least some title to equitable consideration; and injustice might be done if we should now, by main force, without going into an original investigation, which, to say the least, would be of very doubtful propriety, place the assignee in control of the cause. From the papers laid before us it appears that the district court has already assumed partial jurisdiction of the matter; and as that court can do full justice between all the parties, we think it better that the controversy should be disposed of there or in some other tribunal having original jurisdiction in such matters, than by this court in a collateral way.

The motion to substitute is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD J. GAY, *Appellant*, [7

v.

CHARLES E. ALTER ET AL., EXRS. of GEORGE F. MILLER, Deceased, AND THE GRAND LAKE COAL COMPANY.

(See S. C., 12 Otto, 79, 80.)

Rescinding assignment of judgment.

In Louisiana, where a judgment creditor assigns a judgment and receives part pay therefor, he cannot rescind the contract on failure to pay the balance of the purchase price, unless he returns what he has received, or, where the payment was made by the judgment debtor, without crediting the amount on the judgment.

[No. 1025.]

Submitted Jan. 12, 1880. Decided Mar. 29, 1880.

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APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the Court.

Mr. **Henry J. Leovy**, for appellant.

Mr. **Geo. L. Bright**, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

On the 3d of July, 1869, Amos B. Merrill sold to Margaret D. Allain a sugar plantation, known as the Australia plantation, situated in the Parishes of West Baton Rouge and Iberville in Louisiana, and by the act of sale reserved the vendors' lien and privilege to secure the payment of three notes of $11,000 each, part of the purchase money, payable respectively in one, two and three years, with interest and attorneys' fees.

On the 7th of July, 1869, Margaret D. Allain sold to one William H. Aymar, one undivided half of the same property for $36,000, Aymar agreeing to pay the three notes given to Merrill, as part of his purchase money; and vendors' lien and privilege was required as security for his paying said notes. On the 9th day of May, 1871, Mrs. Allain sold to Aymar the other undivided half of the property, reserving a like vendors' lien and privilege for part of the consideration, as well as for the payment of the original notes.

In January, 1873, Frank M. Ames, being then the holder of the last note for $11,000 given by Mrs. Allain to Merrill, filed a bill in the Circuit Court of the United States for the District of Louisiana, to foreclose and sell the mortgaged plantation for the payment of said note, making Mrs. Allain, with her husband and Aymar, defendants to the suit. On the 24th of May, 1873, the defendants filed a joint answer admitting the claim, and on the same day a decree of foreclosure and sale was made. On this decree an order for the issue of execution was made on the 19th of June, 1876, for the benefit of Edward J. Gay, subrogee of Frank M. Ames, and execution was issued accordingly; and on the 2d of September, 1876, the property was sold by the sheriff to one Charles E. Alter for the sum of $28,800, of which $26,307.82, the balance left after paying expenses, was paid into court, and deposited in the sub-treasury to the order of the Circuit Judge.

On the 11th of July, 1876, after the execution came into the sheriff's hands, and before he advertised the property for sale, Charles E. Alter (who, as before mentioned, afterwards became the purchaser at the sheriff's sale) filed a bill of complaint in the circuit court in the nature of a bill of intervention or cross-bill, alleging that only $5,000, instead of $11,000, besides interest, was due on the judgment in favor of Frank M. Ames which had been purchased by Edward J. Gay, and that he, Alter, held the second of the three notes given by Mrs. Allain to Merrill, and had obtained judgment thereon in the Fifth District Court for the Parish of Orleans; and that the first of said three notes had been paid, although it had been fraudulently put into the hands of one George F. Miller, who had recovered a judgment thereon, and he prayed that this judgment might be canceled; that the Ames judgment held by Gay might be reduced to $5,000, and that the money to be produced by the sale of the property might be retained in the hands of the sheriff for distribution until the further order of the court. A decree was made in the case on this cross-bill in January, 1879, declaring the privilege of the first note extinguished, and no appeal has been taken from that portion of it. The decree further declared that, exclusive of interest, there was only $5,000 due on the Ames judgment held by Gay, with the addition of $1,000 for counsel fees; and that Alter, the intervener, or complainant in the cross-bill, was entitled to be paid the full amount of his judgment. Gay has appealed, and questions the correctness of the decree, both as to the reduction of his own claim and as to the allowance of Alter's. The balance of purchase money paid into court is sufficient to pay both claims as allowed by the court below; but if Gay should be allowed the full amount of his claim, there would be a deficiency of $6,000 or $7,000. This brings the validity of both claims into question.

The allegation in Alter's intervention or cross-bill, in relation to the Ames judgment, is as follows: "Your orator shows that he is informed, believes and charges, that, on or about the 3d of June, 1874, Frank M. Ames sold the aforesaid judgment, rendered in his favor, to Henry P. Redmond and Frederick Eastman, purchasing for the defendant, William H. Aymar, for the price of $8,000, $3,000 of which was paid on or about the 3d of June, 1874, and the balance to be paid thereafter and, consequently, there can only be due on said judgment the sum of $5,000." It is further alleged that Gay knew these facts when the judgment was transferred to him.

If these statements are true, Gay had no right to claim more than $5,000 on the judgment. Redmond and Eastman held the judgment for Aymar's benefit, except for the balance of $5,000, and except to that extent it was in equity extinguished. The question with regard to the amount due to Gay is, therefore, a question of fact.

We have carefully examined the evidence on this subject, and have come to the conclusion that the averments of the cross-bill are substantially true.

First, as to the purchase of the judgment by Redmond and Eastman in 1874. The negotiation was commenced by Aymar, who telegraphed Ames on the 28th of March, 1874, as follows: "Parties will buy your note against Australia for $6,500, to be consummated in sixty days. Will you accept above for your whole claim? Answer paid." Ames telegraphed *Judge* Merrick, his attorney, next day: "Will sell Allain note for $9,000 and legal expenses within sixty days. Aymar proposes $6,500." It seems that Ames had a pledge of half the sugar on the plantation. Merrick wrote Ames on the 2d of April as to the condition of the plantation, and stated that there were 47 hhds. of sugar, "which will give you twenty-four." He further says: "Your telegram of 30th is at hand, and I have had a conference with the broker who is managing for Aymar, and submitted to him your counter-proposition." This broker was Thomas S. Elder of New Orleans. The negotiation continued with him until, the 7th or 8th of May, when it was concluded by an agreement to give Ames $8,000 for the

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judgment and to pay $1,000 counsel fees. $3,000 was to be paid in cash in thirty days, and the balance of $5,000 in January following. The proceeds of the sugar on which Ames had a lien was to be allowed on the cash payment of $3,000. The judgment and papers were to be held by Ames as security for the deferred payment of $5,000. On the 3d of June, Mr. Merrick wrote to Ames that the $3,000 had been paid by Frank N. Butler, Esq., and was to his, Ames', credit. Mr. Merrick, when called upon to testify, could not tell who was the unknown party who was supposed to have purchased the judgment. Mr. Butler, the counsel who represented the supposed purchaser, was the standing counsel of Aymar as well as of Eastman and Redmond. In his testimony he says he had every reason to believe that Eastman or Redmond bought the judgment, either Eastman for Redmond or Redmond for Eastman. He says that Aymar was aware of the transaction, and was desirous it should take effect. The first note and judgment, which was held by Dr. Mercier, were purchased about the same time, ostensibly by the same parties, and $3,500 paid on it out of the proceeds of Aymar's sugar. Mr. Butler admits that this judgment was afterward pledged by Eastman or Redmond to one Miller, to secure a debt of Aymar's, for which Eastman had given his note. Why this was done he does not know.

Redmond and Eastman were examined. Redmond, who was a clerk of Eastman, admits that he had no interest in the matter; that he acted for Eastman. As to the first note, to which he was subrogated in place of Dr. Mercier, he says: "I really had no interest in the subrogation, and was only permitting my name to be used for that purpose by Eastman, but not by Aymar. I do not know if Aymar's counsel made the arrangement or prepared the subrogation. I did not know Aymar in the transaction. I handed the money, that is, Eastman's check, to Lacey & Butler to pay Dr. Mercier for the subrogation. The check was $3,500, I think, I did not draw the money. I had no means at that time, and was not a man of means." This $3,500 was shown to be the proceeds of Aymar's sugar. As to the Ames judgment, Redmond says he does not remember purchasing it; that Eastman may have purchased in his name, but he had no recollection of it. Eastman's testimony is most vague and unsatisfactory. His recollection is greatly at fault, and he does not know what has become of his books or memoranda. He was formerly a clerk of Aymar and then a lessee of Aymar's cotton press, and on very intimate terms with him. As to the lease he was asked whether it was not a simulated one. His answer was "No, sir; I think not." Being asked why he answered so indefinitely, he said: "Well, he (Aymar) has had so many transactions that I do not remember exactly about them both, Mr. Aymar and myself." He claims to have bought the Ames note; but he admits that he never had possession of it; he thinks *Judge* Merrick had possession of it; that Butler made the negotiations with *Judge* Merrick; whether Aymar had anything to do with the negotiations he does not know; admits that the $3,000 paid on the purchase money of the judgment came from the proceeds of Aymar's sugar; says he did not remember employing Elder to negotiate for him.

Mr. Elder testifies that Aymar requested him to call upon *Judge* Merrick to negotiate for the purchase of that claim in behalf of other parties; but he (Aymar) never mentioned who the parties were, and he (Elder) never knew anybody in the transaction but Aymar. A letter from Elder to *Judge* Merrick, dated May 7th, 1874, which closed the transaction of the purchase of the Ames judgment, commenced with the words: "Sir: I am instructed to accept the proposition mentioned by you to-day for the entire claim of Mr. Ames against Australia plantation and W. H. Aymar, the present owner, to wit: etc." Mr. Elder being asked by whom he was so instructed, answered: "By Mr. Aymar, sir. He was particular, though, that I should understand that he was not the principal in that matter;" but he adds, in answer to another question, that he never knew of any principal.

Much more evidence to the same effect could be adduced. Suffice it to say, that we are entirely satisfied that the Ames judgment was purchased in May, 1874, for the benefit of Aymar, for the sum of $8,000 besides counsel fees; and that $3,000 of the purchase money was paid out of the proceeds of the sugar produced on the plantation; and that it was pretended to be purchased for Eastman or Redmond, but that neither of them paid anything in the transaction; and that it continued to be held by Ames only as security for the balance of the purchase money, namely: $5,000 and counsel fees.

We are also satisfied, from the evidence in the case, that Gay, when he purchased the same judgment in May, 1876, knew the substance of this transaction, or had sufficient knowledge to make it his duty to make further inquiries. Mr. Merrick being asked the question: "When this transfer was made by Ames to Gay, was Gay informed of the previous transfer mentioned in the documents marked 1, 2 and 3" (the proposition of Ames, and Elder's letters of acceptance in May, 1874), "or anything relative thereto?" answered: "I cannot say that these papers were shown to him, but I think he had knowledge of it;" and he distinctly says that that previous transfer was the subject of conversation with him. Mr. Ames testifies that he told Gay, in March, 1876, all his transactions concerning the property. Gay's answer to Alter's cross-bill is somewhat evasive on the subject. He avers that he is ignorant of all transactions which may have occurred previous to his becoming the owner of judgment *as set forth*, but that he is informed and believes, it is not true that any sale of the judgment was ever made by Ames to Redmond and Eastman *purchasing for Aymar*, as charged in the bill; and he denies that he had knowledge of the pretended sale *as aforesaid*, at the date of the transfer, but admits that he was informed that some transactions had taken place relative to said note between Ames and parties other than those set forth in the bill, but said negotiations never resulted in any *complete* agreement; said parties being unwilling to carry out their proposition.

This answer must be taken in view of the fact that, in Gay's negotiations with Ames and Merrick for the purchase of the judgment, particular reference was made to the $3,000 which

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had been paid to Ames on account of the purchase in 1874, the latter insisting that he should never be called upon to refund that money by reason of selling the judgment, and that Gay should guaranty him from such liability. Gay, in his testimony, admits that Ames, in his propositions, was very particular to specify the nature of this $8,000 transaction, and always plainly stated that it was a payment on account of an agreement on his part to sell; but he says that Ames insisted that the parties had entirely failed to carry out their agreement, and that he considered they had forfeited what they had paid, and that he considered the note his property.

Now we know that this was not the terms of the agreement, and if Gay knew what he says Ames told him, he had sufficient knowledge to put him on further inquiry as to what the particulars of the agreement were, by ascertaining the names of the parties and applying to them for information. But whether he had sufficient notice or not, as purchaser of the judgment, he stood in no better plight than Ames did. If, as was the fact, Ames held it merely as collateral security for the balance of the $5,000 purchase money, besides counsel fees, Gay cannot hold it for a larger amount. As this was all the interest in it which Ames had to dispose of, it was all that Gay could acquire.

[80] It is contended however, by the plaintiff in error, that the contract of 1874, whereby Ames agreed to sell his judgment for $8,000, was a synallagmatic contract, which he had a right to rescind if the agreement of the other party as to the payment of the purchase money was not performed. This is, undoubtedly, the law of Louisiana; but that law also requires that, if a party to a contract wishes to rescind it for such a cause, he must return to the other party what he has received, so as to put him in the same situation he was in before. In the present case, it is not to be supposed that it was Ames' duty to return the $8,000 which he received, because it was really received from Aymar, the debtor. But he was at least bound to credit that amount on the judgment, which would have been a substantial return; and in that case he would have had a right to maintain his judgment for the whole balance, and Gay, his vendee, would have had the same right. But he did not do this; nor has Gay done it; but, on the contrary, the latter has endeavored to collect the whole judgment without any deduction whatever. This conduct is totally inconsistent with the position taken. It shows, not a rescission of the contract, and a return or credit of the amount paid thereon, but a determination to regard the transaction as altogether void and the whole judgment still due.

We think that this position cannot be maintained.

As to Alter's title to the second note; an attempt was made to show that that also had been bought for Aymar's use, and that Alter stood in no better plight than Gay. But this attempt failed. It clearly appears by the evidence that Alter purchased the note of Merrill, to whom it had been indorsed by Mrs. Allain at a discount of ten per cent.

We think that the decree of the Circuit Court was correct, *and it is, therefore, affirmed.*

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DAVENPORT AND NORTHWESTERN RAILWAY COMPANY, *Plff. in Err.*, [180]

v.

WILLIAM RENWICK ET AL., Composing the Firm of RENWICK, SHAW & CROSSETT.

(See S. C., 12 Otto, 180-183.)

Riparian proprietor, rights of—Iowa law.

1. If a riparian proprietor erects a pier in front of his property on a navigable river, with a view to its use in connection with the river, without complying with the Act of Congress prescribing the conditions on which piers may be constructed, a railroad company, under the power of eminent domain granted by the State, cannot appropriate his pier to its own use, without compensating him.

2. Section 2, of the Iowa Act of March 18, 1874, that it shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between the shore and the river without compensation to the shore owners, is valid and not in conflict with the Act of Congress.

[No. 843.]

Submitted Mar. 15, 1880. Decided Mar. 29, 1880.

IN ERROR to the Supreme Court of the State of Iowa.

The proceedings brought up for review by this writ of error were commenced by the Railroad Company in September, 1876, under the statutes of Iowa regulating the exercise of the right of eminent domain for the construction of railways, to have the damages ascertained which would be sustained by the defendants in error, as riparian owners, by the construction of the railroad along the shore of the Mississippi, between high and low water-mark, in front of certain land in Davenport, Iowa bounded on the river, and occupied by the defendants in error for the purposes of a steam saw-mill and appurtenances, for manufacturing lumber from logs floated down the river to said mill.

An appeal was taken from the award of the six freeholders summoned by the sheriff, to the State Circuit Court for Scott County, where the appeal was tried by a jury and a verdict rendered fixing the damages to be paid to the defendants at $5,000.

Judgment being rendered accordingly, the Railroad Company appealed to the Supreme Court of Iowa, where the judgment below was affirmed. See 49 Iowa, 664.

Thereupon said Company sued out this writ of error.

The Iowa Legislature, in 1874, enacted a statute (Public Laws of Iowa, 1874, ch. 35, p. 28), authorizing owners of property upon the Iowa banks of the Mississippi and Missouri Rivers, upon which property there is carried on any business in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, to construct and maintain in front of their said property, proper and convenient erections and devices for the use of their respective pursuits, and for the protection and harbor of rafts, logs, floats and other water crafts; provided, that the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

It also made it unlawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands

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and either of said rivers, or upon the shore or margin thereof, unless the injury or damage to such owners occasioned thereby should first be ascertained and compensated, in the manner provided by chapter 4, title 10, of the Code.

The proceedings in this case were commenced and prosecuted under the authority of the 2d section of this Act, there being no other law of the State providing for the assessment of damages in such a case.

It was insisted on behalf of the Railroad Company in the court below, that the above statute was void, as conflicting with the Act of Congress of Mar. 3, 1873, R. S., sec. 5254.

It was claimed that Congress, under the Constitution, is invested with power to regulate the subject of erecting piers, cribs, etc., on navigable rivers; and having exercised the power as to the Mississippi River, by the Act referred to, any state legislation on the same subject is unauthorized and void; that, therefore, the Iowa Act of 1874 was invalid, and the defendants in error were, in consequence thereof, entitled to no damages whatever for being cut off from the river by the construction of the railroad in front of their property.

Instructions to the jury to that effect were asked on the trial and refused; for which refusal error was assigned in the Supreme Court.

Messrs. **Grant** & *Grant*, for plaintiff in error.

Messrs. **John T. Lane** and **John N. Rogers**, for defendants in error.

[182] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

Although the Supreme Court of Iowa decided that Congress, under the power to regulate commerce, had jurisdiction over the Mississippi River, and having exercised that power in the way specified in sec. 5254, R. S., all state legislation in conflict therewith was void, still the question remains, whether, if a riparian proprietor improves his property with a view to its use in connection with the river, without complying with this Act of Congress, a railroad [183] company, under the power of eminent domain granted by the State, can appropriate his improvements to its own use without his consent and without making him compensation. This, we think, is a federal question, giving us jurisdiction, but it is a question on which we do not care to hear argument. The controversy is not between the public and the riparian owner as to his right to keep up his improvements. The public does not complain, but the Railroad Company wants the improvements. In the hands of the Company they will be just as much a nuisance, so far as the public is concerned, as they can be if kept up by the owner. As between these two parties, the improvements are the property of the riparian proprietor, and if the Company wants them for its own use it must make compensation. So the court below has decided, and, to our minds, its decision was clearly right. While in Iowa it has been held that the State owns the lands lying along the river between high and low water-mark, care was taken in the Act of March 18, 1874, to provide that it should not be lawful for any person or corporation to construct or operate any railroad or other obstruction between the shore and the river without compensation to the shore owners. The 2d section of the Act is good, even though the first may conflict with what Congress had before done.

The motion to dismiss is denied, but that to affirm granted.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

Cited—49 Mich., 114; 43 Am. Rep., 450.

NICHOLAS W. CASEY, Receiver of THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, *Plff. in Err.*, [66]

v.

JOHN I. ADAMS ET. AL., Partners, Composing the Firm of JOHN I. ADAMS & Co., in Liquidation.

(See S. C., 12 Otto, 66-68.)

Suit against national bank.

A national bank can be sued in a state court, in a local action, in any other county or city than that where the bank is located. Section 5198 R. S. relates to transitory actions only.

[No. 248.]

Argued Apr. 7, 8, 1880. Decided Apr. 19, 1880.

IN ERROR to the Supreme Court of the State of Louisiana.

On the 28th day of July, 1875, John I. Adams & Co. brought suit in the District Court of the Parish of Lafourche, against Daunis and Tucker, to foreclose a mortgage, but without making any of the creditors who claimed rights under a prior mortgage, parties. Such proceedings were had that a writ of seizure and sale was issued, under which the sheriff adjudicated the property to John I. Adams & Co., for the price of $17,519.

Adams & Co. claimed the whole price on their mortgage and refused to pay their bid on this ground, but the sheriff refused to admit this demand and complete the adjudication.

Adams & Co. then moved the court under whose writ the property had been sold, for a rule on the bank which claimed under the prior mortgage, to show cause why the same should not be erased from the records.

The motion also averred "That the affairs of the Bank of New Orleans are now in the hands of Nicholas W. Casey of the City of New Orleans, Receiver, appointed under the National Bank Act, and that he is the proper party on whom to serve a copy hereof."

In answer to the motion the Receiver alleged the conversion of the Bank of New Orleans into the New Orleans National Banking Association, under the National Bank Act, and the succession of the latter to all its rights and property; that such national bank was located in the City of New Orleans, Parish of Orleans, Louisiana, and could be sued only in the United States Court, or in a state, county or municipal court or city in which it was located; and reserving the benefit of this exception, in case it should be overruled, the Receiver answered and claimed a prior mortgage on the property, and averred that the same had never been paid. The District Court overruled the exception as to the jurisdiction and ordered the erasure of the bank's

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mortgage by decree of Dec. 18, 1875, from which decree an appeal was taken; whereupon the Receiver sued out this writ of error.

Messrs. **Durant** & *Hornor* for defendant in error.

Messrs. John D. Rouse, **Chas. Case** and *Wm. Grant,* for plaintiff in error.

[67] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The federal question in this case is, whether a national bank can be sued in a state court in a local action in any other county or city than that where the bank is located. By sec. 5198, R. S., it is provided that "Suits, actions and proceedings against any association under this title (The National Banks) may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed [68] generally where one should be sued, included such suits as were local in their character, either by statute or the common law unless it was expressly so declared. Local actions are in the nature of suits *in rem,* and are to be prosecuted where the thing on which they are founded is situated. To give the Act of Congress the construction now contended for, would be, in effect, to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

The proceeding in this case was clearly local in its nature. It related to property in the Parish of La Fourche, which had been seized and sold under process from the district court of that parish. The proceeds of the sale were in that court, and could not be distributed until "a conflict of privileges" arising between creditors was settled. No personal claim was made against the bank. Nothing was wanted except to "class the privilege" of the bank on the property seized "according to its rank." Whether, under the laws of Louisiana, the form of proceeding instituted for that purpose was appropriate, is not a question for us. The decision of the Supreme Court of the State as to that matter is conclusive.

Judgment affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—91 N. Y., 539; 18 S. C., 37; 44 Am. Rep., 562.
See 12 OTTO.

WILLIAM G. LANGFORD, *Plff. in Err,* [145]
v.
CHARLES E. MONTEITH

(See S. C., 12 Otto, 145-148.)

Lands of Indians in Territories—suits in Idaho Territory.

*1. Where an Act of Congress, organizing a State or Territorial Government contains a provision that no lands in the possession of an Indian Tribe shall be a part of the new State or Territory, when there is a treaty with such Tribe that it shall not be so included, the new government has no jurisdiction over the Territory covered by such treaty. *Harkness* v. *Hyde* [XXV., 237], qualified and explained.

2. The decision of the Supreme Court of Idaho Territory is affirmed, that, when it appears from a sworn plea of defendant in an action before a justice of the peace, that title to real estate is involved in the decision of the case, it cannot be tried by such justice and carried by appeal to the District Court for trial, but must in the District Court be dismissed, unless certified there by the justice, without trial before him.

[No. 111.]
Argued Apr. 5, 1880. Decided Apr. 19, 1880.

IN ERROR to the Supreme Court of the Territory of Idaho.

The case is stated by the court.

Mr. **Benjamin F. Butler,** for plaintiff in error.

Mr. **Chas. Devens,** *Atty-Gen.,* for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Idaho.

Plaintiff in error, who was plaintiff below, brought an action before a justice of the peace in the nature of forcible detainer, to recover of the defendant the possession of houses and grounds occupied by him under the Indian agent for the Government of the United States among the Nez Percé Indians.

Plaintiff, in his petition, charged that the defendant entered under a lease from him with a condition to deliver possession to plaintiff on ten days' notice, which had been given.

Defendant answered by alleging that, at the time of making the lease, he was in possession under John B. Monteith, Indian agent; that he was induced to give the lease by the false representation of plaintiff that he was the owner of the property; that said buildings and land were then and are now the property of the United States; and that the government had issued orders to defend its possession against plaintiff.

Another allegation of the defense is, that the property is situated within an Indian reservation, to which the Indian title has never been extinguished, and, therefore, forms no part of the Idaho Territory. Of course, if this latter alle- [146] gation was true, neither the justice of the peace before whom the case was first tried, nor the District Court to which it afterwards came by appeal, had any jurisdiction over the case. And the opinion of this court at the last Term, in the case of *Harkness* v. *Hyde,* 98 U. S., 476 [XXV., 237], is relied on by defendant's counsel.

The principle announced in that case, namely: that when, by the Act of Congress which organizes a new Territorial or State Government,

*Head notes by *Mr. Justice* MILLER.

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any part of the land within the limits of its exterior boundaries is excepted out of the jurisdiction of the government thus brought into existence, it is no part of such State or Territory, is sound. The authority of Congress, from which the power to exercise the new jurisdiction proceeds, to except from that jurisdiction any part of its own soil, or that of the Indians, to whom the government has promised by solemn treaties to do so, is beyond question.

The applicability of this doctrine to the jurisdiction of places in which the United States have constructed permanent forts, arsenals, etc., before such governments are organized, will be seen at once. Congress has also acted on this principle on the organization of new State Governments. The Act for the admission of Kansas into the Union as a State, after describing its exterior boundaries and declaring that the new State is admitted into the Union on an equal footing with the original States, in all respects whatever, adds, that nothing contained in the Constitution of the State shall be construed "to include any territory which by treaty with a Tribe of Indians is not, without the consent of said Tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas, until such Tribe shall signify their assent to the President of the United States to be included within said State." Between the United States and the Shawnee Tribe a Treaty then existed by which the United States guarantied that the lands of the Tribe should never be brought within the bounds of any State or Territory, or subject to the laws thereof. In the case of *U. S.* v. *Ward*, 1 Woolw., 1, the Circuit Court held that the state courts had no jurisdiction in the lands of the Shawnees, and this was [147] repeated in *U. S.* v. *Stahl*, 1 Woolw., 192.

The Act of Congress of March 3, 1868, which organized the Territory of Idaho, 12 Stat. at L., 808, contained a clause precisely similar to the one in the Act admitting Kansas into the Union.

And this court in the case of *Harkness* v. *Hyde*, relying upon an imperfect extract from a Treaty with the Shoshonees found in the brief of counsel, inadvertently inferred that it contained a clause against including the lands of the Tribe within a territorial or state jurisdiction like the Treaty with the Shawnees. In this it seems we were laboring under a mistake, and where no such clause or language equivalent to it is found in a treaty with any Indian Tribe within the exterior limits of Idaho, the land held by them is a part of the Territory and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction. As we are not shown any such Treaty with the Nez Percé Tribe, on whose lands the premises in dispute are situated; and as it is a contest between white men, citizens of the United States, the court had jurisdiction of the parties, if the subject-matter was one of which the justice of the peace could take cognizance.

The Act to regulate proceedings in civil cases in the courts of Idaho Territory, section 347, declares that, on a trial before a justice of the peace if it appear from the plaintiff's own showing, or from the answer of the defendant verified by his oath, that the determination of the action will necessarily involve the decision of a question of title to real property, the justice of the peace shall suspend all further proceedings, and certify the case to the District Court of the county, which shall thereafter have jurisdiction over the case as if originally brought in that court.

The record of the case is imperfect, but it appears that the case was an appeal in the District Court from the judgment of the justice of the peace; and that the District Court overruled the motion of the defendant to dismiss the case because the justice of the peace was without jurisdiction to try it. The same matter was urged in the Supreme Court on appeal from the judgment of the District Court. [148]

We are of opinion that the justice of the peace had no jurisdiction to try the case after the sworn answer of the defendant was filed, and that it was his duty to have certified it for primary trial to the District Court. When it came there on appeal, it should have been dismissed, because there could have been no lawful trial before the justice.

That the issue tendered by the sworn answer of the defendant involved the title, is clear. If he was holding under the United States, his attornment to plaintiff and taking a lease was void. The question would then arise, as to the superiority of the title of plaintiff and that of the United States, set up by defendant. For the trial of that title, the action brought by plaintiff and the forum in which it was commenced were inappropriate. The judgment of the Supreme Court of Idaho on the effect of their own Code of procedure in this respect will not be reversed here, *and it is, accordingly, affirmed.*

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[96]

GEORGE PARKS, GRANT B. TURNER, WILLIAM A. TAYLOR AND JAMES A. VAUGHN, Partners, as TURNER, PARKS & Co., *Appts.*,

v.

JONATHAN L. BOOTH.

(See S. C. 12 Otto, 96-107.)

Application for patent—patented invention—defenses—patent for grain separators—costs and interest.

1. An applicant for a patent, in case of a machine, is required to explain the principle thereof, the best mode of applying the same, and to point out and distinctly claim the part, improvement or combination which he claims as his invention.

2. A patented invention may embrace both a new device or element, and a new combination of old devices.

3. The defense, that the patentee is not the original and first inventor, if the thing patented is an entirety, incapable of division or of separate use, must be addressed to the invention and not to a part of it, nor to one or more claims of the patent, if less than the entire invention.

4. Booth's re-issued patent for an improvement in grain separators is valid. The proofs in this case establish that he is the original and first inventor.

5. In an action for the infringement of a patent, the complainant is not entitled to an allowance for any expenses beyond the taxable costs. Interest on

NOTE.—*Damages for infringement of patents; treble damages.* See *note* to Hogg v. Emerson, 52 U. S. (11 How.), 587.

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the profits decreed to the complainant is not allowed.

[No. 233.]

Argued Mar. 31, Apr. 1, 1880. Decided Apr. 26, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The case is stated by the court.

Messrs. W. Bakewell and **T. B. Kerr**, by leave of court for appellants.

Mr. **W. F. Cogswell**, for appellee.

[97] *Mr. Justice* **Clifford** delivered the opinion of the court:

Power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writing sand discoveries, is expressly vested in Congress by the Constitution. Pursuant to the power there conferred, the enactment of Congress provides that the original jurisdiction of patent cases shall be exclusive in the circuit courts or the district courts exercising circuit court powers. R. S., secs. 629–711.

Provision is also made that a party whose rights, secured by valid patent, are invaded by infringement, may seek his remedy in an action at law or by a suit in equity, at his election. 5 Stat. at L., 124; 16 Stat. at L., 206; R. S., sec. 4920.

Federal Courts vested with jurisdiction in such cases have power, in their discretion, to grant injunctions to prevent the violation of any right secured by a patent, as in other cases of equity cognizance.

Sufficient appears to show that a patent in due form was issued to the complainant, on the 20th of September, 1859, for a new and useful improvement in grain separators, which consisted in the employment and use of a series of inclined screens and boxes, having a proper shake motion communicated to them, in connection with a fan air-blast spout, the whole being arranged in a manner set forth in the specification.

Without entering much into details, it will suffice to say, in this connection, that the object [98] of the improvement was to subject grain to a thorough screening operation. Machines were constructed under the patent and were put in operation at various places, but on the 25th of September of the next year it was surrendered and re-issued, and on the 29th of November, four years later, it was surrendered a second time, when the patent in suit was issued to the complainant, which is a second re-issue. Having removed the defects in the prior patents, the complainant alleges that he immediately put the machines on sale; that he has ever since been in possession of the right secured by the patent; and that he would have made large profits from the manufacture and sale of the same had he not been prevented from so doing by the respondents.

Two claims are made by the complainant. He charges that the respondents have largely infringed his exclusive right, and are still engaged in making and selling machines which are constructed in the same manner as the patented improvement, and which accomplish the same object by the same mode of operation.

Service was made, and the respondents appeared and filed an answer. Their principal defenses are as follows: (1) That the complainant is not the original and first inventor of the patented improvement. (2) That the alleged invention had been in public use and on sale for more than two years prior to the application by the complainant for a patent. (3) That the re-issued patent described in the bill of complaint is not for the same invention as the original.

Proofs were taken, hearing had, and the circuit court entered a decree in favor of the complainant, and sent the cause to a master to compute the profits, gains and advantages which the respondents have received, or which have arisen or accrued to them from the infringements of the said patent. Due report was made by the master, to whose report certain exceptions were filed by the respondents. Exceptions were also filed by the complainant, but, inasmuch as he did not appeal, they will not be re-examined. Those filed by the respondents, which are still the subject of complaint, will receive due consideration.

Both parties appeared, and were heard in support of their respective exceptions, all of which were overruled by the circuit court except the fourth exception filed by the respondents. Matters of the kind being settled, the circuit court entered a final decree in favor of the complainant in the sum of $11,184.42, with costs of suit. Prompt appeal was taken by the respondents to [99] this court, and since the cause was entered here they have filed the assignment of errors set forth in their brief.

All such matters as are deemed material to the several defenses pleaded in the answers will be carefully considered, without entering into the details of the argumentative portion of the errors assigned. When reduced to specific propositions, the errors assigned may be stated as follows: (1) That the complainant is not the original and first inventor of the patented improvement. (2) That the supposed improvement was not the proper subject of a patent, because it did not involve any invention. (3) That the circuit court erred in finding that the respondents had infringed the re-issued patent of the complainant. (4) That the circuit court erred in overruling the exceptions of the repondents to the master's report. (5) That the circuit court erred in allowing damages to the complainant in addition to profits.

Redress for the infringement of a patent may be sought by a suit in equity as well as by an action at law, and the required allegations and proofs are substantially the same in one form of remedy as in the other. Neither damages nor profits can be recovered unless the complaining party alleges and proves that he or the person under whom he claims was the original and first inventor of the patented improvement, and that the same has been infringed by the party against whom the suit is brought. Both of those allegations must be proved to maintain the suit; but the law is well settled that the patent in question, if introduced in evidence by the complaining party, affords him *prima facie* evidence that the patentee was the original and first inventor. That presumption, in the absence of any satisfactory proof to the contrary, is sufficient to entitle him to recover if he proves the alleged infringement.

Evidence to overcome that presumption may

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be introduced by the defending party in case due notice of such an intention is given to the party that instituted the suit, as required by the [100] Act of Congress. R. S., sec. 4920. Notices of the kind were given by the respondents in their answers, and the assignment of errors calls in question the decision of the circuit court in that regard, which is the first question presented for re-examination in the record.

Questions of the kind cannot well be decided without first ascertaining what the patented improvement is that is described in the first pleading of the complaining party; and that becomes necessary in this case, both in determining the issue of prior invention and the issue of infringement. Attempt having failed to show that the re-issued patent is not for the same invention as the original, the question as to the nature of the improvement may be determined by the examination of the specification and drawings of the patent in suit.

Two claims are annexed to the specification, of which the first is the combination of the zigzag screens and boxes, as exhibited in the model and drawings, when the same have a lateral shake motion, or one at right angles to the passage of the grain, in such a manner as to cause the grain to pass consecutively over and through them, and when arranged relatively to each other, to operate as set forth in the specification; (2) in the second place he claims the series of zigzag screens and boxes with or without the troughs and having the lateral shake motion in connection with the fan and spout, as set forth in the specification and exhibited in the drawings.

Plain as these claims are, it would not be difficult to define their meaning, even without resort to the details of what precedes in the specification. Speaking directly to the point, the patentee states that his invention consists in the employment or use of zigzag screens and boxes or passages having a proper lateral shake motion communicated to them, and so arranged that the grain may pass consecutively over and through them and be subjected to a thorough screening operation. Also using in connection with the zigzag screens and boxes a revolving fan and spout, so arranged that the grain will be subjected to a sufficient blast for the separation from it of all light impurities. Reference is then made to the drawings, which show the frame of the machine and the manner in which the series of devices called inclined screens are [101] secured by elastic pendants, as more fully explained in another part of the specification. Explanations follow which show that the screens may be formed of perforated zinc or other sheet metal, placed alternately in reversed inclined positions, as is clearly seen in figure 2 of the drawings, each screen being placed at the top of what is termed a shallow box which forms the passage of the grain, the boxes extending the whole length of the screens in order to receive the grain and discharge the same on to the elevated end of the screen next below, through openings constructed for the purpose, in order that the screening operation may be continued through the whole series of screens.

Instructive and minute explanations are given in the specification of the entire construction and mode of operation of the apparatus and the several devices of which it is composed. Beyond all doubt, the explanations constitute a full compliance with requirements of the Patent Act in all respects, and are amply sufficient to show that the invention consists of the combination of elements or ingredients, the substance of which is embodied in the claims of the patent annexed to the specification. None of the elements or ingredients are claimed to be new, from which it follows that the invention consists entirely in the combination, and not a doubt is entertained that it is both new and useful.

Inventors of machines are required, before they secure a patent, to deliver a written description of the improvement and of the manner and process of making, constructing and using the same, in such full, clear and exact terms as to enable one skilled in the art or science to make, construct and use the invention. Drawings are also required in certain cases, and if the invention is such that it may be represented by a model, the applicant for a patent is required to furnish a model of the improvement. Requirements of the kind, in cases where they apply, may be regarded as conditions precedent to the right of the commissioner to grant such an application; but cases often arise where they or some of them do not apply.

An applicant for a patent, "in case of a machine," is required to explain the principle thereof, the best mode of applying the same, and to point out and distinctly claim the part, improvement or combination which he claims as his in- [102] vention; and the respondents contend that the patent of the complainant is invalid because the specification does not comply with that requirement. R. S., sec. 4888.

Inventions sometimes embrace an entire machine, and in such cases it is sufficient if it appears that the claim is co-extensive with the patented improvement. Other inventions embrace only one or more parts of a machine, and in such cases the part or parts claimed must be specified and pointed out, so that constructors, other inventors, and the public may know what the invention is and what is withdrawn from general use.

Patented inventions are also made which embrace both a new device or element and a new combination of old devices embodied in the same apparatus or machine. Particular description of the improvement is required in such a case, as the property of the patentee in such a case consists not only in the new device, but also in the new combination.

Modern inventions very often consist merely of a new combination of old elements or devices, where nothing is or can be claimed except the new combination. Such a combination is sufficiently described, to constitute a compliance with the letter and spirit of the Act of Congress, if the devices of which it is composed are specifically named, their mode of operation given, and the new and useful result to be acomplished is pointed out, so that those skilled in the art and the public may know the extent and nature of the claim and what the parts are which co-operate to do the work claimed for the invention.

Apply those rules to the specification in question, and it is clear that the proposition that it does not point out what is claimed as new is wholly unsupported and founded in mistake as to what is required by the Patent Act.

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Suppose that is so; still it is insisted by the respondents that the patentee is not the original and first inventor of the improvement. Such a defense may be supported by proof that the invention was made by another before the patented improvement was made for the infringement of which the suit is brought. Authority is also given to the respondent in such a suit to show if he can that the improvement had been patented or described in some printed publication prior to the supposed invention set forth in the specification. R. S., sec. 4920. Defenses of the kind are authorized by the Act of Congress, and it may be remarked that it is not necessary to allege or prove, in order to sustain such a defense, that the prior patent or description was issued or given two years earlier, as [103] the only requirement is that the patent or publication was prior to the supposed invention of the complainant.

Enough appears in this explanation to show that the two defenses may be considered together, as it is settled law that if the patentee is not the original and first inventor of the improvement, or if it had been patented or described in any printed publication prior to the supposed invention, then the complainant cannot recover.

Notice in due form is given by the respondents in their answer and amended answer of twelve patents or specifications prior in date to the patent of the complainant, and which, as the respondents allege, supersede the invention described in the complainant's patent. Attempt will not be made to describe the invention set forth in each of these publications. Suffice it so say in that regard, that all of them have been carefully examined to the extent of the means furnished by the transcript, and the court is of the opinion that no one of the documents is of a character to sustain the issue that the complainant is not the original and first inventor of the improvement.

Most or all of the inventions described in those publications bear more or less resemblance to that claimed by the complainant, and it may be that if it were allowable to test the validity of the invention in question by comparing the same with the whole as if embodied in a single exhibit, the evidence might be sufficient to support the views of the respondents in respect to the defense under consideration. Were that allowable it might well be suggested that the screen is found in one, the box in another, and the means to produce the lateral shake in a third, and so on to the end; but it would still be true that neither the same combination in its entirety nor the same mode of operation is described in any one of the patents or printed publications given in evidence.

Attempt is scarcely made in argument to show that any one of these exhibits embodies the entire invention of the complainant, but it [104] is insisted that every feature of the patented improvement is found in some one or more of those publications. Suppose that is so; still it is clear that such a concession, if made, could not benefit the respondents, unless they can be allowed to extend the same comparison to two or more exhibits, as they do not contend that the entire invention is superseded by any one of their exhibits.

Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defense in question by proving that a part of the entire invention is found in one prior patent, printed publication or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant. *Imhaeuser* v. *Buerk*, not reported [101 U. S., 647, XXV., 945].

Common justice forbids such a defense, as it would work a virtual repeal of so much of the Patent Act as gives to inventors the right to a patent consisting of old elements, where the combination itself is new and produces a new and useful result. New elements in such a patent are not required, and if such a defense were allowed, not one patent of the kind in a thousand of modern date could be held valid. Nor is such a defense consistent with the regulations enacted by Congress in respect to the procedure in litigations in respect to patent-rights.

Infringers or persons sued as such may plead the general issue, and having given the required notice may prove that the patentee is not the original and first inventor of the improvement, or that it had been patented or described in some printed publication prior to the supposed invention, or that it had been in public use or on sale in this country for more than two years before the patentee applied for his patent. Corresponding proceedings may be had in equity, the denial of infringement and notice being alleged and given in the answer.

Defenses of the kind, if the thing patented is an entirety, incapable of division or of separate use, must be addressed to the invention and not [105] to a part of it or to one or more claims of the patent, if less than the entire invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent, in which cases the several defenses may be made to each patent in the suit and to each invention to which the charge of infringement relates. *Bates* v. *Coe*, 98 U. S., 31, 48 [XXV., 68, 74].

Remarks already made, without more, are sufficient to show that the evidence introduced by the respondents to sustain the proposition that the complainant is not the original and first inventor of the improvement fails to establish that assignment of error, and that the defense must be overruled.

Much discussion of the next defense is not required; beyond what is necessary to state the true construction and meaning of the provision of the Patent Act which allows that defense.

Evidence of the want of novelty arises from the acts of others, the defense being that the invention was constructed by another before the patentee made his invention, the rule being that priority of right depends in the first place upon priority of construction. Inventors may, if they can, keep their inventions secret; but if they do not, and suffer the same to go into public use for a period exceeding what is allowed by the Patent Act, they forfeit their right to a patent. Hence, the Patent Act allows the infringer to plead and prove that the invention of the patentee had been in public use or on sale in this country for more than two years before

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the inventor applied for a patent. No question of priority is open under that defense, nor will evidence sustain it that another had made or patented the invention two years before the application, without the knowledge of the patentee whose invention is in question.

Evidence of priority is admissible under the preceding defense. Unless inventors keep their inventions secret, they are required to be vigilant in securing patents for their protection; and if they do not, and suffer the same to be in public use or on sale in this country for more than two years before they apply for a patent, they forfeit their right; and if an infringer alleges and proves that defense, he cannot be held liable in a suit for infringement.

Subject to this explanation, it is clear that there is no proof in this case that the complain-
[106] ant was guilty of any laches in applying for a patent, or that *his improvement* ever went into public use or was on sale in this country before he applied for his patent.

Machines called grain-separators, it is admitted in argument, are manufactured and sold by the respondents, but they denied in their original answer that their separators were in all respects constructed in the same manner as the apparatus of the complainant, nor have they since entirely abandoned that proposition. Instead of that, they still insist that the re-issued patent of the complainant differs from the original, but they substantially admit that the machines which they construct and sell do infringe the invention of the complainant, as described in the re-issued patent, which is sufficient for the complainant, as the respondents have failed to make good their defense that the reissued patent is not for the same invention as the original. Irrespective of any admission, however, the court is satisfied, from a comparison of the two exhibits, that the charge of infringement is fully sustained.

Eighteen exceptions were filed by the respondents to the report of the master, but it is not deemed necessary, in view of the state of the record, to give them a separate examination in this case. Infringement being proved, the complainant was entitled to an account of the profits made by the respondents in the unlawful use of the patented improvement, which consisted of the new combination described in the specification. Obviously, it was a proper case for reference to a master, and it is not perceived that the general basis of his report exhibits any error to the prejudice of either party. Two special errors are discovered in addition to the one very properly corrected by the circuit court.

Costs were properly allowed, but the court is of the opinion that the complainant was not entitled to an allowance for any expenses beyond the taxable costs. Interest on the profits decreed to the complainant should not have been allowed, as was decided by this court many years ago, the better opinion being that profits in such a case are to be regarded in the light of unliquidated damages, which usually do not draw interest without the special order of the court. *Silsby* v. *Foote*, 20 How., 378, 386 [61 U. S., XV., 953, 955].

[107] Expenses to the amount of $627.20, including counsel fees, were allowed to the complainant beyond the taxable costs, which, together with the entire interest allowed, must be deducted from the decree. From which it follows that the decree in favor of the complaint, instead of being $11,184.42, should be $9,992.09, without interest, but with costs of suit, as allowed in the decree of the circuit court; and the decree of the circuit court is modified so as to conform to that computation, but without any injunction, as the term of the patent has expired.

The decree, as modified, is affirmed without interest or costs, the costs of this court to be paid by the appellee.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Cited—105 U. S., 204. 110 U. S., 303.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*, [120]

v.

JOHN HECK, Who Sues for the Use of LAWSON G. LANE, NATHANIEL J. OWENS and JOHN LEACH.

(See S. C., 12 Otto, 120.)

Exceptions necessary to a review—new trial.

1. The power of this court is confined to exceptions actually taken at the trial, and unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial.
2. The action of a trial court, in granting or refusing to grant a motion for a new trial, cannot be assigned for error here.

[No. 256.]

Argued Apr. 12, 1880. Decided Apr. 26, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **E. Walker,** for plaintiff in error.

Mr. **O. B. Sansum,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

It does not appear from this record that any exceptions were taken in the progress of the trial to what was done by the court below. The trial was finished and a verdict rendered on the 28th of November. Nearly three weeks afterwards, a motion was made for a new trial, because of certain alleged errors in the charge; but it is nowhere shown that these errors were noted or brought to the attention of the court before the verdict. Certainly no exceptions were taken. A trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury. But not so with us. Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred while the trial was going on. Time is usually given to put what was done into an appropriate form for the record; but, unless objection was made and exception

NOTE.—*Exceptions; when must be taken to be available on review.* See *note* to Phelps v. Mayer, 56 U. S. (15 How.), 160.

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taken before the verdict, no case is presented for a review here of the rulings at the trial. This has been settled in this court since *Walton* v. *U. S.* 9 Wheat., 651. The cases are numerous to that effect.

We have uniformly held that, as a motion for new trial in the Courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here. *Schuchardt* v. *Allens*, 1 Wall., 359 [68 U. S., XVII., 642]; *Ins. Co.* v. *Barton*, 13 Wall., 603 [80 U. S., XX., 708].

Judgment affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 555.

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[1] LEWIS H. MEYER AND WILLIAM DENNISON, Trustees, *Appts.*,

v.

WESTERN CAR COMPANY.

(See S. C., "*Myer v. Car Company*," 12 Otto, 1-14.)

Railroad mortgage on future acquired property —conditional sale—rolling stock—debts incurred.

1. Where a mortgage of a railroad is executed upon its present and future acquired property, including cars, the mortgagee cannot hold under the mortgage, cars which have been subsequently leased to the company with the privilege of purchasing them.
2. The Statute of Iowa in regard to conditional sales of personal property, construed.
3. It is unimportant that, under the railroad mortgage laws of Iowa, the rolling stock and personal property of the company, properly belonging to the road and appertaining thereto, are deemed a part of the road, for the purposes of the mortgage.
4. It is the duty of a court to pay from the trust fund in its possession, all the debts it incurred in its judicial capacity, while administering the trust assumed, pending the litigation, in behalf of the litigating parties.

[No. 262.]

Argued Apr. 14, 15, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the District of Iowa.

In February, 1872, the Western Car Company Association, then a copartnership, leased ninety cars to the Davenport and St. Paul R. R. Co., by written contract. The lease contained a stipulation that the lessee should have the right to purchase the cars at a fixed price. In May, 1873, the Western Car Co. was organized as a corporation, and succeeded to the property and rights of the Western Car Co. Association. The R. R. Co. paid the rent up to Oct. 1, 1873. On that date the Western Car Co. and the Davenport and St. Paul R. R. Co. entered into a contract, by which the former Company let to the latter the ninety cars on substantially the same terms as in the lease of February, 1872.

In December, 1874, one Loomis, claiming to be the owner of certain bonds secured by a mortgage, executed by the Davenport and St. Paul R. R. Co. on July 1, 1871, brought suit to foreclose that mortgage, and procured the appointment of a receiver. In February, 1875, the Western Car Company, by Lovejoy, its president, made demand upon the receiver for the payment of rent, or for possession of the cars. Lovejoy testified that the receiver, in answer to the demand, requested the Company not to take the cars from his possession, and stated that he had no doubt the court would order the rent paid. In March, 1875, the Western Car Co. obtained possession of fifty-six of the cars by virtue of a writ of replevin issued out of the U. S. Circuit Court for the Northern District of Illinois. In May, 1875, Meyer, who was one of the trustees in the above mentioned mortgage of July 1, 1871, filed in the then pending suit commenced by Loomis, a cross-bill for foreclosure of the mortgage. He made the Western Car Co. a defendant, and asked that the ninety cars might be adjudged to be the property of the Davenport and St. Paul R. R. Co., and sold as a part of the property covered by that mortgage. This bill also alleged that the Davenport Railway Construction Company made a contract to iron and equip the road for $20,000 per mile, of the bonds sought to be foreclosed; that subsequently the construction company agreed to furnish rolling stock for the use of the railroad and the same was to be subject to the first-mortgage bonds; that the construction company, instead of furnishing the equipments as part of the road, leased ninety cars of the Western Car Company; that the construction company, by its contract, owned a majority of the stock of the Company and controlled it; that the construction company and the Car Company knew the construction company were bound to furnish said cars, and the contract of lease instead of purchase was a fraud on the creditors of the railroad company; the Car Company answered, denying any contract with the construction company, and setting out its contract with the railroad company. It denied that the cars were subject to the lien of the mortgage, and asked that rent might be paid under the order and direction of the court.

After various further proceedings, the court below rendered a decree to the effect that two of the cars in the possession of the receiver were subject to the mortgage lien, and directing that the remaining thirty-two be delivered to the Car Company. From this decree the trustees appealed.

It appears that the contract of Oct. 1, 1873, was never recorded. The mortgage of July 1, 1871, was duly recorded. The statutes of Iowa relating to the questions at issue are given in the opinion of the court.

Messrs. **Joseph H. Choate, Grant & Grant** and *John W. Cary*, for appellants.

Messrs. **John M. Butler,** *E. C. Ingersoll, J. E. McDonald* and *Robert G. Ingersoll*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court: [9]

We consider it unnecessary to decide in this case whether a lease of personal property at a specified rent, with an option in the lessee to buy for a fixed price, is, in legal effect, a conditional sale; because, even if it be, the decree below is in our opinion right. At the last term, in *Foddick* v. *Schall*, 99 U. S., 235 [XXV., 339], a case which came up from Illinois, we decided that such a contract of sale, if not recorded in accordance with the requirements of the Chattel

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Mortgage Acts, was legal and valid as between the parties, and that under a mortgage reaching after acquired property the mortgagee would take such property subject to all the conditions with which it was incumbered when it came into the hands of the mortgagor. The Statute we were then considering was as follows:

"That no mortgage, trust-deed or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this Act, be deemed a chattel mortgage." R. S. Ill., 1874, p. 711.

Under this Statute the courts of Illinois have uniformly held that contracts of conditional sale are in effect, so far as the Chattel Mortgage Acts are concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the purchase money. So that the question we were then called on to [10] decide was whether one holding as a mortgagee of after acquired property was a "third person" within the meaning of that law.

The Statute of Iowa which is involved in the present case is as follows:

"That no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee, in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, and recorded the same as a chattel mortgage." Code of 1873, sec. 1922, p. 336; Acts of 14th General Assembly, ch. 63, p. 69.

It will thus be seen that the statutes of the two States are substantially alike, unless a different meaning is given the term "third persons," used in the one, from that of "creditor or purchaser," found in the other. If these terms are the same in legal effect, the principal question involved in this case has already been settled here.

In *Fosdick* v. *Schall* we held that a mortgagee whose mortgage embraced property to be acquired in the future was in no sense a purchaser of such property. His rights were not granted after the property was bought by the mortgagor. He got nothing by this provision in his mortgage except what the mortgagor himself had acquired. He paid nothing for his new security. He took as mortgagee just such title as the mortgagor had; no more, no less. The Code of Iowa, section 1283, authorized mortgages of property afterwards to be acquired, and made them as valid and effectual as if the property were in possession at the time of the execution thereof; but this does not change the case. The question still is, what property has been acquired to which the mortgage can attach.

We think, therefore, that the word "purchaser" in the Iowa Statute gives the appellants no rights over what they would be entitled to under like circumstances in Illinois.

Every mortgagee is necessarily a creditor. A mortgage is in general but an incident to the debt it secures, and the mortgagee is nothing more than a creditor secured by mortgage. These appellants are mortgagees; but, as has [11] just been seen, their mortgage gives them no rights to the property in dispute against the Car Company, the lessor or conditional vendor. Their claim is only such as belongs to creditors of the railroad company, the lessee, or conditional vendee. So far as any rights they have as simple creditors are concerned, the railroad company could do with the property just what it pleased. It might have been surrendered to the Car Company or sold to another. The Car Company, too, could have taken possession under its lien, and held against any proceeding these creditors might afterwards commence as mere creditors. Unless a creditor is in a condition to prevent the vendee from controlling his property, he is powerless, and the vendor and vendee may contract with each other as they please without consulting him. It follows that although the word "creditor" appears in the Statute, it must have been used with some limitation. This makes it necessary to inquire what that limitation was.

The Statute, as we now find it, is part of the Code of Iowa adopted in 1873. This Code, like the Revised Statutes of the United States, was, in reality, only a convenient compilation or codification of laws before that time in force. In the brief of counsel for the appellants, it is stated, in terms, that the particular section of the Code now in question (sec. 1922) is a copy of chapter 63 of the Acts of the Fourteenth General Assembly.

In relation to the Revised Statutes of the United States, we held at this Term in *U. S.* v. *Bowen* [100 U. S., 508, XXV., 631], that "When it becomes necessary to construe language in the revision which leaves a substantial doubt as to its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning." The same rule is applicable to the Iowa Code, and there is a substantial doubt here as to what the word "creditor" means. Looking then to the original Act, we find the text the same as the Code; but the title, omitted in the codification, is as follows: "An Act requiring conditional sales of personal property to be recorded like mortgages of personal property to be of any validity as against *bona fide* purchasers, execution and attaching creditors." In cases of doubt the title might always be resorted [12] to for the purpose of ascertaining the meaning of the body of the Act; but especially is this true in States like Iowa, where the Constitution provides that "Every Act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title." Art. III., sec. 29. This leaves no doubt, and clearly confines the operation of the text to such creditors as have by suit perfected a right to impeach the transaction. Such has always been the rule in respect to conveyances made to hinder and delay creditors. Until suit was commenced, the parties were at liberty to deal as they pleased with the property conveyed, and the rights of creditors were determined by the

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condition in which the property was when they interfered. It is clear, therefore, that these appellants, as creditors at large, had acquired no such special interest in the property, when their bill to foreclose their mortgage was filed, as would give them the right to contest the validity of the Car Company's title. As against them, in the condition they were, the lien created by the conditional sale was, to all intents and purposes, valid and subsisting when the receiver, on his appointment, took possession of the property; and his possession, as we said in *Fosdick v. Schall*, was for the benefit of whomsoever in the end it should be found to concern. The rights of the parties were fixed at the moment the property was taken by the court through its receiver into its own possession. At that time these appellants were not either execution or attaching creditors. They had not then, neither have they since, sued as any other than mortgaged creditors endeavoring to enforce their mortgage lien. We conclude, therefore, that the Statute of Iowa has a no more extended operation, so far as the circumstances of this case are concerned, than that of Illinois, and that under our former decision the appellants stand precisely where the railroad company would in a controversy with its vendor. To our minds it is unimportant that under the railroad mortgage laws of Iowa "The rolling stock and personal property of the company, properly belonging to the road and appertaining thereto, [13] shall be deemed a part of the road," for the purposes of a mortgage. Such personal property is still "loose property, susceptible of separate ownership and separate liens," and it is only such interest as "properly belongs" to the Company that the authorized mortgage reaches. The evident purpose of the Act was to do no more than prevent confusion growing out of any difference there might be between recording Acts having reference to personal property and those affecting real estate. This disposes of the principal question in the case.

The money recovered below was only for the use of the cars by the receiver during the receivership, and the amount was substantially agreed on. In other words, it is, in effect, admitted that the use of the cars was worth to the court while operating the road under the trust created by the appointment of a receiver, at the instance of these appellants, just what has been decreed. There can be no doubt that it is the duty of a court to pay from the trust fund it has in possession all the debts it incurred in its judicial capacity while administering the trust assumed, pending the litigation, in behalf of the litigating parties. The objection here is, not that the fund in hand did not incur the debt, the payment of which has been ordered, but that the railroad company, while operating the road before the receivership, paid the Car Company too large a sum for the use of its cars, and that the debt of the fund should be reduced by the amount of this improvident and excessive payment. There is nothing in the case, as it has been brought here by the appeal, which will enable us to determine whether the Car Company ought to contribute anything to the fund in court on this account or not. It is sufficient for our purposes on this appeal that an authorized officer of the court has, in a legitimate way, charged the fund in hand with the debt, the payment of which has been ordered, and that it has not been proved that the Car Company owes the railroad company for overpayments made before the receivership was created.

It is impossible for us to determine, from anything now here, whether the receiver is indebted to the Car Company for the use of the cars in question after the decree below, or whether the purchaser of the railroad property under the mortgage has used the cars pending the appeal; or that he can, in this suit, be required to make compensation therefor. All those questions will properly come before the court below for determination on the law and the facts when the case goes down. [14]

Affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—3 McCrary, 495.

BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY, *Plff. in Err.*, [14]

v.

NATIONAL BANK OF THE REPUBLIC OF NEW YORK.

(See S. C., 12 Otto, 14-59.)

Action against indorser of negotiable paper—when not a bar —estoppel—transfer of, as security—decision of U. S. Court not controlled by that of state court.

*1. The judgment in an action instituted by the holder of negotiable paper against the indorsers, is not a bar to a subsequent action by the holder against the maker, the latter not having been made a party to the first action, nor notified of its pendency.

2. An estoppel arising out of the judgment of a court of competent jurisdiction is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require.

3. The transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances—if the paper be so indorsed that the holder becomes a party to the instrument—although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defenses, between prior parties of which he had no notice.

4. The courts of the United States, in determining questions of general commercial law, are not controlled by the decisions of a state court, even in an action instituted by a national bank located in the State rendering such decision, against one of its citizens, upon a negotiable note there executed and payable. Such decisions not based upon local legislative enactments, are not "laws," within the meaning of the federal statute which provides that "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Smith v. Tyson, 16 Pet., 1, *re-affirmed.*

[229.]

Argued Mar. 30, 1880. Decided May 10, 1880.

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Estoppel by judgment.* See *note* to Aspden v. Nixon, 45 U. S. (4 How.), 467.

In what instances U. S. Courts do not follow state decisions. See *note* to U. S. v. Muscatine, 75 U. S., XIX., 490.

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IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **William Dorsheimer,** and *Field & Deyo,* for plaintiff in error:

The matter was *res judicata.*

That is, there had been a determination, by a court of competent jurisdiction, upon the same subject-matter, in controversy between the same parties or their privies.

There was the same plaintiff, but a different defendant, to wit: the maker instead of the indorser. Although the maker and indorser of the note may have independent interests, yet here the two are privies. The note never had any valid inception. The making and the indorsing were alike without consideration. There could be no liability on the part of either maker or indorser, except such as might arise from the unauthorized action of Hutchinson and Ingersoll, in pledging the note with the Bank.

3 Toml. L. Dic., "privies," 218; 2 Bouv., 382; *Green* v. *Clark*, 5 Den., 497; *S. C.*, 13 Barb., 57; *Kent* v. *H. R. R. Co.*, 22 Barb., 278; see, also, *Taylor* v. *Spader*, 48 N. Y., 664; *Bates* v. *Stanton*, 1 Duer, 87; *Ehle* v. *Bingham*, 7 Barb., 494; *Burr* v. *Bigler*, 16 Abb. Pr., 183; *Sturdy* v. *Jackaway*, 4 Wall., 174.

Even if the judgment obtained in the Supreme Court of the State of New York were not to be construed as *res judicata*, in the strict sense, the Bank should have been held to be estopped from proceeding further with this action.

1. It selected its own tribunal. Its suit was against indorsers alone, it is true, but it was contested on the merits alone, and the Bank was defeated except as to the $601.

2. The Bank did not appeal from the judgment, but abided by it and accepted the money which the court determined to be the whole amount due, not from the indorsers alone, but upon the note, and then satisfied the judgment.

3. Is it to be tolerated that the Bank can have a second trial upon the same question, because it is a banking association under the National Banking Law, and has the choice of suing either in the State or Federal Courts? If it had first sued in the Federal Court, in an action precisely similar to the suit in the Supreme Court, and upon a similar trial, upon the merits, of the right to recover upon the note, had been awarded $601, against the indorser, and had taken the money, would this court have entertained a second suit upon the same cause of action against the maker?

Kellogg v. U. S., 1 Ct. of Cl. (Nott & H.), 310; *Kendall* v. *Stokes*, 3 How., 87; *Mercer* v. *Selden*, 1 How., 37.

The claim was extinguished by the acceptance of the sum adjudged to be due in the State Court, without reservation and the satisfaction of the judgment.

2 Dan. Neg. Inst., *Woodworth* v. *Spaffords*, 2 McLean, 168; *Sedam* v. *Williams*, 4 McLean, 51; *King* v. *Hoare*, 13 Mees. & W., 494; *Farewell* v. *Hilliard*, 3 N. H., 318.

Upon the general question of the right of the Bank to recover, see:

McBride v. *Bk.*, 26 N. Y., 450; *S. C.*, 25 Barb., 657; *Van Amee* v. *Bk.*, 8 Barb., 312; *Bk.* v. *Leland*, 5 Met., 259; Story, Ag., sec. 381; 2 Pars., Cont., 104; *West* v. *Bk.*, 44 Barb., 175; *Bk.* v. *Corliss*, 46 Barb., 19; *Farrington* v. *Bk.*, 24 Barb., 559; *Com. Bk.* v. *Marine Bk.*, 3 Keyes, 337; *Scott* v. *Bk.*, 23 N. Y., 293; *Coddington* v. *Bay*, 20 Johns., 637; *Lawrence* v. *Clark*, 36 N. Y., 128.

The Bank relied upon the decision in *Swift* v. *Tyson*, 16 Pet., 1.

1. An examination of the facts (pp. 2 and 3) will show that the acceptance sued upon there was, with another acceptance, given in payment of a promissory note, and that the note was given up when the acceptances were received. All then that was decided is, that an innocent third party may acquire a title to a note, if he takes it in payment of a pre-existing debt, as well as if he makes an immediate advance upon it.

2. But, conceding, for the purposes of the argument, that a party, receiving a note as additional security to a claim already existing, may recover upon the note, this is not such a case.

The note was not given as security for a pre-existing debt. It was given as security for a loan and the loan has been paid, and the right of recovery cannot be extended to the case of a subsequent and independent loan made upon different collaterals.

3. All the other cases cited were those of continuing loans or balances. In other words: the party holding the notes had done or omitted to do some act on the faith thereof.

Here there was no agreement to extend the second loan.

An examination of *Swift* v. *Tyson*, shows that the point was taken on the argument that "The acceptance of a bill of exchange by the defendant having been given in New York, the contract was to be regulated by the laws of that State. The reporter says: "This question was not brought before the court by the certificate of division."

In the case at bar, the question is clearly presented; and, inasmuch as these parties are both residents of New York, and the contract was made there, and the complainant resorted to the tribunals of that State for the assertion of his rights, and obtained a judgment upon which he received payment, and gave satisfaction, we suggest that the case should be determined with sole reference to the *lex loci contractus*, and that this court should accept the decisions of the court of the State of New York as governing this case.

Mr. **Thomas H. Rodman,** for defendant in error:

The doctrine of *Swift* v. *Tyson*, 16 Pet., 1, is decisive. The criticism, that the doctrine announced there, so far as it applies to paper given as security for an antecedent debt, is *obiter*, because the case there shows that the plaintiff had given up a draft of his debtors for the acceptance of their draft in suit, does not accord with subsequent cases in this court, nor with the construction of that decision by either the State Courts that have adopted or those that have rejected the doctrine of *Judge* Story's opinion in regard to paper taken as security for a debt.

The principles declared in *Swift* v. *Tyson*, were: first, that a pre-existing debt was a valuable consideration; second, that the interests of commerce demanded that the fullest credit

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and freest circulation should be given to negotiable paper, so that it should not only pass as security for new purchases and advances made upon the transfer thereof; but also in payment of, and as security for, old debts. "Probably," the court said, "one half of all bank transactions in our country, as well as those of other countries, are of this nature;"—that is, renewals of old debts.

McCarty v. *Roots*, 21 How., 432 (XVI., 162).

The doctrine of *Swift* v. *Tyson* has since been applied in the following cases in the States.

Quinn v. *Hard*, 43 Vt., 375; *Russell* v. *Slater*, 47 Vt., 273; *Atkinson* v. *Brooks*, 26 Vt., 569; *Fisher* v. *Fisher*, 98 Mass., 303; *Stoddard* v. *Kimball*, 6 Cush., 469; *Roberts* v. *Hall*, 37 Conn., 205; *Bk* v. *Carrington*, 5 R. I., 515; *Bowman* v. *Millison*, 58 Ill., 36; *Manning* v. *McClure*, 36 Ill., 490; *Payne* v. *Bensley*, 8 Cal., 260; *Giovanovich* v. *Bk.*, 26 La. Ann., 15; *Smith* v. *Isaacs*, 23 La. Ann., 454; *Partridge* v. *Smith*, 2 Biss., 183; *Armour* v. *McMichael*, 36 N.J., 92; *Maitland* v. *Bk.*, 40 Md., 540; *Robinson* v. *Lair*, 31 Ia., 9; *Bonaud* v. *Genesi*, 42 Ga., 639; *Allaire* v. *Hartshorne*, 1 Zab., 665.

The fact that the contract was made in New York, where the contrary rule prevails, makes no difference.

Swift v. *Tyson*, 16 Pet., 1; *Town of Pine Grove* v. *Talcott*, 19 Wall., 666 (86 U. S., XXII., 227).

The defense of a former recovery is not tenable, because:

1. The former judgment was not in a suit between the same parties or their privies.

2. There is no privity between principal and surety, maker and indorser, and the like, to which the doctrine of estoppel applies.

Big. Est., 75, 2d ed.

Judgment against the indorser does not discharge the maker.

Russell, etc., Mfg. Co. v. *Carpenter*, 5 Hun, 162; *Pritchard* v. *Hitchcock*, 6 Man. & G., 151, cited by Big., 75.

It cannot be maintained that the plaintiff's claim was satisfied by the payment of the judgment against the indorsers for part only of the debt. What the law means by "satisfaction of a debt upon execution against another party severally liable," is, real satisfaction. Therefore, taking the body of such other party in execution merely, is not satisfaction.

Porter v. *Ingraham*, 10 Mass., 88.

Part payment from and release of the indorser, does not discharge the maker.

Story, Prom. N., sec. 422, *note*, 2; *Bk.* v. *Cunningham*, 24 Pick., 270.

Release of subsequent indorser does not discharge prior one.

Story, sec. 423.

The principle is, that it benefits and cannot injure any other party to have his liability diminished.

Story, sec. 422.

Judgment "unsatisfied" against indorser is no bar to action against maker.

Russell, etc., Mfg. Co. v. *Carpenter* (*supra*).

Mr. Justice **Harlan** delivered the opinion of the court:

The case as made by an agreed statement of facts, is this:

The plaintiff in error, the Brooklyn City and Newtown Railroad Company, a Corporation organized under the laws of New York, executed, at Brooklyn, in that State, on 9th May, 1873, its promissory note for the sum of $5,000, payable four months after date to the order of Wm. V. Le Count (its), Treasurer, at the Atlantic State Bank of Brooklyn. It was indorsed in blank, first by Le Count, Treasurer, and then by Palmer & Co., a firm composed of Thomas Palmer, Jr., and Anson S. Palmer, the former being the President, and the latter the financial agent of the Company, and together owning the larger portion of its stock. The note was made for the purpose only of raising money thereon for the Company. Neither Le Count nor Palmer & Co received any consideration for their respective indorsements. The note thus indorsed was, with others, placed by the Company in the hands of Hutchinson & Ingersoll, a firm of note-brokers in Wall Street, for negotiation and sale.

Prior to the execution of the note Hutchinson [15]
& Ingersoll had frequently borrowed money from the defendant in error, the National Bank of the Republic, of New York. They, however, kept no account with that institution, and had no transactions with it, other than those to which reference will now be made.

In the month of October, 1872, the Bank first made them a call loan at seven per cent interest, of $25,000, on collaterals. Subsequently, in 1873, it made to them other call loans on collaterals, at the same rate of interest as follows: March 11, $15,000; March 15, $10,000; April 11, $10,000; May 16, $10,000; May 20, $20,000; May 23, $10,000; June 4, $15,000; June 6, $12,000; June 12, $10,000; June 19, $36,000; and July 11, $10,000. Each of these loans was a separate one, upon a particular and distinct lot of collaterals. Hutchinson & Ingersoll were in the habit of borrowing money from various banks and from individuals or firms upon specific lots of collaterals.

The loan of $36,000 on 19th June, 1873, was upon several notes as collateral security, among them the above described note for $5,000, executed May 9, 1873. All the loans by the Bank, prior to the one of $36,000, had been paid off before that loan was made.

The loan of $10,000 on 11th July, 1873, was upon the following notes as collateral security: two notes of Howes, Hyatt & Co., for $2,605.98 and $3,540.15, and two of H. L. Ritch & Co. for $3,320.17 and $2,146.92.

On the 22d of July, 1873, Howes, Hyatt & Co. having become insolvent, Hutchinson & Ingersoll executed and delivered to the Bank, at its request, antedated to June 19, 1873, which was the date of the $36,000 loan, a written instrument, whereby they agreed with the Bank "That all securities, bonds, stocks, things in action or other property or evidences of property whatsoever, which have been or may at any time hereafter be deposited or left by us or on our account, with said Bank, whether specifically pledged or not, may be held by said Bank, and shall be deemed to be and are hereby pledged as security for the payment of any and every [16]
indebtedness, liability or engagement on our part, held by said Bank, and that on the non-payment, when due and payable, of any sum or sums of money which have been or may hereafter be by said Bank lent, paid or advanced to or for the account or use of us, or for which we are or may become in any way liable or indebted

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to said Bank, the said Bank, or its President or Cashier, may immediately thereupon, or at any time thereafter, sell, etc. * * * and apply the net proceeds of sale to the payment of any sum or sums due and payable from us to said Bank, and hold any surplus of such net proceeds, together with any and all remaining securities, property or evidences of property, then held by said Bank and not sold, as security for the payment of any and all other of our then existing and remaining liabilities and engagements to said Bank."

When that writing was executed, no agreement was made to extend the loan, or to refrain from calling it in.

The Bank knew that Hutchinson & Ingersoll were note-brokers, but until August 8, 1873, had no knowledge or information of the connection of the Palmers with the Railroad Company, or of the circumstances attending the making or indorsement of the note in suit, or of the purpose thereof, or of any relations, dealings or communication between Hutchinson & Ingersoll, and the parties to the note, except that they knew Hutchinson & Ingersoll to be note-brokers, or that the note was anything else than ordinary business paper; or that there was any question as to the right of said Hutchinson & Ingersoll to pledge or negotiate it. Nor did the Railroad Company know or suspect that the firm had parted with or hypothecated said note, until August 15, 1873.

The Company, by reason of certain advances made to its use, by Hutchinson & Ingersoll, became indebted to the latter, on the 8th of August, 1873, in the sum of $600. On the 15th day of August, 1873, it tendered that sum to the firm, and demanded a return of the $5,000 note. During the same month it made a like tender to the Bank, and demanded the note.

The $36,000 loan was paid in full out of the collaterals given to secure its payment, as they respectively matured, without resorting to the note in suit, the first payment of $4,580 being July 22, 1873, and the last payment being April [17] 4, 1874, leaving the $5,000 note in the Bank's possession.

Hutchinson & Ingersoll are insolvent. The collaterals collected exceeded the $36,000 loan by $2,403.61.

On the $10,000 loan of July 11, 1873, there was a balance due the Bank, November 21, 1876, of $5,136.68 after exhausting all collaterals in its possession which had been specially pledged to secure that loan, and crediting the amount, with interest collected, of a certain judgment to be now referred to.

In 1874, the Bank sued Palmer & Co., as indorsers upon the note in suit, in the Supreme Court of New York. The case was sent to a referee, who rendered judgment in favor of the Bank for $601, which seems to be the amount due from the Railroad Company to Hutchinson & Ingersoll. That judgment, with the costs, was satisfied.

The present action is by the Bank against the Railroad Company to recover the amount of the $5,000 note executed by the latter on the 9th of May, 1873, and placed in the hands of Hutchinson & Ingersoll for sale for the benefit of the Company.

The court below gave judgment for the Bank, to reverse which the Company has prosecuted this writ.

First. The first proposition of the plaintiff in [21] error is, that there has been a final determination by a court of competent jurisdiction, between the same parties or their privies, upon the same subject-matter as that here in controversy. This contention rests upon the judgment of the Supreme Court of New York, in the action instituted by the Bank against Palmer & Co., as the indorsers of the note in suit.

The judgment in the state court clearly constitutes no bar to the present action. Personal judgments bind only parties and their privies. The Railroad Company was in no sense a party to the separate action against Palmer & Co., nor did it receive notice from the latter of the pendency of that suit. It was, therefore, in no manner affected by the judgment. Had the Company received such notice in due time, it would, perhaps, although not technically a party to the record, have been estopped, at least as between it and its accommodation indorsers, from saying that the latter were not bound to pay the judgment, if obtained without fraud or collusion. Being, however, an entire stranger to the record, it had no opportunity or right, in that proceeding, to controvert the claim of the Bank, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment.

If, in the action against Palmer & Co., the Bank had obtained judgment for the full amount of the note and, being unable to collect it, had sued the Railroad Company, the latter would not have been precluded by the judgment in that action, to which it was not a party, and of the pendency of which it had not been notified, from asserting any defense it might have against the note. This being so, it results that the Com- [22] pany cannot plead the judgment in the State Court as a bar to this action. An estoppel, arising out of the judgment of a court of competent jurisdiction, is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require.

The liability of the maker and indorsers was not joint, but several and, therefore, a judgment in an action against the indorsers, upon the contract of indorsement, could not bar a separate action by the Bank against the maker; certainly not, where the maker was without notice from the indorsers of the pendency of the action against them.

Second. The next proposition involves the right of the Railroad Company to show, as against the Bank, that the note was executed and delivered to Hutchinson & Ingersoll for the purpose only of raising money upon it for the Company; and that, consequently, they had no authority to pledge it as collateral security for their own indebtedness to the Bank. It will have been observed, from the statement of facts, that the note in suit was among those pledged to the Bank as security for the call loan of $36,000, made June 19, 1873; that Howes, Hyatt & Co., whose notes had been pledged as security for the call loan of $10,000, made on June 19, 1873, having become insolvent, Hutchinson & Ingersoll, July 22, 1873, at the request of the bank, executed the writing, dated June 19, 1873, whereby they pledged all securities, bonds, stocks, things in action, or other property theretofore

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deposited with the Bank, whether specifically or not, as security for the payment of any and every indebtedness, liability or engagement held by the Bank, for which they were, or should become, in any way liable. Although, therefore, the call loan of $36,000 was extinguished, without resorting to the note in suit, that note, under the agreement made on the 22d of July, 1873, stood pledged as collateral security, also, for the $10,000 call loan of July 11, 1873.

The Bank, we have seen, received the note, before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defense thereto, and in ignorance of the purposes for which [23] it had been executed and delivered to Hutchinson & Ingersoll. Did the Bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defenses which the Railroad Company may have against the other parties to the note?

This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in *Swift* v. *Tyson*, 16 Pet., 1. After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by *Mr. Justice* Story, said: "And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt, from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of *or as security for a pre-existing debt*, is, according to the known usual course of trade and business. And why, upon principle," continued the court, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, [24] and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

After a review of the English cases, the court proceeded: "They directly establish that a *bona fide* holder, taking a negotiable note in payment of *or* as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the *bona fide* holder of a negotiable note, taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of *Mr. Justice* Catron was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted, *Mr. Justice* Catron alone excepted, the holder of a negotiable instrument, received before maturity, and without notice of any defense thereto, is unaffected by the equities or defenses of antecedent parties, equally whether the note is taken as collateral security for or in payment of previous indebtedness. And we understand the case of *McCarty* v. *Roots*, 21 How., 432 [62 U. S., XVI., 162] to affirm *Swift* v. *Tyson*, upon the point now under consideration. It was there said: "Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt impair the plaintiff's right to recover." * * * "The delivery of the [25] bills to the plaintiff as collateral security for a pre-existing debt, under the decision of *Swift* v. *Tyson*, was legal."

It may be remarked, in this connection, that the courts holding a different rule have uniformly referred to an opinion of *Chancellor* Kent in *Bay* v. *Coddington*, 5 Johns. Ch., 54, re-affirmed in *Coddington* v. *Bay*, 20 Johns., 637. There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the 6th edition of his Commentaries, side page 81, *note b*, prepared by himself, reference is made to *Stalker* v. *M'Donald*, 6 Hill, 93, in which the principles asserted in *Bay* v. *Coddington* were re-examined and maintained in an elaborate opinion by *Chancellor* Walworth, who took occasion to say that the opinion in *Swift* v. *Tyson* was not correct in declaring that a pre-existing debt was, of itself, and without other circumstances, a sufficient consideration to entitle the *bona fide* holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But *Chancellor* Kent adds: "*Mr. Justice* Story on Promissory Notes, p. 215, *n.* 1, repeats and sustains the decision in *Swift* v. *Tyson*,

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and I am inclined to concur in that decision as the plainer and better doctrine." Of course, it did not escape his attention that the court, in *Swift* v. *Tyson*, declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt, as when transferred in payment or extinguishment of such debt.

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence, there being no statutory regulations to the contrary, that where negotiable paper is received in payment of an antecedent debt; or where it is transferred, by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer; or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the [26] transfer of negotiable paper as collateral security therefor; or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due; in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between prior parties to such paper.

Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security *merely*, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in *Swift* v. *Tyson* is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts, nothing more, constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects: one, where the paper is received as collateral security for antecedent debts. We concur with the author, "That, when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers, not affected by peculiar circumstances, will be held to be regular, and to rest upon a valid consideration." 1 Pars., Notes and B., 2d ed., 218.

Another ground upon which some courts have declined to sanction the rule announced in *Swift* v. *Tyson* is, that upon the transfer of ne- [27] gotiable paper merely as collateral security for an antecedent debt nothing is surrendered by the indorsee; that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes upon him no additional burdens, and subjects him to no additional inconveniences.

This may be true in some but it is not true in most cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

The Bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law, to present it for payment and give notice of non-payment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the Bank to fix the liability of prior parties, by due presentation for payment and due notice in case of non-payment—an undertaking necessarily implied by becoming a party to the instrument—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. The correctness of this rule is apparent in cases like the one now before us. The note in suit was negotiable in form, and was delivered by the maker for the purpose of being negotiated. Had it been regularly discounted by the Bank, at any time before maturity, and the proceeds either placed to the credit of Hutchinson & Ingersoll, or applied directly to the discharge, *pro tanto*, of any one of the call loans previously made to them, it would not be doubted that the Bank would be protected against the equities of prior parties. Instead of procuring its formal discount, Hutchinson & Ingersoll used it to secure the ultimate payment of their own debt to the Bank. At the time the written [28] agreement of July 22, 1873, was executed, by which this note, with others, was pledged as security for any debt then or thereafter held against them, the Bank had the right to call in the $10,000 loan; that is, to require immediate payment. The securities upon which that loan rested had become, in part, worthless, and it is evident that but for the deposit of additional collateral securities, the Bank would have called in the loan or resorted to its rightful legal remedies for the enforcement of payment. It was, under the circumstances, the duty of the debtors to make such payment, or to secure the debt. It was important to them, and was in the usual course of commercial transactions, to furnish such security. If the Bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the

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Railroad Company intrusted it to those parties in a form which indicated that the latter were its rightful holders and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is, that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. Bigelow, Bills and N., 502, *et seq.;* 1 Daniel, Neg. Inst., 2d ed., ch. 25, secs. 820–833; Story, Prom. N., secs. 136, 195, 7th ed., by Thorndyke; 1 Pars. Notes and B., 2d ed., 218, sec. 4, ch. 6; and Redfield & B. Lead. Cas. upon Bills of Exch. and Prom. N., where the authorities are cited by the authors.

Third. It is, however, insisted that, by the course of judicial decision in New York, negotiable paper transferred merely as collateral security for an antecedent debt, is subject to the equities of prior parties existing at the time of [29] transfer; that the Bank being located in New York, and the other parties being citizens of the same State, and the contract having been there made, this court is bound to accept and follow the decision of the State Court, whether it meets our approval or not. This contention rests upon the provision of the statute which declares that "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

It is, undoubtedly, true that if we should apply to this case the principles announced in the highest court of the State of New York, a different conclusion would have been reached from that already announced. That learned court has held that the holder of negotiable paper transferred *merely* as collateral security for an antecedent debt, nothing more, is not a holder for value, within those rules of commercial law which protect such paper against the equities of prior parties.

The question here presented is concluded by our former decisions.

We remark, at the outset, that the section of the Statute of the United States already quoted is the same as the 34th section of the original Judiciary Act. 1 Stat. at L., 29.

In *Swift* v. *Tyson*, *supra*, the contention was that this court was obliged to follow the decisions of the State Courts in all cases where they apply. But this court said: in order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases [30] which have hitherto come before us for decision this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local; that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It has never been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation: as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In *Carpenter* v. *Ins. Co.*, 16 Pet., 495, decided at the same term with *Swift* v. *Tyson*, it was necessary to determine certain questions in the law of insurance. The court said: "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance which is, by no means, local in its character or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tri- [31] bunals may have on such a subject, and they, certainly, are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from these learned State Courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Oates* v. *Bk.*, 100 U. S., 239 [XXV., 580].

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we had before us in precisely the question now under consideration. That was an action by a national bank, located in Alabama, against a citizen of that State, upon a promissory note there executed and negotiated. It was contended that the decision of the Supreme Court of Alabama should be accepted as the law governing the rights of parties. We however, held, referring to some of our previous decisions, that the Federal Courts were not bound by the decisions of the State Courts "upon questions of general commercial law. * * * We have already seen that the Statutes of Alabama placed under the protection of the commercial law promissory notes payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal Courts to determine, upon their own judgment as to what these rules and doctrines are."

To this doctrine, which received the approval of all the members of this court when first announced, we have, as our decisions show, steadily adhered. We perceive no reason for its modification in any degree whatever. We could not infringe upon it, in this case, without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract there made, are not in exposition of any legislative enactment of that State. They express the opinion of that court, not as to the rights of parties under any law local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State, or dependent upon local [32] authority, but one arising out of the usages of the commercial world. Suppose a State Court in a case before it, should determine what were the laws of war as applicable to that and similar cases. The Federal Courts, sitting in that State, possessing, it must be conceded, equal power with the State Court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the State Court as the true interpretation, for that locality, of the laws of war, and as the "law" of the State in the sense of the statute which makes the "Laws of the States rules of decision in trials at common law." We apprehend, however, that no one would go that far in asserting the binding force of State decisions upon the Courts of the United States when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions. Further elaboration would seem to be unnecessary.

The judgment is affirmed.

Dissenting, *Mr. Justice* **Miller.**

Mr. Justice **Clifford** concurred in the judgment and delivered the following opinion:

Commercial law is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity or decision throughout the world.

Bills of exchange and promissory notes are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality, as their universal convenience in mercantile affairs. Everywhere the rule is that they may be transferred by indorsement, or when indorsed in blank or made payable to bearer they are transferable by mere delivery. International regulations encourage their use as a safe and convenient medium for the settlement of balances among mercantile men of different na [33] tions, and any course of judicial decision calculated to restrain or impede their full and unembarrassed circulation for the purposes of foreign or domestic trade would be contrary to the soundest principles of public policy. *Goodman* v. *Simonds*, 20 How., 343, 364 [61 U. S., XV., 934, 940].

Sufficient appears to show that the corporation plaintiff became the holder of the note described in the declaration, and that, payment being refused, it instituted the present action of *assumpsit* to recover the amount. Service having been made, the defendant appeared and set up several defenses, which are fully exhibited in its answer filed in the case. Certain proceedings followed, which it is not necessary to notice, as the parties by consent waived a jury and submitted the cause to the circuit court upon an agreed statement of facts. Hearing was had, and the circuit court rendered judgment in favor of the plaintiff for the amount of the note and costs of suit, and the defendant sued out the present writ of error.

Eight errors are assigned, but it will not be necessary to give the several assignments a separate examination, as the questions presented do not properly involve more than three material propositions: (1) That the cause of action is barred by a former recovery in an action by the plaintiff against the indorsers of the note. (2) That the plaintiff, inasmuch as it holds the note as collateral security for a pre-existing debt, is not a *bona fide* holder of the same within the meaning of the commercial rule which shuts out proof of equities between the antecedent parties to the instrument. (3) That, by the law of the State, the plaintiff, in view of the facts exhibited in the agreed statement, is not entitled to the benefit of that rule, and that the law of the State in that regard furnishes in such a case the rule of decision in the Federal Courts.

Special findings were made by the circuit court, from which it appears that the defendant was the maker of the note, and that it was payable to the order of its treasurer, by whom it was indorsed in blank, and that it was also indorsed by the firm of Palmer & Company, consisting of the president and financial agent of the corporation defendant.

Enough appears to show that the note was made and indorsed for the sole purpose of raising money for the use of the defendant, nothing [34] having been paid to either of the indorsers for their indorsement. When duly executed and indorsed in blank, the defendant placed the note with others in the hands of a firm of note-brokers for sale to raise money for its use. Prior to that, the same note-brokers had frequently borrowed money from the corporation plaintiff;

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but they did not keep any account with the Bank, and had no other transactions with the same than those set forth in the findings of the court.

Twelve call loans at seven per cent interest were made at different times by the plaintiff to the note-brokers on collaterals, as specifically enumerated and described in the findings, each of which was separate and had no reference to any other, and it appears that each was made upon a separate lot of collaterals. Two of those loans, to wit: the one for $36,000, and the last one, which is for $10,000, will be the subject of special comment in disposing of the case.

Before the brokers applied for the loan of $36,000, it appears that they had paid all their previous loans obtained from the plaintiff, and that they procured the loan upon collaterals, among which was the note for $36,000 described in the findings. Other banks or capitalists made loans to these brokers, taking collaterals as security, and the plaintiff, three weeks later, loaned them $10,000 more, taking as security the four notes mentioned in the findings.

Adequate collaterals were at that time held by the plaintiff for each of those loans, but it appears that the promisors of one of the collaterals given for the last loan, within eleven days after the money was advanced, failed in business and became notoriously bankrupt, and that knowledge of that fact reached the plaintiff. Prior to that, it was known that the brokers who negotiated the loans were insolvent, and the findings show that they, at the request of the plaintiff, executed and delivered to it the instrument exhibited in the transcript, in which they agreed that all securities, bonds, stocks or other property deposited by them with the plaintiff might be held by it, and be deemed security for all their indebtedness to the plaintiff, as more fully set forth in the findings.

Certain advances were made by the brokers to the defendant, by reason of which the latter became indebted to the brokers in the sum of [35] $600, and it appears that the defendant tendered that sum both to the brokers and the plaintiff, and demanded the return of note in suit.

Payment in full of the large note was obtained by the plaintiff out of the collaterals originally deposited with it for that purpose, and it appears that the moneys collected from those collaterals exceeded the amount of that loan by the sum of $2,403.61, so that the entire balance remaining due on the last loan was $5,906.99.

Process to enforce payment was first sued out against the indorsers, and in that action the plaintiff recovered judgment in the sum of $600, which sum, with the costs of suit, was duly paid; and it appears that the balance due, deducting the collections from the collaterals and the judgment against the indorsers, is $5,136.68, for which, with interest and costs, the judgment was entered in the circuit court.

Judgments rendered in courts of competent jurisdiction are conclusive between the parties and privies until the same are reversed or in some manner set aside and annulled.

When a fact has once been tried and decided by a court of competent jurisdiction, it cannot be again contested between the same parties or their privies in the same or any other court, if it appear that the same matter was directly involved in the pleadings and that the merits of the cause were decided in the first case.

I. Parties and privies in such a case are bound by the estoppel, but the holder of a negotiable bill of exchange or promissory note may pursue his remedy against the indorsers as well as the immediate promissory party. Consequently, as stated by Mr. Bigelow, an indorsee of a bill of exchange or promissory note may sue all the prior parties concurrently or successively at his election, subject to the condition that he is entitled to but one satisfaction. Bigelow, Estop., 2d ed., 55; *Bishop* v. *Hayward*, 4 T. R., 470; *Britten* v. *Webb*, 2 Barn. & C., 483; *Windham* v. *Wither*, 1 Str., 515; *Burgess* v. *Merrill*, 4 Taunt., 468; *Farwell* v. *Hilliard*, 8 N. H., 318; *Porter* v. *Ingraham*, 10 Mass., 88.

Authorities to show that the holder in such a case is not estopped to sue the maker because [36] he has recovered judgment against the indorser are numerous and decisive. *Mfg. Co.* v. *Carpenter*, 5 Hun, 162; Story, Prom. N., 7th ed., sec. 401; *Pritchard* v. *Hitchcock*, 6 Man. & G., 151, 201.

II. Suppose that is so; then it is insisted by the defendant that the plaintiff is not a *bona fide* holder for value in the usual course of business within the meaning of the commercial law.

Questions of fact are set at rest by the findings, from which it appears that the note is payable to the treasurer of the defendants or order, by whom it was indorsed in blank as well as by the firm, consisting of the president and financial agent of the Company; that it was placed by the maker in the hands of the brokers for sale to raise money for the use of the maker, and that the plaintiff loaned the full amount of the note to the agents of the defendant and took the note indorsed in blank as collateral security for the loan before maturity. None of these matters are disputed, and it is equally and undeniably true that the whole of the money loaned went into the hands of the defendant, in pursuance of the arrangement it made with its own agents.

Neither fraud nor mistake is alleged or even suggested in respect to any one of these matters, from which it follows, as a necessary legal conclusion, that the plaintiff became the actual holder of the note in good faith before maturity by delivery from the agents of the defendant, and that it as such assumed the responsibility to demand payment of the makers when the note fell due, and, if not paid, to give the required notice of non-payment to the indorsers.

Beyond all question, the findings show that the plaintiff in good faith became a party to the note described in the declaration before maturity, and that as such holder it was bound to adopt proper measures to fix the liability of the indorsers, and that if it had failed to demand payment of the maker, or to give the required notice to the indorsers, it would have become liable to the party from whom it received the note for whatever loss ensued from such neglect. Such a holder of a foreign bill of exchange, if not paid at maturity, must see that it is duly [37] protested; and for the same reason the holder of an inland bill or negotiable promissory note must see to it that proper steps are taken, in case of non-payment by the acceptor or maker, to fix the liability of parties to the instrument who would otherwise be discharged.

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Securities of a negotiable character may be transferred by indorsement made at the time they are delivered, or if indorsed in blank or made payable to bearer, they may be transferred by mere delivery without any new indorsement, and in either case, the holder, other things being equal, acquires full title to the instrument, the correct commercial rule being that whoever lawfully and in good faith becomes the holder of a valid negotiable bill of exchange or promissory note before maturity, by direct indorsement or by delivery when indorsed in blank or made payable to bearer, assumes the responsibility, if not paid when it falls due, of entering protest or of making demand and giving notice of non-payment as the case may require; and that, in all cases of such a transfer, the holder, whether he paid cash for the note or made new advances to the transferrer, or accepted it in substitution of prior collaterals surrendered, or received it in payment of property sold or of antecedent indebtedness, or as collateral security of a pre-existing debt or any pecuniary liability for the pledgor, is a holder for value in the usual course of business, within the meaning of the commercial law, and is unaffected by any equities between the antecedent parties, provided he took it in good faith and without notice of anything to impeach the title of the person from whom it was received.

Authorities everywhere agree at the present time that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of anything which impeaches its validity, if he takes it under an indorsement made before maturity, holds the title unaffected by any equities between the antecedent parties, even though as between them it may be without any legal validity. *Swift* v. *Tyson*, 16 Pet., 1, 15.

Instruments of the kind are commercial paper in the strictest sense, and must ever be regarded as favored securities, on account of their universal convenience in mercantile transactions and the settled rule is that transferees of the same hold the instrument clothed with the presumption that it was negotiated for value, in [38] the usual course of business, at the time of its execution, and without notice of any equities between the antecedent parties to the instrument. *Collins* v. *Gilbert*, 94 U. S., 753 [XXIV., 170].

Possession of such an instrument before maturity, if indorsed in blank or payable to bearer, is *prima facie* evidence that the holder is the owner and lawful possessor of the same; and nothing short of proof that he had knowledge, at the time he took it, of the facts which impeach the title as between the antecedent parties, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption. *Goodman* v. *Harvey*, 4 Ad. & E., 870; *Goodman* v. *Simonds*, 20 How., 343, 365 [61 U. S., XV., 934, 941]; *Bk.* v. *Leighton*, 2 Exch., 61; *Wheeler* v. *Guild*, 20 Pick, 545; *Magee* v. *Badger*, 34 N. Y., 247, 249.

Apply that rule in an action by the transferee against the maker of a negotiable note indorsed in blank, or payable to bearer, and it is clear that he has nothing to do in the opening of his case except to prove the signatures to the instrument and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date, in the usual course of business, without notice of anything to impeach his title. *Pettes* v. *Prout*, 3 Gray, 502; *Way* v. *Richardson*, 3 Gray, 412.

Clothed as the instrument is with the described presumption, the plaintiff is not bound to give any evidence to show that he gave value for the same until the other party has clearly proved that the consideration was illegal, or that the instrument was fraudulent it its inception, or that it had been lost or stolen before it came to the possession of the holder. *Fitch* v. *Jones*, 5 El. & Bl., 238; *Smith* v. *Braine*, 16 Ad. & E. (N. S.), 244; *Hall* v. *Featherstone*, 3 H.& N.,284.

Cases arise where the supposed defect or the infirmity of the title appears on the face of the instrument; and where that is so, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law. *Andrews* v. *Pond*, 13 Pet., 65; *Fowler* v. *Brantley*, 14 Pet., 318; *Brown* v. *Davies*, 3 T. R., 80. [39]

Decided cases of the highest authority support that proposition, but it is a very different matter when it is proposed to impeach the title of the holder by proof of facts and circumstances outside of the instrument itself, as he is then to be affected, if at all, by what has occurred between other parties. For his own acts he is plainly responsible, but he may well claim exemption from any consequences flowing from the acts of others, unless it be first clearly shown that he had knowledge of such facts and circumstances at the time he became the holder of the instrument. Actual knowledge of such facts and circumstances must be proved to defeat the title of the holder; and the question whether he had such knowledge or not is a question of fact for the jury and, like other questions of *scienter*, must be submitted to their determination.

Indorsers of negotiable securities enjoyed the protection of that rule for ages before any successful attempt was made to annex to it any qualification, unless it appeared that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Hinton's Case*, 2 Show.,235; *Anonymous*, 1 Salk.,126; *Miller* v. *Race*, 1 Burr., 452; *Grant* v. *Vaughan*, 3 Burr., 1516; *Peacock* v. *Rhodes*, 2 Doug., 633; *Lawson* v. *Weston*, 4 Esp., 56.

Throughout the whole period covered by those decisions, it was universally understood that the title of the *bona fide* holder was unaffected by any equities between the antecedent parties; but it was subsequently decided that if the indorser of the instrument had no valid title to the same, and that such facts and circumstances were known to the indorsee, at the time of the transfer, as would have caused a person of ordinary prudence to suspect that the indorser had no right to transfer the instrument or to use the same for his own benefit, then the holder, as against the acceptor or maker, is not entitled to recover. *Gill* v. *Cubitt*, 3 Barn. & C., 466.

For a brief period that rule was followed, but [40] it was never satisfactory, and at the end of twelve years was distinctly overruled in the tribunal where it was first promulgated. *Goodman*

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v. *Harvey*, 4 Ad. & E., 870; *Arbouin* v. *Anderson*, 1 Ad. & E. (N. S.), 498.

We must hold, said Lord Denman, in the case last cited, that the owner of a bill of exchange is entitled to recover upon it if he has come by it honestly, and that that fact is implied *prima facie* by possession; and that, to meet the inference so raised, fraud, felony or some such matter must be proved.

Abundant authority to support the proposition that the case which for a period relaxed that rule has been overruled for more than half a century is found in the reported cases already cited, and Mr. Chitty says that the old rule of law, that the holder of a negotiable security transferable by delivery, can give a title, which he himself does not possess, to a person taking the same *bona fide* for value, is by those decisions again re-established in its fullest extent. Chitty, Bills, 13th ed., 257; *Worcester Co. Bk.* v. *Dorchester & Milton Bk.*, 10 Cush., 491. Conclusive support to that conclusion is found in decisions not previously cited and in the text writers of the highest authority. *Bk.* v. *Neal*, 22 How., 96 [63 U. S., XVI., 323]; *Murray* v. *Lardner* 2 Wall., 110 [69 U. S., XVII., 857].

Nothing short of fraud, not even gross negligence, says *Judge* Story, if unattended with *mala fides* on the part of the taker of the instrument, will invalidate his title so as to prevent him from recovering the amount. Story, Prom. N., 7th ed., sec. 382. Every person, says the same learned author, is treated in the sense of the rule as a *bona fide* holder for value, not only who has advanced money or other value for it, but who has received it in payment of a precedent debt, or has a lien on it, or has taken it as collateral security for a precedent debt, or for future as well as for past advances. Story, Bills, 4th ed., sec. 192.

During the period the modified rule referred to was recognized as good law in the courts of the country where it was first promulgated, it must be admitted that the courts of several of the States in our own country accepted the same rule, and that the pernicious effects resulting from those examples are still to be seen in some of the more recent state decisions. Attempt was made at one time to maintain that the holder of a negotiable security, if he received it as *payment* of a precedent debt, could not be regarded [41] as a *bona fide* holder for value in the usual course of business, even though he took it without notice of any defect in the title of the transferrer, or of any equities between the antecedent parties; but that erroneous rule of decision is abandoned and overruled. *Bk.* v. *Gilliland*, 23 Wend., 311; *Small* v. *Smith*, 1 Den., 583, 586; Edwards, Bills and N., 2d ed., 322.

Reported cases also show that it was decided during that period in the courts of the same State, that if a party in good faith took a negotiable security of a holder without due inquiry, or with knowledge of such facts and circumstances as would put a prudent man upon inquiry in making purchases of personal property, he would not acquire a good title to the instrument, if it appeared that equities existed between the antecedent parties, and that vigilant inquiry would have enabled the taker to have ascertained the true character of those equities; but the appellate tribunal of the State has exploded that legal heresy as applied to negotiable securities, and has in that respect adopted the true commercial rule as administered in the courts of Westminster Hall. *Pringle* v. *Phillips*, 5 Sand., 157; *Welch* v. *Sage*, 47 N.Y., 143, 147.

Prior to the decision in the case of *Gill* v. *Cubitt*, the rule was that nothing short of proof of knowledge of the facts and circumstances constituting the equities between the antecedent parties would enable the maker to defend the suit of the holder; but the court in that case decided that the transferee could not recover if the circumstances under which the transfer took place were such as would naturally have excited the suspicion of a prudent and careful man. State Court decisions, in many cases, followed that erroneous theory; but the case itself has been authoritatively overruled in the tribunal where it had its origin, and the old rule as re-established by the later adjudications has been in repeated instances adopted by this court and by the highest courts of the State where the present controversy arose. *Goodman* v. *Harvey* [*supra*]; *Goodman* v. *Simonds* [*supra*]; *Seybel* v. *Bk.*, 54 N. Y., 288, 295; *Ins. Co.* v. *Hachfield*, 73 N. Y., 226. [42]

Much progress, it will be seen from the preceeding observations, has been made within the last thirty years in securing uniformity of decision in respect to mercantile controversies between the Federal and State Courts, and the courts of this country and those of the parent country, from which most of our commercial rules and usages are derived. *Howry* v. *Eppinger*, 34 Mich., 29.

Concede all that; and still it is insisted by the defendant that the plaintiff took the note merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes a negotiable security, under such circumstances, cannot be regarded as acquiring it in the usual course of business, and, consequently, that he takes it subject to prior equities. Many decisions of the courts of the State concur that if there is a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable bill of exchange or promissory note before maturity, as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will not be affected by any prior equities between other parties, at least to the extent of the debt for which it is so held. *White* v. *Bk.*, 3 Sandf., 222; *Iron Works* v. *Smith*, 4 Duer, 362.

When commercial paper is pledged by the apparent owner before it matures, as collateral security for advances, the pledgee in good faith is entitled to hold it for the amount of such advances, though it turns out afterwards that the party making the pledge was a mere agent for the true owner, and that the transaction was a breach of duty to the principal. *Bk.* v. *Hoge*, 35 N. Y., 65; *Murray* v. *Beckwith*, 81 Ill., 48.

Where full value is paid by the pledgee, and the transfer is made before maturity, without notice of any prior equities between the antecedent parties, the title of the holder of the security is not subject to be defeated by proof that he might have obtained such notice by the

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exercise of active vigilance. Cash advances or the sale of goods or other property will constitute a good consideration for the transfer; nor is such a payment or sale indispensable, as it is [43] equally well settled that the actual discharge of a precedent debt, or the surrender of prior collaterals or a binding agreement to give time for the payment of a debt then due, will have the same effect. *Elting* v. *Vanderlyn*, 4 Johns., 237; *Morton* v. *Burn*, 7 Ad. & E., 19; *Jennison* v. *Stafford*, 1 Cush., 168; *Baker* v. *Walker*, 14 Mees. & W., 465; *Walton* v. *Mascall*, 13 Mees. & W., 452; *Wheeler* v. *Slocumb*, 16 Pick., 52; *Kearslake* v. *Morgan*, 5 T. R., 513.

Examples given by *Judge* Story show that the receiving a note as security for a debt, or forbearance to sue a present claim or debt, or an exchange of securities, or becoming a surety, or doing any other act at the request or for the benefit of the maker or indorser, will constitute a sufficient consideration for a note as well as the payment of money, or the making of advances, or giving credit, or the discharge of a present debt, or the performance of work or labor at the request of the party. Story, Prom. N., 7th ed., sec. 186.

Differences of opinion, however, still exist where the transfer is made as a collateral security for a pre-existing debt, without any other consideration than what flows from the nature of the contract at the time the instrument is delivered, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt.

Further argument, to show that where negotiable paper is received in payment and extinguishment of a pre-existing debt the holder is entitled to protection, is quite unnecessary, as the authorities in support of the proposition, even in this country, are quite too numerous for citation. *Townsley* v. *Sumrall*, 2 Pet., 170, 182; Pars., Bills and N., 221.

Nor is it necessary to add anything to prove that the title of the holder is good if he took the note outright for goods or other property sold and delivered to the transferrer of the note at the time the transfer was made. All this is admitted, or, if not admitted, is so fully established by authority as not to require any further argument in its support. Substantial uniformity of judicial opinion exists both in this country and in England to that extent, but there is still some diversity of decision in this country upon the question whether the same conclusion will follow where the negotiable se- [44] curity is transferred as collateral security without any other consideration than the delay of payment incident to the transaction and what flows from the relation of debtor and creditor in respect to the existing debt and the obligation which the transferee assumes by the reception of the negotiable instrument before maturity. Standard decisions of the State Courts are referred to by the defendant where it is held that the title of the holder under such circumstances is not good. *Bay* v. *Coddington*, 5 Johns. Ch., 54, 59; *Coddington* v. *Bay*, 20 Johns., 637, 644; *Stalker* v. *M'Donald*, 6 Hill, 93.

Sixty years have elapsed since the commercial rule adopted and enforced by that series of decisions was first promulgated, and yet it does not and never has commanded the slightest countenance from any court sitting in Westminster Hall. Earnest differences of opinion existed in that country among judicial men in respect to the extent of the protection which the commercial law afforded to a *bona fide* holder of a negotiable security against the equities between the antecedent parties, but there is no authentic evidence that any substantial diversity of opinion ever arose in the courts of that country touching the question under consideration.

Partners engaged in business being in want of available means, the senior member gave his note to a bank to enable the firm to overdraw their account, and the junior member gave his note to the maker of the first note for half the amount. In the course of subsequent transactions, the payee of the last note indorsed it to his creditors as collateral security for a pre-existing debt. Payment of the note being refused, the holders sued the maker, who made defense that the plaintiffs were not *bona fide* holders; but the court held otherwise, and rendered judgment in favor of the plaintiffs, separate opinions being given by all the justices of the court. *Heywood* v. *Watson*, 1 Moody & P. 268; *S. C.*, 4 Bing., 496.

Consideration was given for the note in the case of *Percival* v. *Frampton*, 2 C., M. & R., 180, but the court unanimously held that, if the note had been transferred merely as a collateral security for a previous debt, the plaintiffs might properly be described as holders for a valuable consideration.

Holders of a negotiable security transferred before maturity as a collateral security for a [45] pre-existing debt become parties to the instrument to such an extent that they assume the responsibility of making demand and giving the required notice to fix the liability of the indorser; and it is held that where a creditor received such a security from the debtor and failed to make seasonable demand of payment, that his laches as between himself and his debtor were equivalent to the payment of the collateral. *Peacock* v. *Purcell*, 14 C. B. (N. S.), 728; *Taylor* v. *Wilson*, 11 Met., 44.

Proof of fraud may defeat the right of the holder in such a case, but where there is no such proof the settled rule in England is that a party taking a negotiable instrument as a collateral security takes it for a sufficient consideration and is entitled to recover. *Poirier* v. *Morris*, 22 L. J. (N. S.), Q. B., 313; *S. C.*, 2 El. & Bl., 89, 104.

Securities of the kind were deposited by the defendant with the plaintiffs as collaterals for a pre-existing debt, among which was the check in controversy, and it appeared that the defendants having failed to pay the debt the plaintiffs brought an action on the check, the defense being the want of consideration and that the plaintiffs were not holders for value; but the Court of Exchequer ruled otherwise, and rendered judgment in favor of the plaintiffs, from which the defendant appealed to the Exchequer Chamber. Both parties were fully heard in the appellate tribunal, and the court decided that the title of a creditor to a negotiable security transferred to him on account of a pre-existing debt, if received *bona fide*, without notice of any infirmity in the title of the debtor, is indefeasible, whether the instrument is payable at a future time or on demand. *Currie* v. *Misa*, L. R. 10 Exch. 153.

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Questions of various kinds, it seems, were discussed in the subordinate court; but the statement of the Justice who gave the opinion of the court in the appellate tribunal is, that the argument was addressed almost entirely to the question whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value; and the court, *Justice* Lush giving the opinion, decided that question in the [46] affirmative. His reasons for the conclusion are cogent and satisfactory and, in the course of the opinion, he remarked that "It was not disputed on the argument, nor could it be, that if instead of a check the security had been a bill or note, payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable;" to which he also added, that the proposition had been established by many authorities, both in that country and in the American courts.

No attempt was made to controvert that proposition as applied to bills or notes payable at a future day; but the defendant insisted that, inasmuch as the check was payable on demand, the rule did not apply, as there was no consideration, because it could not be implied that there was any agreement for delay. Suffice it to say, in that regard, that the court decided that the supposed distinction "had no foundation either in principle or upon authority," and proceeded to remark that it does not follow that the legal element of consideration is entirely absent where the security is payable immediately.

Forbearance is, doubtless, a good consideration for the transfer of such an instrument; but a valuable consideration in the sense of the law, as the court remarked in that case, may consist either in some right, interest, profit or benefit accruing to the one party, or some extension of time of payment, detriment, loss or responsibility given, suffered or undertaken by the other.

Call loans may be regarded as payable on demand, and, inasmuch as the collateral in this case was payable at a future day, the implication is not an unreasonable one that the arrangement operated as an injury to the holder and as a benefit to the debtor and pledger. Such a reason may, doubtless, have weight; but it is by no means certain that it is the true foundation of the title of the holder, as other authorities hold that a negotiable security transferred for such a purpose is in some sense a conditional payment of the debt, the condition being that the debt revives if the security is not realized. *Belshaw* v. *Bush*, 11 C. B., 191-205; *Griffiths* v. *Owen*, 13 Mee. & W., 58, 64.

Still not satisfied, the defendant in the case, [47] *Currie* v. *Misa*, appealed from the judgment of affirmance rendered in the Exchequer Chamber to the House of Lords. Much instruction is derived in respect to the issue between the parties by referring to the propositions maintained by the counsel of the appellant, of which the following are the most important: (1) That there was a total failure of consideration, inasmuch as the defendant Misa never received any value for his draft except the four bills which were dishonored. (2) That the check in question was not a bill of exchange, nor a promissory note, nor an order for the payment of money on demand. (3) That the existence of a past debt is not a sufficient consideration for the transfer of the check.

Enough is reported of the arguments for the appellant to show that nothing was left undone by his counsel, in their power to do, to sustain those propositions; but the learned Judges overruled them all, and affirmed the judgment rendered in the two lower courts. In giving the principal opinion, Lord Chelmsford said that he entertained no doubt that, as between the defendant and the depositor of the check, there was a sufficient consideration, and that the bankers were holders for value, and he proceeded to remark that the counsel of the appellant admit that if the Judges are of that opinion it will dispose of the case. All the Judges concurred that the holders were holders for value, and the result was the same as in the court of original jurisdiction. *Misa* v. *Currie*, L. R., 1 App. Cas., 554, 563.

Corresponding views are held in the Queen's Bench, in the Court of Appeals, and in the High Court of Chancery. Where a party by means of a false pretense or condition which he does not fulfill procures another party to give him a note or acceptance in favor of a third person, to whom he pays it and who receives it *bona fide* for value, the Queen's Bench decided that the giver remains liable to pay the same, because his acceptance or transfer of the same imports value *prima facie*, and he can only relieve himself from his promise to pay the holder by showing that he is not a holder for value, or that he received the instrument in bad faith, or with notice of its infirmity. *Watson* v. *Russell*, 3 B. & S., 34, 40.

Two of the Justices concurred in that proposition without any qualification, and the *Chief* [48] *Justice* also concurred in the same to the extent of the debt of the holder it was pledged to secure, which is the same rule that Shaw, *Ch. J.*, with the concurrence of all his associates, adopted nearly twenty years earlier. *Bk.* v. *Chapin*, 8 Met., 40.

Commercial securities, when transferred to discharge a pre-existing debt, it is admitted, give the holder a good title which will shut out prior equities; and the Court of Appeals in a recent case decided that there was no difference in that regard between past and present consideration to be found in the books, and held that the transfer of a bill of lading, for a valuable consideration, to a *bona fide* transferee, defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was delivered to the transferee by the lawful holder. *Leask* v. *Scott*, 2 Q. B. Div., 376, 380.

Certain bankers pressed their debtors for better security, and the debtors, having promised to comply with the request, hypothecated merchandise for the purpose, evidenced by warehouse certificates, which the debtors agreed to deliver as soon as they could be procured from the warehouse. They, the debtors, procured the warrants, but refused to deliver the same, when the plaintiffs instituted the present suit, to which the respondents demurred, insisting that the existence of the debt is no sufficient consideration for such an agreement. Among other

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things, the respondents contended that the allegations of the bill did not exhibit a transaction where the complainants promised to abstain from suing their demand for any certain time; but the Vice-Chancellor held that the bankers did in effect give, and that the respondents did receive, the benefit of some degree of forbearance and benefit that they would not have obtained if they had not made the agreement, and the demurrer was accordingly overruled. *Bk.* v. *Broom*, 2 Drew. & S., 289.

Without more, these authorities are sufficient to show that there is but one voice upon the subject in the courts of the parent country, and that they speak to the point with a degree of unanimity and uniformity well calculated to excite admiration and to inspire confidence that the rule of decision is both correct and just. Not only every court, but every judge of every court [49] in that country concurs in the proposition, that the holder of such a negotiable security before maturity, as collateral to a pre-existing debt, without notice of any prior equities, is a *bona fide* holder for value in the usual course of business, and that his title to the instrument is good, and wholly unaffected by any such prior equities between the antecedent parties. Text writers everywhere adopt the same rule, and recognize and commend it as the correct and true rule of decision.

So, if a bill or note be indorsed as a *collateral security*, says Chitty, that is an adequate consideration to enable the party to sue thereon, though he advanced no new credit on the bill or note at the time; and he lays down the same rule as to the receipt of a bill or note in payment of a pre-existing debt. Chitty, Bills, 13th ed., 74.

In the ordinary course of things, says Story, the holder is presumed to be the *prima facie* holder of such a security for value, and he is not bound to give evidence that he gave any value for it, until the other party establishes the want or failure or illegality of the consideration, or that the bill had been lost or stolen before it came to the possession of the holder. It may then be incumbent on him to show that he has given value for it, because he ought not, under such circumstances, to be placed in a better situation than the antecedent parties through whom he obtained the instrument. Story, Bills, 4th ed., sec. 193; Story, Notes, 7th ed., sec. 195, 196.

A creditor, says Byles, may agree to take a bill as collateral security for a debt already due, without affecting his present right to sue for the debt; but, if a creditor elects so to do, he becomes the trustee to that extent of the debtor, and is bound to perform the duties of a holder in respect to presentment and notice of dishonor, and, if he fail to do so, the parties only liable conditionally are discharged, as no one but the actual holder can perform those duties. Byles, Bills, 5th Am. ed., 369; *Peacock* v. *Pursell*, 32 L. J. C. P., 266; *Peacock* v. *Pursell*, 14 C. B. (N. S.), 728.

Litigated cases often arise where there is a present consideration given for the transfer; and Mr. Daniel regards it as agreed that the holder of the collateral security, in all such cases, is a [50] *bona fide* holder for value, if he took the security without notice of any equities between the antecedent parties, or if there was any agreement, express or *implied*, to give time of payment of the debt to the debtor; but he admits that, where neither of these conditions exists in the case, the question is one of more difficulty. Those two propositions he supports by sound reasons and convincing suggestions, and then proceeds to examine the argument for and against the proposition, that the same conclusion should be reached even where there is no new consideration other than what arises from the relation of debtor and creditor, nor any express agreement to extend the time of payment. His view is, that the issue in such a case must turn upon the question whether there is any implied suspension of the prior debt until the collateral becomes due, and that an implied agreement is as binding as one expressed in terms, of which it is supposed no one entertains the least doubt.

Different examples are put by the author, and the proper presumption in each supposed case is stated; but he finally comes to the conclusion that, inasmuch as the holder in such a case becomes a party to the collateral security, and that he thereby assumes the burden as such holder of fixing the liability of the indorser, he is properly to be regarded as a holder for value, if he took the collateral in good faith and without notice of any equities between the antecedent parties. 1 Dan. Neg. Sec., 2d ed., secs. 827–830; *Blanchard* v. *Stevens*, 3 Cush., 162, 167; *Maitland* v. *Bk.*, 40 Md., 540, 564.

Three of the theories involved in the controversy are presented by Mr. Parsons for careful examination: (1) Where negotiable paper is received in payment of an antecedent debt; but further discussion of that topic is unnecessary, as it is conceded in this case that the title of the holder in such a case is as good as if the contents were paid in cash. (2) Where it is received as collateral security for a pre-existing debt. (3) Where it is received as collateral security for a debt contracted at the date of the transfer.

Two objections, as the author states, are usually taken to each of the last two theories: (1) That, [51] as no new consideration is paid by the holder, he is not injured by the impeachment of his title. (2) That such a transfer as is supposed in either of the last two cases is not one made in the usual course of business.

Transfers of negotiable securities, for the purpose supposed, are seldom made, except in the execution of some agreement or understanding, by which the transferrer is to be benefited; as by delay or forbearance or further credit, or the giving up of other collaterals, or the substitution of one collateral for another, or the promise to forego the means of obtaining other indemnity or security.

Few cases, it is presumed, arise where the interest of the debtor is not consulted; so that, if the rule should be confined to the cases falling within the abstract theory of such a defense, the question would cease to be of much importance, nor would it often be true that, if the title of the holder should be impeached, he would be left in as good condition as he was before. 1 Pars., Bills and N., 219.

Debtors are often benefited by delay, but creditors are usually sufferers. Transactions of the kind, it is said, are not to be regarded as transfers made in the usual course of business; but the court is unable to adopt that conclusion, as

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the statement of the learned author is believed to be correct, that a large part of the use that is made of negotiable paper is as a means of borrowing money or of securing debts previously contracted.

Bills and instruments of the kind, indorsed in blank or payable to bearer, when transferred to an innocent holder, create the same liability as if indorsed at the time of the transfer. Where a party executed such a note to take up a prior note, and his agent delivered it to a third person as collateral security for his own pre-existing debt, Shaw, *Ch. J.*, held that the holder took a good title as against the maker to the extent of his debt, but that he could not recover any more than the amount of his pre-existing debt. *Stoddard* v. *Kimball*, 6 Cush., 469.

Adjudged cases, almost without number, decide that, where the pre-existing debt is discharged, the title of the innocent holder is beyond question; but frequent attempt is made to show that there is a distinction between taking such a note in payment of a pre-existing debt and taking it as a collateral security for [52] such a payment. One whose debt is due, says Redfield, *Ch. J.*, must pay it, or become a bankrupt in the commercial sense. If, instead of money, he gives a bill or note, either on time or at sight, whether this is payment in form or is given as collateral to his debt, he gains time, and is saved from the disgrace and ruin consequent upon stopping payment. Viewed as it may be, the debtor in either case derives the benefit of an implied understanding that the creditor will not immediately press for payment, unless the new security proves unproductive, and, if it does, that the creditor may pursue any other proper remedy. Difference in form between payment and collateral security, it was admitted, existed; but the court unanimously held that there was no difference in principle, provided the indorsement was unqualified, so as to impose upon the holder the obligation to conform to the law merchant in enforcing payment. *Atkinson* v. *Brooks*, 26 Vt., 569, 576.

Other state decisions, too numerous for citation, hold that a party taking a negotiable note in payment of, or as a collateral security for, a precedent debt, is a *bona fide* holder for a valuable consideration, and that he is entitled to the same protection, as a holder who receives the same in payment for goods delivered at the time of the transfer, or one who pays cash for the instrument when it is delivered. *Allaire* v. *Hartshorne*, 21 N. J. L., 1 Zab., 665; *Hamilton* v. *Vought*, 34 N. J. L., 187, 191; *Culver* v. *Benedict*, 13 Gray, 7, 10; *Johnson* v. *Way*, 27 Ohio St., 374, 379; *Brush* v. *Scribner*, 11 Conn., 388; *Guynn* v. *Lee*, 9 Gill., 138;

III. Even suppose that the title of the plaintiffs is good under the rule of the commercial law, as understood and administered in the Federal Courts, still it is insisted by the defendants that the State Courts have adopted a different rule in such a case, and that the State rule of decision is the one applicable in the case before the court. Both parties are citizens of the same State; and it must be admitted that if the state rule is applicable in the case, then the ruling of the circuit court is erroneous. Various arguments were advanced in support of the proposition, but the one most pressed is that derived from the 34th section of the Judiciary Act, which provides that the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of [53] decision in trials at common law in the courts of the United States, in cases where they apply. 1 Stat. at L., 92.

State laws furnish rules of decision in trials at common law in the Federal Courts, in cases where they apply, which leaves it plainly to be understood that those laws do not apply in all cases, and it was early decided that they do not apply to the process and practice of the Federal Courts. *Wayman* v. *Southard*, 10 Wheat., 1.

In cases depending on the statutes of a State, and more especially in those representing titles to land, the court adopts the construction of the State, where that construction is settled and can be ascertained. *Polk* v. *Wendal*, 9 Cranch, 87, 98.

Where any rule of real property has been settled in the State Courts, the same rule will be applied in this court that would be applied by the State tribunals. *Jackson* v. *Chew*, 12 Wheat., 153, 162.

Controversies often arise where this court will refuse to adopt a decision of the State Court, as in the construction of a will, unless it appears that the decision has become, by acquiescence, a rule of property in the State. *Lane* v. *Vick*, 3 How., 464, 476.

Three decisions from the State Courts show that the rule of decision adopted by the courts of the State at that period support the views of the defendants, and we regret to say that the tendency of some of the later decisions in the same tribunals are in the same direction. *Bk.* v. *Franklin*, 55 N. Y., 235.

Such being the fact, it becomes necessary to decide the question whether the decisions of the State Court compel this court to apply to the facts of the case a rule of decision believed to be in direct conflict with the rule of commercial law. Nearly forty years have elapsed since this question was first presented to this court for decision. Doubts were then entertained whether the state rule was absolutely settled; but for the purposes of the decision, that point was unconditionally admitted. Then as now the chief argument in support of the proposition was, that the question was controlled by the [54] 34th section of the Judiciary Act, to which the court responded, in the first place, by denying that the word "laws," used in the section, included the decisions of the local tribunals within the scope of its meaning. In the ordinary meaning of language, said *Judge* Story, it will hardly be contended that the decisions of the courts constitute laws, adding that, at most, they are only evidence of what the law is, and are not of themselves laws. They are often reexamined, reversed and qualified by the courts themselves, whenever they are found to be either defective or ill-founded or otherwise incorrect.

His views were that the laws of a State are more usually understood to be the rules and enactments of the Legislature, or long established local customs having the force of laws. None, it is believed, can dissent from that view, and we have the authority of that opinion for saying that, in all cases prior to that time, the

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court had uniformly supposed that the section, when properly interpreted, was limited in its application to state laws strictly local, and the construction thereof by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character; that the court had never supposed that the section applied or was designed to apply to the construction of ordinary contracts or other written instruments, nor to questions of general commercial law.

These views were enforced by many other illustrations, and the court decided, every member of the court but one concurring, that the section, upon its true intendment and construction, is strictly limited to local statutes and local usages, and that it does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect of which are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. *Swift* v. *Tyson*, 16 Pet., 1, 18.

Judicial views of a corresponding character were expressed by Lord Mansfield, as *Chief Justice* of the King's Bench, nearly a century earlier, when he said that the maritime law is not the law of a particular country, but the general [55] law of nations. *Luke* v. *Lyde*, 2 Burr., 882.

Judge Story referred to that case, in support of the decision of the court, and quoted the celebrated maxim of Cicero, which, liberally interpreted, is to the effect that maritime law is not one thing in one country and another thing in a different country, nor one thing to-day and another to-morrow, but that, in all times and nations, it is immutable and imperishable. Translation by Yonge, London, 1853, 360.

Commercial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicil, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations.

Codes, laws and ordinances of other States, says a learned writer, whether ancient or modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where the law is decided to be the other way. Levi, 2d ed., 2.

Authoritative support to the proposition, that the decisions of the State Courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. *Carpenter* v. *Ins. Co.*, 16 Pet., 495, 511.

Insurance against fire, in that case, was effected by a mortgagor, and one of the questions was as to the amount the insured was entitled to recover. Reported cases from the state reports were referred to as furnishing the rule of decision. Responsive to that argument, *Judge* Story remarked, among other things, that the question presented was a question of general commercial law, involving the construction of an insurance contract, which is by no means local in its character, or regulated by any local policy or customs; that the decisions of the state tribunals are entitled to great respect, but that they cannot conclude the judgment of this [56] court in such a case; and that this court is bound to interpret the instrument according to its own opinion of its true intent and objects.

Equally decisive views have often been expressed by this court in other cases, of which one decided at the present term deserves special notice. Preliminary to the point decided, the court very properly admitted that the Federal Courts will pay due regard to the laws of the States and their construction by the state tribunals; but the court decided, *Mr Justice* Harlan giving the opinion, that this court is not bound by the decisions of the State Courts in determining a question of general commercial law; that such is the established doctrine of the court, so frequently announced as not to require any extended citation of authorities in its support. *Oates* v. *Bk.*, 100 U. S., 239 [XXV., 580]; *Amis* v. *Smith*, 16 Pet., 303, 314; Conkling, Tr., 5th ed., 140.

Argument, to show that the decisions of this court referred to contradict the decisions of the State Court upon the matter in decision, is quite unnecessary, as that is admitted. Nor is it correct to suppose that the leading case, contradicting the views of the State Court, is unsupported to its full extent by other decisions of this court. Instead of that, the doctrines of that case were directly and fully reaffirmed in the following case, decided more than twelve years later. *Watson* v *Tarpley*, 18 How 517 [59 U. S., XV., 509].

State legislation, as shown in that case, had prescribed regulations in respect to the protest of bills of exchange, and notice of their dishonor repugnant to the requirements of the law merchant; and this court held that the state regulations were not operative, and that the payee or indorsee of the bill, in spite of the state law, might enforce his rights in the Federal Court, as defined and recognized by the decisions of this court. Reference was there made to the sentiments expressed by Lord Mansfield, that the maritime law was not the law of one country only, but of the commercial world; and the court decided that the commercial law was not circumscribed within any local limits, and that citizens resorting to the federal tribunals for the ascertainment of their rights might well claim the benefit of the rules of the general commercial law. Six of the Justices of the court, in- [57] cluding the *Chief Justice*, held the same views in the still later case, to which special reference is made. *Goodman* v. *Simonds*, 20 How., 343, 371 [61 U. S., XV., 934, 943].

Collaterals previously held in that case, had been surrendered when the new arrangement was made, and the evidence showed an agreement for forbearance, and the court, in order to prevent a dissent, rested the case, so far as respected the question of consideration, upon those special facts; but it is deemed proper to state that two thirds of the court entirely approved of the views of *Judge* Story, as expressed in the case of *Swift* v. *Tyson*, and in his valuable works upon bills of exchange and promissory notes. Confirmation of the proposition that the views

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of *Judge* Story in that decision are correct is also derived from a note appended to the text of the third volume of Kent's Commentaries, by the distinguished author, in which he says that he is inclined to concur in that decision as the plainer and better doctrine. 3 Kent, Com., 12th ed., 81; Cooley, Const. Lim., 4th ed., 18.

State decisions, in respect to titles to real estate and transfers of property, usually furnish the rule of decision in the Federal Courts, by virtue of the before mentioned provision of the Judiciary Act; but the established practice is, that it does not apply, except in matters of a strictly local character; that is to say, to the positive statutes of the States and the interpretations of the same by their own tribunals, including rights and titles to things having a permanent locality, such as real property, and that it does not extend to questions of general commercial law, from which it follows that where any controversy arises as to the liability of a party to a bill of exchange, promissory note or other negotiable paper, in one of the Federal Courts, which is not determined by the positive words of a state statute, or its meaning as construed by the State Courts, the Federal Courts will apply to its solution the general principles of the law merchant, regardless of any local decision. 1 Dan. Neg. Inst., 2d ed., sec. 10.

Transactions of a commercial character extend throughout the civilized world, and it is well known that they are chiefly conducted through the medium of bills of exchange and other negotiable instruments. Uniformity of [58] decision is a matter of great public convenience and universal necessity, acknowledged by all commercial nations. Should this court adopt a principle of decision which when carried into effect would establish as many different rules for the determination of commercial controversies as there are States in the Union, it would justly be considered a public calamity, as it must necessarily depreciate our negotiable securities in all the foreign markets of the world where our merchants have commercial transactions.

Stable and immutable rules are necessary, to give confidence to those who receive such securities in the usual course of business, when indorsed in blank, or made payable to bearer, so that if such a bill or note is made without consideration, or be lost or stolen, and afterwards be negotiated for value to one having no knowledge of such facts, in the usual course of business, his title shall be good and he shall be entitled to collect the amount.

Uniformity of decision in such cases is highly desirable, and these observations are sufficient to show that nothing is wanting to accomplish that great object but the concurrence of a few more of the State Courts, of which none are more to be desired than the courts of New York and Pennsylvania, which is hoped will concur at no distant day.

For these reasons the conclusion is that the judgment should be affirmed.

Mr. Justice **Bradley.**

I concur in the judgment rendered in this case, and in most of the reasons given in the opinion. But, in reference to the consideration of the transfer of the note as collateral security, I do not regard the obligation assumed by the indorsee (the Bank), to present the note for payment and give notice of non-payment, as the only, or the principal consideration of such transfer. The true consideration was the debt due from the indorsers to the indorsee, and the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to, namely: the debt and the obligation to pay it or to secure its payment. If the indorsers had assigned a mortgage for that purpose, the title of the Bank to hold [59] the mortgage would have been indubitable. In that case prior equities of the mortgagor might have prevailed against the title of the Bank; because a mortgage is not a commercial security, and its transfer for any consideration whatever does not cut off prior equities. But the *bona fide* transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor by such title and in such manner as appertain to its nature and qualities. Security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject.

True copy. Test:
James H. McKenny, Clerk, Sup. Court, U. S.

Cited—104 U. S., 265; 105 U. S., 75; 110 U. S., 294; 37 Ohio, 680; 41 Am. Rep., 542.

WYOMING NATIONAL BANK, *Plf. in Err.*, [59]
v.
THOMAS J. DAYTON.

(See S. C., 12 Otto, 59-63.)

Delivery of chattels.

Where wood is sold to be delivered at a specified place not belonging to the seller, it becomes, on such delivery at such place, the property of the buyer.

[No. 276.]

Argued Apr. 22, 23, 1880. Decided May 10, 1880.

IN ERROR to the Supreme Court of Wyoming Territory.

This was an action in replevin, or for the unlawful detention of personal property, under the Civil Code of Wyoming Ty.

The proceedings were begun in the District Court of the Second Judicial District of Wyoming, Jan. 22, 1874, by the Wyoming National Bank, against Thomas J. Dayton, to recover the possession of five hundred cords of wood, alleged to have been unlawfully detained.

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Sept. 22, 1876, the cause having been regularly tried and verdict returned by a jury, judgment was rendered in favor of defendant, Dayton, for damages and costs of suit.

From this judgment the plaintiff, the Wyoming National Bank, took the case to the Supreme Court of Wyoming Territory, by petition in error, where the case was again heard at the March Term, 1877, and judgment of the court below was affirmed, defendant being ordered to file a remission for interest computed by the jury; which was accordingly done Aug. 6, 1877, leaving the affirmative judgment of the court in favor of defendant, Dayton. Whereupon the plaintiff sued out this writ of error.

Messrs. **Shellabarger** *&* *Wilson*, and *W. W. Corlett* for plaintiff in error.

Messrs. Stephen W. Downey, M. C. Brown, Edward P. Johnson and **W. A. Fraury**, for defendant in error.

[60]

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action of replevin for five hundred cords of firewood which the defendant in error, as Sheriff of Albany County, Wyoming Territory, levied upon and took into possession in virtue of several attachments coming to his hands against the property of one W. S. Bramel. The claim of the Wyoming National Bank, plaintiff in error, is, that it was the owner of the wood at and before the attachments were issued and levied. For its recovery, and damages for the detention thereof, this action was instituted.

Upon the trial before a jury in the court of original jurisdiction a verdict was returned in favor of the defendant, and judgment thereon entered. From a judgment of affirmance in the Supreme Court of the Territory the present writ of error is prosecuted.

Upon the question of the ownership of the wood, at the date of the respective levies, the evidence was conflicting. As presented in the testimony it was a case peculiarly within the province of the jury to determine, under proper guidance as to the principles of law governing the case. Without attempting to set forth the whole case as developed by the proof, it is sufficient for its disposition here to remark that there was evidence to establish (we will not say conclusively) the following facts:

Bramel was engaged in the business of bringing wood down the Big Laramie River to Laramie City. He had a contract with the Union Pacific Railroad Company for the delivery to it, at its yard in that city, by a specified date, of five hundred cords of wood at $5 per cord. In the necessary preparations for that engagement, he had, prior to October 30, 1873, received from the Bank about $2,100, which its President testified had been advanced to him at different times on this same wood. For these advances the Bank held his notes. On the day last named he applied to the President of the Bank for a further advance of money. His application was denied. He then proposed that the Bank should *buy* all the wood he had, some of which was then in the yard of the railroad company, but not received by it, some on the bank of the river, and some in the river. This proposition was at first declined; but, after further conversation between him and the President of the Bank, it was agreed that the Bank should take the five hundred cords at $5 per cord, to be paid for in the debt of $2,100, then held by the Bank, and $400 in cash, upon the condition that the railroad company would receive the wood from the Bank upon like terms. It was a part of the arrangement that Bramel should, in that event, put the wood into the yard of the company, and use the $400 for that purpose. In order to ascertain whether the company would assent to this arrangement, the bank cashier and Bramel, by direction of the President of the Bank, visited Mr. Shankland, who had the control of all such business for the railroad company. They returned together and reported that Shankland approved the arrangement, and would make out the vouchers for the wood to the Bank. The cashier then paid $400 to Bramel, taking his note therefor, bearing interest at three per cent per month; and the latter went on putting the wood into the yard of the railroad company. He had delivered at that place about 375 cords, and had a few cords on the river bank, when it was all seized by the defendant in error, under the attachments against Bramel's property. None of the wood had then been actually received by the company. Bramel's notes, to which we have referred, were held by the Bank at the commencement of this action. They were taken, as the Bank claimed and proved by its President, more as *memoranda* than anything else, and had not been surrendered to Bramel because he had not called at the Bank for them.

[61]

Such was, substantially, the case as made by the Bank. We do not say that the jury should have found these facts to have been established, even by a decided preponderance of testimony, but only that there was evidence tending to show that the contract between the parties and their acts were such as the foregoing statement implies.

Looking at the case in the light of these facts, it seems to the court that the transaction between the Bank and Bramel was something more than a mere agreement as to the disposition of the money to be obtained from the railroad company. It constituted a sale to the Bank of all the wood which the latter delivered at the yard of the railroad company. Upon being deposited at that place, with the intention or for the purpose of completing the sale, the absolute title to the wood passed to the Bank. Nothing more remained to be done by the seller. He was not bound by the contract with the Bank to deliver it to the railroad company, but at its yard only. In legal contemplation, it then came into the possession of the Bank and was therefore subject to its control. It was no longer subject to be reached by the creditors of the seller upon the mere ground that the title had not passed, or a complete delivery made. The delivery in execution of the contract, at a specified place not belonging to the seller, was such a delivery as accorded with the nature of the property. When placed in the yard of the railroad company, in pursuance of the agreement, the acts of the parties united with the previous verbal contract, resulting in a consummated obligatory agreement, depriving the seller of all further control of the property, and putting it under the exclusive dominion of the buyer, with a perfected title thereto.

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From that moment, the indebtedness of the seller to the Bank, to the extent of the contract price of the wood actually delivered at the designated place, was discharged, and the property was thence forward at the risk of the buyer. Actual manual possession of the Bank, by its agents, was, under the circumstances and regarding the nature of the property, both impracticable and unnecessary to a complete delivery. These conclusions are abundantly sustained by authority. Benj., Sales, bk. 1, pt. 2, p. 134; Hilliard, Sales, ch. 7, pp. 124–130; Browne, Stat. F., ch. 15, p. 323.

The instructions given to the jury were not in accordance with these views. The court failed to state distinctly and clearly the principles of law by which they were to be governed. Taking all the instructions together, it is evident that the court did not regard the deposit of the wood at the yard of the railroad company, in pursuance of the previous agreement between the Bank and Bramel that it should be put there for ultimate delivery to the company, as such change of possession as would, in law, pass the title to the Bank as against creditors, whose attachments were subsequently issued and levied.

That we do not misinterpret the instructions is quite clear, from the opinion of the Supreme Court of the Territory which declared that "The record shows that the full and absolute control and possession of the same was publicly and privately retained by Bramel, after the alleged unconditional sale." In view of the pleadings and evidence this could not be, unless the court below not only disregarded the evidence in behalf of the Bank, but was, further, of opinion that the delivery of the wood at the yard was insufficient to pass the title and change the control and possession of the property from the seller to the buyer. But that position, as we [63] have seen, is unsound both upon principle and authority. We repeat that, if Bramel agreed to sell, and the Bank agreed to buy the wood at a fixed price per cord, the seller to remove the wood from the river and put it in the yard of the railroad company for sale or delivery to the company by the Bank, which was to receive the vouchers, and if the wood was so deposited in pursuance of that sale and agreement, then, in legal contemplation, the title and possession of the property passed to the Bank from the moment it reached the yard. If stolen or destroyed by fire after being placed there and before its receipt by the company, the loss would have been that of the Bank. It is immaterial, under the circumstances, that the railroad company had not, when the attachments were levied, expressly or formally recognized the Bank's ownership of the wood.

Some stress was laid upon the fact that the Bank took the note of Bramel for the $400 advanced to him. That act, it is claimed, was inconsistent with the theory of an absolute purchase by the Bank. There was, however, evidence conducing to show that the Bank took the note by way only of precaution, and to meet the possible contingency of the non-delivery of the wood at the yard of the railroad company. But it was for the jury to say what weight should be given to that fact in determining, upon the whole case, whether there was an actual sale of the wood, or only an agreement as to the disposition of the proceeds after it should be received by the railroad company.

The judgment is reversed, with directions to require the judgment of the court of original jurisdiction to be set aside and a new trial granted, and for such further proceedings as may be in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE E. KIRK, *Plff. in Error*, [68]
v.
CHARLES O. HAMILTON ET AL.

(See S. C. 12 Otto, 68-79.)

Estoppel in pais—*equitable estoppel.*

1. If a man, knowingly, although he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal right against such person.
2. In an action of ejectment, the defense of an equitable estoppel is sufficient.

[No. 279.]

Argued Apr. 23, 27, 1880. Decided May 10, 1880.

IN ERROR to the Supreme Court of the District of Columbia.

Statement of the case by *Mr. Justice* **Harlan:**

In this action of ejectment, commenced in the year 1872, the plaintiff seeks to recover parts of lots 7 and 9 in square 437 in the City of Washington. The defendants pleaded not guilty. A verdict was returned in their favor, and a new trial having been refused, judgment was entered in conformity with the verdict.

Six bills of exception were taken by plaintiff in error. The nature and scope of the questions thereby raised will be understood from a statement of the principal facts appearing in the record of a suit in equity, commenced in the year 1859 by D. W. Moore & Co., in the Circuit Court for the District of Columbia, against George E. Kirk, the present plaintiff in error, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeney, John Robinson, Major Garnett, John H. Goddard, Jr., Job. W. Angus, Charles Stott, and William S. Martin. The object of that suit was to obtain satisfaction of several unpaid [70] judgments previously obtained by complainants against Kirk in the courts of justices of the peace, and which then amounted to less than $200.

The bill of Moore & Co. alleged that complainants did not know of any property belonging to Kirk upon which execution could be levied; that he was the owner of large real estate in Washington, which he had conveyed for the purpose of hindering, delaying and defrauding complainants in the recovery of said judgment debts, to wit: lot 78 in the subdivision of square No. 465, and parts of lots 7, 9, 10, 11 and 12 in square No. 437; that by deed of August, 1853, duly recorded, Kirk conveyed part of lots 7 and 9 to

NOTE.—*Estoppel* in pais. See *note* to Stowe v. U. S., 86 U. S., XXII., 146.

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defendants, Lenox and Naylor, in trust to secure the Washington Building Association the sum of money therein mentioned; that, by recorded deed of March 24, 1856, he conveyed a portion of the same lots to defendants, Clarke and Smith, in trust to secure defendant, Sweeney, in the payment of a promissory note for $1,600; that, by recorded deed of April 14, 1854, he had conveyed parts of lots 10 and 12 in square 437 to defendant, Robinson, in trust to secure the defendant, Garnett, in four promissory notes of $131.25 each; that, by recorded deed of October 13, 1854, he had conveyed the west half of lot 11 in square 437 to defendant, Goddard, in trust to secure defendant, Angus, in the payment of a promissory note for $500; that it was provided in the deeds, that if the several debts respectively mentioned therein were not paid at maturity, then the several parcels of ground thereby conveyed should be sold, and the balance remaining after satisfying the several debts to be paid to Kirk; that Kirk had purchased of one Wm. S. Martin lots 43, 44, 45 and 46 in square 465, and for the purpose of defrauding, hindering and delaying his trustees had caused the latter, by recorded deed of April 22, 1858, to convey the same to him, as trustee for his wife and children; that the several pieces of property largely exceeded in value the debts secured thereby, and that if the debts were genuine and still unpaid, which was not admitted but denied, then the interest of Kirk therein was liable in equity for the payment of the judgments, after satisfying any sums due on the debts described in the conveyances.

The bill further alleged that, on 22d March, 1856, Kirk, by recorded deed, for the pretended consideration of $4,000, conveyed to defendant Stott, his heirs and assignees, lot 78, in subdivision of square 465, and parts of lots 7, 9, 10, [71] 11 and 12 in square 437; that the conveyance was purely voluntary and with the intent to defraud and delay the creditors of Kirk; and, in any event, if a consideration passed, it was upon a secret trust to reconvey to Kirk whenever the sum of $4,000 was repaid.

The prayer of the bill was that the deed from Kirk to Stott be declared null and void as against complainants, and that the several parcels of ground mentioned in the conveyances be sold for the payment, "First, of such sums as were shown to be due on account of debts; and next, of the amount or amounts due to complainants on their judgments, and the costs" of that suit.

Special interrogatories to the several defendants were embodied in the bill.

On 21st November, 1859, summons was issued, and returned 28th November, 1859, as executed on all the defendants except Garnett and Martin.

At the May Term, 1860, a decree, *pro confesso*, was entered against all of the defendants, except Garnett and Martin, for want of an appearance and answer at rules. The decree ordered that parts of lots 7 and 9 in square 437, and lot 78 in subdivision of square 465, "Be sold, or so much thereof as may be necessary, for the payment of said complainants' claim and others who may come in as creditors of the said George E. Kirk by petition, in the manner and form required by law and the practice of the court, and that Edward C. Carrington be and is hereby appointed trustee to make such sale," etc.

After advertisement as required by the decree, the trustee sold lot 78, with improvements, for $1,480. In his report of sale he says: "Your trustee, having sold *sufficient property to pay and satisfy the claims provided for in said bill and decree*, discontinued the sale of the other property mentioned in said proceedings."

On 28th October, 1862, no exception to the report of sale having been filed, it was confirmed, and the cause referred to the auditor to state the trustee's account and make distribution of the fund realized. *After satisfying the claims of Moore & Co.* and costs of suit, there was left a surplus in the trustee's hands of $1,008.52. [72]

In an order entered November 14, 1863, it is recited that certain creditors of Kirk had filed petitions, seeking the payment of numerous judgments and claims against him. Upon the ground that he was not a resident of the District, and was living beyond the jurisdiction of the court, an order was made that notice of the character and object of the petitions be given to Kirk by publication, for six weeks, warning him to appear in person or by solicitor, on or before the second Monday of January, 1864, at rules to be held in the clerk's office of the court; otherwise the petitions and claims would be taken as confessed against him. Due proof of publication of that order was filed January 23, 1864. On 2d February, 1864, this order was entered: "It appearing to the clerk that the defendants, Geo. E. Kirk, Walter Lenox, Henry Naylor, R. H. Clarke, A. A. Smith, H. B. Sweeney, John Robinson, J. H. Goddard, Jr., Job. W. Angus and Charles Stott have failed to appear and answer in this suit, it is, this second day of February, 1864, on motion of A. Lloyd (by Fred. H. Norton), solicitor for complainants, ordered by the clerk that the bill and the matters thereof be taken for confessed against the above defendants."

By an order of the 12th of February, 1864, the cause, with the said petitions and claims, were referred to the auditor of court, with instructions to state the trustee's account and make distribution of the balance of the fund in his hands. A report of distribution was made, showing that judgments and claims were proven in excess of the funds remaining in the trustee's hands upon the sale of lot 78. His report of distribution was approved April 9, 1864.

Thereupon the trustee, Carrington, without any further order by the court, and by virtue of the original decree of May 30, 1860, advertised and sold at public auction, on the 19th of April, 1864, the parts of lots 7 and 9 described in the bill, which, with the improvements thereon, were purchased by Hamilton, defendant in error, at $950. The sale was subsequently confirmed, and, by order of December 12, 1864, the cause was referred to the auditor to state the accounts of the trustee and report a distribution. In his report the auditor says: "Pending this last reference of December, 1864, and before the case was confirmed, Kirk returned from the [73] South, and has *appeared by Mr. Laskey, his counsel, upon this reference.* The simple contract debts are not admitted by him, but *he states that he has off-sets in bar against some if not all of them.*" Appended to the auditor's report there is the following paper: "The defendant, Kirk, does not admit the simple contract

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debts, but contests the same and requires the said claims, before they be allowed by the auditor, to be established by competent proof. R. H. Laskey, Atty. for Deft." The report was confirmed February 5, 1865, and by deed of December 14, 1865, the purchase money having been paid, Carrington, the trustee named in the original decree, conveyed to Hamilton the parts of lots 7 and 9 purchased by the latter at the sale of April 19, 1864. And under that conveyance Hamilton went into possession.

Messrs. **Albert Pike, L. H. Pike** and **R. W. Johnson,** for plaintiff in error.

Messrs. **R. T. Merrick** and **M. F. Morris,** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

It appears from the first bill of exceptions, that, upon the trial of the cause, the plaintiff, to maintain the issue joined, gave evidence to the jury tending to prove title in himself to the land in dispute, as well as his actual possession of the premises under that title; that he had fully discharged the indebtedness secured by the two deeds of trust executed, one to Lenox and Naylor, and the other to Clarke and Smith; that Charles Stott, on the 14th of May, 1872, reconveyed to him all that portion of the premises which, on the 22d of March, 1856, he had conveyed to Stott; that he had never made nor authorized any other conveyances than those just named. He also introduced a deed from Carrington, as the supposed trustee in the case of *Moore & Co.* v. *Kirk, etc.*, at the same time, however, denying its validity, and avowing that it was introduced subject to his exceptions reserved, and to be thereafter presented, as to its sufficiency in law to prove title in the defendants or either of them. It was admitted by the court subject to those exceptions. The plaintiff further gave evidence to prove that defendants were in possession of the premises at the commencement of the action, and then rested.

The bill of exceptions then shows that defendants, to sustain their defense, and to prove [74] title out of the plaintiff, offered to read in evidence the record of the equity suit of *Moore & Co.* v. *Kirk, etc.* Plaintiff insisted that the record of that suit was insufficient in law to maintain the issue on defendants' behalf, or to show title in them, and asked the court to inform the jury that it should not then be admitted in evidence, except subject to his exceptions as to its sufficiency in law, to be thereafter presented to the court pending the further trial of the cause. The record was so admitted. The defendants, further to maintain their defense, and to prove title in themselves, offered to introduce testimony tending to prove that, at the time of the purchase of the premises at the sale made by Carrington, trustee, in the suit of *Moore & Co.* v. *Kirk, etc.*, the only improvement thereon was a two-story four room brick house, and that, about the year 1868, the defendants erected an extensive building on the property, at a cost of some $4,000; that when they began such building, and for some time thereafter, the plaintiff, Kirk, resided on the adjoining premises; that during all that time the plaintiff well knew of said improvements, made no objection thereto, and asserted no claim to the property, except the west three feet thereof, adjoining the plaintiff's ground, and which he claimed as an alley, and, even as to such portion, he subsequently informed the witness he was mistaken; and, lastly, that the plaintiff, though residing in the City of Washington ever since about the year 1865, never, to defendants' knowledge, until the commencement of this action, asserted any claim to the premises in dispute.

At that stage of the trial, the plaintiff interposed and asked the court to inform the jury that the testimony thus offered, in reference to defendants putting improvements on the premises, was inadmissible in law, and that such issue ought to be found for the plaintiff. The court ruled that the testimony was admissible, to which plaintiff excepted. The defendants then gave the said testimony in evidence to the jury, who gave a verdict against the plaintiff upon the issue set forth by the first bill of exceptions.

The remaining bills of exceptions present, in different forms, the general question whether the sale by Carrington, as trustee, on the 19th of April, 1864, was or not, upon the face of the record of *Moore & Co.* v. *Kirk, etc.*, a mere nullity. Its validity is assailed by the plaintiff upon various grounds, the most important of which seem to be: 1. That as Moore & Co. sued in their own behalf only, and not for the benefit of [75] themselves and other creditors, the jurisdiction and power of the court was exhausted by the first sale, of lot No. 78, which raised an amount largely in excess of the claims for which Moore & Co. sued. 2. That the utmost which the court, upon the pleadings, could do, was to distribute such excess among the other creditors of Kirk who should appear, in proper form, and establish their claims. 3. That the court was entirely without jurisdiction to make a second order of sale, and did not assume to exercise any such power. 4. That the second sale by Carrington, having been made without any previous order or direction of the court, its confirmation, and the deed subsequently made to Hamilton, were absolutely null and void.

In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co.* v. *Kirk*, was, of itself, insufficient in law to devest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defense to the present action.

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well of the trustee's accounts as for distribution of the fund realized by the sales, Kirk, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly, he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his

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appearance before the auditor, could have disregarded all that had been done subsequent to the first sale, discharged Hamilton's bond, re- [76] turned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city and two years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had or would assert a claim to the remainder of the lots 7 and 9, which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that he was in error in claiming even that three feet of ground, only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question upon this branch of the case is, whether, consistently with the authorities, the defense is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is the truth, as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by *Chancellor* Kent in *Wendell* v. *Van Rensselaer*, 1 Johns. Ch., 344: "There is no principle better established, nor one founded on more solid considerations of equity and public utility, than that which declares that a man who, knowingly, though he does it passively, looks on and suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.

In *King* v. *Butterton*, 6 T. R.., 554, *Mr. Justice* Lawrence said: "I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land."

In 2 Smith, L. Cas., pp. 734-740, 7th Am. ed., with *n.* by Hare and Wallace, the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law.

Again (pp. 733, 734): "The question presented in these and other cases, which involve the operation of equitable estoppels on real estate, is both difficult and important. It is, undoubtedly, true that the title to land cannot be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the Statute of Frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the Statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the Act, and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the Statute of Frauds; and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to [78] chancery, and no redress could be had (except) in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country and even in England for the relief of grantees, the protection of mortgagors and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change, through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."

This question in a different form was examined at the present Term of the court in *Dickerson* v. *Colgrove* [100 U. S., 578, XXV., 618]. That was an action of ejectment, and the defense, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action of ejectment involved both the right of possession and the right of property, and that as the facts developed showed that plaintiff was not in equity and conscience entitled to

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disturb the possession of the defendants, there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession.

Applying these principles to the case in hand, it is clear, upon the facts recited in the first bill of exceptions, and which the jury found to have been established, that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendant claimed the property under a sale made [79] in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that the plaintiff could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, with a knowledge of all the facts, he appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of his property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct he indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others have acted.

The evidence upon this point was properly admitted, and operated to defeat the action independent of the question whether the sale by Carrington, the trustee, and its confirmation by the court, was, itself, a valid, binding transfer of the title to the purchaser.

What has been said renders it unnecessary to consider the questions of law presented in the remaining bills of exceptions.

The judgment is affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—19 N. W. Rep., 451.

TOWN OF MENASHA AND CITY OF MENASHA, *Plffs. in Err.*, [81]
v.
ROWLAND G. HAZARD.

(See S. C., 12 Otto, 81-95.)

Certificate on town bonds—delivery of stock—consolidation.

1. Where bonds of a town in Wisconsin contained the recital that they should be valid only when a certificate should be indorsed on them that the conditions on which they were issued had been performed, a certificate so indorsed, which is a substantial compliance with the condition, binds the town. A certificate signed in the name of a railroad company by the president, is a certificate of the president.

2. A delivery of the stock of the Wisconsin Central Railroad Company, after consolidation with the Portage, Winnebago and Superior Railroad Company, and with the Manitowoc and Minnesota Railroad Company, was a compliance with the terms of the bond.

3. The town was authorized to issue its bonds to the Wisconsin Central Railroad Company after the several consolidations set forth in the opinion.

[No. 284.]

Argued Apr. 27, 29, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was an action brought in the court below by Hazard, the defendant in error, on certain coupons of bonds of the Town of Menasha, payable to the Wisconsin Central Railroad Company or bearer. [82]

From the certificate of division of opinion it appears that the Portage, Winnebago and Superior Railroad Company made to the Town of Menasha a proposition under chapter 26 of the General Laws of Wisconsin, 1869, the substance of which was as follows:

1. That, in consideration of the construction by the company of a single track railroad from block 3, in Jones' plat, Town of Neenah, on Doty's Island, to Wolf River, and of five hundred full paid shares of the stock of the company, the Town of Menasha shall pay to the company or its assigns, $50,000 as hereinafter provided.

2. The Town shall secure the payment of this sum by its corporate bonds to run twenty years, interest at seven per cent, principal and interest payable in gold at the National Bank of Commerce in New York; that the bonds shall provide that the same, and the coupons when due, shall be receivable for taxes by the Town; that there shall be annually levied upon the property of the Town, a tax sufficient to pay the interest and to raise a sinking fund to pay the principal; and shall also further provide that said bonds shall be valid only when it is thereon duly certified that the conditions upon which they were voted, issued and deposited by said Town have been performed.

3. That the proper officers of the Town shall issue the bonds as required by law, and on notice being received by the Chairman of the Board of Supervisors of the Town from the National Bank of Commerce, that the company has deposited five hundred full paid shares of its capital stock, he shall deposit in said bank all of the bonds, with instructions to hold the same in trust for the Town until there shall be filed in the bank a properly authenticated certificate signed by the "chief officer of this company and the Chairman of the Board of Supervisors of said Town, or the Secretary of State of this State," that the iron has been laid upon the track and cars have been run from the depot on Doty's Island to [83] Wolf River, when the bonds shall become the property of said bank, subject to the order of the company or its assigns. This certificate shall authorize and require the president of the bank to certify upon the back of each of the bonds, that the conditions upon which they were voted, issued and deposited have been performed.

4. In consideration of the acceptance of this proposition, the company was to issue and deposit to the credit of the Town in the said bank, five hundred full paid shares, etc., and as soon as the right of way and depot grounds have been secured, the company was to commence the construction of its track and complete the same, within a year from the issue and deposit of bonds; provided that the like proposition submitted by

NOTE.—*Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited.* See *note to* Mercer County v. Hackett, 68 U. S., XVII., 548.

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this company to the Town of Neenah shall be accepted and its provisions fulfilled.

5. In the event the said Town of Neenah failed to accept and fulfill the terms of said proposition so as aforesaid submitted to it, this company further proposed to said Town of Menasha, that if the required additional sum of $50,000 shall be furnished to this company by individual subscriptions to stock in like amount and satisfactorily secured to be paid, the depot of this company shall be located and its road constructed therefrom at such place in said Town and on such route as may be agreed upon between this company and the authorities of said Town, and under the foregoing proposition as hereby qualified.

[84] June 4, 1870, an election was held in said Town, as provided in said Act, approved Mar. 9, 1869, and a majority of the votes was cast in favor of the railroad proposition. This proposition was published and voted upon as required by said Act, except the third paragraph, which, as published, provided that the certificate could be signed by the "chief officers of this company and the Board of Supervisors of said Town, or the Secretary of State of this State," instead of as above.

The Wisconsin Central R. R. Co. deposited with the above named bank for said Town, five hundred shares of its common capital stock.

Oct. 25, 1871, the Chairman of the Board of Supervisors and the clerk of said Town executed and delivered to the National Bank of Commerce, a series of fifty coupon bonds of said Town, for $1,000 each. Each of these bonds contained the following paragraph:

"This bond is one of the series amounting in the aggregate to $50,000, and is issued in pursuance of a vote of the legal voters of said Town, on the 4th day of June, 1870, under and by virtue of an Act of the Legislature of the State of Wisconsin, entitled 'An Act to Authorize Certain Counties, Towns, Cities and Villages to Aid in the Construction of the Land Grant Railroad from Portage City and from Doty's Island to Lake Superior,' approved March 9, 1869, and in pursuance of an Act of the Legislature of said State, approved February 4, A. D. 1871, entitled, 'An Act to Change the Name of the Portage, Winnebago and Superior Railroad Company,' and of an Act of the same Legislature approved March 1, A. D. 1871, amendatory of said chapter 126 of the General Laws of 1869, of Wisconsin."

Afterwards the Chairman of the Board of Supervisors of said Town, and the President of the Wisconsin Central Railroad Company, signed and delivered to the National Bank of Commerce, a joint certificate to the effect that the iron had been laid on the track of said company from block No. 3, in Jones' plat, in the Town of Neenah, Doty's Island, to Wolf River, and that the cars had been run over the same daily for more than two weeks, from the depot on Doty's Island to said Wolf River, and that, therefore, the said company was entitled to the transfer of the bonds of said Town deposited with the bank. This certificate was dated October 25, 1871.

March 5, 1872, the bank sent the certificate of stock to the Chairman of the Board of Supervisors, and delivered the bonds to the Wisconsin Railroad Company. April 17, the president of the bank affixed to the bonds his certificate, setting out a copy of the certificate received by him from the president of the railroad company and the president of the Board of Supervisors, with its acknowledgments, and stating that he had received certificates of which these were copies, which certificates were on file in the bank.

In November, 1872, the Town levied a tax to pay the interest on its bonds, and collected and paid over to the railroad company about two thirds of it, when it was enjoined by the Circuit Court of Winnebago County.

Lake Butte des Morts, about 2,000 feet wide, lies between block 3, in Jones' plat and Wolf River, across which the route of said Wisconsin road runs. That company, instead of constructing a bridge of its own across said lake, made an agreement with the Chicago and Northwestern Railway Co. to cross this lake upon that company's bridge. According to this agreement, each company was to furnish the iron for its own track. The Wisconsin Central Railroad Company runs on a line with the Chicago and Northwestern, about one mile. With that exception it has constructed its road from said block 3 to Wolf River.

On the 4th day of February, 1871, the name [91] of the Portage, Winnebago and Superior Railroad Company was changed to the Wisconsin Central Railroad Company, under the provisions of chapter 27, of Private and Local Laws of Wisconsin of 1871. By chapter 31, General Laws of Wisconsin, 1871, approved March 1, 1871, the said chapter 126 of the General Laws of 1869, was amended as follows:

"Sec. 2. All bonds and other securities which have heretofore been voted any county, town, incorporated city or village, under the provisions of said chapter 12 of the General Laws of 1869, to said railroad, under its name of Portage, Winnebago and Superior Railroad Company, shall be issued and delivered to said county, by and under its said name of Wisconsin Central Railroad Company, and such bonds and other securities so issued and delivered shall have in all courts and places and with all parties the same force and effect as though the name of said company had not been changed and the same had been issued and delivered to it under its name of Portage, Winnebago and Superior Railroad Company."

July 1, 1871, the said company voluntarily consolidated its franchises and capital stock with the Manitowoc and Minnesota Railroad Company, a corporation incorporated and extended under and by virtue of chapter 342, of the Private and Local Laws of Wisconsin for 1868, chapters 255 and 302, of the Private and Local Laws for 1869, and chapter 476 of the Private and Local Laws for the year 1871, by an agreement thereto filed in the office of the Secretary of State of the State of Wisconsin, July 10, 1871.

By chapter 127 of the General Laws of Wisconsin, for 1874, the City of Menasha was incorporated and made capable of being sued for [92] the indebtedness of said Town of Menasha, and liable to pay three fourths of any recovery.

The plaintiff bought the bonds of which the coupons are in suit, from Gardner Colby, President of the Wisconsin Central Railroad Company, for a valuable consideration without notice

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other than appears on the face of the bonds and certificates printed on them.

Upon the trial of this cause, the following questions occurred:

First. Whether the coupons executed and delivered, and, there being upon the bonds to which they were annexed, such certificates as hereinbefore set forth and produced upon the trial by the plaintiff, created a liability against said Town in favor of the plaintiff, under the pleadings and proofs.

Second. Whether the court should have instructed the jury that the construction of such railroad by the Wisconsin Central Railroad Company, without constructing the same across Lake Butte des Morts, but securing the right to cross said lake on the bridge of the Chicago and Northwestern Railway Company under the contract above set forth, was not a performance of the conditions of the proposition to construct a railroad from block 3, in Jones' plat, on Doty's Island, to Wolf River.

[93] Third. Whether a delivery of the stock of the Wisconsin Central Railroad Company after consolidation with the Portage, Winnebago and Superior Railroad Company and with the Manitowoc and Minnesota Railroad Company, as hereinbefore set forth, was a compliance with the terms of such proposition.

Fourth. Whether said Town was authorized to issue its bonds to the Wisconsin Central Railroad Company after the several consolidations hereinbefore set forth.

Mr. **E. Mariner,** for plaintiffs in error.

Messrs. **Edwin H. Abbot** and *L. S. Dixon,* for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The first question certified in this case is answered in the affirmative.

We think that the certificate on the back of the bonds is a substantial compliance with the condition on their face, and the proposition of the railroad company accepted by the Town. The condition as expressed in the bonds is in the exact language of the second article of the proposition, and implies that they shall be considered as fully executed, and that they may be put on the market as valid commercial paper, "When it is thereon duly certified that the conditions upon which they were voted, issued and deposited by said Town have been performed." To ascertain what "duly" means in this connection, it is necessary to look to the other parts of the proposition, and there we find in article three, that the bonds, when issued by the proper officers of the Town, were to be deposited with the National Bank of Commerce in New York, "In trust for said Town, until such time as there shall be filed in said bank

[94] a properly authenticated certificate, signed by the chief officer of this company and the Chairman of the Board of Supervisors of said town, or the Secretary of State of this State, that the iron has been laid upon the track of the road and cars run over the same, through from the depot on Doty's Island, or in said Town to Wolf River, when the said bonds shall become the absolute property of and be held by said bank, subject to the order of this company or its assigns, and which certificate shall authorize and require the president of said bank to certify upon the back of each of said bonds that the conditions upon which the said bonds were voted, issued and deposited by said Town have been performed." Taken as a whole, the proposition and the condition on the face of the bond mean that the bonds should become the valid and subsisting obligations of the Town when the president of the National Bank of Commerce had certified thereon that the president of the railroad company and the chairman of the Board of Supervisors of the Town had certified to him that the iron had been laid on the track of the road and the cars run over the same from the depot on Doty's Island, or in said Town, to Wolf River. This certificate was on the bonds when they were bought by the defendant in error on the market. In legal effect, it was the same as if it contained the words, "that the conditions upon which they (the bonds) were voted, issued and deposited by said Town had been performed;" because by the very terms of the proposition the certificate of the proper officers was to be conclusive evidence to the president of the bank of that fact, and not only authorize but require him to make the indorsement contemplated. When, therefore, he certified that he had received, and put on file in his bank, certificates from the proper parties, such as were required as the basis of his action, he did certify to the facts which the proposition said they should conclusively prove. His statement of what they proved was unimportant. The proposition settled that.

The fact that the certificate furnished the bank is signed in the name of the railroad company by the president, is not a valid objection. It was signed by the president, and that is all the proposition required.

The third and fourth questions are also answered in the affirmative.

Before the subscription and bonds were voted, [95] the Portage, Winnebago & Superior Company was authorized to consolidate with other companies "which, by law, may be authorized to construct connecting lines of road or make such consolidation." Act approved March 10, and published April 6, 1870. The Portage, Stevens Point and Superior Railroad was incorporated March 16, 1870, with express authority to consolidate with the Portage, Winnebago & Superior Company. The Wisconsin Central Railroad Company is, in fact, the name of the Portage, Winnebago & Superior Company as changed by statute, February 4, 1871. The organization of the company was the same after as before this change. The Manitowoc & Minnesota Railroad Company was authorized to enter into consolidation agreements by the Act of March 24, 1871, being chapter 476 of P. & L. Laws, Wis., 1871, and the consolidation with the company was actually effected July 1, 1871. The vote for the bonds was taken on the 4th of June, 1870, and the bonds were issued and delivered to the bank on the 25th of October, 1871. Upon this state of facts we think this case is brought directly within the principles settled in *Scotland Co.* v. *Thomas*, 94 U. S., 682 [XXIV., 219], and *Wilson* v. *Salamanca*, 99 U. S., 499 [XXV., 330]. The authority of the Wisconsin Central Company was to consolidate with any other company that might at any time have the power to enter into such an arrangement. It was not confined to such companies as then had the power.

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These answers dispose of the case, and make it unnecessary to consider the second question certified. When the bonds were "duly certified" and delivered to the railroad company by the bank, they became, under the agreement of the parties, valid instruments, completely executed in form, and in a condition to be put on the market as commercial paper. Having on them the necessary certificate, the purchaser need not inquire whether the facts were as certified. *Anthony* v. *Jasper Co.*, decided at this Term [101 U. S., 693, XXV., 1005]. With the certificate indorsed, the bonds were in legal effect the same as if they had been issued by the proper officers, under full authority without the condition which appeared on their face. Under these circumstances, the condition did not destroy their negotiability.

Affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 76.

WILLIAM C. FRANCE ET AL., *Plffs. in Err.*,
v.
STATE OF MISSOURI, *ex. rel.* JACKSON L. SMITH, Atty-Gen.

154 US 667 Appx

A case, brought to this Court by writ of error from a State Court, in which no federal question was raised or decided in the State Court, will be dismissed.

[No. 915.]

Submitted Oct. 18, 1880. Decided Oct. 25, 1880.

IN ERROR to the Supreme Court of the State of Missouri.

On motion to dismiss.

The case is stated by the Court.

Mr. **Leverett Bell,** for defendant in error, for motion.

Messrs. **J. M. & C. H. Krum,** and **Wm. O. Bateman,** for plaintiffs in error

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a proceeding by *quo warranto*, to exclude the plaintiffs in error, who were the defendants below, from the further use of the franchises of a lottery, known as the Missouri State Lottery, on the ground that the event had happened which fixed the period for the termination of the grant under which they were acting. This was, in legal effect, all that the petition contained. The defendants, in their answer, conceded that their grant was to terminate on the happening of a certain event, but insisted that this event had not yet taken place, because they had for a time been prevented from carrying on their business by judicial proceedings against them in the courts of the State. This presented the only question in the case. It was agreed by both parties that the grant or contract under which the defendants claimed was valid and binding on the State, and that the grant was not limited to an arbitrary period, but to the happening of a particular event. All these questions had long before been decided by the highest court of the State, and there was no attempt to overturn or modify the decisions. No claim was made under any of the statutes of the State, passed for the suppression of lotteries, and the single question put to the Supreme Court of the State for determination was, whether the event had in fact happened, which all agreed was to terminate the franchise. The court decided that it had, and gave judgment accordingly. No effect whatever was given to any law of the State impairing the obligations of the grant. Nothing was done but to decide that, upon the evidence, the grant had expired by its own limitation. The contracts, as presented and agreed on by both parties, were construed and full effect given to all the obligations they were found to contain. No federal question was raised or decided.

The motion to dismiss is, therefore, granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM H. SEWARD ET AL., *Appts.*, [161]
v.
JEAN BAPTISTE COMEAU, Sheriff ET AL.

(See S. C., "*Seward* v. *Corneau*," 12 Otto, 161, 162.)

Insufficient bond on appeal—amendment.

1. A bond which contains no security for costs is insufficient in form, either for the purposes of a *supersedeas* or an appeal.
2. This, however, does not necessarily avoid the appeal; but such terms may be imposed on the appellants for the omission, as, under the circumstances, seem proper.

[No. 240.]

Submitted Oct. 18, 1880. Decided Oct. 25, 1880,

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

The grounds on which the motion was based sufficiently appear in the opinion.

Messrs. **E. L. Merrick** and **George W. Race**, for appellees.

Messrs. **Jno. D. McPherson** and **Calderon Carlisle,** for appellants.

Mr. Chief Justice **Waite** delivered the opinion of the court: [162]

The bond in this case is insufficient in form, either for the purposes of a *supersedeas* or an appeal, inasmuch as it contains no security for costs. This, however, does not necessarily avoid the appeal; but we may impose such terms on the appellants for the omission as, under the circumstances, shall seem to be proper. *Martin* v. *Hunter*, 1 Wheat., 304; *Davidson* v. *Lanier*, 4 Wall., 447 [71 U. S., XVIII., 377]. *It is, therefore, ordered that the appeal be dismissed*, unless the appellants, on or before the first Monday in January next, give bond, with good and sufficient security, in due form of law, to prosecute their appeal to effect, and to answer all damages and costs if they fail to make their plea good; the bond to be in the penal sum of $1,000, and the security taken and approved by the Justice of this court assigned to the Fifth Circuit.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[300]

ANNA M. SIMS, *Appt.*
v.
WILLIAM EVERHARDT AND ELIZA E. BURSON, EXR. and EXTX. of MAGDALENA EVERHARDT, Deceased, ET AL.

(See S. C., 12 Otto, 300-313.)

Disabilities of infancy and coverture—avoidance of acts—estoppel not applicable to infants.

1. If an infant, who is also a married woman, makes an instrument, voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended.
2. Mere inertness or silence, continued for a period less than that prescribed by the Statute of Limitations, unless accompanied by voluntary affirmative acts, manifesting an intention to assent to the deed, will not bar the infant's right to avoid it.
3. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity.

[No. 81.]

Argued Apr. 20, 21, 1880. Decided Oct. 25, 1880.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The case is fully stated by the court.

Messrs. Robert Rae and **Arthur D. Rich,** for appellant.

Messrs. **Edwin B. Smith,** *David J. Wile* and **W. H. Calkins,** for appellee.

Mr. Justice **Strong** delivered the opinion of the court:

This case shows that the complainant was married on the 14th of July, 1844, to John B. Sims. She was then a minor less than seventeen years old, having been born on the 25th of September, 1828. On the 3d of April, 1845, her father, conveyed to her, in fee, the tract of land now claimed by the defendants; and on the 28th day of May, 1847, joining with her husband, she executed a deed for the land to Magdalena Everhardt, the mother of the defendants. The deed, was subscribed by her and her husband in the presence of a magistrate, was acknowledged in due form, and the purchase money was paid. Mrs. Everhardt went into immediate possession, paid a mortgage upon the property, paid taxes, continued in possession and made improvements until her death in 1871. The defendants have succeeded her as her devisees.

When the deed to Mrs. Everhardt was made, some doubts appear to have been entertained [301] upon the question whether the complainant was then of full age, and to remove them she signed a statement, which was written on the deed, declaring "that she was twenty-one years of age on the 25th day of September, 1846."

There is evidence that early in her married life, before the deed was made, the complainant received very ill-treatment from her husband; that he insisted upon her selling the place; that he employed threats; that she became afraid of him; that a look from him would make her do almost anything; and that she knew nothing of any arrangement to sell the property until the deed was brought for her to sign in her own house.

On the 14th of February, 1870, the complainant was divorced from her husband, John B. Sims, for his own fault. In the month of March next following, or early in April, she caused her deed to Everhardt to be disaffirmed and demanded possession of the land. Her demand not having been complied with, this suit has been brought to set aside the deed, and for an account of the rents and profits of the land, as well as of the amount the complainant is in duty bound to pay to the defendants on account of the purchase money paid by the grantees and the mortgage aforesaid.

Assuming, as we think it must be assumed, [306] and as it is certainly held in Indiana, that the deed of Mrs. Sims, in which her husband joined, though made during her minority, was not void as against her, but only voidable, and hence that it was incumbent upon her to disaffirm it within a reasonable time after she came of age, the inquiry is still to be met: what was a reasonable time under the circumstances of the case? She gave notice of her disaffirmance almost immediately after she became *discovert*, certainly within less than two months. This was, however, a little more than twenty years after she attained her majority.

The circuit court dismissed the complainant's bill, for the reason that it did not appear she had disaffirmed the deed of May 28, 1847, within a reasonable time after the attainment of her majority, being of opinion that the rule was established in Indiana she must have so disaffirmed it, notwithstanding her coverture; that is, in the same time as if she had been *discovert*.

We find no decision of the Indiana courts that ought to be regarded as establishing that rule. The case relied upon by the appellees in support of the judgment of the circuit court is *Scranton* v. *Stewart*, 52 Ind., 68. The facts of that case, it must be admitted, were, in some respects, like those of the present, though in others essentially different. The plaintiff was at the time of her marriage an infant, aged sixteen. She was then seised in fee simple of a tract of land, containing forty-five acres, and also of an undivided interest in another tract. On the 2d day of March, 1864, when she was in the 19th year of her age, she and her husband conveyed the lands to one George W. Stewart, for a consideration of $2,500, a considerable part of which was paid. Mrs. Scranton came of age on the 12th of January, 1867, gave notice to Stewart of her disaffirmance of the deed on the 22d of July, 1870, and shortly after brought her action to recover the land. This was more than three [307] years and a half after she had attained her majority. The Supreme Court held that her disaffirmance was in time. It was all the case required. But the Judge went on to declare that a married woman who has made a deed of her lands during her infancy and coverture, must disaffirm it within a reasonable time after she arrives at age, notwithstanding her coverture, and that the fact of the continued coverture would not extend the time for the disaffirmance. All this was *obiter*. It had nothing to do with the case before the court. Nothing in the facts or the judgment required the assertion of such a rule. And it is observable that it was said in a case in which it appeared the married woman was seised of her land before her marriage, and that she was married in 1864, after the statutes of the State had greatly enlarged the power of a *feme covert* over her property. Those statutes

NOTE.—*Estoppel* in pais. See *note* to Stowe v. U. S., 86 U. S., XXII., 146.

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had given her the rights of a *feme sole* in regard to her lands, and empowered her to sue as such without joining her husband. They had denied to a husband the rights which at common law he acquired in the wife's property by the marriage. They had made her lands and the profits of them her separate property, as fully as if she was unmarried, with the single exception that she could not incumber or convey them except by deed in which her husband should join. The effect of the state statute, touching the marriage relation and the liabilities incident thereto, was, in part, considered in *Miles* v. *Lingerman*, 24 Ind., 385, where it was said by the Supreme Court of the State: "Under our present statute the wife may bring her action in regard to her own estate as though she were a *feme sole*. Still, our Legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although as to her power to disaffirm her contracts made during minority her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without the assent, and even against the will, of her husband." This language, if not a positive assertion of its converse, contains at least a strong implication that her power to disaffirm a conveyance made by her during infancy did not [308] exist at common law, nor before the statutes of 1847 and 1852 were enacted.

We find nothing in any prior decision of the Indiana courts that sustains what was said *obiter* in *Scranton* v. *Stewart*. *Law* v. *Long*, 41 Ind., 586, to which reference has been made, decided that the deed of a minor, conveying her land for a valuable consideration, is voidable only and not void, and that the right to avoid it on coming of age is a personal privilege of the minor and her heirs. It also decided that when the act of an infant is executed, as when a deed has been made and delivered, the infant must, on attaining full age, do some act to disaffirm the contract, and that such act must precede the commencement of an action. But the case did not define what is a reasonable time, nor rule that if the wife came of age during coverture she was bound to disaffirm the contract notwithstanding her coverture, as if she was a *feme sole*. In that case the conveyance was made by the wife and her husband before the Act of 1852 was passed. The husband died in 1852. The wife married again in 1853, and came of age in 1854. Her second husband died in 1864, and she married a third time in 1868. It was not until after her third marriage that her suit was brought. She had been discovert during more than four years after her deed was made, and after she had reached her majority, and yet she had taken no step nor done any act to disaffirm the deed prior to the institution of her suit. No intimation is given in the case that she was bound to disaffirm or could disaffirm during her coverture. Nothing, therefore, in *Law* v. *Long* supports what was said, but not decided in *Scranton* v. *Stewart*.

But if the law was accurately stated in the opinion given by the court in *Scranton* v. *Stewart*, as applicable to a deed of her lands made by an infant *feme covert* after the Statute of 1852, it by no means follows that it should rule the present case. There is a radical difference in the facts of the two cases. Mrs. Sims was married before the Act of 1852 or that of 1847 was passed, and while the common law relative to the marriage relation existed. By the marriage her husband acquired a vested freehold interest in her lands, and became entitled to the rents and profits. His control over the usufruct thereof became absolute. His interest extended during the joint lives of himself and his wife, or at least as long as the marriage relation continued. It was an interest capable of sale. [309] When, therefore, the deed was made to Mrs. Everhardt in 1846, it gave to the grantee the wife's right, subject to disaffirmance, and the husband's right to the possession and enjoyment of the profits absolutely When the wife subsequently came of age, she continued powerless to disturb the possession of the grantee, so long as her coverture lasted; for the grantee held not only her right, but that also of her husband. The most she could have done was to give notice that she would not be bound by her deed. Was she required to do that? To answer the question it is important to keep in mind her condition at common law. The land was not her separate estate, such as the wife had in *Scranton* v. *Stewart*. In regard to it she was *sub potestate viri*, incapable of suing or making any contract without her husband's assent, except such as might relate to separate property. She could not even receive a grant of land if her husband dissented. Her disability during her coverture was even greater than that of an infant, and it is settled that an infant cannot disaffirm his deed while his infancy continues. *Zouch* v. *Parsons*, 3 Burr., 1794; *Roof* v. *Stafford*, 7 Cow., 179. The reason is that a disaffirmance works a re-investiture of the estate in the infant, and he is presumed not to have sufficient discretion for that. Why should not the greater disability of coverture be attended with the same consequences? If a wife cannot contract about any land which is not her separate property, how can she, without the concurrence of her husband, do any act, the effect of which is to transfer the title to land from another to herself?

We are not, however, called upon by the exigencies of this case to decide that a wife cannot, during her coverture, disaffirm a deed which she made during her infancy. The question now is, whether Mrs. Sims did disaffirm her deed within a reasonable time after she attained her majority. What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. *State* v. *Plaisted*, 43 N. H., 413; *Jenkins* v. *Jenkins*, 12 Iowa, 195, and numerous other cases. It must be admitted that generally the disaffirmance must be within the periods limited by the Statute of Limitations for bringing an action of ejectment. A much less time has in some cases [310 been held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable.

Now, in this case, though there was no disaffirmance for nearly twenty-one years after Mrs. Sims attained her majority, there were very remarkable reasons for the delay, sufficient, in our opinion, to excuse it. When the deed was made she was laboring under a double disability

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—infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the Statute of Limitations, to sue until both the disabilities had ceased; that is, until after 1870. It is an acknowledged rule that when there are two or more co-existing disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugd. Vend., 103, 482; *Mercer* v. *Selden*, 1 How., 37. This is the rule under the Statute of Limitations. But Mrs. Sims could not sue until after her divorce, and until the right the husband acquired by his marriage terminated. And had she given notice during her coverture, of disaffirmance of her deed, it was in the power of her husband to disaffirm her disaffirmance. 2 Bishop, Married W., sec. 392. Giving notice, therefore, which was all she could do, would have been a vain thing. The law does not compel the performance of things that are vain. Mr. Bishop, in his work to which we have referred, says that if an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. Sec. 516. In support of this he refers to *Dodd* v. *Benthal*, 4 Heisk., 601, and *Matherson* v. *Davis*, 2 Coldw., 443. These cases certainly sustain the rule stated in the text. In the former it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her discoverture, though her coverture may continue more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as the law intends it, would be the contrary. We have found no decision that is in [311] conflict with this doctrine, and no *dicta* even, except those in *Scranton* v. *Stewart*. And why should the rule not be thus? The person who takes a deed from an infant *feme covert* knows that she is not *sui juris*, and that she will be under the control of her husband while the coverture lasts. He is bound to know, also, that she has the disability of infancy. He assumes, therefore, the risk attending both those disabilities.

But the continued coverture of Mrs. Sims, after she attained full age, is not the only circumstance of importance to the inquiry whether she disaffirmed her deed within a reasonable time. The circumstances under which the deed was made are to be considered. There is evidence that she was constrained by her husband to execute the deed; that his conduct toward her was abusive, violent and threatening, in order to induce her to consent to the sale; that she was intimidated by him; that a look from him would make her do almost anything, and that she was in a weak and nervous condition. It is not strange that a woman bound to such a husband should delay during her coverture disaffirming a contract which he had forced her to make.

Add to this, that she had very little opportunity to disaffirm until after her divorce. Before she had reached her majority she removed to another State, and never returned to the neighborhood of the property to reside. Between 1848 or 1849 and 1870 she made but two visits to Laporte, both on account of sickness or the death of a relative, and neither visit was prolonged beyond three days. It is not a case, therefore, of standing by after she came of age and seeing her property in the enjoyment of another.

And again; she never did any act after her deed was made and after she came of age expressive of her consent to it or implying an affirmance of the contract. The most that is alleged against her is that she was silent during her coverture. But silence is not necessarily acquiescence.

We are aware that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after [312] his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the Statute of Limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was in effect the ruling in *Irvine* v. *Irvine*, 9 Wall., 617 [76 U. S., XIX, 800]. See, also, *Prout* v. *Wiley*, 28 Mich., 164, a well considered case, and *Drake* v. *Ramsey*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But these cases either rely upon *Holmes* v. *Blogg*, 8 Taunt., 35, which was not a case of an infant's deed, or subsequent cases decided on its authority, or they were rested in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. We think the preponderance of authority is that, in deeds executed by infants, *mere* inertness or silence, continued for a period less than that prescribed by the Statute of Limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. Affirmance or disaffirmance are in their nature mental assents. They necessarily imply the action of a free mind, exempt from all constraint or disability.

In view of these considerations, our conclusion is that Mrs. Sims, the complainant, having been a *feme covert* until 1870, and never having done during her coverture, any act to confirm the deed which she made during her infancy, could effectively disaffirm it in 1870, when she became a free agent, and that her notice of disaffirmance and her suit avoided her deed made in 1847.

The remaining question is, whether she is estopped by anything which she has done from asserting her right to the land in controversy. [313] In regard to this very little need be said. It is not insisted that she has done anything since she has attained her majority which can work an

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estoppel. All that is claimed is, that when she made her deed she asserted that she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown* v. *McOune*, 5 Sandf., 224; *Keen* v. *Coleman*, 39 Pa., 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.

It is, however, unnecessary to dilate upon this branch of the case. The judgment of the circuit court was not rested upon any estoppel of the complaintant.

Our conclusion upon the whole matter is that the complainant was entitled to the decree for which she asked, and *the decree of the Circuit Court is, accordingly, reversed, the record to be remitted, with instructions to enter a decree in accordance with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—86 Ind., 91; 44 Am. Rep., 265, 269; 95 Ind., 12; 48 Am. Rep., 695; 77 Va., 65; 46 Am. Rep., 714.

ALFRED H. ANDREWS ET AL., *Plffs. in Err.*,

v.

HENRY M. CONGAR.

131 US clxxxiii appx

1. In Missouri, he who writes his name on the back of a note, of which he is neither the maker nor the payee, is *prima facie* liable as a joint maker.
2. A charge which is more favorable than the one contended for, is not a ground of reversal.
3. In an action against a guarantor of a promissory note, proof of the execution of the guaranty is equivalent to proof of an admission by the guarantor of the due execution of the note.
4. In making a contract which is within the scope of the partnership business, each partner is presumed to be the authorized agent of all, and it is of no consequence, as to its validity as a partnership contract, what the secret understanding of the partners may have been as to the powers of each.
5. Defendants cannot set up a settled and balanced account as a set-off, without showing fraud or mistake in striking such balance.

[No. 38.]

Submitted Oct. 21, 1880. Decided Nov. 8, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Mr. **George Herbert,** for plaintiffs in error.

Mr. **Charles Hitchcock,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

There are nineteen errors assigned on this record; but those relied on in the argument present in reality but four questions.

These are:

1. Whether the court erred in charging the jury, that "If a person not a party to a note, that is to say, not the payee or maker, writes his name on the back of the note at the time the note is made, the presumption is that he has assumed the liabilities and responsibilities of a guarantor; this presumption, however, is liable to be rebutted by the proof."

2. Whether, under the practice in Illinois, which is regulated by statute, if one is sued as a guarantor of a note, and he verifies his plea of the general issue by affidavit, the plaintiff must prove the execution of the note itself as well as the guaranty.

3. Whether the defendants should have been permitted to prove that there was an agreement between themselves as partners, that neither of them should assume any liability on behalf of the firm out of the line of its regular business, without the consent of the others, and that one of the defendants did not know that the liability sued on was incurred, until long after the notes were made and indorsed, and that since he learned it he has always repudiated it.

4 Whether it was wrong for the court to instruct the jury that if, as between the plaintiff and the maker of the note, the maker could not use an account on its books as a set-off against the note, the defendants as guarantors could not.

As to the first question:

The charge, as given, states correctly the law of Illinois, as settled by the highest court of the State in a long series of decisions. *Cushman* v. *Dement*, 3 Scam., 497; *Stowell* v. *Raymond*, 83 Ill., 120.

The contract, however, was made in Missouri and was to be performed there. In that State the rule is, that he who writes his name on the back of a note, of which he is neither the maker nor the payee, is *prima facie* liable as a joint maker. *Powell* v. *Thomas*, 7 Mo., 440; *Schneider* v. *Seiffman*, 20 Mo., 571; *Otto* v. *Bent*, 48 Mo., 26; *Baker* v. *Block*, 30 Mo., 225.

For this reason it is insisted that the contract is governed by the laws of Missouri, and that the jury should have been so instructed. Admitting this to be true, it is difficult to see how the plaintiffs in error have been harmed by the charge of which they complain. They claim to have been presumptively joint makers of the note, while the court told the jury they were guarantors only. Clearly, the charge as given was more favorable than the one contended for. A recovery could have been had against them as joint makers under the common counts.

The court, however, after stating what the presumption from such an indorsement was, went on to say: "The law authorizes the holder of a note to write over the name thus written across the back of the note, any agreement consistent with that made between the

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parties at the time the name was placed there; that is to say, if the party did actually, at the time he put his name on the back of the note, stipulate for any liability short of a guaranty, or different from that of guarantor, then the holder of the note had no right to write a false guaranty over the name." Then, after calling attention to the facts which had been shown in evidence, and the claims of the respective parties, it was said: "If you are satisfied that the defendants in this case put their names upon the note at the time it was made, with the express understanding that they were to be liable as indorsers, that is, liable after the plaintiff had used due diligence to fix their liability as indorsers, then the defendants are not liable in this action; but if, on the contrary, you are satisfied from all the evidence in the case that the defendants intended to become liable to pay the debt if the maker did not, that is, that they would stand in the relation of sureties and guarantors, substantially as the contract is now written over their names, then the defendants are liable." And again; after referring to a condition which it was proved the plaintiffs in error had incorporated into the obligation they assumed, and which it was insisted should have been expressed in the guaranty as written over their signature, the court says: "If you are satisfied that the positive performance of this part of the agreement was thus waived or abrogated by mutual consent of the plaintiff and defendants before the guaranty was written, then no mention need be made of it." In this way, as it seems to us, the case upon this point was fairly put to the jury, and the plaintiffs in error were given the benefit of every circumstance they relied on to establish their defense. If the presumption arising from their indorsement had been overcome by the evidence, the jury were told in express terms to find accordingly.

As to the second question:

A Statute of Illinois provides that "No person shall be permitted to deny on trial the execution or assignment of any instrument in writing * * * upon which any action may have been brought, * * * or is admissible in evidence under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit." Ill. Stat., ch. 110, sec. 84.

This action was brought on a guaranty, a copy of which was filed. The affidavit only made it necessary to prove the execution of that instrument. That was done; and that of itself was equivalent to proof of an admission by the guarantors of the due execution of the note. Whether this admission was one that could be contradicted, need not now be determined. It was certainly sufficient until overcome.

As to the third question:

There is nothing in the case to show or tending to show that the execution of the guaranty was not in the line of the regular business of the partnership. On the contrary it does appear that the partners were the owners of a majority of the stock in the corporation that made the note, and that the note and guaranty were given with a view to the protection and improvement in value of that stock. The transaction was one which appears to have been entered into for the common benefit of all the partners. Under such circumstances, it was of no consequence what the secret understanding of the partners may have been as to the powers of each. The contract being within the scope of the partnership business, each partner is presumed to be the authorized agent of all.

As to the fourth question:

A simple statement of the facts is all that is necessary to dispose of this question. The plaintiff was the president of the corporation, maker of the note guarantied. On the books he was charged with moneys paid to him from time to time, and credited with a salary and interest on his investment in stock. After he went out of office, his successor settled with him and paid the balance found to be his due. The books were thereupon balanced. The plaintiffs in error sought to set off against their liability as guarantors of the note, the items which appeared on the debit side of the account, without any regard to the credits. As to this, the court instructed the jury that they "Must be satisfied that the company itself could use the same set-off against the note before the defendants could avail themselves of it, and that if they were satisfied from the evidence that the plaintiff's account stood balanced on the books of the company as kept, then the defendants could not set up the account as a set-off to the note, without showing fraud or mistake in striking such balance." There can be no doubt as to the correctness of this ruling.

This covers, substantially, all there is in the case. The other errors assigned are unimportant and need not be considered specially.

The judgment is affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN W. BROOKS ET AL., *Appts.*, [107]
v.
BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY, FARMERS' LOAN AND TRUST COMPANY ET AL.

(See S. C., 12 Otto, 107, 108.)

Petition for rehearing.

A petition for rehearing after judgment cannot be filed except at the term in which the judgment was rendered.

[No. 258, 1879.]

Petition for rehearing, filed——. *Decided Nov. 8, 1880.*

APPEAL from the Circuit Court of the United States for the District of Iowa.

This case was originally decided in the October Term 1879, and is reported in 101 U. S., 443, XXV., 1057.

A petition was now presented for a rehearing.

The case is stated by the court.

Mr. **James Grant**, for appellants.

Messrs. **N. M. Hubbard, Charles A. Clark,** and **B. J. Hall**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

A petition for rehearing after judgment, under the rule promulgated in *Public Schools* v.

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Walker, 9 Wall., 608 [76 U. S., XIX., 650], cannot be filed except at the Term in which the judgment was rendered. In *Hudson* v. *Guestier*, 7 Cranch, 1, a motion was made at the February Term, 1812, for a rehearing in a case decided two years before; but the court said "The case could not be reheard after the Term in which it was decided." At the end of the term, the parties are discharged from further attendance on all causes decided, and we have no power to bring them back. After that, we can do no [108] more than correct any clerical errors that may be found in the record of what we have done.

In *Brown* v. *Aspden*, 14 How., 25, where the practice in respect to orders for rearguments was first formally announced, the rule in this particular was not extended, for *Chief Justice* Taney was careful to say that the order for reargument might be made after judgment, *provided* it was entered at the same term; and in *U. S.* v. *Knight*, 1 Black, 488 [66 U. S., XVII., 80], the same limitation is maintained. Down to that time such an order could be made only on the application of some member of the court who concurred in the judgment, and this continued until *Public Schools* v. *Walker*, *supra*, when leave was given counsel to submit a petition to the same effect. In all other respects the rule is now substantially the same as it was before this relaxation.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 415.

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[108] LOREN GIDDINGS AND LEANDER GIDDINGS, Admrs. of SILAS GIDDINGS, Deceased, *Appts.*,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE.

(See S. C., 12 Otto, 108-112.)

Condition subsequent and precedent—payment of premium.

1. Where a condition is subsequent and it is broken, relief may be given upon equitable terms; but where it is precedent and neither fulfilled nor waived, no right or title vests, and equity can do nothing for the party in default.
2. Where the terms of a life insurance policy are that the policy shall not take effect until the premium is paid, a compliance with that provision, or a waiver of it, on the part of the insurer, is necessary, to make the policy valid.

[No. 39.]

Argued Oct. 22, 1880. Decided Nov. 8, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. **Henry G. Miller** and **Thos. G. Frost**, for appellants.

Messrs. **Thomas Hoyne** and *D. G. Hooker*, of counsel for appellee.

[109] *Mr. Justice* **Swayne** delivered the opinion of the court:

The facts of this case necessary to be considered are few and simple. They are clearly disclosed in the record, and there is no conflict between the parties about them.

The appellee is a Corporation created by the State of Wisconsin. Its principal office and place of business were at Milwaukee. It was authorized to insure lives. Dean & Payne were its agents at Chicago. The extent of their authority was to receive applications, forward them to the office at Milwaukee, and, when risks were taken, to receive, countersign and deliver the policies, collecting in all cases, before the latter was done, the first premium from the assured.

On or about the 6th of August, 1872, a member of the firm of Roberts & Hubbard, of the County of Warren, in the State of Illinois, at the instance of Silas Giddings, Senior, of the same county, presented to Dean & Payne, at Chicago, an application, in due form, for a life insurance policy, insuring Giddings in the sum of $6,000. The application consisted of a printed form furnished previously by Dean & Payne. It contained blanks to be filled with answers of the applicant to the questions propounded, and was filled up accordingly. Dean & Payne immediately forwarded it to Milwaukee. On the 24th of the same month the Company considered the application and decided to issue the policy. It was issued, accordingly, and bears date on that day. The premium to be paid by the assured was $302.52. The policy was immediately sent to Dean & Payne. Not being called for, on the 2d of October following they returned it to the [110] Company, and it was thereupon canceled.

At the same time that the policy was applied for, an application was submitted for a loan by the Company to Giddings of $6,000. In relation to this matter there is some conflict in the evidence, but as the view which we take of the case before us renders it unnecessary to consider that subject, we pass it by without further remark.

The 7th section of the Act incorporating the appellee is as follows:

(Record p. 86.) "Every person who shall become a member of this Corporation, by effecting insurance therein, shall, the first time he effects insurance and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees; and no premium so paid shall ever be withdrawn from said Company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this Company during the continuance of its charter."

The policy, as made out, was according to the form issued by the Company in all cases. Among other things it provided:

"7th. This policy shall not take effect and become binding on the Company until the premium be actually paid, during the life-time of the person whose life is assured, to the Company or to some person authorized to receive it, who shall countersign the policy on receipt of the premium."

Giddings was taken ill of acute pleurisy on or about the 15th of August, 1872, and died of that disease on the 4th of September following. On the 12th or 13th of November following, the appellants, by their attorney, tendered to Dean, of the firm of Dean & Payne, the first premium and demanded the policy. The attorney had also present proof of the death of Giddings. Dean "refused to have anything to do with the

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matter, as he claimed that the Company was not liable." The proof of the death was thereupon transmitted to the home office at Milwaukee.

No tender and no demand for the policy was made by anyone until the time before mentioned, and no notice was given by Giddings nor [111] by anyone in his behalf during his life, that he intended to consummate the transaction by paying the premium and receiving the policy All action on his part terminated with the delivery of his application to Dean & Payne for transmission to the Company. He did nothing afterwards. There his connection with the affair ended.

Upon this state of facts the appellants insist that the Company is liable for the $6,000 specified in the undelivered policy.

A few remarks will be sufficient to dispose of the case:

The presentment of the application to the agents at Chicago, its transmission to Milwaukee, and its receipt by the Company, in nowise committed nor bound the latter to anything. It was competent for the Company to pause as long as they might deem proper, and finally to accept or reject the application, as they might choose to do. If they elected to contract, they had the right to prescribe the terms, and it was for the other party to assent or reject them. His unbroken silence, as would have been such silence by the Company after receiving the application, was necessarily negation. Neither party in such case would have been bound in anywise to the other, because there would have been wanting the mutual assent of the minds of the parties, which is vital in all cases to the creation of a contract obligation. What was done, without something further, could have no more weight nor efficacy, in the view of the law, than an unexpressed thought or any other unexecuted intention.

The Company prepared the draft of a contract which they were willing to execute. Among its stipulations was one that the assurers should not be bound by the instrument until the premium was paid in the lifetime of the assured, and the policy was countersigned by the authorized agent of the Company. This was a condition precedent to the liability of the appellees, and necessary to their safety. There was nothing in it unconscionable nor oppressive, and the Company had a clear legal right to make it.

Where there is a condition subsequent and it is broken, relief may be given upon equitable terms; but where it is precedent, and neither fulfilled nor waived, no right or title vests, and [112] equity can do nothing for the party in default. *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447].

Here there was clearly no performance by the applicant, and it is equally clear that hence there was no contract or obligation whatsoever on the part of the Company.

It was the business of the applicant, if, after sending forward his application, he continued to desire a policy, to keep up the proper communication with Dean & Payne, and during his lifetime to avail himself of the offer which the Company had made. The proposition of the Company expired with his life. After his death, his legal representatives could not act vicariously for him. To allow them to enforce such a claim would be contrary to the plainest principles of both law and equity. If authorities in so plain a case are needed, it is sufficient to refer to *Ins. Co.* v. *Young*, 23 Wall., 85 [90 U. S., XXIII., 152], and *Life Ins. Co.* v. *Ewing*, 92 U. S., 377 [XXIII., 610].

What the consequence would have been if, after the applicant was stricken with his mortal disease, the premium had been paid and the policy delivered, the Company being ignorant of his changed condition, is a point which we do not find it necessary to consider.

The decree of the Circuit Court is affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS D. PEARCE, *Appt.*, [112]
v.
LEWIS J. MULFORD ET AL.

(See S. C., 12 Otto, 112-118.)

Re-issued patent—invention—what is.

1. Re-issued letters patent granted to the assignees of Shubael Cottle for an improvement in chains, etc., are void.

2. All improvement is not invention nor entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than that which is obvious to persons skilled in the art to which it relates.

[No. 19.]

Argued Oct. 19, 1880. Decided Nov. 8, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

The specification forming part of the letters [113] patent was as follows: Figure 1 is a side view of a portion of a chain necklace illustrating my invention. Fig. 2 is a view of the same turned one quarter around. Fig. 3 is a cross section of the same taken through the line x x Fig. 1.

Fig. 1

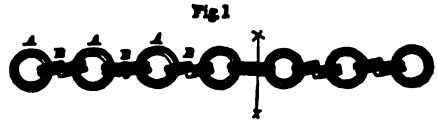

Fig. 2.

Fig. 3.

Mr. **Henry Baldwin, Jr.**, for appellant.
Messrs. **B. F. Lee** and **H. B. Turner**, for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

The complainants in the court below are the owners of a patent for an alleged "new and useful improvement in chains for necklaces, etc.," granted to Shubael Cottle, on the 24th of February, 1874, and numbered 5774. The patent is a re-issue, the original having been granted on the 3d day of February in the same year. The invention is described in the specifi-

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cation as consisting of "an ornamental chain, whereof the links are connected together by open spiral links finished before being connected together, the connection being made by springing the finished links into each other in the manner described." The patentee, having thus stated wherein his invention consists, proceeded to describe the chain represented in the drawing attached to the specification, to illustrate what he claimed to have invented. The description is as follows:

"A and B represent the links of the chain. The links A are round and closed, as shown in Figure 1, and are made and polished or colored separately from the other links. The links B, which constitute the peculiar feature of my invention, are formed of one or more coils of the ring of the proper length, so as to form a double spring link. Into each end of the tube forming the link is soldered a small shot, as shown in the drawing, which shot gives a finish to the link. The links B may then be colored or polished, and the chain is formed by springing the links into each other. The links, A B, may be [114] made the one kind round and the other oval, or both may be made round, or both oval."

After thus describing this mode of constructing a chain, the specification stated some advantages supposed to result from it, and set forth the claims as follows:

1. An ornamental chain for necklaces, etc., formed of alternate closed links A and open spiral links B, substantially as shown and described.

2. The open spiral link B formed of coils of tubing, substantially as shown and described.

The bill of the complainants is founded upon this patent. It charges an infringement by the defendant, and it prays for an injunction, on account of profits and damages. The answer admits the manufacture and sale of chains thus made, but it denies the novelty and patentability of the alleged invention.

[115] In view of the evidence found in the record, it cannot be questioned that ornamental chains composed of alternate closed links and spiral links, or formed by spiral links alone, had been known and in use long before Mr. Cottle made his alleged invention. As was said by the Circuit Judge, "Chains formed by split rings which are sprung into each other, or into a solid link, are familiar articles, and there can be no novelty in the mere shape or form of the chain, nor of the link which is shown in the drawings of the patent." There is abundant evidence, not only that split rings had been long in use, but that other spiral links had been made and used before 1873, when the patentee claims to have made his invention. If, therefore, there be any novelty in the link which is the subject of the second claim, it must consist in the fact that the spiral link is formed of tubing. Tubing itself, as understood in the jeweler's art, is made by compressing a strip of gold around a brass or copper wire, and then forcing it through a draw-plate, the holes in which decrease gradually in diameter until the edges of the gold strip are completely united. The copper wire is then eater out by an acid, and the tubing is [116] complete. Both the product and process have long been well known. And so have been spiral rings formed of gold tubing. The tubing, before the wire is removed, is wound into coils around a mandrel, and cut into desired lengths. The coils may then be pressed together by a wire and annealed, the wire having been removed, or the compressing and annealing process may be omitted. Such spirals have a certain degree of elasticity, which enables them to be sprung upon other links, and when thus sprung into other closed or open spirals they will form a chain. The well known serpent bracelet was such an open spiral, such a double link, and several of them, sprung together alternately with closed links, would have formed a chain identical in principal with that of the patentee. There certainly is nothing patentable in merely reducing the size of the bracelet so as to adapt it to use in a necklace. The record also contains evidence that other spiral rings or links made of gold tubing, some of them open and some closed, by soldering, were made before 1873. It is to be observed that the second claim in the patent is not for any process of making a link; not for making tubing, nor winding it into spiral forms; not for tying nor annealing the coils when they have been wound; but for an open link, consisting of one or more coils of tubing of the proper length, so as to form a double spring link, into each end of which is soldered a small shot to give the link a finish. This is all the description the specification gives of the link. It is not intimated that the coils must be brought into close contact with each other, nor annealed, and it is simply said the links may be colored or polished. The form of the link, when made of gold tubing, is all that is attempted to be patented. The constituents are not. The patentee has testified that as long as he had known anything about the manufacture of jewelry he had known tubing to be used in the art; that for many years he had known shot put into the ends of such tubing, and that for a number of years he had known links formed of tubing with shotted ends. We think, therefore, the evidence sufficiently establishes that the second claim is void for want of novelty in the alleged invention.

The first claim read in connection with the description given in the specification and draw- [117] ings is for an ornamental chain, consisting of solid links and open spiral links made of tubing, the latter being finished before they are sprung into the solid links, and the connection being made by thus springing the links together. In considering whether this can be sustained, it is necessary to observe what was the state of the art and what was known when Mr. Cottle claims to have invented the device for which he obtained the patent. Chains having alternate open and closed links, the open links being spiral and sprung into the closed links, were known. So were chains made entirely of spiral links, and even of open spiral links. A chain had also been made and worn, and it was for sale in the stores, the links of which were hollow. They were made solid, with copper wire inside. The copper wire was then destroyed, leaving the links hollow, and they were then sprung together to form a chain. The chain was thus composed of open spiral links made of hollow metal; that is, of tubing. It is true, as appears from the model which is an exhibit in the case, the two ends of the spiral were bent outward and the coils were soldered together after the links had been sprung into each other. Still, when thus sprung into each other, they made a chain formed of open spiral

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links of tubing. The soldering was a distinct and after process. Omitting that process and the outward deflection of the ends, and alternating the links with other links made closed and solid, the chains would have been substantially the same as that of plaintiff. We cannot think the advance which the patentee made upon that can be called invention. Leaving the links open after they have been sprung into closed links, there being no novelty in the links themselves, cannot be patentable. It is nothing more than the exercise of ordinary mechanical skill. If in one of the complainants' chains, after the links had been joined, a person should solder the spirals together or to the closed rings, it could hardly be maintained that a new chain had been invented. Or if, when thus soldered, the soldering should be removed, the change would not deserve to be regarded as a product of invention. Yet this is substantially what the patentee has done. His chain may have been an improvement on the chains that preceded it. In some particulars it, doubtless, was. It left the [118] elasticity of the spiral gold tubing more free by releasing the link from the attachment of the soldering, and it enabled the chain to be freely taken in pieces without injury to its structure. But all improvement is not invention, and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates.

In this case neither the tubing, nor the open spiral link formed of tubing, nor the process of making either the open or the closed link, nor the junction of closed and open spiral links in a chain, was invented by the patentee. We are, therefore, constrained to hold that the first claim of the patent, even if not void for want of novelty, is void for want of patentability.

The decree of the Circuit Court is, therefore, reversed, and it is ordered that the bill be dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup.Court, U.S.

Cited—104 U. S., 492; 105 U. S., 572; 110 U. S., 494.

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[118] JAMES N. SCHOONMAKER ET AL., *Plffs. in Errr.*,
v.
JOHN GILMORE.

SAMUEL S. BROWN ET AL., *Plffs in Errr.*,
v.
JOHN N. DAVIDSON ET AL., Partners as R. HENDERSON & COMPANY, For use of ROBERT HENDERSON AND SAMUEL WATSON, Admrs. of R. HENDERSON, Deceased.

(See S. C., 12 Otto, 118, 119.)

Jurisdiction of courts of admiralty.

Courts of the United States, as courts of admiralty do not have exclusive jurisdiction of suits *in personam* growing out of collisions between vessels while navigating the Ohio River.

[Nos. 878, 879.]

Submitted Oct. 25, 1880, Decided Nov. 8, 1880.

See 12 OTTO.

IN ERROR to the Supreme Court of Pennsylvania. On motions to dismiss, with which are united motions to affirm.

The case is stated by the court.

Messrs. **Geo. Shiras, Jr.**, *John Barton*, and **Alex. M. Watson**, for defendants in error.

Mr. **Hill Burgwin**, for plaintiffs in error.

Mr. Chief Justice **Waite** delivered the opin [119] ion of the court:

The single question in each of these cases is, whether the Courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. This is a federal question, and gives us jurisdiction; but as it was decided substantially in *The Moses Taylor*, 4 Wall., 411 [71 U. S., XVIII., 397]; *The Hine* v. *Trevor*, 4 Wall., 555 [71 U. S., XVIII., 451]; *The Belfast*, 7 Wall., 624 [74 U. S., XIX., 266]; *Leon* v. *Galceran*, 11 Wall., 185 [78 U. S., XX., 74]; and *Steamboat Co.* v. *Chase*, 16 Wall., 522 [83 U. S., XXI., 369]; we cannot consider it any longer open to argument. The Judiciary Act of 1789, 1 Stat. at L., 73, sec. 9, reproduced in sec. 563, R. S., par. 8, which confers admiralty jurisdiction on the Courts of the United States, expressly saves to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea, cannot be denied.

The motion to dismiss is overruled, and that to affirm granted.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

GEORGE HAYES, *Plff. in Errr.*, [121]
v.
VALENTINE FISCHER.

(See S. C., 12 Otto, 121, 122.)

Equity suits—proceeding for contempt.

1. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree.
2. A proceeding below, for contempt, independent of and separate from the original suit, cannot be re-examined here, either by writ of error or appeal.

[No. 1019.]

Submitted Oct. 22, 1880. Decided Nov. 8, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss.

The case is stated by the court.

Mr. **Charles F. Blake**, for defendant in error, for motion.

Mr. **J. H. Whitelegge**, for plaintiff in error.

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

There is no review of decree punishing for contempt; limits to rule. See *note* to New Orleans v. N. Y. Mail Steamship Co., 87 U. S., XXII., 354.

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[122] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

Fischer, the defendant in error, brought a suit in equity in the Circuit Court of the United States for the Southern District of New York, to restrain Hayes, the plaintiff in error, from using a certain patented device. In this suit an interlocutory injunction was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he pay the clerk $1,389.99 as a fine, and that he stand committed until the order was obeyed. To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss, on the ground that such proceedings in the circuit court cannot be re-examined here.

If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat., 38, and the rule then established was followed as late as *New Orleans* v. *Steamship Co.*, 20 Wall., 387 [87 U. S., XXII., 354].

It follows that we have no jurisdiction *and the motion to dismiss is, consequently granted.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Cited—19 Blatchf., 188.

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[135] NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE OF MISSISSIPPI.

(See S. C., 12 Otto, 135-144.)

Removal of cause—case removable—jurisdiction of State Court—effect of petition for removal.

1. Where a suit in a State Court is one which the defendant is entitled, under the statute, to have removed into the Circuit Court of the United States, it is the duty of the State Court to accept the petition and bond for removal, and proceed no further in the case.

2. A suit in a State Court, brought by the State against a railroad company to procure the removal of a railroad bridge across a navigable river, in which the defendant in support of its right to construct and mantain the bridge across such River, invokes the protection of an Act of Congress, is a case arising under the laws of the United States, and is removable from the State into the Federal Court.

3. The State Court erred in not accepting the petition and bond for removal, and in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal.

4. A defendant does not lose his right to raise this question of jurisdiction by contesting the case, upon the merits, in the State Courts, after his application for the removal of the suit had been disregarded.

[No. 32.]

Argued Oct. 19, 20, 1880. Decided Nov. 8, 1880.

IN ERROR to the Supreme Court of the State of Mississippi.

The case is fully stated by the court.

Messrs. J. A. Campbell and **T. L. Bayne**, for plaintiff in error.

Messrs. **A. M. Clayton** and *Van H. Manning*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, defendant below, filed a petition in the State Court of original jurisdiction for the removal of this suit into the Circuit Court of the United States for the Southern District of Mississippi. The petition was accompanied by a bond, with good and sufficient surety, conditioned as required by the statute. The application for removal was denied, and the court, against the protest of the Company, proceeded with the trial of the suit. A demurrer to the answer was sustained, and judgment was entered in behalf of the State. Upon a writ of error, sued out by the Company, the Supreme Court of Mississippi gave its sanction to the action of the inferior court upon the petition for removal, and affirmed, in all respects, its judgment upon the merits. [136]

The first assignment of error relates to the action of the State Court in proceeding with the trial after the filing of the petition and bond for removal of the suit. If the suit was one which the Company was entitled, under the statute, to have removed into the Circuit Court of the United States, then all that occurred in the State Court, after the filing of the petition and bond, was in the face of the Act of Congress. *Gordon* v. *Longest*, 16 Pet., 97; *Kanouse* v. *Martin*, 15 How., 198; *Ins. Co.* v. *Dunn*, 19 Wall., 214 [86 U. S., XXII., 68]. Its duty, by the express command of the statute, was, the suit being removable, to accept the petition and bond and proceed no further.

Among the cases to which the National Constitution extends the judicial power of the United States, are those arising under the Constitution or laws of the Union. The 1st section of the Act of March 3, 1875, 18 Stat. at L., 470, determining the jurisdiction of Circuit Courts of the United States, and regulating the removal of causes from State Courts, invests such Circuit Courts with original jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and "arising under the Constitution or laws of the United States." Under the 2d section of that Act, either party to a suit, of the character just described, may remove it into the Circuit Court of the United States for the proper district. The only inquiry, therefore, upon this branch of the case is, whether the present suit, looking to its nature and object as disclosed by the record, is, in the sense of the Constitution, or within the meaning of the Act of 1875, one "arising under the Constitution or laws of the United States."

The action was commenced by a petition filed, in behalf of the State, against the New Orleans, Mobile and Chattanooga Railroad Company (now known as the New Orleans, Mobile and Texas Railroad Company), a Corporation created in the year 1866, under the laws of Alabama, and by an Act of the Legislature of

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Mississippi, passed February 7, 1867, recognized and approved as a body politic and corporate in that State, with authority to exercise therein the rights, powers, privileges and franchises [137] granted to it by the State of Alabama.

The object of the action was to obtain a peremptory writ of *mandamus*, requiring the Company to remove a stationary bridge which it had erected across Pearl River, on the line between Louisiana and Mississippi, and construct and maintain, in the central portion of the channel of that river, where the railroad crosses, a draw-bridge which, when open, will give a clear space for the passage of vessels, of not less than sixty feet in width, and provide, after its construction, for the opening of the draw-bridge, without unnecessary delay, for any and all vessels seeking to pass through it.

The claim of the State is:

1. That the construction and maintenance of a stationary bridge across Pearl River is in violation of the Company's charter, an obstruction to the navigation of the river, and a public nuisance, resulting in great and irreparable damage to the people of Mississippi;

2. That Pearl River, by the common law and the law of nations, is a navigable river, in which the tide ebbs and flows above said bridge, is navigable for steamboats for more than two hundred miles, and has been so navigated from time immemorial; that the river is the boundary between Mississippi and Louisiana, neither of those States having power to authorize any obstruction to its free navigation; that, by an Act of Congress, entitled "An Act to Enable the People of the Western Part of Mississippi Territory to Form a Constitution and State Government, and for the Admission of said State into the Union on an Equal Footing with the Original States," passed March 1, 1817, 3 Stat. at L., 348, it was, among other things, provided, "That the Mississippi River and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of said State as to other citizens of the United States;" that those provisions constituted a condition on which the State of Mississippi was admitted into the Union, and an engagement on the part of the United States that all the navigable rivers and waters emptying into the Gulf of Mexico should forever be free to all the inhabitants of the State of Mississippi; that Pearl River does lead and empty into the Gulf of Mexico; that the bridge is such an obstruction to the navigation of Pearl [138] River as to cause permanent injury, as well to the State of Mississippi and its inhabitants, as to the commerce of the United States and of the world, and, consequently, was in violation of the law.

The Company resists the application for a *mandamus* upon several grounds.

It affirms that the bridge in question had been constructed and is maintained in accordance with its charter and conformably to the power and authority conferred by the States of Alabama, Mississippi and Louisiana.

It further avers, in its answer, that the railroad is a great public highway through those States, connecting them with other portions of the United States; that Congress, in view of the magnitude and cost of the work, and to expedite its construction, by an Act entitled "An Act to Establish and Declare the Railroad and Bridges of the New Orleans, Mobile and Chattanooga Railroad, as Hereafter Constructed, a Post-road, and for Other Purposes," approved March 2, 1868, 15 Stat. at L., 38, authorized and empowered that Corporation to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said railroad, between New Orleans and Mobile, for the use of the Company and the passage of its engines, cars, trains of cars, mails, passengers and merchandise, and that the railroad and its bridges, when complete and in use, were to be held and deemed lawful structures and a post-road; that the Act of Congress required draw-bridges on the Pascagoula, the Bay of Beloxi, the Bay of St. Louis and the Great Rigolet, but none on Pearl River, power being reserved by Congress to amend or alter the Act so as to prevent or remove material obstructions; that the Company is authorized to maintain the bridge in question under that Act of Congress; that the same is a lawful structure and a post-road, which no court can, consistently with the Act of Congress, overturn or abate as illegal or as a nuisance.

On the day succeeding that on which its answer was filed, the Company presented the petition for removal, to which reference has already been made, accompanied by a bond in proper form. That petition sets out the nature and object of the action, and claims that the right to erect and to maintain the present bridge for the conveyance of the cars, trains, passen- [139] gers, mails and merchandise, vested in the Company, "On a contract with the State of Mississippi in the enactment aforesaid; that the State of Mississippi has no power to repudiate that contract or to impair its obligations; that it is a vested right resting on a contract and supported and sustained by the Constitution of the United States, and that this cause is one arising under the Constitution of the United States."

It then proceeds:

"And your petitioner further represents, that the bridge aforesaid, and its maintenance over the said river in the manner in which it exists, is authorized by the Act of Congress approved March 2, 1868, which authorized and empowered the said Company to construct, build and maintain bridges over and across the navigable waters of the United States on the route of the said railroad between Mobile and New Orleans, and that when constructed they should be recognized as lawful structures and a post-road, and were declared to be such, and the Congress reserved the power to alter the same when they become an obstruction to the navigable waters.

Your petitioner says, that the railroad and bridges are and have been for three or more years a post-road, over which the mails of the United States have been carried and are now being carried, and as the bridge referred to is a lawful structure under the laws of the United States, this suit impugns the rights, privileges and franchises granted by the Act of Congress aforesaid of the 2d of March, 1868."

From this analysis of the pleadings, and of the petition for removal, it will be observed that the contention of the State rests, in part, upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was

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admitted into the Union, and inconsistent with the engagement, on the part of the United States, as expressed in the Act of March 1, 1817. On the other hand, the Railroad Company, in support of its right to construct and maintain the present bridge across Pearl River, invokes the protection of the Act of Congress passed March 2, 1868. While the case raises questions which may involve the construction of state enactments and also, perhaps, general principles of law, not necessarily connected with any [140] federal question, the suit otherwise presents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an Act of Congress. If it be insisted that the claim of the State, as set out in its petition, might, possibly, be determined by reference alone to state enactments, and without any construction of the Act of 1817, the provisions of which are invoked by the State in support of its application for *mandamus*, the important and, so far as the defense is concerned, the fundamental question would still remain, as to the construction of the Act of Congress of March 2, 1868. That Act, the Company contends, protects the present stationary bridge against all interference whatever, upon the part either of the State or of the courts. In other words; should the court be of opinion that the law is for the State, if the rights of parties were tested simply by the Statutes of Alabama and Mississippi, it could not evade but must meet and determine the question, distinctly raised by the answer, as to the operation and effect of the Act of Congress of 1868.

Is it not, then, plainly a case which, in the sense of the Constitution, and of the Statute of 1875, *arises* under the laws of the United States?

If regard be had to the former adjudications of this court, this question must be answered in the affirmative.

It is settled law, as established by well considered decisions of this court, pronounced upon full argument and after mature deliberation, notably in *Cohens* v. *Virginia*, 6 Wheat., 264; *Osborn* v. *Bk.*, 9 Wheat., 738; *Mayor* v. *Cooper*, 6 Wall., 247 [73 U. S., XVIII., 851]; *Gold-Washing & W. Co.* v. *Keyes*, 96 U. S., 199 [XXIV., 656]; and *Tennessee* v. *Davis*, 100 U. S., 257 [XXV., 648]:

That, while the 11th Amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of [141] the United States against the claim or demand of the State;

That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either;

That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted;

That except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly;

That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when *a* question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

These propositions, now too firmly established to admit of or to require further discussion, embrace the present case, and show that, whether we look to the federal question raised by the State in its original petition, or to the federal question raised by the Company in its answer, the inferior State Court erred, as well in not accepting the petition and bond for the removal of the suit to the Circuit Court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal.

In view of our decisions in *Ins. Co.* v. *Dunn*, 19 Wall., 214 [86 U. S., XXII., 68], in *Removal Cases*, 100 U. S., 457 [XXV., 593], and in other cases, it is scarcely necessary to say, that the Railroad Company did not lose its right to raise this question of jurisdiction by contesting the case, upon the merits, in the State Courts after its application for the removal of the suit had [142] been disregarded. It remained in the State Court under protest as to the right of that court to proceed further in the suit, and there is nothing in the record to show that it waived its right to have the case removed to the Federal Court, and consented to proceed in the State Court, as if there had been no petition and bond for the removal.

The judgment of the Supreme Court of Mississippi is, therefore reversed, and the cause remanded for such orders as may be consistent with this opinion, and with directions that the court of original jurisdiction be required to set aside all judgments and orders made in this suit after the presentation of the petition and bond for its removal into the Circuit Court of the United States, and proceed no further in the suit.

Mr. Justice **Miller**, dissenting.

I dissent from the opinion of the court in this case. It is always a matter of delicacy when a cause of which a court has undoubted jurisdiction is transferred, by the election of one party to the suit, to another court of concurrent jurisdiction. It is especially so when the transfer is to be made from a State Court to a Federal Court, without regard to the consent of the State Court, and against the objection of the other party to the action.

In such a case the right of removal should be made very clear on the application for that purpose. And when the application has been

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refused, and the State Courts, up to the highest to which it can be carried, have considered and decided it upon its merits, the judgment rendered in that final decision should not be treated as a nullity, unless the case upon which the want of jurisdiction of these courts depends is made very plain indeed.

I do not think such a case is presented here.

The removal is based upon the 2d section of the Act of Congress of March 3, 1875, 18 Stat. at L., 470, "To determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, [143] and for other purposes." This enacts "That every suit of a civil nature, at law or in equity, now pending or hereafter brought in a State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and *arising under the Constitution or laws of the United States* or treaties made or which shall be made under their authority," may be removed by either party, on proper showing, to the Circuit Court of the United States. The decision of the court is that this is a suit arising under a law of the United States, to wit: the Act of Congress concerning the bridge of which plaintiff complains. I make no captious criticism on the fact that the opinion of the court is mainly directed to the constitutional provision extending the judicial power of the United States to *cases* arising under that instrument and the laws and treaties made under its authority, while the word used in the statute is *suits*. The language of the Constitution may be broad enough to sustain a statute which authorizes the removal of a cause at any stage when a *case* is made, which case, taken as a whole, requires a judgment based upon the Constitution, a law or a treaty of the United States.

The Act of 1875 is the first which ever attempted to give a right of removal on such ground, and it limits that right to *suits arising under* the Constitution, laws, or treaties of the United States. It does not give the right of removal where the *defense* arises under such a law, unless "suit" necessarily includes the defense which may be made thereto. The lexicons do not so define the word "suit." Bouvier's Law Dictionary says that in the practice of the law "suit" means "an action." Can a defense to an action be called the action? No more can the defense to a suit be called the suit. Webster says "suit" is the act of suing; the process by which one gains an end or object, and as a word in the law, he says it is "an attempt to gain an end by legal process;" "a legal application to a court for justice;" "an action or process for the recovery of a right of action." Does this mean the defense to an alleged right of action? Can it be held to mean the attempt to defeat an action? Worcester defines it thus: "In modern [144] law, the prosecution of some claim or demand in a court of justice; judicial prosecution;" and, perhaps, this is as good a definition of the word, as used in reference to legal proceedings, as any that can be framed, and it is peculiarly applicable to the use of the word in the Act of 1875.

In the case of *Weston* v. *Charleston*, 2 Pet., 449, *Chief Justice* Marshall, in delivering the opinion of the court, conceding the term to be a very comprehensive one, says it applies "to any proceeding in a court of justice by which an individual *pursues that remedy* in a court of justice which the law affords him."

Taking the idea of a "suit" as thus defined, what is meant by the suit *arising* under a law of Congress? The obvious answer seems to be that the *cause of action is founded on* the Act of Congress; that the *remedy* sought is one *given* by an Act of Congress; that the *relief* which is prayed is a relief *dependent on* an Act of Congress; that the right to be enforced in the suit is a right which rests upon an Act of Congress. In all this I see no place for holding that a *defense* to a suit not so founded on an Act of Congress, or a plea which the defendant may interpose to any ordinary action, though that plea be founded on an Act of Congress, is a suit arising under an Act of Congress.

Looking also to the reasons which may have influenced Congress, it may well be supposed that while it intended to allow the removal of a suit into the Courts of the United States, where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the Act of Congress only came in question incidentally as part (it might be a very small part) of defendant's plea in avoidance. In support of this view, it may be added that a defendant in such case is not without remedy in a Federal Court; for if he has pleaded and relied on such defense in the State Court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here, by the highest court of the United States.

Mr. Justice **Field** did not hear the argument of this case and, therefore, did not participate in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 492; 106 U. S., 123; 111 U. S., 137, 492; 112 U. S., 16; 3 McCrary 594; 7 Sawy., 521; 51 Wis., 588; 9 N. W. Rep., 662.

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[187]

COUNTY OF GREENE, ALABAMA, *Plf. in Err.*,
v.
RICHARD C. DANIEL.

COUNTY OF PICKENS, ALABAMA, *Plf. in Err.*,
v.
RICHARD C. DANIEL.

(See S. C., 12 Otto, 187-196.)

Coupons of county bonds—insufficient defense.

1. In an action upon coupons, of bonds of a county in Alabama, the complaint need not aver that the coupons sued upon were presented to the Court of County Commissioners for allowance before the suit was brought.

2. The bonds from which the coupons were cut were not void because they were not of the same

NOTE.—Mandamus *to compel city, town or county to levy tax to pay bonds or interest on bonds.* See note to The Mayor v. U. S., 76 U. S., XIX., 704.

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denomination as those specified in the proposition of the railroad company for subscription, submitted to and voted upon by the county.

3. Bonds issued under the authority of a popular election cannot be set aside simply because all that may have been said by interested parties, in public speeches during the canvass which preceded the election, does not turn out to be in every respect true.

[Nos. 53, 54.]

Submitted Oct. 29, 1880. Decided Nov. 8, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama.

These actions were brought in the court below, by the defendant in error against the respective plaintiffs in error, upon certain coupons cut from bonds alleged to have been issued by the defendant counties.

The case is further stated in the opinion.

Messrs. **John T. Morgan,** *Conway Robinson* and *R. H. Smith,* for plaintiffs in error.

Mr. **S. F. Rice,** for defendant in error.

[192] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The principal questions in these cases are:

1. Whether the demurrer to the complaint should have been sustained because it was not averred specially that the coupons sued on were presented to the Court of County Commissioners for allowance before the suit was brought; and,

2. Whether the bonds from which the coupons were cut were void because they were not of the same denomination as those specified in the proposition of the railroad company for subscription, submitted to and voted on by the County.

As to the first question: by the Code of Alabama, section 826 (907), it is provided that the Court of County Commissioners must, in term time, audit all claims against their respective counties; that every claim as allowed must be registered in a book kept for that purpose, and that the Judge of Probate, who is made by law the principal judge of the court, Code, section 739 (825), shall give the claimant a warrant on the Treasury for the amount allowed. This warrant it is made the duty of the County Treasurer to pay on presentation, if he has funds in the treasury to meet it. Code, sec. 3395 (920). No claim can be passed upon or allowed by the court unless it is itemized and sworn to by the claimant, or some person in his behalf having knowledge of the facts. Code, sec. 827. All claims must be presented for allowance within twelve months after they accrue and become payable, or they will be barred, unless the claimant is a minor or lunatic. Sec. 832 (909). "No suit can be brought against a county until the claim or demand has been presented within the time limited by section 832 (909) to the Court of County Commissioners and either disallowed or reduced by such court, and refused by the party." Code, sec. 2903 (2537).

A county in Alabama is a body corporate, capable of suing and being sued. Code, sec. [193] 815 (897). In *Shinbone* v. *Randolph Co.*, 56 Ala., 183, which was a suit on coupons cut from railroad bonds, while it was held to have been definitely settled that an action at law did not lie against a county on a contract which had not been presented to the Commissioners' Court, and by that court disallowed in whole or in part, and that such presentment and disallowance must be averred in the complaint, it was, nevertheless, said, p. 185: "It may be the claims on which this action is founded are not required to be presented to the Commissioners' Court for allowance. The statute under which the bonds were issued * * * may fix definitely their validity and amount. If that be true—and as the case is not presented, it is not for us to determine whether it is or not—if the Commissioners' Court refuses to levy a tax for their payment, *mandamus* to compel them is the appropriate remedy for appellant." In *Comrs. Ct. of Limestone Co.* v. *Rather*, 48 Ala., 433, it was expressly decided that bonds issued in payment of a subscription to a railroad company, signed by a majority of the Court of County Commissioners in the presence of the Probate Judge, who certified to that fact, and for the payment of which it was made the duty of the Commissioners' Court to levy and assess a special tax each year, were not such claims as need be presented for allowance under this section of the Code. In the opinion, the court said, p. 446: "The Act authorizing their issuance renders it wholly unnecessary that they should be allowed by the Court of County Commissioners, and they are not required to be registered as claims of a different character, nor are they to be paid by warrants on the County Treasurer, but altogether in a different way."

The bonds in the present cases were issued under the Act to authorize the several counties, towns and cities of Alabama to subscribe to the stock of railroads, passed December 31, 1868. Pamph. Acts 1868, 514. This Act provided (sec. 1) that railroad companies might, in writing, propose to a county that it subscribe for an amount of the capital stock of the company, to be named in the proposal, at a certain price per share, and pay for it in such bonds of [194] the county "As should be set forth in said proposal." This proposal or application was (sec. 2) to be submitted to the Commissioners' Court of the County, and that court was authorized and required to order an election within sixty days, to enable the qualified electors of the County to determine whether the proposition should be accepted or rejected. At least (sec. 4) thirty days before the election the court was required to give notice of the "Terms and amount of the proposed subscription." The returns of the election were to be made to the Judge of Probate (sec. 5), whose duty it was to receive, count, estimate and publish the vote. If a majority (sec. 6) was found to be in favor of the subscription, the proposition was to be deemed to have been accepted, and the Court of County Commissioners was required to make the subscription voted in behalf of the County for the amount set forth in the proposal, and deliver the railroad company, in payment of the subscription, bonds of the County, having not less than ten nor more than twenty years to run, with interest coupons attached for semi-annual interest, payable at such times and places as might be agreed upon between the company and the Judge of Probate. By sections 7 and 8 it was made the duty of the Commissioners' Court to levy and see to the collection of such tax, not exceeding one per cent per annum on the taxable value of the property in the County, as should be necessary to meet the interest as it

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fell due; and by section 10 the coupons past due were receivable at par in payment of this tax.

The bonds and coupons in these cases were signed by the Judge of Probate of the County as the presiding officer of the Commissioners' Court; and it seems to us that they are, in legal effect, themselves warrants on the treasurer, given by the Judge of Probate after an allowance by the court of the claim of the railroad company for the payment of the county subscription, in accordance with the terms of the accepted proposal. The claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day. The treasurer could pay them when due on presentation without further action of the court, if he had funds in his hands applicable to that purpose. In his hands they [195] would be good vouchers for money disbursed from that fund. The provision that the coupons should be received in payment of taxes levied to meet them, is entirely inconsistent with any idea of an unliquidated claim which required further auditing.

In the State Courts, under the rule as stated in *Shinbone* v. *Randolph Co.* [*supra*], and other cases, a *mandamus* would lie without reducing the coupons to judgment, to compel the Commissioners' Court to levy and collect the taxes necessary to pay what was due. The rule is different, however, in the courts of the United States, where such a writ can only be granted in aid of an existing jurisdiction. There a judgment at law on the coupons is necessary to support such a writ. The *mandamus* is in the nature of an execution to carry the judgment into effect. *Bath Co.* v. *Amy*, 13 Wall., 244 [80 U. S., XX., 539]; *Graham* v. *Norton*, 15 Wall., 427 [82 U. S., XXI., 177]. A suit, therefore, to get judgment on the bonds or coupons is part of the necessary machinery which the Courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not to be ousted simply because in the courts of the State a remedy may be afforded in another way.

As to the second question. Section 11 of the Act under which the bonds were issued provides "That the bonds * * * shall be of such denomination as the Court of County Commissioners * * * and said railroad company may agree upon, but not to be for less than one hundred dollars, nor more than one thousand dollars."

In the proposition of the company to Greene County, it was suggested that the bonds to be issued in payment of the subscription should be "In the sum of one and five hundred thousand dollars each." In the records of the court ordering the election, the proposition, as recorded, is that the bonds be "In the sum of one thousand five hundred dollars each." The final action of the court was to issue bonds of five hundred dollars.

In the *Pickens County* case the proposition was that the bonds be in the sum of $1,000 each; but after the election, with the consent of the [196] company, it was ordered by the court that one half the amount should be in the sum of $250, and the other half $1,000 each; and the bonds actually put out were of these denominations.

As to the *Greene County* case, it is apparent that there was a clerical mistake, either in the proposal or the record, as to the description of the bonds to be issued, and it is easy to see that the intention was to have bonds of a thousand dollars and five hundred dollars each; but in the *Pickens County* case the proposition was distinctly that they should be for $1,000. This, however, we consider unimportant, for by section 11 it was expressly provided that the bonds should be of such denomination as the Commissioners' Court and the company should agree on. From this it is clear that the parties were not bound in this particular by the sums specified in the proposal. They were limited by the proposition as accepted in respect to the total amount of the issue, but not the denomination. The bonds as issued were of such denominations as the law allowed the court and the company to agree on, and that, in our opinion, is enough.

The only other assignments of error relate to the sufficiency of the second and third pleas. As to these, it is sufficient to say, that we are entirely satisfied with the rulings below. Bonds issued under the authority of a popular election cannot be set aside simply because all that may have been said by interested parties, in public speeches during the canvass which preceded the election, does not turn out to be in every respect true.

The judgment in each of the cases is affirmed.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 242.

PEOPLE'S BANK OF BELLEVILLE, *Plf.*, [256]
v.
EDWARD F. WINSLOW AND JAMES H. WILSON, Late Partners as WINSLOW & WILSON, AND PHILO C. CALHOUN AND GEORGE OPDYKE, Interpleaders.

(See S. C., "*People's Bank* v. *Calhoun*" 12 Otto, 256-263.)

Jurisdiction, by consent—removal of cause—deed as evidence—want of record.

1. The mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.
2. Where a foreclosure suit was instituted, and a receiver of property appointed, in the Circuit Court of the United States, and proceedings to attach the same property were afterwards taken in a state court, it is proper to remove such proceedings into the Circuit Court by consent.
3. A deed made by two persons, but properly acknowledged as to only one of them, is admissible in evidence as to that one.
4. A deed which professed to convey the property in controversy by the parties against whom the attachment ran, two months before, but not recorded until after the writ was issued, is admissible in evidence as to the ownership of the property at the date of the levy of the writ.

[No. 36.]

Argued Oct. 21, 1880. Decided Nov. 8, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is fully stated by the court.

Messrs. **Charles W. Thomas** and *John W. Noble*, for plaintiff in error.

Messrs. **B. H. Bristow** and *W. S. Opdyke*, for defendants in error.

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Mr. Justice **Miller** delivered the opinion of the court:

The plaintiff in error brought its suit in the Circuit Court of the County of St. Clair, in the State of Illinois, against Edward F. Winslow and James H. Wilson, on two promissory notes, on which they alleged that the sum of $40,733.36 was due. At the commencement of the suit, the plaintiff obtained a writ of attachment, which was levied on the right of way, iron track, etc., of the road known as the Belleville and O'Fallon Railroad, and its appurtenances, situated in St. Clair County. At the first Term of the court, a stipulation between the parties was signed and presented to the court for the removal of the case into the proper Circuit Court of the United States.

The case was, accordingly, removed and prosecuted to final judgment in the Circuit Court for the Southern District of Illinois, without objection by either party. After the record was filed in the Federal Court, Philo C. Calhoun and George Opdyke, defendants in error here, presented a petition of interpleader under a statute of Illinois which permitted such a proceeding in attachment cases, alleging that Winslow and Wilson were not the owners of the railroad on which the writ had been levied, and that the petitioners were the owners, and praying that the attachment be dissolved. No defense was made by Winslow and Wilson, and the court rendered judgment against them for the sum due on the notes, and in the record of the judgment was incorporated an order of sale of the attached property. The issue made by the petition of Calhoun and Opdyke was tried some time after this, and judgment rendered in favor of the latter, with an order dismissing or dissolving the attachment. This latter issue, though triable by jury, was submitted to the court by an agreement waiving the jury.

[258] A bill of exceptions, of sixty pages of the printed record, gives the history of this trial, and concludes as follows:

"And now the court found the said property in said interplea described to be the property of said interpleaders, and that it was not subject to the said attachment, and was not the property of Edward F. Winslow and James H. Wilson at the date of levy of said attachment, but was the property of the interpleaders; to which ruling and decision of the court the plaintiff, by its counsel, at the time excepted.

And the court ordered said attachment to be dismissed, and to this ruling and decision of the court, plaintiff, by its counsel, at the time excepted, and inasmuch as the matters and things above set forth are not of themselves matters of record in said cause, the plaintiff presents this its bill of exceptions, which it prays may be signed and sealed and made part of the record, which is done. S. H. TREAT. [SEAL.]"

[260] It has long been the established doctrine of this court, that no such exceptions as these to the judgment of the court on the facts submitted to it can be inquired of this court under the provisions of the Act of Congress providing for the mode and the effect of submitting cases triable by jury to the court alone.

There are, however, one or two exceptions to the admission of evidence on the trial which can be and have been assigned for error. And a still more important question is raised by the record outside the bill of exceptions, which demands our attention. The latter relates to the jurisdiction of the case in the United States Court as supposed to be acquired by the removal proceedings in the State Court. As we have already said, this was founded on the written consent of the Bank and of Winslow and Wilson, who were the only parties to the suit.

It needs no citation of authorities to show that the mere consent of parties cannot confer upon [261] the courts of the United States the jurisdiction to hear and decide their cases. If this were once conceded, the Federal Courts would become the common resort of persons who have no right, either under the Constitution of the United States nor by the laws creating them, to litigate in those courts.

It is not necessary for us to decide whether a paper might not be drawn up and signed by the parties, which showed on its face that either by reason of the citizenship of the parties or the subject-matter of the litigation, the case was properly cognizable in a Federal Court, and that that court could, on the assent of the parties, take jurisdiction either by way of original proceeding in such court or by removal from a State Court.

No such case is presented by the agreement for removal found in this record. Nor does it anywhere appear in this record that the parties had the citizenship or alienage which would authorize the Federal Court to entertain jurisdiction of the case.

The record of the case, however, shows that, prior to the begining of plaintiff's attachment suit, there was pending in the Circuit Court of the United States a mortgage foreclosure suit in which Calhoun and Opdyke were plaintiffs, and in which they had procured the appointment of a receiver who held possession of the railroad under the order of that court at the time the plaintiff's writ of attachment was levied on it. It is further shown that Calhoun and Opdyke made application to the court sitting in chancery to enjoin the plaintiff from proceeding in the State Court with his attachment. No disposition seems to have been made of this application, and it is a reasonable inference that the removal of the attachment suit from the State Court into the court which had possession, by its officer, of the property attached, was made to avoid the conflict which might arise if the cases proceeded to final judgment in courts of different jurisdictions.

We think this was not only permissible, but was the proper course to be pursued in such case. The jurisdiction of the United States Court does not here depend on the citizenship of the parties, but on the subject-matter of the litigation. That was in the actual possession of [262] that court when the State Court attempted to levy its writ of attachment on the property. It was for the court having such possession to determine how far it would permit any other court to interfere with that possession, and what effect it would give to the attempt of another court to seize the property so under its control. Courts of equity have had no hesitation in punishing as contempts of their authority persons who bring suits against corporations in the hands of their receivers, and it is the constant practice to ask the permission of the court to institute suits against its receiver when they concern property in his hands.

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The plaintiff was attempting in the State Court to enforce a lien on the railroad by judicial sale, which was a rival and conflicting lien to that of Calhoun and Opdyke, who were proceeding in the Federal Court to sell the same property under their lien. The latter court had not only obtained jurisdiction of the question of lien prior to the initiation of plaintiff's suit, but it had taken possession of the property by its receiver. It had thus drawn to itself the subject-matter of the litigation and the right to decide upon the conflicting claims to the possession and control of the road.

These principles are not new in this court. They will be found to be sustained by the cases of *Minnesota Co.* v. *St. Paul Co.*, 2 Wall., 609 [69 U. S., XVII., 886]; *Watson* v. *Jones*, 13 Wall., 679 [80 U. S., XX., 666]; *Buck* v. *Colbath*, 3 Wall., 334 [70 U. S., XVIII., 257]; and *Freeman* v. *Howe*, 24 How., 450 [65 U. S., XVI., 749].

In consenting, therefore, to the voluntary transfer of the litigation from the State Court into the Federal Court, the parties did no more than what they could have been compelled to do by the injunction of the latter, and what would have been done by such compulsory order if they had not submitted to it by agreement. We do not think that there was error in the court entertaining jurisdiction of the plea of interpleader of the defendants in error. *Wiswall* v. *Sampson*, 14 How., 52.

In the progress of the trial the interveners offered in evidence a deed of trust made by Winslow and Wilson on the 1th day of January, 1876, conveying the railroad in question to Calhoun and Opdyke. Exception was taken to the admission of this deed because the certificate of acknowledgment did not state that the grantors were personally known to the officer taking it, and because the deed did not tend to prove the issue made.

[263] As one of the certificates does state that Wilson and his wife were personally known to the officer, the objection to its *admissibility* as to these grantors was clearly unfounded in fact. The effect of the deed was for the court to consider afterwards.

And as the deed professed to convey the property in controversy by the parties against whom the attachment ran, two months before the writ was issued, it is impossible to hold it to be irrelevant to an issue as to the ownership of the property at the date of the levy of the writ.

Similar objections were made to a deed made by the same grantors to the St. Louis and Southeastern Railway Company, of the 5th day of January, 1876, to which the same answers apply.

What effect should be given to the fact that these deeds were not recorded until after the levy of plaintiff's attachment we need not inquire, for that proposition does not go to the admissibility of the deed in evidence, and its decision depends upon other matters, both of law and evidence, as to which no question is raised by this record.

These are all the assignments of errors requiring notice at our hands, and in these we find none.

The judgment of the Circuit Court is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 304.

See 12 OTTO.

BARNEY TIERNAN AND PATRICK TIERNAN, Partners, as B. & P. TIERNAN ET AL., *Plffs. in Err.*, [123]

v.

SELIM RINKER, as COUNTY TREASURER OF THE COUNTY OF GALVESTON, TEXAS.

(See S. C., 12 Otto, 123-128.)

Texas statute—tax on beer and wines.

1. The Statute of Texas of June 3, 1873, entitled "An Act Regulating Taxation," is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors.

2. A tax cannot be exacted for the sale of beer or wines when of foreign manufacture, if not exacted for their sale when of home manufacture.

[No. 45.]

Submitted Oct. 27, 1880. Decided Nov. 15, 1880.

IN ERROR to the Supreme Court of the State of Texas.

The case is fully stated by the court.

Messrs. **A. H. Willie** and *James Lowndes*, for plaintiffs in error.

No counsel appeared for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

A Statute of Texas, regulating taxation, passed in June, 1873, in its 3d section enacts: "That there shall be levied on and collected from every person, firm, or association of persons, pursuing any of the following named occupations, an annual tax, as follows: for selling spirituous, vinous, malt and other intoxicating liquors, in quantities less than one quart, $200; in quantities of a quart and less than ten gallons, $100; *Provided*, That this section shall not be so construed as to include any wines or beer manufactured in this State, or when sold by druggists for medicinal purposes."

In the succeeding section the statute authorizes the county courts of the several counties of the State to levy taxes upon the same parties equal to one half the amount of the state tax.

In pursuance of this authority, the County Court of Galveston County, in March, 1876, levied a tax upon the parties engaged in the occupations mentioned in the 2d section, equal to one half the tax levied by the State.

The petitioners in the court below, the plaintiffs in error here, are engaged in the County of Galveston in the occupation of "selling spirituous, vinous, malt and other intoxicating liquors," some of them in quantities less than one quart, and others in quantities of one quart and less than ten gallons, and the wines and beers which they sell are not of the manufacture of the State. They, therefore, seek to enjoin the enforcement of the tax against them, on the alleged ground that the statute is invalid in that it discriminates in favor of wines and beer manufactured in the State against those which are manufactured elsewhere, and they commenced the present suit for that purpose. The District Court of the State sustained a demurrer to their petition and dismissed the case. The Supreme Court of the State affirmed the decision, and hence the appeal to this court.

The petitioners rely upon the ruling of this [125] court in the case of *Welton* v. *Missouri* [91 U. S., 275, XXIII., 347] to sustain their position. There the State had exacted the payment of a

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license tax from traveling peddlers who dealt in the sale of goods, wares and merchandise which were not the growth, product or manufacture of the State, and required no such license tax from similar traders selling goods which were the growth, product or manufacture of the State. And this court held, following in that respect the ruling in *Brown* v. *Maryland*, 12 Wheat., 419, that the tax exacted from dealers in goods before they could be sold was, in effect, a tax upon the goods themselves, and that the legislation which [126] thus discriminated against the products of other States in the conditions upon which they could be sold by a certain class of dealers, was in conflict with the commercial clause of the Constitution.

In deciding the case, the court observed that the power conferred by this clause to regulate commerce with foreign nations and among the several States, is without limitation; and that to regulate commerce is to prescribe the conditions upon which it shall be conducted; to determine how far it shall be free from restrictions; how far it shall be subjected to duties and imposts; and how far it shall be prohibited; that when the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of state authority; that the portion of commerce with foreign countries or between the States, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation; that the object of vesting this power in the General Government was to insure this uniformity against discriminating state legislation; and that to that end this power must cover the property which is the subject of trade from hostile or interfering legislation until it has become a part of the general property of the country and subject to similar protection, and to no greater burdens. If, before that time, the property can become subject to any restrictions by state legislation, the object of vesting the control in Congress may be defeated. If the State can exact a license tax from one class of traders for the sale of goods which are the growth, product or manufacture of other States, it can exact the license from all traders in such goods, and the amount of the tax will rest in its discretion. "Imposts," the court said, "operating as an absolute exclusion of the goods, would be possible, and all the evils of discriminating state legislation favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of [127] some of the States." The court, therefore, held that the commercial power of the Federal Government over a commodity continued until the commodity had ceased to be the subject of discriminating legislation in any State by reason of its foreign character, and that this power protects it after it has entered the State, from any burdens imposed by reason of its foreign origin. The court also held that the inaction of Congress to prescribe any specific rules to govern interstate commerce, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled, and that this policy would be defeated by discriminating legislation like that of Missouri.

The doctrine of this case has never been questioned; it has been uniformly recognized and approved, and expresses now the settled judgment of the court.

According to it, the Statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors. A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the Act, and on that account challenge its validity, under the decision in question; but if engaged in the sale of other liquors than beer or wines, he cannot complain of the state tax on that ground. The statute makes no discrimination in favor of other liquors of home manufacture. Whilst it groups the sale of several kinds of liquors as one occupation, it evidently intends that the occupation which consists in the sale of any one of the several liquors named, in the quantities mentioned, shall be subject to taxation, as though it read, "For selling spirituous, or vinous or malt, or other intoxicating liquors." It does not require, to justify the tax, that a party shall be engaged in the sale of all the liquors mentioned, as well as other liquors. This being the true construction of the Act, there can be no objection to its enforcement where the tax is levied for occupations for the sale of other liquors [128] than wines and beers. In the present case the petitioners describe themselves as engaged in the occupation of selling spirituous, vinous, malt and other intoxicating liquors; that is, in all the liquors mentioned and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and whiskys and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wines and beer.

We see, therefore, no error in the ruling of the Supreme Court of Texas *and its judgment is, accordingly, affirmed.*

True copy. Test:
James H. McKenney. Clerk, Sup. Court, U. S.

HOSEA BALL ET AL., *Appts.*, [128]

v.

JUSTIN LANGLES AND N. A. BAUMGARDEN, Composing the Firm of BAUMGARDEN & LANGLES.

(See S. C., 12 Otto, 128-132.)

Re-issued Letters Patent.

The Commissioner of Patents has no authority to grant re-issued letters patent for an invention different from that for which the patentee first applied, much broader and containing new matter. They are void.

[No. 29.]

Argued March 29, 1880, Decided Nov. 15, 1880.

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APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. **Durant** *&* *Hornor*, for appellants.

Messrs. Conway Robinson and **Leigh Robinson** for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

The bill charges an infringement of re-issued letters patent for an alleged new and useful improvement in ovens, granted to Hosea Ball on the 14th day of June, 1870. The original patent was granted to Ball on the 25th day of September, 1856, for a period of fourteen years from that date. On the 12th of October, 1869, this original was surrendered, and a re-issue was granted. A second re-issue was granted on [129] the 14th of June, 1870, numbered 4026. Subsequently an extension of the patent was granted for seven years, from September 23, 1870. It is upon the second re-issue, No. 4026, thus extended, that this suit is founded. The charge of the bill is, that the defendants have constructed such an oven as that patented, with intent to use it. The circuit court dismissed the bill, and from that decree the complainants have appealed.

The first question now to be considered under the pleadings and evidence is, whether the re-issued patent, No. 4026, is valid. One of the defenses set up by the answer is, that the re-issue is not for the same invention as that described, claimed and shown in the original letters, and it is averred that the surrender of those letters and the first re-issue were for the purpose of introducing new matter not shown, suggested or indicated in the specification, drawings or model filed with the original application, and also for the purpose of obtaining a claim broader than the invention, and broad enough to cover the invention of subsequent inventors and patentees. If these averments of the answer are well founded, the re-issue is void and it will be unnecessary to consider the other defenses set up.

When the re-issues of 1869 and 1870 were granted, the Commissioner of Patents had authority, under the Acts of Congress, to grant re-issues only in certain specified cases. These were whenever a patent was inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee's claiming as his own invention or discovery more than he had a right to claim as new, if the error had arisen by inadvertence, accident or mistake, without any fraudulent or deceptive intention. The commissioner was invested with authority to determine whether the surrendered patent was valid by reason of a defective or insufficient specification, or because the patentee had claimed more than he had a right to claim as new; and if he found such to be the case, and found also that the error had been due to inadvertence, accident or mistake, without fraud, his decision was conclusive and not subject to review by the courts. But the law did not confer upon him jurisdiction to grant a re-[130] issue embracing new matter, or a broader invention than what was revealed by his original specification or drawings or models, except in some cases where there was neither model nor drawing. A re-issue for anything more is, therefore, inoperative and void. Accordingly, this court has repeatedly held that if, on comparing a re-issue with its original, the former appears on its face to be for a different invention from that described or indicated in the latter, it must be declared invalid. *Seymour* v. *Osborne*, 11 Wall., 516, 544 [78 U. S., XX., 33, 38]; *Russell* v. *Dodge*, 93 U. S., 460 [XXIII., 973].

In the original patent, Ball described his invention as consisting of an oven with a series of bread receivers swung between the ends of a rod hung in an interior perforated chamber, and capable of rotation on a horizontal shaft; an arrangement being provided for the self-delivery of the bread from the front of the oven, as afterwards set forth. Having thus described it generally, he proceeded to set forth in detail its construction, including the mode in which it was heated. This was done in part by explanation of his drawings. A fire-chamber was represented below the oven, with an ash-pit beneath; above the fire-chamber, but beneath the oven, a space through which the products of combustion passed on their way to the chimney, communicating by openings with the vertical side and back flues. These flues were exterior to the oven proper, but they communicated with the interior chamber or oven by perforations or openings. In this interior chamber the bread was placed on platforms hung on a revolving rod, and a mode of discharge and filling was described. The specification then stated that, "Owing to the perforated sides and back of the interior chamber, all parts of it receive the full heat of the oven, suitable dampers regulating the course of the products of combustion to the chimney." Such was the description, so far as it is necessary to state it. The single claim of the patent was as follows: "What I claim and desire to secure by letters patent, is the perforated interior chamber, in combination with the rotary reel and the swinging platform thereon, self-discharging, substantially as set forth."

It is evident from this description and from the attendant drawings, that the interior chamber or oven was so constructed, that what are called "the products of combustion" did not [131] and could not pass directly into it. The chamber was heated by those products passing through the exterior flues on the sides and back. There was no direct communication between the space above the fire-chamber and the interior of the oven, and no communication at all except indirectly through the perforations in the vertical flues on the sides and back of the oven. The interior chamber was heated for baking by heat radiating from its walls, except the comparatively small quantity which was permitted to enter through the small perforations in the flues. It is impossible to detect in the specification or drawings any intention or hint even of conducting the products of combustion (whatever may have been meant by the phrase, whether heat, gases or smoke, or all of them) directly into the baking chamber. Not a single ray of heat could enter the chamber, radiated from the fire. No passage was provided through the bottom, and even the perforations in the sides must have been ineffectual to divert the ascending heat from its upward course through the flues.

If, now, we turn to the re-issues of 1869 and

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1870, it cannot be doubted that while they claim what was claimed in the original, they claim much more. They claim an entirely different mode of heating the chamber, necessitating a radical difference in the construction of the oven.

The specification of the re-issue of 1870, as well as that of 1869, instead of representing the space above the fire-chamber as communicating with the interior chamber only indirectly through perforations in the vertical and back flues, described it as communicating "Directly or indirectly in any proper manner with the chamber in which the bread-receiving shelves or platforms are revolved." The patentee says: "The flues and openings to permit the passage or circulation of gases into or through the bread-chamber may be located and arranged in any effective manner." Thus the flues and openings may be made through the bottom of the oven and immediately over the fire, admitting direct radiation from the fire-chamber. And he claims
132] "One or more swinging bread-holders, suspended from the arms or end plates of a rotating rod in combination with a furnace so arranged and connected that the products of combustion will pass into or through the chamber within which the bread-holders move." Thus his re-issued patent has become one for an oven in which there may be no diaphragm or partition separating the compartment in which the dough is placed from the furnace by which it is heated, and which may be directly under it. Thus the oven is made a part of the passage-way for the products of combustion from the fire-chamber to the chimney. That this is a very different invention from anything exhibited in the original specification and drawings, is too obvious to need further elucidation. We cannot doubt that the purpose of the re-issues was not to cure defects in the original specification, or any deficiency in describing the invention, but to cover other devices which the patentee had not in mind when he first applied for his patent, and which may have subsequently come to his knowledge. Thirteen years after the patent was granted had elapsed before he applied for any re-issue. However this may be, the re-issued letters are so clearly for a different invention from that for which the patentee first applied, containing new matter and so much broader, that we are constrained to hold that the Commissioner of Patents had no authority to grant them, and, consequently, that they are void.

The complainants' bill was, therefore, rightly dismissed, and the decree of the court below is affirmed, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—102 U. S., 232; 103 U. S., 792; 105 U. S., 547; 106 U. S., 147, 428; 111 U. S., 103; 112 U. S., 669.

148] LAURENCE G. GRAHAM ET AL., *Appts.*,

v.

LA CROSSE AND MILWAUKEE RAILROAD COMPANY, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY ET AL.

(See S. C., 12 Otto, 148-161.)

Sales, when not fraudulent as to creditors—acquiescence—subsequent purchaser—sale by corporation.

1. If an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction.
2. Subsequent creditors have no better right than subsequent purchasers, to question a previous transaction, in which the debtor's property was obtained from him by fraud, in which he has acquiesced.
3. A subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee, to defeat his title.
4. The disposal by a corporation of any of its property cannot be questioned by subsequent creditors of the corporation, any more than a like disposal of property by an individual can be.

[No. 33.]

Argued Oct. 20, 21, 1880. Decided Nov. 15, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is fully stated by the court:

Messrs. **Matt. H. Carpenter** and *Newton S. Murphey*, for appellants:

The directors of a corporation are, in regard to the property of the corporation, trustees for the stockholders and creditors.

Jackson v. *Ludeling*, 21 Wall., 616, 624 (88 U. S., XXII., 492, 495); Field, Corp., sec. 172; *Cumberland Coal Co.* v. *Parish*, 42 Md., 598; *R. R. Co.* v. *Poor.*, 59 Me., 277; *Comrs.* v. *Reynolds*, 44 Ind., 509; *Bradley* v. *Farwell*, 1 Holmes, 433; *Bliss* v. *Matteson*, 45 N.Y., 22.

A director cannot be interested in a contract between the corporation and a third person.

Port v. *Russell*, 36 Ind., 60; *R. R. Co.* v. *Bowler*, 9 Bush., 468; *R. R. Co.* v. *Howard*, 7 Wall., 410, 411 (74 U. S., XIX., 120).

The stock and property of a corporation are funds for the benefit of creditors, and they may pursue its property, except into the hands of a *bona fide* purchaser.

Curran v. *Ark.*, 15 How., 307, 311.

The sale from the debtor Corporation to Nash, which creates the obstacle in the way of the complainants' satisfying their judgment out of this property, was fraudulent and void.

This transaction presents every feature and element, in greatly aggravated form, of the transaction which this court, in *Michoud* v. *Girod*, 4 How., 557, declared to be not voidable merely, but absolutely void.

It is also a case within the exception to the general rule, that a sale procured by fraud is voidable merely, as stated by this court in *Twin Lick Oil Co.* v. *Marbury*, 91 U. S., 589 (XXIII., 330), and is to be regarded as void *ab initio*.

There may be cases where such contracts would be void *ab initio*; as where an agent to sell buys for himself, and by his power of attorney conveys to himself that which he was authorized to sell.

The only question in this case which deserves serious consideration is, whether or not the complainants, who are the subsequent creditors, can maintain this suit.

The sale is void and not merely voidable. But if merely voidable, yet a subsequent judgment creditor may reach the property.

It is a general principle that a creditor may, in equity, reach every property right of his debtor.

Williams v. *Thorn*, 70 N. Y., 270.

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Even damages recovered for tort, to property subject to execution, may be reached by creditors' bill.

Hudson v. *Plets*, 11 Paige, 183.

Where a creditor sells the real estate of his debtor and becomes the purchaser, he may maintain a bill to set aside a prior usurious mortgage.

Dix v. *Van Wyck*, 2 Hill (N. Y.), 525.

Creditors, becoming purchasers of a debtor's lands, are not strangers, and may maintain any suit in regard to the lands that the debtor could have maintained.

Shaw v. *Dwight*, 27 N. Y., 245; *McMahon* v. *Allen*, 35 N. Y., 405.

A judgment creditor may maintain suit to remove cloud upon the title to lands, upon which his judgment would otherwise be a lien, even without issuing execution.

Shaw v. *Dwight* (*supra*).

But here execution has been issued and levied, and this suit is brought to remove cloud and obstruction to the sale, which, it is conceded by the other side, the debtor might have done.

Livingston v. *Iron Co.*, 9 Wend., 511; *Dickinson* v. *Burrell*, L. R., 1 Eq. Cas., 337; *McMahon* v. *Allen* (*supra*); *Baker* v. *Whiting*, 3 Sum., 475.

The other side will cite *Prosser* v. *Edmonds*, 1 Y, & C. Ex. Eq., 481; *Crocker* v. *Bellangee*, 6 Wis., 645; *R. R. Co.* v. *R. R. Co.*, 20 Wis., 174, and perhaps other cases, as holding a contrary doctrine. They all rest upon *Prosser* v. *Edmonds*, and are bad law.

Prosser v. *Edmonds* is substantially overruled by *Dickinson* v. *Burrell* (*supra*), and in *McMahon* v. *Allen* (*supra*) these cases are both considered, and by the unanimous decision of the court, *Dickinson* v. *Burrell* is followed. *McMahon* v. *Allen* (*supra*) is a case very like this one.

Messrs. **John W. Cary** and **E. Mariner**, for appellees:

(*a*) There is no statement in the bill that the complainant was unable to collect his judgment at law; no allegation that there was no other property upon which the execution could be levied. It does not appear that the complainant had exhausted his remedy at law. There is no allegation that the La Crosse Company was insolvent, nor that the execution could not be made out of other property.

(*b*) Granting that the transfer of this property to Nash, and the subsequent conveyance to Kneeland, was a fraud upon the La Crosse Company, the complainants are in no position to assert their rights of the Company, and claim that it should be set aside. It is none of their business. The La Crosse Company does not and has not asked to have it set aside.

Prosser v. *Edmonds*, 1 You. & C., Ex. Eq., 481; *Crocker* v. *Bellangee*, 6 Wis., 645; *Mil. & M. R. R. Co.* v. *Mil. & W. R. R. Co.*, 20 Wis., 174; *Johnson* v. *Bennett*, 39 Barb., 237; *Buell* v. *Buckingham*, 16 Iowa, 284, and cases cited.

(*c*) Because the bill does not allege that the complainants or anyone else were creditors of the La Crosse Company at the time of sale. To render a conveyance fraudulent as to creditors, it must be voluntary, with an intent to hinder and delay or defraud creditors of grantor, being indebted at the time.

A voluntary deed is valid, except as to creditors, against the world, and if there are no creditors at the time, and it is not made for the purpose of defrauding creditors, a subsequent creditor cannot take advantage of it.

Backhouse v. *Jett.*, 1 Brock., 500.

A voluntary conveyance made by a party indebted at the time, is void as to creditors whose debts existed when the gift was made, but it is not void if there are no creditors existing.

Sexton v. *Wheaton*, 8 Wheat., 229, 241.

In that case the bill did not charge Wheaton with having been indebted at the time he made the conveyance to his wife, and the court says: "The fact that he was indebted cannot be assumed; it must be alleged and proved."

See *S. C.*, in 1 Am., L. Cas., 1., and the note thereto; *Mattingly* v. *Nye*, 8 Wall., 370 (75 U.S., XIX., 380); *Hinde* v. *Longworth*, 11 Wheat., 199.

To invalidate a deed, evidence of indebtedness at the time, at least, as I conceive, amounting or approximating to embarrassment must be shown.

Opinion of Gould, in *Salmon* v. *Bennett*, 1 Am., L. Cas., 85.

There is nothing in this case tending to show that this conveyance was made with any intent to defraud creditors. The complaninants' allegations, if true, would only make out a purchase by a trustee, of the trust property, which the *cestui que trust* might disaffirm, if it chose to do so. But under the authorities above cited, no other person than the trustee has a right to cancel such a sale.

But if there was a fraud, it was a fraud against the La Crosse Company alone; it was not void *ab origine*, but only voidable, and voidable only by the party in interest, which was the La Crosse Company, and not by a creditor. No stranger could interfere; no person, unless someone having an interest in the land. No general creditor of the Company, at the time of the sale, could do it, much less a subsequent one.

The authorities are uniform, that a stranger cannot object to the invalidity of such a sale.

Mr. Justice **Bradley** delivered the opinion of the court: [151]

In September, 1855, the La Crosse and Milwaukee R. R. Company not being at that time, so far as appears, indebted in any considerable amount, sold certain real estate in the City of Milwaukee, not then wanted for railroad purposes, to Charles D. Nash, for the sum of $25,000. The officers of the Company who took a leading part in negotiating the sale are charged to have been interested in the purchase, and to have furnished Nash the means for effecting it. At all events, shortly after it was made, Nash conveyed the property, for the original consideration, to Moses Kneeland, one of the officers referred to; and Kneeland, retaining one third part, subsequently conveyed the other two third parts to Ludington and Kilbourn, they all being directors of the Company and members of the executive committee. The Company itself never questioned the fairness of this transaction; on the contrary, the sale was subsequently, in March, 1858, expressly confirmed by the Board of Directors, and a further quitclaim deed executed by the Company in confirmation thereof. In September and November, 1858, the appellants, Graham and Scott, recovered

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two judgments against the Company for indebtedness on contract, arising after the sale of the lands, and issued executions thereon, under which levies were made on said lands, as lands of the Company. In January, 1860, the appellants, having sued these judgments in the United States Court, recovered a second judgment for upwards of $40,000, issued execution thereon, and made another levy on the lands. Being unwilling to attempt a sale under their said execution, in consequence of the deeds for the lands being recorded, the appellants, in June, 1860, filed the bill in this case in the Circuit Court of the United States for the Eastern District of Wisconsin against Kneeland, Kilbourn, Ludington and the Railroad Company, setting forth their said judgments, executions and levies, stating the fact of the said sale to Nash and his conveyance to Kneeland, and the latter's conveyance to the other parties; alleging [152] that the transaction was a fraud against the Corporation and its creditors, and complaining that the said conveyances of the lands were a cloud upon their right to sell the lands under execution, and an impediment in the way of the execution of their writ of *fieri facias;* and prayed that the lands might be decreed subject to the lien of their judgment; that they might be decreed to be authorized to sell the same, or so much as might be necessary for the purpose of satisfying their judgment; and that Kneeland, Kilbourn and Ludington might join in the conveyance, and might be enjoined from claiming the land; and that the conveyances to them might be declared null and void. The bill, amongst other things, averred that the lands were sold to Nash for much less than their real value; but it contained no allegation that the Company was insolvent, or that it had not other assets available under an execution; nor was any offer made to repay the consideration which the purchaser had given for the lands.

To this bill the defendants severally filed answers, denying that the lands were worth more than $25,000 at the time of sale; averring that the sale was made in good faith and with the Company's concurrence, and setting forth, in detail, many circumstances tending to show that the title was involved and embarrassed; that they required large outlays of money to render them available; that the Company had offered them for sale in the market and was unable to get from any other person the price paid for them by Nash; that, although Nash was requested to purchase the lands by Kneeland and was aided by him in paying therefor, yet Nash had the option to keep them; but after making the purchase and inquiring into the title and situation of the lands, he asked to be relieved from the purchase, and that thereupon Kneeland, Kilbourn and Ludington took them off his hands.

The parties went into proofs, and it does appear that the Company had, for months prior to the sale, been endeavoring to dispose of the lands, and could get no purchaser at the price offered by Nash; and the leading statements of the answer, as to the title and situation of the lands, were verified. It also appeared that the Railroad Company never objected to the sale, but that it was expressly confirmed in March, 1858, by a resolution of the Board of Directors, as before noticed.

Various transactions subsequently took place, [153] by which other parties became interested in the lands, and in the affairs and property of the Railroad Company, which are fully developed in the supplemental proceedings and proofs; but it is unnecessary to notice them further. The foregoing statement exhibits the leading features of the case as presented for our consideration.

The main question is, whether the sale to Nash, made before the Railroad Company became indebted to the appellants, and when for all that appears it was perfectly solvent, even though made for the use and benefit of the officers referred to, can be set aside at the instance of the complainants, for the purpose of subjecting the lands to sale under their execution. And this question, we think, must be answered in the negative.

It is a well settled rule of law, that if an individual, being solvent at the time, without any actual intent to defraud creditors, dispose of property, for an inadequate consideration, or even make a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made.

The authorities on this subject are fully collected in the notes to *Sexton* v. *Wheaton*, 1 Am. L. Cas., 1 [8 Wheat., 229], and in the opinion of *Chief Justice* Marshall in that case; and the general doctrine is affirmed in the case of *Mattingly* v. *Nye*, 8 Wall., 370 [75 U. S., XIX., 380].

It is true that if a debtor dispose of his property, with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel. But that is a special case, to which the present bears no resemblance. It is not pretended that the Railroad Company disposed of the property in question for the purpose of defrauding creditors, much less for the purpose of defrauding those who afterwards in due course of business might become its creditors.

But it is contended that this is a case in which the debtor Corporation was defrauded of its property, and that as the Company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors.

Conceding that creditors who were such when [154] the fraudulent procurement of the debtor's property occurred—and cases to that effect have been cited—the question still remains, whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case, going as far as this, can be found. No such case has been cited in the argument. *Dicta* of judges to that effect may, undoubtedly, be produced, but they are not supported by the facts of the cases under consideration.

It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such

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right. In the case of *French* v. *Shotwell*, 5 Johns. Ch., 555, *Chancellor* Kent decided, upon full consideration, that when a party to a judgment, entered upon a warrant of attorney, voluntarily waives his defense or remedy on the ground of fraud or usury and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it or to investigate the merits of the original transaction between the original parties; and he dismissed a bill filed by the subsequent purchaser for relief in such a case. The Chancellor said: "If the party himself, who is the victim of fraud or usury, chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist, in justice or sound policy, that a subsequent voluntary purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quisquis potest renunciare jure pro se introducto.* * * * It is stated to have been a principle of the common law, that a fraud could only be avoided by him who had a prior interest in the estate affected [155] by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. [*Upton* v. *Basset*] Cro. Eliz., 445; *Twyne's Case*, 3 Coke, 83, *a*."

This decision of *Chancellor* Kent was afterwards nearly unanimously affirmed by the Court of Errors of New York. *French* v. *Shotwell*, 20 Johns., 668.

When the question of the right of a creditor to set aside a conveyance procured from the debtor by fraud first came before the courts in England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and, if he did not see fit to take such a proceeding, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the Court of Exchequer in *Prosser* v. *Edmonds*, in 1835 (1 Y. & C., 481). Lord Abinger treated the case as a new one, and at the close of the argument remarked that his impression was that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. He afterwards gave a deliberate opinion upon the point. In that case, an executor and trustee had fraudulently procured an assignment of his brother-in-law's interest in the estate, knowing its value, which was unknown to the assignor. A subsequent creditor of the assignor, to whom he assigned his whole interest in the estate, filed a bill to set aside the assignment to the trustee. Lord Abinger distinguished the case from that of an assignment of a chose in action, as a note not negotiable, or a bond or mortgage or equity of redemption, where possession of the thing assigned is delivered to the assignee; and treated it as an assignment of a mere naked right to file a bill in equity, in which the last assignee purchased nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. "What is this," says the Lord Chief Baron, "but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries, Voet ad Pandect, [156] lib. 41, tit. 1, sec. 38, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice." "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity." These remarks are very broad, and would apply to the case of existing as well as subsequent creditors; though the case itself was that of a subsequent creditor. It forms the subject of a section in Story's Commentaries on Equity (sec. 1040 *h*), where, in a *note*, Lord Abinger's opinion is extensively quoted; and it has been followed by other very respectable authorities, and, as applied to subsequent creditors, at least, we think that the reasoning is sound.

The principle established in *Prosser* v. *Edmonds* has been adopted by the Supreme Court of Wisconsin, in which State the lands in question are situated. In *Crocker* v. *Bellangee*, 6 Wis., 645, decided in 1858, it was held that a deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only, at the election of the grantor; and that the conveyance of the same land by the grantor to another person, is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title; the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or interest capable of sale and [157] transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right, incapable of sale or transfer.

In *Milwaukee & M. R. R. Co.* v. *Milwaukee & W. R. R. Co.*, 20 Wis., 174, the latter company had covenanted to pay a certain portion of an incumbrance on railroad property afterwards purchased by the complainant company under a subsequent mortgage. A release of the obligation had been fraudulently, as alleged, procured from the original mortgagor company owning the road. The complainant purchased

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under a mortgage which conveyed "all causes of action, demands, and choses in action, of whatever nature," of the mortgagors; and claimed to have purchased the right to set aside the alleged fraudulent release, and filed a bill for that purpose; but the bill was dismissed on the ground that such a right of action could not be thus assigned. The court say: "Admitting that the facts alleged present a case which would entitle the La Crosse and Milwaukee Company (the mortgagor) to have the release set aside on account of these acts of fraudulent concealment by one of its directors of his interest in the defendant company, and assuming that the further fact appears that this right of action has been assigned by the La Crosse and Milwaukee Company to the plaintiff, the question would then arise, whether the release could be avoided on the application of such plaintiff, the La Crosse and Milwaukee Company making no complaint of the fraud whatever. In other words: is this mere right to litigate the question, and to set aside the deed of release on account of fraud practiced upon the assignor, a subject of assignment and transfer, and will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?" And then referring to the previous case of *Crocker* v. *Bellangee* and to *Prosser* v. *Edmonds*, the court expresses its approbation of those decisions and adds: "A reference to these authorities is all which probably need be said at this time in regard to the allegations above cited (referring to the contention of counsel, and upon the point whether the plaintiff company could avoid the release for the alleged fraudulent act of concealment, even if this right of action had been assigned to it by the [158] La Crosse and Milwaukee Company."

It seems to us that those cases, which, so far as it appears, declared the settled law of Wisconsin, are conclusive of the present case.

It is contended on the part of the appellants that the case of *Prosser* v. *Edmonds* has been overruled by the subsequent cases of *Dickinson* v. *Burrell*, L. R., 1 Eq. Cas., 337, and *McMahon* v. *Allen*, 35 N. Y., 403. We have examined these cases, and others which are supposed to be in conflict with *Prosser* v. *Edmonds*. In *Dickinson* v. *Burrell*, the Master of the Rolls, Lord Romilly, expressly disavows any intention to overrule the former case. He says: "The demurrer is mainly supported on the case of *Prosser* v. *Edmonds*, which was decided, after long deliberation, by Lord Abinger; but I am of opinion that the case before me does not fall within the rule established by that decision." The case then before the court was, that a conveyance of an interest in an estate had been fraudulently procured from Dickinson, by his own solicitor, to a third party for the solicitor's benefit, and for a very inadequate consideration. Dickinson, ascertaining the fraud, by a conveyance which recited the facts, and that he disputed the validity of the first conveyance, transferred all his share in the estate to trustees for the benefit of himself and his children. The trustees filed a bill to set aside the fraudulent conveyance upon repayment of the consideration money and interest, and to establish the trust. The Master of the Rolls sustained the bill, observing: "The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of Dec., 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A B, to maintain this bill; but if A B had bought the whole interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." "I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, is taken by Lord Abinger in the case of *Prosser* v. *Edmonds*. The distinction is also taken in *Cockell* v. *Taylor*, 15 Beav., 103, and in *Anderson* v. *Radcliffe*, Ell., B. & E., 806, and has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense." [159]

Surely there is here no overruling of *Prosser* v. *Edmonds*, even if such overruling could avail against the Wisconsin decisions. It leaves that case in full force as to assignments of the mere right to sue. In the case before us there is not even that. The Railroad Corporation acquiesced in the sale and confirmed it. The conveyance, which, perhaps, might have been set aside had the Company seen fit, became absolute as between the parties and carried the title. It is as valid between the parties as if the Corporation had conveyed to a stranger. The appellant then becomes a creditor, and afterwards obtains judgment, and simply makes a levy; and then comes into court and asks its aid to remove a cloud from his title. What title? Has he acquired any title? Was there any title for him to acquire? There had been a right to file a bill in equity, and that right had been remitted by the Company's acquiescence in the sale; probably for the reason that it obtained all that the property was worth at the time. The contrary, at least, is not established. And if it were established, it would only make out a case of voluntary conveyance as against a subsequent creditor, which has already been considered. We think that there is nothing in the case of *Dickinson* v. *Burrell* to overrule the effect of *Prosser* v. *Edmonds*, so far as the present case is concerned.

Then, as to the case of *McMahon* v. *Allen* [*supra*], decided in 1866. One Harrison, in March, 1852, being in debt, was induced, by the fraudulent contrivance of his agent and attorney and to the prejudice of his creditors, to convey to said agent, for a very inadequate consideration, his interest in his mother's estate and in certain other property, he being ignorant of the fraud practiced upon him. In August, 1852, Harrison made a general assignment for the benefit of his creditors of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. The bill was sustained. The court, *Mr. Justice* Hunt delivering the opinion, relied on *Dickinson* v. *Burrell*, saying: "In the recent case of *Dickinson* v. *Burrell*, this precise question was presented;" and, after quoting largely from the opinion in that case, added: [160] "This was a well considered case, is of high authority, and, in my opinion, is an accurate exposition of the law. I think it should control the present case." In the *New York* case, it is true, there was no express repudiation of the

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fraudulent conveyance, as in *Dickinson* v. *Burrell*, but there was a conveyance of the estate to the assignee, with a power to sue for the benefit of creditors; and those creditors had been directly defrauded. Without further comment, it seems to us clear that *McMahon* v. *Allen* cannot control the present case.

The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true that the purchase of the lands in question by or for the benefit of officers of the Company actively concerned in the transaction could be set aside at the instance of the Company as a constructive fraud, yet if there was no actual fraud; if the Company received full consideration for the property sold, how can it be said that subsequent creditors of the Company are injured?

In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the Railroad Company's estate.

It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold.

It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by [161] officers and agents, it is true; but, in law, it is as distinct a being as an individual is and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each.

We think that the present bill cannot be maintained, *and that the decree of the Circuit Court must be affirmed.*

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

Cited—15 N. W. Rep., 781; 57 Wis., 592.

ORRIN W. POTTER, Exr. of EBER B. WARD, Deceased, *Plff. in Err.*, [163]

v.

THIRD NATIONAL BANK OF CHICAGO.

(See S. C., 12 Otto, 163-167.)

Witnesses in U. S. Courts—laws of State.

1. In the Courts of the United States, no witness can be excluded in any civil action because he is a party to or interested in the issue tried.

2. It is only in cases not provided for by the Statutes of the United States, that the laws of the State in which the Federal Court sits constitute rules of decision as to the competency of witnesses.

[No. 46.]

Argued Oct. 27, 28, 1880. Decided Nov. 15, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. **George Willard** and *F. H. Hales*, for plaintiff in error.

Messrs. **John H. Thompson** and **Huntington W. Jackson**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a writ of error from a judgment rendered in the Circuit Court of the United States for the Northern District of Illinois, in favor of the defendant in error, against the executor of E. B. Ward. Upon the trial before the jury, one William Sturgess, not a party to the action, was introduced as a witness in behalf of the Bank. In the course of his examination, he was allowed, against the objection of the defendant, to testify as to a conversation had by him with Ward, touching some of the matters involved in the present controversy. The objection to his testifying was placed upon the ground that Ward was dead, and that he, the witness, was interested in the issues to be tried. The action of the circuit court, in permitting the witness to disclose that conversation, is the subject of one of the assignments of error.

By section 858 of the Revised Statutes it is declared that "In the Courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to *or* interested in the issue tried; *Provided*, That, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither *party* shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, [164] or required to testify thereto by the court. In *all other* respects the laws of the *State* in which the court is held shall be the rules of decision

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as to the competency of witnesses in the Courts of the United States in trials at common law and in equity and admiralty."

The first clause of this section is, substantially, in the words of the proviso of the 3d section of the Act of July 2, 1864, making appropriations for sundry civil expenses of the government. 13 Stat. at L., 351. The 2d clause is in the words of the proviso of the Act of March 3, 1865, amending the 3d section of the Act of July 2, 1864, 13 Stat. at L., 533, while the last clause is founded upon the Act of July 16, 1862. 12 Stat. at L., 588.

The existing statute, R. S., section 858, seems too plain to require construction. The first clause of that section shows that there was in the mind of Congress two classes of witnesses: those who were parties to the issue, that is, parties to the record and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto; a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not to be excluded in the courts of the United States, upon either ground, except that in actions in which judgment may be rendered for or against an executor, administrator or guardian, no *party* to the action can testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. The proviso of section 858 excludes only one of the classes described in its first clause—those who are, technically, *parties* to the issue to be tried—and we are not at liberty to suppose that Congress intended the word "party," as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue.

[165] It is, however, contended by the learned counsel for the plaintiff in error that, by the laws of Illinois, Sturgess was an incompetent witness as to the matters embraced in his conversation with Ward, and that the circuit court was bound to follow the law of the State as interpreted by its highest court. It is quite true that the 34th section of the Judiciary Act of 1789, 1 Stat. at L., 73—preserved *totidem verbis*, in section 721 of the present revision of the statutes—has been construed as requiring the Federal Courts, in all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts respectively sit. *Vance* v. *Campbell*, 1 Black, 427 [66 U. S., XVII., 168]; *Wright* v. *Bales*, 2 Black, 535 [67 U. S., XVII., 264]; *M'Niel* v. *Holbrook*, 12 Pet., 84; *Sims* v. *Hundley*, 6 How., 1; *Ryan* v. *Bindley*, 1 Wall., 66 [68 U. S., XVII., 559]. But that section of the Act of 1789, as does section 721 of the Revised Statutes, expressly excepts from its operations cases "Where the Constitution, treaties or statutes of the United States otherwise provide." We have seen that the existing statutes of the United States do "otherwise provide," in that they forbid the exclusion of a witness upon the ground that he is a party to or interested in the issue, in any civil action whatever pending in a Federal Court, except in a certain class of actions, which do not embrace the one now before us. "In all *other* respects," that is, in all cases not provided for by the Statutes of the United States, the laws of the State, in which the Federal Court sits, constitute rules of decision as to the *competency of witnesses* in all actions at common law, in equity, or in admiralty. It is clear, therefore, that the law of Illinois can have no bearing upon a case which, as here, is embraced or has been provided for by the Federal Statute.

But little need be said concerning the remaining assignments of error. The one which relates to the action of the court in permitting the Bank to show that, in due course of its business, notices of protest would have been forwarded by mail to Ward, had they been received from the notary, would have deserved consideration, but for the fact, which appears from the bill of exceptions, that the jury were informed by the court, in its charge, that if the liability of Ward, as indorser, depended solely upon this point, they would be instructed that the proof of such notice was insufficient. We cannot see, therefore, that this evidence, even if improperly admitted, injuriously affected the plaintiff in error. [166

The objection to the admission in evidence of the letter of Parsons, cashier, to Smith, dated December 11, 1873, was properly overruled. No objection was made by plaintiff in error to the admission of the letters and telegrams of prior dates. The particular letter, to the reading of which objection was interposed, constituted a part of the transactions described in the letters and telegrams of previous dates, and was properly admitted, in further explanation of those transactions.

The only other assignments of error, of sufficient importance to require notice, relate to those parts of the charge to the jury to which exception was taken by the plaintiff in error. In each sentence or paragraph of the charge, to which exception was especially taken, the court informed the jury that the evidence *tended to show* certain facts which are detailed in the charge. The point is made here that the evidence did not tend to show any such state of facts as the charge of the court implied. But counsel overlook or fail to give proper force to the circumstance that the bill of exceptions, not purporting to contain all the evidence adduced before the jury, itself states that there was evidence tending to show the facts set forth in the charge. If, upon the whole evidence, the plaintiff in error was entitled to a peremptory instruction in his behalf, and the court had refused, when asked, to give such an instruction, its action could not be reviewed here, except upon a bill of exceptions, containing all the evidence. And so, if there was no evidence, or not sufficient evidence, tending to show the facts recited in the charge. If upon the evidence the plaintiff in error desired any particular propositions of law given to the jury, the bill of exceptions should have stated so much of the evidence as was necessary to show the pertinency of these propositions. But no propositions of law were submitted by the defendant to the court to be

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given to the jury. We do perceive that the charge is in conflict with the evidence, so far as it is detailed in the bill of exceptions.

Under all the circumstances, this court must [167] assume that there was evidence tending to show the facts set out in the charge to the jury. And so construing the bill of exceptions, we do not perceive that any error of law was committed, *and the judgment is, therefore, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 50, 443; 109 U. S., 277; 112 U. S., 255.

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[333]

W. S. HUNNICUTT, G. W. BARNES ET AL., *Plffs. in Err.*,
v.
JOHN B. PEYTON AND EMILY T. PEYTON, Legal Representatives of BAILIE PEYTON, Deceased, SALLIE C. PARKER ET AL.

(See S. C., 12 Otto, 333-369.)

Bills of exception—signature of judge—late filing—Mexican laws—title to land—private boundary—evidence of—possession of land.

1. The rule, requiring the presentation of bills of exception for the signature of the judge within five days, is not a rule which controls his action. Such time, if within the term, is left to the discretion of the judge who noted the exception when it was made.

2. A party does not waive his exceptions by suing out a writ of error before the signature of the judge is obtained.

3. It is not a fatal objection to bills of exception, but at most only an irregularity, that they were not signed or filed *nunc pro tunc*, when they appear on their face to have been signed and filed ten days after the trial.

4. Purchasers, under the 24th article of Mexican Laws of 1825, can aliene their grants as soon as the concession has been made to them, before the land has been selected, or the title of possession issued; and such alienation constitutes the purchaser the absolute owner when he is put into possession of the land, and the evidence of title, by the proper officer of the government.

5. Where the original grant did not locate the subject of the grant, but contemplated a selection and location thereafter, when these were made and the title was given, the title was complete.

6. In questions of private boundary, declarations of particular facts made by persons since deceased, are not admissible unless they had knowledge of that whereof they spoke, and were at the time on the land or in possession of it, and were pointing out or marking the boundaries or discharging some duties relating thereto.

7. There is no essential difference between the rule as held in Texas and the general rules held by the American Courts.

8. When a person enters upon unoccupied land, under a defective title, and holds adversely, if the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder.

[No. 28.]

Argued Mar. 25, 29, 1880. Reargument submitted Oct. 18, 1880. Decided Apr. 26, 1880. Judgment of reversal set aside and reargument ordered May 10, 1880. Decided Nov. 15, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Texas.

The case is fully stated by the court.

Argument was had and judgment of reversal given, in the October Term of 1879; but that judgment was subsequently set aside, and the following questions submitted for discussion, viz.:

1. How far, under the decisions of the Court of Texas, has it become a rule of property in that State that in controversies respecting private boundaries, or the location of grants of land, the declaration of deceased persons concerning particular facts not amounting to reputation, may be received in evidence?

2. Is the verdict which was returned by the jury sufficiently certain?

Messrs. **Levi W. Goodrich** and *Matthew H. Carpenter*, for plaintiffs in error:

1. It does not appear from any source outside of the declaration, that the deceased, Moore, made the survey, or that he had any knowledge whatever of the lines in question, or that he was in any position to know about the matters to which his declaration refers, the boundary line was not pointed out to the witness by him, nor was anything said or done to point out to the mind of the witness the locality of the line to which the declaration refers.

The witness says he never saw the line, nor did he have time to hunt for it.

If the testimony tends to prove anything, it tends to prove that a survey was actually made on the ground; but does not in the least degree tend to show where it was made.

The question of the competency of hearsay testimony to establish boundaries, has often been discussed by the Supreme Court of Texas.

Where a corner or marked line has been pointed out to the witness by a deceased person, who is shown to be in a position to have a knowledge of the facts, the parol declaration has been received; and where it appeared that the survey in question was one of a block of surveys, or was surveyed at the same time by the same surveyor, the plats made by the said surveyor, or the field notes made by him of surrounding or contiguous surveys, have been received to illustrate and identify the lines of the survey in question.

We assert with confidence that the Supreme Court of Texas has not, in any case, gone beyond the rule as above stated.

The first case in the Texas Reports is *George* v. *Thomas*, 16 Tex., 74, where the declaration of the surveyor, made by him while running the line, was a part of the "*res gestæ*," and admitted as original evidence.

The next in order is *Stroud* v. *Springfield*, 28 Tex., 649, where the plaintiffs offered in evidence two ancient documents, one purporting to be the field notes of a league of land, the land in controversy, surveyed for Powell, dated May 17, 1835, and the other to be field notes of a league surveyed by the same surveyor on the same day, for Whitaker, and designating the southeast corner of the Powell survey as the first and last calls of the survey issued for Whitaker. No title was ever issued on the Whitaker field notes. These documents were excluded, on the ground that their genuineness was not sufficiently established; but the court proceeded to say: "If the genuineness of these papers had been sufficiently proved, we are of opinion that they would have been admissible in evidence as the declarations of the party making them, for the purpose of aiding in the ascertainment of the boundaries of the Powell league." The court then cites approvingly the cases of *Spear* v.

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Coate, 3 McCord, 227, and *Blythe* v. *Sutherland*, 3 McCord, 259, and *George* v. *Thomas* (*supra*); wherein the declarations of deceased surveyors who pointed out the lines and corners, were received in evidence.

No attempt whatever is made to lay down the rule in Texas, and then no case had ever been before the court in which the question was mooted, except that of *George* v. *Thomas* (*supra*).

An examination of the cases cited by the court from North and South Carolina, will show that a visible line or corner was pointed out by the deceased person who made the declaration.

Blythe v. *Sutherland* (*supra*); *Spear* v. *Coate*, 3 McCord, 229.

In the case of *Welder* v. *Carrol*, 29 Tex., 333, the court cites *Stroud* v. *Springfield* (*supra*), and says:

"If its locality can be proved by witnesses who can, from their personal knowledge or on information derived from general reputation, or from its having been pointed out to them by the surveyor by whom it was run, or others who were present at the time, or cognizant of the fact, this will fix and mark its position."

In *Evans* v. *Hurt*, 34 Tex., 111, it was held that the declarations of Gay and Lynch, deceased, who pointed out corner trees and lines, were admissible.

Hurt v. *Evans*, 49 Tex., 314, is the same case cited above from 34 Tex., 111. After the reversal of the case in 34 Tex., 111, it was again retried and again appealed, and it was again held that the declarations of Gay and Lynch, who pointed out the corner trees and line, were admissible.

In *Smith* v. *Russell*, 37 Tex., 255, the court permitted the defendant to prove that one of the original chain carriers, who was dead at the time of the trial, had pointed out to the witness the group of young timber as the place of the corner, and the Supreme Court held it correct.

The cases above cited are the only instances in the Texas Reports in which the verbal declarations of deceased persons have been received in evidence to establish boundary lines and corners. In every instance, the declaration was in explanation of, or accompanying the act of pointing out a visible line or corner.

Messrs. **P. Phillips, S. R. Fisher,** *Bailie Peyton* and *John B. Peyton*, for defendants in error:

In answer to the first question, we submit the following decisions of the Supreme Court of Texas:

George v. *Thomas*, 16 Tex., 74, decided in 1856.

"On these questions of boundary the courts have gone very far, and under certain restrictions have freely admitted hearsay evidence, to establish old surveys and boundary lines."

The court refers with approbation to the decisions in *Blythe* v. *Sutherland*, 3 McCord, 258, where the witness was allowed to detail the information derived from the survey after the running of the lines. This was, therefore, merely hearsay, and not part of the *res gestæ*.

George v. *Thomas* (*supra*).

In *Stroud* v. *Springfield*, 28 Tex., 649, the court says: "If the genuineness of these papers had been sufficiently proved, in our opinion they would have been admissible in evidence, as the declarations of the party making them, for the purpose of aiding in the ascertainment of the boundaries of the Powell league."

The case of *Spear* v. *Coate*, 3 McCord, 229, is then referred to, in which the declaration of a chain carrier as to a certain corner of the survey was admitted in evidence. It was contended at the bar, in that case, that declarations have never been admitted to affect private rights; but the court held, Colcock, *J.*, delivering the opinion, that "It cannot be doubted at this day, that the declarations of deceased persons who shall appear to have been in a situation to possess the information, and are not interested, shall, on a question of boundary, be received in evidence. The exception, if made *post litem*, seems to have been generally adopted; but could only have originated in that extreme caution which it was deemed necessary to observe in the application of a rule which is opposed to the general principles laid down on the subject of evidence."

Another case was cited in support of the decision, that of *Boardman* v. *Reed*, 6 Pet., 341, in which it is said: "As the testimony of the witness was not given between the same parties, his testimony, if admissible, could only be received as hearsay. That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country and from other causes, they are often destroyed. It is important, therefore, in many cases, that hearsay or reputation should be received to establish ancient boundaries."

Resuming our review of the Texas decisions, we now cite *Welder* v. *Carroll*, 29 Tex., 333, which, after referring to *Stroud* v. *Springfield*, *supra*, holds, "That, if the locality can be proved by witnesses who can, from their personal knowledge or from information derived from general reputation, or from its having been pointed out to them by the surveyor by whom it was run, or others who were present at the time or cognizant of the fact, this will fix and mark its position."

The next case is that of *Welder* v. *Hunt*, 34 Tex., 47, in which it is said: "The declarations of public officers are held admissible to prove their official acts, and we see no reason why the declarations made by a public surveyor who claims to have run the lines upon the ground as to the location of the boundary line may not, after the death of the surveyor, be proved by the witness to whom he made the declaration."

This is followed by *Evans* v. *Hurt*, 34 Tex., 113, in which the same doctrine is repeated.

We then have *Smith* v. *Russell*, 37 Tex., 255, in which it was contended that in England the distinction is now clearly established that hearsay, reputation or tradition is not admissible in cases of a mere private right, but only in cases of a general public or *quasi* public, involving similar interests in a large number of persons; but the court cites *Stroud* v. *Springfield* (*supra*) and other cases, holding it to be a "well settled rule, that the declarations of deceased witnesses may be proved to fix the location of corners and lines."

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We call attention to the fact that in the case last cited, the decision in *Ellicott* v. *Pearl*, 10 Pet., 412, was urged as authority for excluding the declarations. *Mr. Justice* Story held in that case: "The evidence was not merely hearsay, but hearsay not to the matter of general reputation or common interest among many." He then goes on to define in what cases hearsay is admissible, and concludes by saying, that "In England it is now clearly established, that hearsay or reputation or tradition is not admissible in cases of mere private rights, but only in cases of public rights, or those *quasi publici*, involving similar interests by a number of persons."

The evidence rejected in this case is precisely the same as that admitted in the case at bar. The witness was offered to prove the declarations of Moore, who was dead, that a certain corner was made by the surveyor, Kincaid; Moore was put down as a chain carrier, and was present when the lines were run.

This case is also the one relied on in the first argument here, and which induced the opinion delivered. But with this case before them, the Supreme Court of Texas, nevertheless, adhered to their well settled decisions, that such declarations were admissible.

The last case we have found is *Hurt* v. *Evans*, 49 Tex., 314, decided as late as 1878, in which the former decisions on this subject are affirmed.

As is well known, this State is covered over by grants of immense tracts of land in which large numbers are interested; with landmarks usually of perishable materials, constantly destroyed by the settlement of the country and by other causes. These decisions, therefore, constitute a rule of property of the very highest importance to its inhabitants and those dealing with such grants.

It is then evident that if Moore's declarations had been offered in a state court they would have been admitted, and the question is, whether the judgment of the Circuit Judge, made in accordance with the state decisions, is erroneous and should be reversed.

It was never contemplated that the circuit court, in exercising its concurrent jurisdiction, possessed the power to administer the law, otherwise than it is administered by a well settled rule in the Supreme Court of the State. Impartial administration of justice is all that was aimed at.

The 34th section of the Judiciary Act seeks to effect this by declaring: "The laws of the several States shall be regarded as rules of decision in the Courts of the United States."

Congress has provided no system of laws for the government of these circuit courts, nor has it adopted the body of the common law.

If the 34th section had never been enacted, these courts could only have administered the jurisprudence of the States, in all of which there was a great body of laws not derived from special statute, and ascertainable only from the decisions of the State tribunals.

When, therefore, it is said that the laws of the State shall be regarded as the rule of decision, something more is meant than statutory law.

Swift v. *Tyson*, 16 Pet., 18; *McNiel* v. *Holbrook*, 12 Pet., 89; *Waring* v. *Jackson*, 1 Pet., 571; *Hinde* v. *Vattier*, 5 Pet., 401; *Polk* v. *Wendell*, 5 Wheat., 293; *Olcott* v. *Bynum*, 17 Wall., 57 (84 U. S., XXI., 573); see, also, *Jackson* v. *Chew*, 12 Wheat., 153; *Henderson* v. *Griffin*, 5 Pet., 151; *Lane* v. *Vick*, 3 How., 477; *Lloyd* v. *Fulton*, 91 U. S., 485 (XXIII., 365); *Sanborn* v. *Co. Comrs.*, 97 U. S., 186 (XXIV., 929); *Orvis* v. *Powell*, 98 U. S., 177 (XXV., 238).

Mr. Justice **Strong** delivered the opinion of the court: [352]

This is an action of ejectment brought to recover the possession of a tract of land described as "Four leagues of land on the east bank of the Brazos River, known as the Gregorio Basques survey of four leagues," and more particularly described in the amended petition as "Beginning at a stake on the east bank of the River Brazos, in the County of Falls, State of Texas, at a point where the upper line of the Austin and Williams reserve, on the east side of said river intersects the river; running thence with said upper line of the reserve north 71 degrees east 20,230 *varas* to a stake," thence by the several courses to a stake on the Brazos River for its fourth corner; thence up the river to the place of beginning, "covering an area of four leagues, fronting on said river and lying within said Austin and Williams reserve, immediately below and adjoining said upper line of said reserve." The defense set up against the claim of the plaintiffs was the general issue by which the titleo the plaintiffs was denied, as also the wrongful entry of the defendants. The Statutes of Limitation were also pleaded.

At the trial in the circuit court a verdict was obtained by the plaintiffs, upon which a judgment was entered, and the defendants have brought the case here, assigning several errors to the rulings in the lower court.

Before proceeding to examine them, it is necessary to notice an objection interposed by the plaintiffs against their being considered at all. [353]

The verdict was rendered on the 17th of February, 1877, and judgment thereon was entered on the same day. On the 19th of the same month the defendants moved for a new trial. This motion was overruled on the 20th. Two days afterwards, on the 24th, the writ of error was sued out, tested on that day. It does not appear when the writ was filed or served. A citation was also issued on the 24th of February and returned by the marshal, received in his office September 3, and served the same day.

The defendants' bills of exception, upon which their assignments of error are founded, were signed by the Judge on the 28th of February, and filed in the cause on the first of March next following. This was during the Term at which the cause was tried, but eleven days after the verdict was rendered. The plaintiffs' counsel was present when the bills were signed, and objected on the ground that they were not presented for signature within the time limited by the rule of the court. That rule was as follows: "No bill of exceptions will be signed unless presented to the Judge within five days after the close of the trial, unless further time be allowed by the court." No objection was made to the correctness of the bills or to their signature because a writ of error had been sued out.

On the first of March an order was made by the court extending the time for presenting and filing the bills until that day (the plaintiffs

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objecting to the order) and, accordingly, the bills were then filed.

It is now insisted that the bills of exceptions cannot be considered a part of the record, and that they are not properly here for review. For this several reasons are advanced, the first of which is, that the presentation to the Judge was not in the time prescribed by the rule of the court. But the rule requiring the presentation of bills for the signature of the judge within five days is not a rule which controls his action. He may depart from it in order to effectuate justice. *Stanton* v. *Embrey*, 93 U. S., 548 [XXIII., 983]. It is a direction to the parties, and it expressly [354] reserves the power to enlarge the time. It is no doubt necessary that exceptions should be taken and, at least, noted before the rendition of the verdict; but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the Statute of Westminster, "*for a testimony*," may be afterwards, during the term. In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The Statute of Westminster did not require it. It would greatly and uselessly retard the business of courts, were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. *U. S.* v. *Breitling*, 20 How., 252 [61 U. S., XV., 900]; *Stanton* v. *Embrey* [*supra*]; *Dredge* v. *Forsyth*, 2 Black, 564 [67 U. S., XVII., 253]. The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made. It may depend much upon the nature of the bills. Some require much more time for preparation than others. It is true a judge cannot be permitted to make up a statement of facts, after the writ of error is issued, upon which the case shall be heard. *Generes* v. *Bonnemer*, 7 Wall., 564 [74 U. S., XIX., 227]. That is quite a different matter. But when an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it is not making a new case; it is merely verifying the case as it appeared on the trial.

It is further urged by the plaintiffs that the defendants waived their exceptions by suing out the writ of error before the signature of the Judge was obtained. In support of this objection we are referred to Tidd's Practice, 863, where it is said, "If a party who at the trial of a cause has tendered a bill of exceptions, bring a writ of error before he has procured the judge's signature to such bill, he thereby waives the bill of exceptions, and will not be permitted by the court of error afterwards to tack or append the bill of exceptions to the writ of error." 4th Am. ed., from the 9th London. For this the author relies on the case of *Dillon* v. *Parker*, reported in 1 Bing., 17; and *S. C.*, 11 Price, 100. In that case a year had elapsed after the writ of error had issued. The transcript of the record [355] had gone into the Court of Errors. The common assignments of error had been made and issue had been joined before the plaintiff in error moved the court in error to compel a settlement of the bill in the lower court, and asked that it might be appended to the writ. In response to this motion, it was observed by two of the Justices that the proper course would be to apply to the inferior court, the Court of King's Bench, who might, perhaps, make such an order, and then the bill of exceptions might be brought up by an allegation of diminution. The case cited hardly sustains the text. Only one of the Judges expressed the opinion that the writ of error and the return of the record were a waiver of the bill of exceptions. But if that is the rule in the English courts, it is not imperative even there. Where the presentation to the judge has been delayed from the default of the defendant in error, or for other sufficient reasons, the Court of Errors will allow the bill of exceptions, when signed, to be tacked to the record as of the time when the record was removed. *Taylor* v. *Williams*, 2 B. & Ad., 845; *Williams* v. *Taylor*, 6 Bing., 512. The case is also reported in 4 Moo. & P., 257, where the facts are fully stated. On a trial before *Chief Justice* Tindal, on the 23d of December, a bill of exceptions was tendered, the substance of which was reduced to writing and given to the officer of the court before the termination of the cause, but it was not then signed and sealed. There was a verdict for the plaintiff. The defendant sued out a writ of error in the King's Bench. Subsequently, on the 11th of February following, the bill of exceptions, in an amended form, was settled by the counsel for the parties, and a copy was sent to the plaintiff's attorney that he might accede to its terms, or suggest alterations before it was sealed by the *Chief Justice*. At the same time, the defendant served a rule to transcribe the record for return with the writ of error. The bill not having been returned, the court granted an order for its return. It was argued against the rule, and *Dillon* v. *Parker* was cited in support of the argument that the bill was waived and that, by the writ of error and the rule to transcribe, the record had been removed into the King's Bench. [356] But the court, all the Judges concurring, retained the order upon the attorney, holding that the *Chief Justice* might seal the bill. It is not, therefore, by any means settled, even in England, that suing out a writ of error is a waiver of unsigned bills of exceptions.

We know of no decision in this country that asserts or gives any countenance to such a rule, nor any reason that justifies it, unless it be one in New York, to which we shall refer. True, a writ of error here, as in England, is supposed to remove the record of the court to which it is directed into the superior tribunal. But this is a mere fiction. In neither country is the record itself actually sent up. A transcript only is sent. In England, at common law, a writ of error operated as a *supersedeas* and stayed all action of the inferior court, and thence it was regarded as removing the record and ousting the jurisdiction of that court. The law there has been changed. And here, the writ is of itself no *supersedeas*. If there be no bail for a *supersedeas*, a writ does not stay the action of the trial court. An execution may be issued and executed though a writ of error is pending. Much more, it would seem, must the court to which the writ is sent have power, during the term in which the case is tried, to put its records and

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proceedings in form to return them in obedience to the writ. If that cannot be done, great hardship and injustice would in many cases be the result. As we have said, bills of exceptions cannot always be formally prepared until a considerable time after verdict and judgment. They may require, in some cases, a full statement of almost all that occurred at the trial. Papers necessary to be incorporated may be mislaid or withheld by the opposite party; the charges of the Judge, to which exception has been taken, may not have been filed, or sickness may have interfered. Meanwhile, judgment on the verdict may have been entered, and, unless the party can protect himself by a writ of error, an execution may follow. For these reasons, the universal practice is to give reasonable time to make up the bills of exception and obtain the signature. This is not altering the record, it is completing it It is not exercising jurisdiction over the case. It is merely putting into form [357] the record statement of what was done before the writ of error was sent down. In *Brown* v. *Bissell*, 1 Doug. (Mich.), 273, where a bill of exceptions returned with a writ of error appeared to have been signed after the writ was sued out, it was held to be, at most, whether at common law or under the statute, a mere irregularity, which was waived by a joinder in error. *Witbeck* v. *Waine*, 8 How. Pr., 433.

The remaining objection to the bills of exceptions is that they were not signed nor filed *nunc pro tunc*, but that they appear on their face to have been signed and filed ten days after the trial. We think, however, the absence of any order that the bills should have the same effect as if they had been signed and filed during the trial is not a fatal objection. The order of March 1, extending the time for signing and filing, is equivalent to such an order. And the fact that the date of the signature was the 28th of February is of no practical importance. At most it is only an irregularity. It is not a void act. Perhaps the bills would have appeared more regular had they been dated February 17, but they are recitals of what occurred at the trial, and they show that the exceptions were then taken—taken in time. If it be kept in mind that the judge's signature is required only for "testimony" that the exception was taken at the trial, and before verdict, it cannot be material that the testimony was given after the close of the trial, if given during the Term. We do not overlook what was said by Duval, *J.*, in *Walton* v. *U. S.*, 9 Wheat., 651. We gather the facts of that case only from the opinion of the court. From that it appears that the bill of exceptions did not show that any exception was taken at the trial. That, of course, was a fatal defect. But Duval, *J.*, after having noticed that fact, went on to make some general observations. After stating that it will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and that it may afterwards, during the term, according to the rules of court, be reduced to form and signed by the Judge, he added: "But in all those cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if actually reduced to form and signed pending the trial. And," he said: "it would be a fatal defect if it were to appear otherwise; for the original authority under which bills of exceptions are allowed, has always been considered to be [358] restricted to matters of exception taken pending the trial and ascertained before the verdict."

These remarks were not necessary to the decision of the case, and they are unsustained by any authority, so far as we know, that existed when they were made. In *Ex parte Bradstreet*, 4 Pet., 102, *Ch. J.* Marshall said, a practice to sign a bill of exceptions after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term allowing such a period to prepare it. No intimation was given that the signature must be *nunc pro tunc*.

Walton v. *U. S.*, was referred to in *Law* v. *Merrills*, 6 Wend., 268, by one of the Judges, and the language of *Judge* Duval was quoted, but it was unnecessary to a decision of that case. The bill there had been signed a year after the trial, by a Judge who had not tried the cause. We find no case which can be regarded as an authoritative decision that a bill of exceptions, signed during the term at which the trial took place, though after the close of the trial, must be antedated to make it effective, or ordered to be filed *nunc pro tunc*, as of a time during the trial. Nor can we discover any reason for such a requirement. During the term the records of the term are before it for amendment in matters of form, and whether a bill was signed as of a date after judgment if during the term, or antedated to a time during the trial, is a question of form only, if it appears that the exceptions were in fact taken before verdict and during the progress of the trial. Confessedly it may be signed after judgment, as of a date before, and be effective, though the date of the signature in such a case is false. Why should giving to the signature its true date destroy it? The reason why it is required that a bill shall be presented for signature during the term, except in extraordinary cases, when delay is allowed by the judge, is, that the facts appearing and rulings made at the trial may be fresh in his memory. Are they any more fresh in his memory when he antedates the bill, or orders it to be filed as of the date of the trial, than when he gives to the signature and filing their true date? We cannot doubt that in a multitude of [359] cases bills of exception have been signed after judgment, and filed without any order that the signature and filing be entered *nunc pro tunc*, but, when the true time of the signature appeared, have been treated as sufficient, whenever they have shown that the exceptions were taken during the trial. And, we think, it would be a surprise to the profession, and work great wrong to suitors, were we to hold such bills invalid.

In *Neece* v. *Haley*, 23 Ill., 416, exceptions were duly taken at the trial. The record showed that the bill of exceptions was signed three days afterwards, but during the Term. It was held that the bill was good, and that the record need not explain the delay.

So it was ruled in *R. R. Co.* v. *Palmer*, 24 Ill., 43, that, if the bill of exceptions clearly shows that exceptions were taken at the proper time, it is immaterial that it was not signed till some days after the trial, and that it spoke in the present tense.

In *Dean* v. *Gridley*, 10 Wend., 254, Savage, *Ch. J.*, declared that it was not required the bill

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should be so drawn as to appear to have been signed upon the trial, whether it was so or not. He was speaking of the Supreme Court of Errors. See, *Hallowell* v. *Hallowell*, 1 Mon., 130; *Hughes* v. *Robertson*, 1 Mon., 215.

We pass, then, to a consideration of the assignments of error. The first raises the question whether the title which was set up in Jonathan Peyton was a legal one or merely an equity. As set out in the several bills of exceptions, it appears to have been as follows: on the 28th of September, 1830, Gregorio Basques applied to the proper authorities of the Mexican Government for a grant in sale of eleven leagues of vacant land in the department wherein Nacogdoches was situated, with the privilege of selecting them together or separate or in distinct places.

On the 11th of March next following, a concession was made in accordance with the prayer of the petition, and an order was given to the commissioner for the partition of land, or to the alcalde of the jurisdiction, to put the petitioner into possession of the subject of the grant.

On the 20th of September, 1831, Basques gave a power of attorney to Don Jayme Hartz, [360] empowering him to solicit the possession and titles to the said eleven leagues, in the place or places which best suited him (Hartz), together or separate, and empowering him, also, to appoint substitutes.

Two days afterwards Basques sold and conveyed the grant for the sum of $150 to Don Jayme Hartz in fee.

On the 2d of March, 1832, Hartz, in consideration of $500 to him paid, sold the concession or grant to Jonathan Peyton, the ancestor of the plaintiff, in fee, and substituted him as attorney. The act of sale recited the conveyance of Basques to the vendor.

On the 7th day of October, 1833, the constitutional alcalde, by a legalized act, conferred upon and put Peyton, the aforesaid attorney of Basques, "in real, virtual, personal and actual possession of the eleven leagues," the same which had been granted to Basques, describing them by the situation, lines, limits and corners as delineated in the notes of survey made by Francis W. Johnson, the principal surveyor, on pages two and following of the proceeding, with the figure thereof shown in the map thereunto annexed. The act of the alcalde also ordered that an authenticated copy of it should be delivered to the interested party that he might possess, use and enjoy the lands sold to him, his children, heirs and successors, or whoever of him or them might have cause, interest or right to represent.

We are unable to see why these proceedings did not vest the legal title to the lands granted in Peyton. The possession was delivered to him, and he was instituted therein. The interest of Basques, whatever it was, both legal and equitable, had been sold by him to Hartz, and Hartz had sold it to Peyton. The institution into possession must, therefore, have inured to the benefit of Peyton. It is a mistake to allege, as the defendants now do, that the final extension of title was to Basques. It may be that Peyton would have held the land for the use of Basques, had he been only the attorney of Basques. But he was more. He was a grantee of all the Basques right. In this particular the case is unlike *Hanrick* v. *Barton*, 16 Wall., 166 [83 U. S., XXI., 350]. There, as here, there had been an extension of the possession to the attorney in fact of the original grantee of the government, and it was held that the ex- [361] tension inured to his benefit, and that its legal effect was to perfect title in him. But there had been no grant of the original title to the attorney. An assertion of title in him was, therefore, a fraud upon his principal. But this court said: "We do not mean to say that the original grantee, if not prohibited by law, might not have assigned his inchoate title to a third person, nor that the title might not, by a grant in proper form, have been perfected in such assignee."

It has repeatedly been decided in Texas that purchasers under the twenty-fourth article of Mexican Laws of 1825 can alienate their grants as soon as the concession has been made to them, before the land was selected or the title of possession was issued. *Ryan* v. *Jackson*, 11 Tex., 391; *Clay* v. *Holbert*, 14 Tex., 189. In *Martin* v. *Parker*, 26 Tex., 254, it was held that a formal act of sale by the original grantee, with a power to the purchaser to obtain the title of possession, must be held to constitute the purchaser the absolute owner of the property when he is put into possession of the land, and, the evidence of title by the proper officer of the government. Such is this case. The first assignment of error, therefore, cannot be sustained.

Nor can the second. The original grant, it is true, did not locate the subject of the grant. It contemplated a selection and location thereafter, and, when these were made, as the jury found, and the title of extension was given, the title was complete. There was enough in the extension, coupled with the notes of the surveyor (made a part of it), to enable the location to be identified. A more important question is raised by the third and fourth assignments.

It was a very material inquiry at the trial, where the Basques four leagues had been located. The title papers described the location as beginning at a stake marked P, upon the left margin of the River Brazos, running thence north 71 degrees east, to a corner; thence by other courses back to the river, and thence up the river to the place of beginning. Such was the report of the survey. The starting-point was a stake, perishable, of course, and which, as might have been expected, would not be found after a lapse of forty years. But the survey was not a mere chamber one. There was evidence that it had actually been made [362] upon the ground, and the court submitted to the jury to find whether it had or not. No exception was taken to this submission, and the jury found that an actual survey had been thus made. The location of that actual survey was the matter chiefly in controversy. The claim of the plaintiff was that its upper or north line, described as beginning at a stake marked P on the left bank of the Brazos River, running thence by a course north seventy-one degrees east, was the upper line of the Austin and Williams reserve, and identical with it to the extent of the Basques survey. To prove this they introduced the testimony of Horatio Chriesman, against the objection of the defendants. Chriesman had been a surveyor under F. W. Johnson,

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principal surveyor of the Austin and Williams lands in the reserve, and William Moore, deceased, had been another deputy. The two deputies, in 1833 and 1834, had been engaged surveying in the reserve other lots on the left side of the Brazos River. Neither of them was on the Basques tract, nor on any line of it. Chriesman was laying out tracts fronting one thousand *varas* on the river. By direction of Johnson, these surveys were to include all the river front between the upper line of the Ruiz (a grant located on the lower line of the reserve) and the lower line of the Basques four-league grant. Moore was surveying in the rear. During the time that Moore and the witness were thus engaged surveying in the reserve, and perhaps before that time, as he testified, he was allowed to state that Moore informed him he had made the survey of the Basques four-league tract; that the upper line of said grant began on the east bank of the Brazos River, at the point where the upper line of the reserve began; and that the upper line of the Basques ran north 71 east with the reserve line the full distance of the Basques line, and that the upper line of the Basques and the upper line of the reserve were the same to the extent of the Basques line. It was this testimony, and other of a similar nature, to which the defendants objected, and to the admission of which they excepted.

It is to be noticed that the witness himself, as he expressly stated, had no knowledge of the location or lines of the Basques survey, except [363] what Moore told him. The declarations of Moore were made when he was at a distance from the place of beginning of the Basques survey and from its upper line, and they were not made when he was pointing out the boundaries of that survey. That Moore had made the survey, or that he had ever been upon its upper line, or on the upper line of the reserve, is proved only by his assertion, which the court allowed to be given in evidence. There was no such proof *aliunde*. Whether he had any knowledge of the facts whereof he spoke to Chriesman, is known only from his own statement.

Again; Moore's declarations had no reference to reputation in the neighborhood. They are not to be confounded with proof of reputation—proof of what the community thought, believed or said. As repeated by the witness, it was mere hearsay, the unsworn declarations of a deceased person respecting a particular fact not of a public nature. We do not question that declarations by deceased persons of reputation respecting ancient public boundaries are admissible, and they have sometimes been admitted in controversies respecting private boundaries. But they are admissible in only a limited class of cases, a class much more limited than that in which such evidence is offered to prove reputation of public boundaries. Proof of reputation is open to rebuttal by witnesses. Not so with declarations of a particular fact respecting a private boundary. They are, therefore, receivable only when made coincidently with pointing out the boundaries and generally as part of the *res gestæ*.

In *Ellicott* v. *Pearl*, 10 Pet., 412, we find a case which bears strongly on the present. In that case, which was a writ of right for a tract of land, in which the location of a survey was a matter in controversy, a witness was offered to prove that one Moore, who was dead, but whose name was put down as one of the chain carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared that a certain corner was the corner made by the surveyor when the original survey was made and the line was run for that survey. The evidence was rejected and, this court ruled, correctly rejected, though the declarations offered were made by one who was proved by other evidence to have [364] assisted in running the line. This case is instructive, and we believe it is in harmony with the rule generally enforced in this country. It certainly is in accord with the ruling of the English courts.

It is true that in several States of the Union decisions have been made recognizing the admissibility of declarations of deceased persons, even though they were statements of particular facts and in regard to mere private boundaries: but many of them, perhaps most of them, were admissible on other grounds, either as parts of the *res gestæ* or declarations of parties in possession. We think such is not the preponderant weight of decision. In Massachusetts, where the subject has been much discussed, it is held that, to be admissible, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries. *Bartlett* v. *Emerson*, 7 Gray, 174; *Daggett* v. *Shaw*, 5 Met., 223. And again in *Long* v. *Colton*, 116 Mass., 414, when it was said that it is an element not to be disregarded, especially where the question is one of private boundaries, that the declaration was made while in the act of pointing out the boundaries, on the declarant's land. The declaration derives its force from the fact that it accompanies and qualifies an act, and is thus a part of the act. A similar ruling was made in *Bender* v. *Pitzer*, 27 Pa., 333.

We will not undertake to review the vast number of decisions of state courts upon this subject. It would greatly protract this opinion. Some things may be deduced from them, which, though not universally recognized, are the conclusions to which, we think, a great majority of them lead. In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land, or in possession of it when the declarations were made.

To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence. Still, if a different ruling has been made in the State of Texas, and has become a rule of property there, applicable to the determination of con- [365] troversies respecting disputed boundaries, we should feel constrained to apply the Texas rule to this case. We have, therefore, carefully examined all the decisions of the Supreme Court of that State which relate to the subject. The result has been to convince us that there is no essential difference between the rule as there

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held and the general rules held by the American courts. Hearsay evidence is admitted in questions of boundary to establish old boundary lines, even when private; but it is under restrictions, and the restrictions appear to be the same as those which are recognized elsewhere.

The first case is *George* v. *Thomas*, 16 Tex., 74. What was there ruled was that the declarations of a public surveyor, made while he was making the survey to establish the dividing line, were admissible. They were a part of the *res gestæ*. This is the leading case to which the later cases refer, and upon which they are generally rested. The opinion cites *Blythe* v. *Sutherland*, 3 McCord, 158. In that case the declarations of a deceased surveyor, who was proved by a witness to have run the line originally, were admitted in evidence. But they were declarations made while the surveyor was pointing out the line and showing the monuments. *Stroud* v. *Springfield*, 28 Tex., 649, goes no farther. The evidence offered in that case was rejected. The court, however, referred to *Spear* v. *Coate*, 3 McCord, 227, where the court had said in reference to the declarations of a deceased chain carrier *who had pointed out to the witness a corner tree of the survey*, "It cannot be doubted at this day that the declarations of deceased persons *who shall appear to have been in a situation to possess the information*, and are not interested, shall, on a question of boundary, be received in evidence." Even this was not declared to be an accepted rule in Texas, though the chain carrier who aided in the survey had actually pointed out a corner.

The next case is *Welder* v. *Carroll*, 29 Tex., 317. It decided nothing more than was ruled in the former cases. Indeed, while the court said, "If the locality of a boundary line can be proved by witnesses, who can, from their personal knowledge, or on information derived from general reputation, or from its having been pointed [366] out to them by the surveyor by whom it was run, or others who were present at the time, or cognizant of the fact, it will fix and mark its position." But at the same time the court rejected the deposition of a witness tending to prove the locality of the line from information given him by a surveyor, remarking that "While, as heretofore held by this court, hearsay evidence to establish ancient boundaries is, under proper circumstances, admissible, it should be closely scrutinized and received with proper caution." And it was held that the evidence was much too vague and uncertain in respect to the locality of the line of which the witness spoke, as well as in respect to the source of his information, and the time and circumstances under which he acquired it.

The next case is *Evans* v. *Hurt*, 34 Tex., 111. What was decided in that case was, that declarations of a former owner, since deceased, who, while in possession of and claiming the land, pointed out his corner and line to the deposing witness, are evidence of the boundary in behalf of the parties claiming under him. This is the rule as held in other States. The court also decided that the declarations of a son of a former owner who pointed out the disputed line to the witness were inadmissible; but the case does not show what they were, nor under what circumstances they were made. This case came again before the court, and it is reported in 49 Tex., 311. The report, however, contains nothing more definite than what appears in 34 Tex., 111.

The only other case which we have found or to which we have been referred is *Smith* v. *Russell*, 37 Tex., 247. In that case it appeared that the lower court had permitted the defendants to prove that one of the original chain carriers, who was dead at the time of the trial, had pointed out to the witness the place of the corner. The Supreme Court held that the evidence was properly admitted, with the general remark that "the declarations of deceased witnesses may be proved to fix the location of corners and lines," citing *Stroud* v. *Springfield* and *Welder* v. *Carroll*. From a review of all these cases it is quite obvious that the rule in Texas is not different from that which we have endeavored to show is the general American rule, the guarded rule we have heretofore stated.

Our conclusion, therefore, is, that the 4th and [367] 5th assignments of error must be sustained, and that the answer of Chriesman to the 4th, 9th and 19th interrogatories, as well as all the declarations of Moore, were erroneously received.

We discover no error in the admission of the evidence set out in the 4th bill of exceptions. The documents were certainly evidence against one of the defendants.

Nor can the 6th assignment of error be sustained. The survey made under the Sanchez concession was not the completion of his title. It did not identify the subject of the concession until it was accepted by the government, and until the title of possession was given. That was issued October 19, 1883, after the Basques concession had been consummated.

The 7th assignment relates to the charge given to the jury respecting the Statute of Limitations. To understand this it is necessary to refer to some of the facts that appeared in evidence. It appeared that in 1835 John Martin, as a colonist, obtained a complete grant from the Mexican Government of one league, part of which interfered with the Basques four leagues tract. It appeared, also, that the defendants, Watson and his children, Bartlett and his wife, and W. H. Jones, having shown title in themselves to the several tracts they claimed, by regular transfer from the sovereignty of the soil, gave evidence tending to show that their ancestor, Churchill Jones, in 1855 or 1856, took actual possession of that part of the Martin league which interfered with the Basques grant, built a mill and other improvements thereon, and that the possession had been kept up exclusively by said defendants and those under whom they hold, down to the trial. This possession they claimed to be a defense. It appeared, however, that in 1858 the plaintiff's ancestor entered on the Basques grant, but not on the interference, and made a lease to James Martin, permitting him to occupy three hundred and twenty acres. Martin has ever since resided there, holding as tenant under the plaintiffs or their ancestors.

The charge of the court was as follows:

"The facts, as I understand the defendants to claim them, are, that in 1855, under the Martin title, and in 1856 or 1857, under the Sanchez title, they took actual possession of their lands lying within the conflict.

From that date the Statute of Limitations be- [36 gan to run in their favor for the lands embraced within their title as against the Basques title.

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If three years elapsed before they were ousted by a superior possession, then their occupancy for three years makes a complete bar to any recovery by the plaintiffs.

But the plaintiffs claim that in May, 1857, before the defendants had been in possession for the period of three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basques grant of James Martin as the agent for Mrs. Eberly.

If you find this fact to be as the plaintiffs claim, that James Martin entered upon the Basquez grant in 1857 as the agent for Mrs. Eberly, claiming title to the whole in her name, we instruct you that for that time the possession of the defendants, they holding under a junior title, was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper title.

From January 28, 1861, to the 30th of March, 1870, the Statute of Limitations in this State was suspended. No extension, therefore, of the actual possession of defendants between these dates would avail them unless held for three years after the Statute had again commenced running, and before the commencement of this suit."

It is this instruction of which the defendants complain. But we think it was correct. It was in accordance with the doctrine asserted in *Clarke* v. *Courtney*, 5 Pet., 319, and generally recognized. It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title. Still, his possession beyond the limits of his actual occupancy is only a constructive one. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, the constructive possession is in him of all the land not in the actual possession of the intruder, and this, though the owner's actual possession, is not within the limits of the defective title. "The reason is plain. Both parties cannot be seised at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not [369] in the actual occupancy of the adverse party to him who has the better title." These distinctions are clearly shown in the cases cited from 5 Pet. (*supra*). One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretense. Such, we think, is not the law. When the owner of the Basques title entered upon the tract, took actual possession of a part by her tenant, and retained it, claiming the whole, the law gave to that owner the constructive possession of all that was not in the actual adverse possession or occupancy of another.

In *Altemus* v. *Long*, 4 Pa., 254, it was ruled that though actual possession under a junior title of part of a tract of land, which interfered with an older grant, gave possession of the whole to the holder of the junior title, yet a subsequent entry of the true owner upon any part of his land was an ouster of the intruder from what he had in constructive possession merely. We know of no authoritative decision that is in conflict with this.

It is sufficient to say of the 8th assignment of error, that it is not sustainable. The answer to the defendants' point was clearly correct.

The remaining exception is to the sufficiency of the verdict.

It is said it was "indefinite, uncertain and did not find the main issue, viz: how much of the defendants' land, if any, is covered by the Basques grant?" This is not necessary for us now to discuss. It may be the verdict was not sufficiently certain, but as the case goes back for another trial, the matter is of no importance now.

The judgment is reversed and the cause is remitted for a new trial.

Dissenting, *Mr. Justice* **Bradley.**

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S. 53; 11 N. W. Rep., 501; 20 N. W. Rep., 781.

NATHAN C. DRAPER, *Appt.*, [370]

v.

HENRY S. DAVIS ET AL.

(S. C., 12 Otto, 370, 371.)

Appeal, practice on.

The power of a justice of the court below, over the appeal to this court and over the security, in the absence of fraud, is exhausted when he takes the security and signs the citation. From that time the control of the *supersedeas*, as well as the appeal, is transferred to this court.

[No. 309.]

Submitted Nov. 8, 1880. Decided Nov. 15, 1880.

APPEAL from the Supreme Court of the District of Columbia.

Motion for a writ of *supersedeas*.

The case is stated by the court.

Mr. **W. A. Meloy**, for appellant.

Messrs. **John Selden** and **Leigh Robinson**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The final decree in this cause was rendered April 20, 1878. On the 7th of May an order was entered on the minutes of the court below, sitting in General Term, allowing an appeal to this court, but no security was then taken, either for costs or to obtain a *supersedeas*. On the 29th of June, being the sixtieth day after the rendition of the decree, a bond in the penal sum of $1000, conditioned according to law, for a *supersedeas*, with sureties, was approved by one of the Justices of the court below, and filed with the clerk. There has been no allegation that the approval of this bond was procured by fraud. On the same day the same Justice signed

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a citation, which was served July 8. The taking of this security was not the act of the court, but of the Justice. On the 20th of July, the same Justice, being satisfied that the bond he had taken and approved was "insufficient and inadequate security," "ordered that the appellant, within twenty days, * * * file an additional bond in the penalty of $3,000, with good and sufficient surety to be duly approved, and upon such notice as is required under Rule 116 of this (the Supreme Court of the District) court." Within the time required by this order, the appellant presented to the Justice, for approval an additional bond for the required amount; but it does not appear that this bond was ever accepted. The appellant fearing, as he alleges, that the court below will proceed to carry its decree into effect pending this appeal, now asks that a writ of *supersedeas* may issue [371] to stay any such proceeding.

When the original bond of $1,000 was accepted by the Justice and the citation signed, an appeal was allowed and security taken, which operated as a *supersedeas*. That transferred the jurisdiction of the suit appealed to this court. As this allowance was the act of the Justice of the court and not of the court itself, no such question is presented as was decided in *Goddard* [*Phillips*] v. *Ordway*, 101 U.S., 745 [XXV., 1040], where we held that if the allowance was the judicial act of the court in term time, it might, like any other order in the suit, be set aside on proper showing during the Term. The power of the Justice over the appeal and the security, in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the *supersedeas*, as well as the appeal, was transferred to this court, and even here, as we held in *Jerome* v. *McCarter*, 21 Wall., 17 [88 U. S., XXII., 515], in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted. It follows that the *supersedeas*, which resulted from the taking of the security on the 29th of June, is still in force and has never been vacated. Consequently, the court below is without power at this time to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us it will not attempt to do so.

Should an application be made to us to increase the security on the ground of a change "in the circumstances of the case, or of the parties, or of the sureties on the bond," "so that security which was good and sufficient" at the time it was taken "does not continue to be so," *Jerome* v. *McCarter*, *supra*, or to set aside the bond which was accepted, on the ground that its acceptance was procured by fraud, *R. R. Co.* v. *Schutte*, 100 U. S., 644 [XXV., 605], we can then determine whether the *supersedeas* now in force shall be vacated; but on the case as it now stands we think the court below is without power to proceed in the execution of the decree which has been appealed from.

Motion denied, without prejudice to its renewal should it be necessary.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 262, 266.

H. B. WELLS, *Plff. in Err.*, [625]
v.
BOARD OF SUPERVISORS OF PONTOTOC COUNTY.

(See S. C., 12 Otto, 625-634.)

Municipal bonds—power to issue—Mississippi law—supervisors—railroad mortgage on future property—conditional sales.

1. Where there was no authority in law for issuing municipal bonds, no recovery can be had in an action upon the bonds or coupons.
2. Unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms or by reasonable implication, no obligation of that kind can be created.
3. As a general rule, the Boards of Supervisors of counties in Mississippi, have no other financial powers than to levy such taxes as may be necessary to meet the demands of their respective counties, and to direct the appropriation of the money that may come into the treasury.
4. When the state statute conferred an extraordinary power on the Boards of Supervisors to create a new liability for their respective counties, and provided a special way of discharging that liability, the mode prescribed is exclusive of all others.

[No. 716.]

Submitted Oct. 12, 1880. Decided Nov. 15, 1880.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The case is fully stated in the opinion of the court.

Messrs. **Hallam & Perkins** and **A. G. Riddle**, for plaintiff in error.

Mr. **Van H. Manning**, for defendant in error:

Mr. Chief Justice **Waite** delivered the opin- [626]
ion of the court.

On the 10th of March, 1852, the Legislature of Mississippi passed an Act to incorporate the Mississippi Central Railroad Company. Sections 17 and 18 of that Act are as follows:

"Section 17. *Be it further enacted*, That the Boards of Police of the several Counties of Madison, Holmes, Carroll, Yallabusha, Lafayette and Marshall, together with such other counties as are adjoining or adjacent to the counties through which said railroad may pass, may for their respective counties subscribe for capital stock in said railroad, not to exceed in amount two hundred thousand dollars for any one county; *Provided, however*, That an election shall be holden in the county for and on account of which said stock is proposed to be subscribed, by the qualified electors thereof, at the regular precincts of said county, ten days' notice of the time of holding such election, and of the amount proposed to be subscribed, being first given by the Board of Police; and if at such election a majority of the qualified electors voting shall be in favor of such subscription, then said Board shall make such subscription for and in behalf of the county for the amount specified; but if a majority of those voting shall be opposed to such subscription, the same shall not be made.

Section 18. *Be it further enacted*, That said several Boards of Police, either before or after any election held as provided in the 17th section of this Act, may direct that, whenever any tax shall be collected in their respective counties for

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the payment of the capital stock so subscribed by the county, which tax the several Boards of Police are hereby authorized to assess and collect from the taxable property or real property of the county as said Board may elect, the sheriff or tax collector shall issue to the person paying such tax a certificate specifying the amount of tax so paid and on account of what railroad the same is paid, which said certificate or certificates shall be transferable by indorsement; and whenever any person, either by payment of taxes as aforesaid, or by indorsement as aforesaid, shall hold a certificate or certificates, in amount equal to one or more shares of the capital stock of said railroad company, he may present the same to the treasurer of said company, who shall thereupon take up the said certificate or certificates and issue, to the holder of them, certificates for one or more shares of stock in said company; and such holder of said certificate of stock shall be, for such stock, [627] substituted to the right of the county as a stockholder to the number of shares named in said certificate."

On the 19th of April, and during the same session of the Legislature, a supplemental Act was passed, by which, if the Act should be approved by a vote of the several counties through which the road might be located, a tax of five per cent on the assessed value of all lands lying within five miles and two and one half per cent on all lying over five miles and under ten of the road, was to be collected annually for a term of four years to aid in the construction of the road. Section 4 of this Act is as follows:

"Section 4. *Be it further enacted*, That, whenever any sheriff or tax collector shall collect any tax by virtue of this Act, he shall give to the person or persons paying the same a certificate therefor, which certificate shall be transferable by indorsement; and whenever any person or persons, either by payment of taxes as aforesaid or by indorsement as aforesaid, shall hold a certificate or certificates in amount equal to a share of the capital stock of said railroad company, he may present the same to the treasurer of said company, who shall thereupon take up the said certificate or certificates and issue, to the holder of them, a certificate for a share of stock in said company, which certificate shall entitle such person to all the rights and privileges of a stockholder in said railroad company."

On the 23d of November, 1859, the Memphis, Holly Springs and Mobile Railroad Company was incorporated. Section 7 of that Act of incorporation gave authority to the Board of Directors "To issue, sell, negotiate, mortgage, pledge or hypothecate the bonds or notes of the company, as well as any notes, bonds, scrip, certificates or other property for the payment of money or other property which said company shall or may receive as donations, or in [628] payment of subscriptions to the capital stock of said company or other dues thereto." Section 8 provided that the Board of Directors might require each subscriber, at the time of subscribing or at any time thereafter, to pay a part not exceeding ten per cent of his subscription to the capital stock in cash, and that no further payment should be demanded until in the opinion of the Board a sufficient amount of the capital stock had been subscribed, with the means and credits of the company, to construct the road. No calls were to be made except on thirty days' notice, and the amount called for at any one time could not exceed thirty per cent to each subscriber of the amount of his subscription. Section 15 is as follows:

"Section 15. *Be it further enacted*, That the sections 17 and 18 of an Act passed by the Legislature of this State, and approved March 10, 1852, entitled 'An Act to Incorporate the Mississippi Central Railroad Company,' regulating county subscriptions to the capital stock of said company, be and the same are adopted as part of this Act, so far as the provisions of the same may be applicable."

By section 16 the company was authorized to consolidate with other railroad companies.

No organization is shown to have been perfected under this Act and, February 20, 1867, another Act was passed, of which the title and the only portion pertinent to this case are as follows:

"An Act to Revive and Amend an Act Entitled 'An Act to Incorporate the Memphis and Holly Springs and Mobile Railroad Company,' Approved November 23, 1859, and for Other Purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That the above recited Act be and the same is hereby revived, and that the style of said Railroad Company shall hereafter be known as the 'Memphis, Holly Springs, Okolona and Selma Railroad Company'; and, as many of the original incorporators are now dead, that N.B. Forrest" (etc., etc.) "all of the State of Mississippi, together with those who may hereafter become stockholders, their successors, etc., shall be said corporators.

Section 2. *Be it further enacted*, That said Company shall have sixteen years in which to construct the said road, and shall commence the same in three years from and after the passage of this Act."

When these several Acts were passed, the Constitution of Mississippi, adopted in 1832, was in force. This Constitution contained no limitation on the power of the Legislature to authorize counties to become stockholders in or to lend their credit to railway or other corporations. A new Constitution went into effect [629] in 1868, article XII. section 14 of which is as follows:

"The Legislature shall not authorize any county, city or town to become a stockholder in or lend its credit to any corporation, unless two thirds of the qualified voters of such county, city or town, at a special or regular election to be held therein, shall assent thereto."

At a special election held for that purpose on the 20th of November, 1869, the people of the County voted a subscription to the capital stock of the Memphis, Holly Springs, Okolona and Selma Company, and on the 21st of July, 1870, the name of the Company was changed by a special Act of the Legislature to the Selma, Marion and Memphis Railroad Company.

On the 19th of April, 1872, a general Act was passed "To Authorize Counties, Cities and Towns to Subscribe to the Capital Stock of Railroads," which gave any county through which any railroad should pass authority to subscribe any sum to the capital stock, if two thirds of the legal voters should give their assent in the manner specially provided for. Such

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subscriptions were to be paid in the twenty-year coupon bonds of the county, bearing interest at the rate of seven per cent per annum. Taxes were to be levied and collected to pay the principal and interest of these bonds as they matured; and it was further also provided "That certificates of shares in the capital stock of said companies shall be issued to all persons paying taxes, for the principal and interest of said bonds, to the amount paid by them, whenever the receipts for the taxes so paid shall be equal to one or more shares of the capital stock."

Under date of July 1, 1872, the Board of Supervisors of Pontotoc County, which was the legal successor of the Board of Police, under the authority of the vote of November 20, 1869, issued to the Selma, Marion and Memphis Railroad Company coupon bonds, having twenty years to run, and bearing interest, payable semi-annually at the rate of eight per cent per annum, amounting in the aggregate to $150,000. [630] The plaintiff being the holder for value of a large amount of the coupons of these bonds, payable January and July, 1873, and January, 1874, which were not paid on presentation at maturity, brought this suit for their recovery. The court below gave judgment against him as on demurrer to the declaration, which presented substantially the foregoing facts, and to reverse that judgment this writ of error has been brought.

The controlling question in this case is, whether there was authority in law for issuing the bonds to which the coupons sued on were attached. If there was not, it has always been held that no recovery can be had in an action on the bonds or coupons. It is also settled that, unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms or by reasonable implication, no obligation of that kind can be created.

In Mississippi, as a general rule, the Boards of Supervisors of counties have no other financial powers than "To levy such taxes as may be necessary to meet the demands of their respective counties," and to "Direct the appropriation of the money that may come into the treasury." Code, 1880, secs. 2148, 2158; Code, 1857, ch. LIX., sec. IV., arts. 16, 30. This, it has been held by the highest court of the State, gives no power to borrow money. In *Beaman* v. *Leake Co.*, 42 Miss., 247, decided in 1868, the court, referring to an Act then under consideration, passed in December, 1863, but which in no manner affects this case, said: "The Act just referred to is the only one of a general nature empowering Boards of Police to borrow money, and without some such Act they could not lawfully do so in their official characters." The policy of the State, from its earliest history, seems to have been to require municipal organizations to meet their current liabilities by current taxation; and in *Hawkins* v. *Carroll Co.*, 50 Miss., 762, it was expressly declared that "The grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed."

Such being the general law of the State, we come to consider the special legislation on which this case depends, that is to say, sections 17 and 18 of the Act of 1852, in connection with the other provisions of the Act of 1859, into which these sections were incorporated by adoption. [631] Undoubtedly, section 17 authorized a subscription to the stock of the Railroad Company for the County, after a majority of the electors of the County had in the proper way given their consent; and it is possible, if there had been nothing more, that, under the rule of construction stated in *Lynde* v. *Winnebago Co.*, 16 Wall., 6 [83 U. S., XXI., 272], the subscription might have been paid in bonds. It seems to us, however, that the provisions of section 18 are such as to exclude any such presumption. By that section, the Boards of Police (Supervisors) were authorized to assess and collect a tax on the taxable property or the real property of the County, at their election, "For the payment of the capital stock so subscribed." No other mode of payment was provided for. This, of itself, when considered in the light of the settled policy of the State to require the current liabilities of counties to be discharged by current taxation, would seem to indicate an intention not to confer upon the counties the power of funding this kind of liability. But when it is taken in connection with the further provision of the same section, which authorizes the Boards of Police to direct that the railroad company issue to the tax payers, in lieu of the county, stock to the amount of their taxes paid, the intention is even more apparent. As stock was to be issued by the company to an amount equal to the taxes paid, it would seem as though it could not have been supposed that, before the tax was collected, any payment of the subscription was to be made or any stock issued that could in any manner interfere with this privilege of the tax payers. So, too, the Company could only be required to issue stock upon and to the amount of the subscription. As the tax payer was to be entitled to stock to the full amount of his payment, it follows that the tax must have been intended to pay the subscription, and not bonds. We are not unmindful of the fact that the language of this part of the section is such as to leave it optional with the Board to give this direction or not; but it may, nevertheless, be referred to, as we think, to strengthen the presumption arising from the other provisions, that the subscription was not to be paid through taxation, directly or indirectly, until the money to be raised in that way had actually been collected. This statute conferred an extraordinary power on the Boards [632] of Police. It authorized them to create a new liability for their respective counties, and provided a special way of discharging that liability. The liability and the mode of discharge were provided for in the same statute. This being so, the mode prescribed is exclusive of all others.

This case differs materially from *Lynde* v. *Winnebago Co.*, *supra*. There the tax voted was to be levied annually during a period not exceeding ten years, and the amount for each year definitely fixed. As this was done for the purpose of building a court-house, the court very properly held the vote implied permission to borrow money to accomplish the object in anticipation of the collection of the tax, which must necessarily be delayed a considerable number of years. Here the tax was to be levied to pay the subscription, that is to say, to pay the

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company the amount subscribed when, by the terms of the subscription, that obligation was to be met. As the statute on its face contemplated no delay in raising the money by taxation, no implication of a power to borrow in anticipation of the tax can arise. The subscription might be made, but the money must be raised by taxation to meet it. The railroad company cannot complain; for when it received the subscription it knew or ought to have known from what source the money was to come to meet the payment, and it impliedly gave its consent to such delays as were necessarily incident to the mode of collection. The other provisions of the charter, as to calls on subscribers to meet their subscriptions, were not necessarily applicable to counties. Counties were to pay as they agreed, and when the tax was collected.

It may be true, as is urged, that the collection of the full amount of the subscription in a single year would be oppressive, but it by no means follows that this must necessarily have been done. These sections are to be construed in the Act of 1859 precisely as they would be in that of 1852, except so far as they may have been modified by the other provisions in 1859. The original Act of 1852 is to be considered in connection with the supplemental Act passed a little later. Being *in pari materia*, and enacted at [633] the same session of the Legislature, they are to be taken together as one law. From the supplemental Act, it is apparent that the object of the Legislature was to raise money by taxation, to aid in the construction of the road, and to require the company to give the tax payers stock for the money they paid. This is entirely inconsistent with any idea of the payment of interest. As the special tax on adjoining lands was large, it was extended over a period of years. This amount was fixed, and not left to the discretion of anyone. In respect to the County at large, the plan adopted was different. There it was left for the people to determine for themselves how much the subscription should be and for the County and the company to agree when it should be paid. In this way, the tax might be extended over a series of years; but as stock was to be issued by the company for all payments made, it could not have been intended to tax beyond the actual amount of the subscription. Consequently, if time was given by the company to make the payment, it must be without interest.

This construction of the Act is strengthened by what actually happened. The revived and amended charter was passed in 1867, and the subscription voted in 1869. When the subscription was made does not appear, but certain it is that no bonds were issued to make the payment until after the policy of the State in respect to funding this class of liabilities was changed by the Act of 1872. Then, although confessedly that Act did not apply to this case and its provisions were not followed, the subscription was paid by binding the tax payers of the County to pay in the aggregate $390,000, instead of $150,000, as was voted. This, we think, could not be done.

It is further argued that, because the 7th section of the Act of 1859 authorized the railroad company to sell any *bonds* it might receive as donations or in payment of subscriptions, the power of counties to issue bonds in payment of their subscriptions must be inferred. We cannot so understand that provision. This gave power to sell bonds if, in the course of business, they should get to be the property of the company, but the implied prohibition against their issue by counties still remains.

It is also said that the provision in section 18 for giving individual tax payers stock for the amount of their taxes paid cannot be considered as in any manner precluding an implication of the power to issue bonds, because the same provision is found in section 4 of the Act of 1872. [634] There is this difference between these provisions of the two Acts: in that of 1852 the railroad company is to issue the stock to the tax payer, while that of 1872 simply says that certificates of shares shall be issued, without saying by whom. But it is not for us at this time to determine the legal effect of that part of the Act of 1872. Power to issue bonds is given in express terms by that Act, and stock was to be issued to all persons "paying taxes for the principal and interest of said bonds;" while in the Act of 1852 the tax was to be collected "for the payment of the capital stock so subscribed," and stock was to be issued by the company to the persons holding certificates of the payment of this tax.

On the whole, we think the court below was right in holding that the issue of bonds in this case was not authorized by law. Different questions will arise if the railroad company or anyone who has been subrogated to the rights of the company shall attempt to enforce the payment of the original subscription by the County.

Judgment affirmed.

Dissenting, *Mr. Justice* **Swayne**, *Mr. Justice* **Strong** and *Mr. Justice* **Harlan.**

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—102 U. S., 639; 103 U. S., 777; 108 U. S., 123; 111 U. S., 411.

HENRY HAUENSTEIN, JOHN HAUENSTEIN, by His Guardian, FREDERICK HAUENSTEIN, ET AL., *Plffs. in Err.*,

v.

JOHN J. LYNHAM, Escheator for the COMMONWEALTH OF VIRGINIA.

131 US cxci Appx

When a party is sued in his official character, as Escheator of the Commonwealth of Virginia, and he holds the funds sued for in that capacity, and he is charged with no official delinquency, he cannot be made liable, personally, for the costs of the plaintiff. The costs can only be charged upon the funds in his hands as Escheator.

[No. 133, 1879.]

Submitted Nov. 15, 1880. Decided Nov. 22, 1880.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

On motion to correct judgment.

Mr. W. L. Royall, in support of the motion.

No counsel appeared in opposition thereto.

Mr. Chief Justice **Waite** delivered the opinion of the court:

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This motion is denied. The defendant in error was sued in his official character, as Escheator for the Commonwealth of Virginia. He was a public officer of the State, and he held the funds sued for in that capacity. He was charged with no official delinquency. Under such circumstances he cannot be made liable, personally for the costs of the plaintiffs. The court below was right, therefore, in confining the judgment for costs to the funds in his hands as Escheator.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[167] IVANHOE MINING COMPANY, *Plff. in Err.*,

v.

KEYSTONE CONSOLIDATED MINING COMPANY.

(See S. C., 12 Otto, 167-176.)

Grant of public lands to California—school lands—settlement.

*1. The grant of the 16th and 36th sections of public lands, to the State of California, by the Act of March 3, 1853, was not intended to cover mineral lands; but such lands were excluded from that grant as they were from all others by the settled policy of the General Government on that subject.

2. The settlement required by the 7th section of the Act of 1853, which defeats the grant of those sections for school purposes need not be precisely the same, either in regard to the acts to be done or the character of the settler, as is required under the general Preemption Law of 1841. The settlement on the school lands, under the Act of 1853, is governed by that Act.

3. Whenever there exists, at the time the government survey is made of such a section, a settlement, by dwelling-house or cultivation, on any portion of said section on which some one is residing and asserting claim to it, the title of the State to that portion does not vest, but the alternative right to other land as indemnity does. *Sherman* v. *Buick* [XXIII.,] and *Natoma Water Co.* v. *Bugbey* [XXIV.,] commented on and explained.

[No. 637.]

Argued Nov. 4, 5, 1880. Decided Nov. 22, 1880.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. W. M. Stewart and **O. D. Barrett,** for plaintiff in error.

Mr. **Benj. F. Butler,** for the State of California.

Mr. **Chas. Devens,** *Atty-Gen.*, for the United States.

Messrs. **Geo. A. Nourse** and **S. M. Wilson,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The action in this case was brought originally in the State Court of California by Daniel W. Gillette against the present defendant in error, to recover possession of the east half of section 36, in township 7 north, range 10 east of Mount Diablo meridian, and in the progress of the case [168] it was transferred to the Circuit Court of the United States, where judgment was rendered in favor of the defendant. The plaintiff in error, having been substituted for Gillette, as his successor in interest, the case was submitted to the court by the parties waiving a jury.

The plaintiff asserted title to the land in controversy under a patent from the State of California, and the defendant under patents from the United States. The title of California rests upon the Act of Congress granting that State the 16th and 36th sections of every township for school purposes; and that of defendant on the Acts of Congress concerning the possession and sale of the mineral lands.

As the question to be decided necessarily involves the title to much other mineral land in California, in which the authorities of the State of California and the officers of the Land Department of the United States entertain and act upon conflicting views of the rights of the State and the General Government, the State of California by her counsel, and the United States by the Attorney-General, have been permitted to take part in the argument.

The defendant only claims part of the land embraced in plaintiff's patent, and denies possession of that for which no title is asserted; and, as no possession is proved beyond that for which the defendant defends, only that is in controversy.

The court below finds that this is mineral land, and that the patent of the United States was issued to defendant for three several mining claims, to wit: the Spring Hill, the Geneva and the Keystone. That the Spring Hill was located in May, 1851, the Keystone in 1853, and the Geneva in October, 1863; and that the original locators of said claims and their grantees have held undisturbed possession thereof ever since and, by such possession and the working of said mines, the possessory title was vested in defendant at the time it filed its application for said patent in the Land-Office of the United States at Sacramento, January 6, 1871, unless the State of California had acquired title to section 36 by grant from the United States. It also appears that on the land thus claimed by plaintiff, a mining town called Amador City exists, of about 400 or 500 people, which began in 1850, and reached the number mentioned in 1853, with [169] many dwelling-houses, and some forty acres cultivated by the owners of the Keystone mining claim.

On the 18th June, 1870, one Henry Casey applied to the State authorities to purchase the half section of land on which this town and these mining claims were located, and a state patent was issued to his vendee, Gillette, October 3, 1872.

The township in which this land lies was surveyed in the field in March, 1870, the survey approved September 3, 1870, and the plat filed in the United States Land-Office at Sacramento, October 7, 1870, and within three months after this latter date, the application of the defendant was made for patents for the three mining claims, and the patents issued July 14, 1873.

The right to these patents, and the claim of the Town of Amador City, were contested before the register and receiver, the Commissioner of the General Land-Office, and the Secretary of the Interior, by the State of California and the parties claiming under her, and the decision was adverse to the title of the State.

The question and the only question presented for our consideration is very sharply presented

*Head notes by *Mr. Justice* MILLER.

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by this statement of facts and by the Acts of Congress pertinent to the subject; and it is, whether, under these Acts, the title of the land in question became fixed and vested absolutely in the State of California on the ascertainment by the survey of 1870 that it was part of the 36th section of the township in which it lies.

The Act of March 3, 1853, 10 Stat. at L., 244, under which the right of the State of California to the school lands arises, has been the subject of construction in this court more than once heretofore, and the decision of the question before us requires a further critical examination of its provisions. The first five sections of it provide for the establishment of the offices of Surveyor-General, two land-offices, with registers and receivers, and for the organization of the general land system of the United States, including surveys; and it then proceeds to lay down the rules by which rights to the public lands may be acquired. The granting clause of the 16th and 36th sections of the public lands as thus surveyed, to the State of California, is as follows:

"Section 6. *And be it further enacted*, That [170] all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this Act or reserved by competent authority; and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the Preemption Laws of 4th September, eighteen hundred and forty-one, with all the exceptions, conditions and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State, of the time and place of sale, under the laws, rules and regulations now governing such sales, or such as may be hereafter prescribed."

Section 7 of the Act may as well be read here, as it is important to a true solution of the question under consideration.

"Section 7. *And be it further enacted*, That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the 20th of May, eighteen hundred and twenty-six, entitled 'An Act to Appropriate Lands for the Support of Schools in Certain Townships and Fractional Townships, Not Before Provided for,' and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this Act by a settlement or location on mineral lands."

The 12th section grants to the State seventy-two sections for the use of a seminary of learning, to be selected by the Governor or some one appointed by him, in legal subdivisions of not less than a quarter-section, of any unsold, unoccupied, and unappropriated public lands; "*Provided*, That no mineral lands or lands reserved for any public purpose whatever, or [171] lands to which any settler may be entitled under the provisions of this Act, shall be subject to such selection."

The 13th section also grants the State ten sections of land for the purpose of erecting the public buildings of the State, with the same proviso as the one to section 12.

The proviso to the 3d section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California. That section contains the authority under which the Surveyor-General is to act in surveying the public lands in that State, and, after investing him with the powers conferred on other Surveyors-General, and some specific directions for the survey of private land claims, it is "*Provided*, That none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked on the field, and were actually necessary to be run."

It is strongly urged by plaintiff's counsel that the language of the granting clause imports a grant *in præsenti*, and that wherever by any survey of the government thereafter made the location of the 16th and 36th sections of a township was ascertained, it establishes the title in the State from the date of the statute, namely: March 3, 1853.

It is quite unnecessary to enter upon this question, which has been before us in so many shapes; for, if it be conceded that such would be the effect of the statute if there were no words of exception in the grant, Congress has, in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs.

Take, for instance, railroad grants. Besides the more general reservations from the grant, there is almost always found a provision that where, by the location of the road, the sections on each side of it, are ascertained, which would pass by the general terms of the grant, those which have been preempted, sold or otherwise disposed of shall not so pass, but the grantee may select other lands in lieu of those, which may be said in this manner to be excepted out of the grant.

This is true of the statute under consideration, and we may pass this branch of the argu- [172] ment by conceding that if the land in controversy is subject to the grant the title relates to the date of the Act of Congress.

Defendants allege that it was not so subject to the grant, for two reasons:

1. That it is mineral land, and that the grant of school lands to the State does not cover any mineral land.

2. That, by virtue of the 7th section, such settlement and cultivation had been made on the land before the survey was made, as to take it out of the grant, and remit the State to the selection of other public land in lieu of this.

We will consider these in their order:

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Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State, in 1850, was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested, by the Treaty, in the Government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish Government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the Crown, which made Spain for a time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that, with the territory, we had acquired the laws which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and, before a State could be organized, had become [173] its dominating element, with wealth and numbers and claims which demanded consideration.

Matters remained in this condition, with slight exception, until the year 1866, when Congress passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished. 14 Stat. at L., 251.

During this period, however, from 1849 to 1866, the system of the disposition of the public lands, in general, had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was, necessarily, turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this Act of 1853. As we have said in *Sherman* v. *Buick*, 93 U. S., 209 [XXIII., 849], the main purpose of that Act was to provide for the survey and sale of the public lands and for the right of preemption to the settler on these lands; and there was embraced in this clause of preemption the grant of the 16th and 36th sections to the State for school purposes. In the very sentence which contains this grant in parenthesis, and while introducing the new principle, that the public lands should be subject to the right of preemption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

We say that this introduced a new principle in preemption law; for, except in a very few cases, no right of preemption had before existed until the lands were surveyed, so that the preemptor could designate, by the description of the congressional survey, the precise land to which his preemption attached.

But this right of preemption on unsurveyed lands was, by this statute, to last but one year; and so careful was Congress to protect mineral land from sale and from preemption that, as we have already shown by the proviso to section 3, of the Act, the surveyors were forbidden to extend their surveys over mineral lands.

The effect of this was as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, preemption or other title [174] acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was, undoubtedly, to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

It is a strong corroboration of this view that Congress, in the section (12) of this same statute giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the 4th section of the Act of 1864, 13 Stat. at L., 356, it is declared that neither that Act nor the Act of 1862, 12 Stat. at L., 489, shall be held to include in the grant "Any government reservation or mineral lands or the improvements of any *bona fide* settler on any lands *returned or denominated* mineral lands."

As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted, in 1866, 14 Stat. at L., 251, a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from preemption and above all from grants, whether for railroads, public buildings or other purposes, and looking to the fact that from all the grants made in this Act they are reserved, one of which is for school purposes, besides the [175] 16th and 36th sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

It follows, from the finding of the court and the undisputed facts of the case, that the land in controversy, being mineral land and well known to be so when the surveys of it were made, did not pass to the State under the school section grant.

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It seems equally clear to us that the land is excepted from the grant by the terms of the 7th section of the Act of 1853.

In the case of *Sherman* v. *Buick*, we have said, in reference to this section, that it was unnecessary to decide whether the improvements found on the land when the survey was made, and the character of the person owning them should be, in all respects, those which are prescribed by the general preemption law. We are now satisfied that this section prescribes its own rules on that subject, and that whenever, at the time these sections are ascertained by the government survey, there is either a dwelling-house or the cultivation of any portion of the land, on which some one is residing and is asserting claim to it, the title of the State does not vest, but the alternative right to other land as indemnity does. It is only necessary to look to what we have said in *Sherman* v. *Buick*, of the fact that Congress had in view the rapid settlement of the country and the long time which might elapse before it could be known by actual survey where these school sections would be found, to see that a liberal construction must be given to the language by which Congress expresses its purpose to protect these settlements, buildings and cultivations, and that we have no right to add other qualifying incidents to the exercise of this right than those found in the statute. These are not the same required under the general preemption law, and we have no authority to import the latter into the new statute.

Some of the expressions found in *Sherman* v. *Buick* and in *Water & M. Co.* v. *Bugley*, 96 U. S., 165 [XXIV., 621], are supposed by counsel to convey a different meaning; but in the use of the words "preemption" and "preemptor," in reference to *this section of the statute*, it was not designed to imply all that was meant by those terms in the Act of 1841 and its amenda- [176] tory adjuncts, but to convey the idea of a settlement and a settler according to the terms of the statute under consideration. Nor is there anything in the principle announced in the latter case, that, where a settler abandons his claim to hold the land against the State by virtue of such settlement or improvement, and acknowledges the title of the State by purchase, his improvement or settlement cannot be set up by a third person to defeat the title of the State recognized by the United States, which conflicts with what we have just said or with the defendants' rights in the present case. Here the settlement, building and cultivation have been continuous for twenty years, with constant assertion of claim. The same parties or their privies are still claiming it. None of them have accepted title under the State or acknowledged its right to the land. The Government of the United States has given them a patent founded on this very possession, use and occupation. Nothing in that opinion justifies the construction placed upon it by counsel, and the case is clearly inapplicable to the one before us.

We are of opinion that the settlement, building and cultivation, found as facts by the Circuit Court, bring the case within the provisions of the 7th section of the Act of 1853 and, necessarily, render void the title asserted under the State by plaintiff.

It follows that the judgment of the Circuit Court is right *and it is, accordingly, affirmed.*

Mr. Justice **Field** did not sit in this case nor participate in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—7 Sawy., 469.

THOMAS JIFKINS ET AL., *Appts.*,
v.
ADDISON SWEETSER. [177]

(See S. C., "*Jifkins* v. *Sweetzer*," 12 Otto, 177-180.)

Removal of causes—before trial.

1. The Acts for the removal of causes from a State to a Federal Court require the petition for removal to be filed before the trial or final hearing.
2. Where the Supreme Court of a State granted no new hearing, but reversed what had been done in the State Court below and then proceeded to decree on the merits and, through the court below, sent the case to a master to settle the details of the final decree, it was then too late to file a petition for removal.

[No. 8.]

Submitted Nov. 10, 1880. Decided Nov. 22, 1880.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The case is fully stated by the court.

Messrs. H. M. Hoyt, W. S. Purviance, **F. Carroll Brewster,** and *Geo. Shiras,* for appellants.

Mr. **A. Ricketts,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit in equity, begun in the Court of Common Pleas of Luzerne County, Pennsylvania, June 20, 1868, by the appellee against the appellants and one James Jifkins, to obtain an account of the rents and profits and a reconveyance of certain real estate, which, it was alleged, had been transferred to the defendants and put into their possession as security for the payment of money. The defendants answered, denying that they held the property as security and claiming that their title was absolute. Upon this issue testimony was taken and, after hearing in the Common Pleas, on the 20th February, 1871, the prayer for relief was refused and the bill dismissed. From this decree an appeal was taken to the Supreme Court of the State, where, on the 23d May, 1872 the decree below was reversed, the bill re-instated and the cause remanded with instructions to refer the cause to a master "To take an account of the rents, issues and profits received by the defendants from the property in question, together with an account of debts paid by them, due by the plaintiff, with an equitable allowance for services rendered by the defendants, ascertaining the amount due by either party to the other party, so as to enable the Court of Common Pleas to make a final decree in the premises, ac- [178] cording to equity." On the 24th of August the case was referred, by the Common Pleas, in accordance with the mandate of the Supreme Court. On the 24th of August, 1874, two years later but before any report was filed, the present appellants, who were then the sole defendants, James Jifkins having before that time

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died, filed, in the Common Pleas, a petition for the removal of the suit to the Circuit Court of the United States for the Western District of Pennsylvania, under the provisions of the Act of 1866, now R. S., section 639, sub. 2. In this petition they averred that they had become citizens of the State of Virginia since the commencement of the suit; that the plaintiff was, when the suit was begun, and still continued to be a citizen of Pennsylvania; and that the suit was one in which there could be a final determination of the controversy, so far as it concerned the petitioners, without the presence of the other defendant or his legal representatives as parties to the cause. On the 9th of November, 1874, the same parties filed a further petition for removal, under the Act of 1867, R. S., section 639, sub. 3, on the ground of local influence and prejudice. Both these petitions were denied in the State Court, November 16, 1874; but, notwithstanding this, the appellants, on the 5th of December, filed in the Circuit Court a certified copy of the record in the case and, on the 20th of March, that court declined to take jurisdiction, and remanded the cause to the Court of Common Pleas. From that order the present appeal was taken, May 11, 1875, under the Act of March 3, 1875, section 5. 18 Stat. at L., 472.

The single question to which our attention was called on the argument was, whether the petitions for removal were presented to the State Court in time. In both the Acts of Congress invoked it is provided that the petition shall be filed "before the trial or final hearing of the suit." From the record, it appears that there was but a single issue between the parties, to wit: whether the appellants were the absolute owners of the property in dispute, or whether they held the title in trust for the appellee. This issue was heard and decided in favor of the appellants in the Common Pleas. The suit was then taken by appeal to the Supreme Court of the State, where it was again heard and a decision rendered in favor of the present appellee. This disposed of the case finally on its merits, [179] and nothing remained to be done but to continue the hearing already begun until the necessary accounts could be taken and the details of a final decree settled. The Act of 1875 requires that the petition for removal shall be filed "before the trial." This, we held in the *Removal Cases*, 100 U. S., 457 [XXV., 593], meant "before the trial is in good faith entered upon." If the "trial had actually begun and was in progress in the orderly course of proceeding," when the petition was presented, it would be too late. The same rule applies to the Acts now under consideration. "Before the trial or final hearing" means here, as there, before the trial or hearing of the cause has been in good faith begun. These statutes do not, any more than that of 1875, "Allow a party to experiment on his case in the State Court and, if he meets with unexpected difficulties, stop the proceedings and take his suit to another tribunal." He must make his election before he goes to the trial or hearing on the merits.

It seems to us clear that if the Court of Common Pleas had, in the first instance, decided the issue raised by the pleadings in favor of the appellee, instead of the appellants, and sent the case to a master to state the accounts, no removal could have been effected after that. The final hearing was entered on when, in the orderly course of proceedings, the issue made by the pleadings, and on which the rights of the parties depended, was submitted to the court for judicial determination. It matters not that, after the main question in the case had been settled, the convenience of the court made it necessary to call in the help of a master. In this way no new hearing was entered on. The old submission was only continued until the details of the original inquiry could be settled for the purposes of a final decree.

The hearing of this case, originally begun in the Common Pleas, was transferred by the appeal to the Supreme Court. That court, on the appeal, had the right to re-examine what had been done in the Common Pleas. In effect, it took up the case on the hearing begun below. If, on the appeal, the decree below had been reversed and the cause sent back for a rehearing, then the final hearing, for the purposes of the statutes now under consideration, would not have begun until the court below had again entered upon the determination of the cause. Then the reversal would have perfected the right to a second hearing in the court of original jurisdiction, and, under the rule stated in *Vannevar* v. *Bryant*, 21 Wall., 41 [88 U. S., XXII., 476], a demand for the transfer might properly be made. Here, however, the Supreme Court granted no new hearing. It reversed what had been done below and then proceeded, under the original submission, to decree on the merits. It thus continued the hearing under the original submission, decided the controversy so far as the primary rights of the parties were concerned, and through the Common Pleas sent the case to a master to settle the details of the final decree. No power was given the court below to rehear the case, but only to proceed in due course with the hearing that had been begun until the inquiry as to the whole subject-matter was completed. [180]

Judgment affirmed.

Mr. Justice **Strong** did not sit in this case, nor participate in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 395; 19 Blatchf., 174.

CARL L. RECKNAGEL ET AL., *Plffs. in Err.*,

v.

THOMAS MURPHY, LATE COLLECTOR OF THE PORT OF NEW YORK. [197]

(See S. C., 12 Otto, 197-200.)

Jury question as to duties.

In an action to recover back duties, illegally exacted, the question whether the articles on which the duties were paid were "argols crude" or argols refined, was a question for the jury, which it was proper for the court to submit to them.

[No. 56.]

Argued Nov. 8, 1880. Decided Nov. 22, 1880.

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IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Messrs. **Stephen G. Clarke** and **William Stanley**, for plaintiffs in error.

Mr. **Edwin B. Smith**, *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The suit was brought to recover the amount of duties claimed to have been illegally exacted from the plaintiffs by the defendant, and paid by the former under protest.

The subject to which the controversy relates is an article known in commerce as *argols*.

The Act of Congress of July 14, 1862, sec. 5, 12 Stat. at L., 547, imposed upon "argols or [198] crude tartar" a duty of "six cents per pound."

The Act of July 14, 1870, 16 Stat. at L., 266, exempted "argols crude" wholly from duty, by putting the article in the free list created by that Act.

Both these Acts were in force when the importations in question were made.

The controversy between the parties therefore narrows itself down to the question whether the argols of the plaintiffs in error, upon which the duties complained of were exacted and paid, were "argols crude" or not. If crude, they were not dutiable and the plaintiffs were entitled to recover; otherwise, the defendant was entitled to a verdict in his favor.

The subject was a proper one to be enlightened by evidence and passed upon by the jury. Both were done, and a verdict and judgment for the defendant was the result.

When wine ferments, certain deposits cling to the sides or fall to the bottom of the casks. These deposits are mingled with a variety of impurities, such as glucose, leaves, sticks and particles of dust, silicate and other like things. By washing in cold water, these impurities are removed and the crude tartar is left free from their presence. The effect of the cold water is mechanical. When boiling water is applied sufficiently, crystallization and recrystallization take place, and the product is the cream of tartar of medicine and commerce. There is refinement in the latter case, but no chemical change is wrought. Argols are used also for making tartaric acid, Rochelle salts, the preparation of tartrate of antimony and potash, called tartar emetic, as a mordant in dyeing, and for other purposes. Argols and *crude tartar* are synonyms. The phrases are used convertibly by those who deal in the article.

The lexical definition of *crude* is: "In its natural state; not cooked or prepared by fire or heat; undressed; not altered, refined or prepared for use by any artificial process; raw." See Webster's Dic.

Upon the trial the plaintiffs produced and [199] identified samples of argols of the several importations upon which the duties were paid, and gave proof tending to support their case. The defendant then gave proof tending to maintain the claim of the government. The testimony of the witnesses on both sides is set out at length in the bill of exceptions. That paper then proceeds: "A large number of witnesses were called by the defendant from the trade and from among the manufacturers of cream of tartar, and dealers and others, whose testimony tended to prove that there was an article of commerce and importation unlike the plaintiffs' samples which was, in fact, 'crude argols;' that the plaintiffs' samples exhibited at the trial were not 'crude argols;' that said samples differed from 'crude argols,' etc. * * * These witnesses also testified uniformly that plaintiffs' samples were refined argols, and in that there was a difference between them and crude argols, etc. * * * Samples of 'crude argols' were exhibited which differed, as above stated, from those exhibited by the plaintiffs. Also, that there was a difference between crude argols and the lees of wine, and that all these differences were well understood by the trade and by manufacturers."

The court, after recapitulating with entire fairness the substance of the testimony, said to the jury: "The only question for you to determine is, whether these argols were 'argols crude,' those known to commerce as such, or those known to science as such, or whether they were argols that were more or less refined."

This instruction was clear and accurate and it covered the entire ground of the controversy. Nothing more was necessary to be said. No amount of verbiage would have improved it. The jury could have no difficulty in applying it intelligently to the facts before them.

They knew from the evidence that if there were no substantial change in the condition of the argols, as they were when they came from the wine cask, they were *crude*. On the other hand, if there were such change wrought by a process to which the argols were subjected, they lost their identity, and took their place in a new and different category. According to the nomenclature of commerce, they ceased to be *crude*, and became refined. They could not be both at the same time. The measure of refinement was of no consequence, provided it was sufficient to be material. The elaborate brief submitted for the Government shows that, in [200] the customs laws passed from time to time by Congress, exact analogies to the case in hand have constantly occurred and are numerous. It is unnecessary particularly to advert to them.

In cases like this, the law recognizes the authority of those engaged in commerce, and adopts, necessarily and as conclusive, the meaning which they have given to words and phrases employed in their daily business.

It is needless to notice specifically the several assignments of error. They relate to the instruction given, and to several asked by the counsel for the plaintiffs and refused by the court. As regards the former, we have expressed our approval.

If the latter were in conflict with it, they were properly refused for that reason.

Conceding that they were correct, the instruction given was sufficient for the case. Nothing more could, therefore, be required of the court. *Bk.* v. *Burkhardt*, 100 U. S., 686 [XXV., 766].

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[203] STATE OF LOUISIANA, *ex rel.* MORRIS RANGER, *Plff. in Err.*,

v.

CITY OF NEW ORLEANS.

(See S. C., 12 Otto, 203-207.)

Contract, obligation of—constitution—legal statute.

1. The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced.
2. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, it is in conflict with the constitutional inhibition.
3. An Act of a State, requiring judgments against a city to be registered with its controller before they are paid, does not impair existing remedies.

[No. 767.]

Submitted Oct. 18, 1880. Decided Nov. 22, 1880.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. **D. C. Labatt,** for plaintiff in error.

Mr. E. Howard McCaleb, for defendant in error.

[204] *Mr. Justice* **Field** delivered the opinion of the court:

This case comes here from the Supreme Court of Louisiana. On the first of May, 1874, the relator recovered in one of the courts of that State against the City of New Orleans, two judgments, amounting in the aggregate to $170,000, besides costs. Upon these judgments executions were issued and returned, unsatisfied, after demand upon the officers of the City to point out property belonging to it subject to seizure, to be levied upon to satisfy the same. The relator thereupon presented a petition to the Third District Court of the Parish of Orleans, setting forth these facts and averring that it was the duty of the Mayor and Administrators of the City to provide for the payment of the judgments by levying and collecting a tax for that [205] purpose; but that they refused to do this and that he was unable to satisfy the judgments by the ordinary process of execution. He, therefore, prayed for an order upon the Mayor and Administrators to show cause why a writ of *mandamus* should not issue to compel them to levy and collect a tax to satisfy the judgments.

The order to show cause was granted and, upon its return, the respondents filed a peremptory exception to the relator's demand, denying that he was entitled to the relief prayed; but the district court granted the writ. Its judgment was, on appeal to the Supreme Court of the State, reversed and a decree entered dismissing the petition. The case was then brought here.

The city authorities resisted the demand of the relator for the *mandamus*, on the ground that he had not registered his judgments as required by the provisions of the Act No. 5 of 1870. That Act devests the courts of the State of authority to allow any summary process or *mandamus* against the officers of the City of New Orleans to compel the issue and delivery of any order or warrant for the payment of money, or to enforce the payment of money claimed to be due from it to any person or corporation; and requires proceedings for the recovery of money, claimed to be owing by the City, to be conducted in the ordinary form of action against the Corporation and not against any department, branch or officer thereof. The Act also provides that no writ of execution or *fieri facias* shall issue against the City, but that a final judgment against it, which has become executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it, with his petition and the defendant's answer and the clerk's

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NOTE.—*What laws are void as impairing the obligation of contracts.* See *note* to Fletcher v. Peck, 10 U. S. (6 Cranch), 87.

Impairing remedy impairs obligation of contracts. The remedy enters into and forms a part of the contract. Von Hoffman v. Quincy, 71 U. S., XVIII., 403; Gunn v. Barry, 82 U. S., XXI., 212; 8 Bk. Reg., 1; Walker v. Whitehead, 83 U. S., XXI., 357; 43 Ga., 537; Johnson v. Higgins, 3 Met., 566.

The validity and remedy of a contract are both parts of its obligation; impairing the remedy is prohibited. Green v. Biddle, 21 U. S. (8 Wheat.), 1; Bronson v. Kinzie, 42 U. S. (1 How.), 311; Scaine v. Belleville, 39 N. J., 10; S. C., Vroom, 526; Coffman v. Bank, 40 Miss., 29; Smith v. Morse, 2 Cal., 524; Johnson v. Duncan, 3 Mart., 531.

A party has a right at all times to some adequate and available remedy. West v. Sansom, 44 Ga., 295; Coffman v. Bank, 40 Miss., 29.

If the law is so changed that the means of enforcing a contract are materially impaired, the obligation of the contract no longer remains the same. Green v. Biddle, 21 U. S. (8 Wheat.), 1; Jackson v. Lamphire, 28 U. S. (3 Pet.), 280; Bronson v. Kinzie, 42 U. S. (1 How.), 311; McCracken v. Hayward, 43 U. S. (2 How.), 612; Grantly v. Ewing, 44 U. S. (3 How.), 717; Curran v. Ark., 56 U. S. (15 How.), 304; S. C., 12 Ark., 321; U. S. v. Muscatine, 75 U. S., XIX., 490; Gunn v. Barry, 82 U. S., XXI., 212; Walker v. Whitehead, 83 U. S., XXI., 357; Olcott v. Supervisors, 83 U. S., XXI., 382; Edwards v. Kearzey, 96 U. S., XXIV., 793; Von Baumbach v. Bade, 9 Wis., 559; Nevitt v. Bank, 14 Miss., 513; Taylor v. Stearns, 18 Gratt., 244.

The obligation of a contract is impaired, where the remedy is taken away or abolished or the legal obligation is diminished, suspended or destroyed by relaxing or abolishing the legal remedy, or the proceedings for enforcement are burdened with new conditions or restrictions. Bronson v. Kinzie, 42 U. S. (1 How.), 311; McCracken v. Hayward, 43 U. S. (2 How.), 612; Woodruff v. Trapnall, 51 U. S. (10 How.), 190; East Hartford v. Hartford Br. Co., 51 U. S. (10 How.), 535; affg. 17 Conn., 78; Rich. R. R. Co. v. Louisville R.R. Co., 54 U. S. (13 How.), 71; Curran v. Ark., 56 U. S. (15 How.), 304; 12 Ark., 321; Chenango Br. v. Binghamton Br., 70 U. S., XVIII., 137; Munday v. Munroe, 1 Mich., 68; Patman v. Bond, 15 Wis., 20; Boston, etc., R. R. Co. v. Salem, etc., R. R. Co., 21 Gray, 1; Johnson v. Duncan, 3 Mart., 531; Com. Bk. v. Chambers, 96 Miss., 9; West. Sav. Fund. v. Phila., 31 Pa. St., 175; Piscataqua Br. Co. v. New Haven Br., 7 N. H., 35; Brewster v. Hough, 10 N. H., 138; Penrose v. Reed, 2 Grant, 472.

Where the remedy is essential to the contract, the Legislature cannot take it away. Thompson v. Com., 81 Pa. St., 314.

In time of war, the remedy may be entirely suspended. *Ex parte* Pollard, 40 Ala., 77; Johnson v. Duncan, 3 Mart., 531.

A State may abolish one of two remedies, as imprisonment for debt, both as to present and future debts. Sturges v. Crowninshield, 17 U. S. (4 Wheat.), 122; Mason v. Haile, 25 U. S. (12 Wheat.), 370; Beers v. Houghton, 34 U. S. (9 Pet.), 359; U. S. v. Quincy, 71 U. S., XVIII., 403; U. S. v. Muscatine, 75 U. S., XIX., 490; Society for Prop. Gospel v. Wheeler, 2 Gall., 141; Gray v. Munroe, 1 McLean, 528; Watts v. Everett, 47 Iowa, 269; Fisher v. Lacky, 6 Blackf., 373; People v. Carpenter, 46 Barb., 619; Donnelly v. Corbett, 7 N. Y., 500; Conkey v. Hart, 14 N. Y., 22; Robinson v. Magee, 9 Cal., 81; Sommers v. Johnson, 4 Vt., 278; Bronson v. Newberry, 2 Doug. (Mich.), 38; Brown v. Dellahunty, 12 Miss., 713; Mercer's Case, 4 Harr., 248; Call v. Hagger, 8 Mass., 429; Woodfin v. Hooper, 4 Humph., 13; Kennebec Land Co. v. Laboree, 2 Me., 294; Oriental Bk. v. Freeze, 18 Me., 109; Mundy v. Monroe, 1 Mann., 68.

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certificate that it has become executory, to be filed in the office of the controller; and that thereupon it shall be the duty of the controller or auditing officer to cause the same to be registered, and to issue a warrant upon the treasurer or disbursing officer of the Corporation for the amount due thereon, without any specific appropriation therefor, provided there be sufficient money in the treasury specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditure, pursuant to the existing or a subsequent law.

[206] The Act further provides, that in case the amount of money designated in the annual budget for the payment of judgments against the City of New Orleans shall have been exhausted, the Common Council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum to pay the same; but if no such appropriation be made, then that all judgments shall be paid in the order in which they shall be filed and registered in the office of the Controller of the City, from the first money next annually set apart for that purpose.

The Supreme Court of the State, whilst observing that the Act might contain provisions which, if invoked, would be considered unconstitutional, held that, so far as it required the registry of judgments before payment, it was valid; that this requirement was a wise and useful provision, tending to restrain and check the reckless levy of taxes, and affording in a compact form a correct knowledge of the City's liabilities; that it was made in the interest of economy and the orderly conduct of the City's affairs, and neither took away any pre-existing right nor rendered less effective any pre-existing remedies, and that the relator was, therefore, premature in his action; that he should first register his judgments, and then, if payment was not made or adequately provided for in the next levy, he might proceed to enforce it.

The relator, on the other hand, assails the constitutionality of the Act in question, contending that it impairs the obligation of his contracts with the City, the validity of which by the judgments thereon is not open to question, in that it compels him to do acts, preliminary to the payment of his judgments, not required when the contracts were made, and deprives him of his remedy by *mandamus;* and cites numerous decisions of this court and of the state courts, upon the nature and extent of the constitutional inhibition against the impairment of contracts by state legislation. These decisions are familiar to us.

The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legis-
[207] lation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened. The Latin proverb: *Qui cito dat bis dat,* he who gives quickly gives twice, has its counterpart in a maxim equally sound: *Qui serius solvit, minus solvit;* he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition. If, therefore, we could see that such would be the effect of the provision of the Act of the State, No. 5 of 1870, requiring judgments to be registered with the controller before they are paid, we should not hesitate to declare the provision to be invalid. But we are not able to see anything in the requirement which impedes the collection of the relator's judgments, or prevents his resort to other remedies, if their payment be not obtained. The registry is a convenient means of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies.

We do not know, from anything in the record before us, that there are any other judgments against the City of New Orleans than the two obtained by the relator, or that the City is indebted in any other sum; nor can we say that there are not ample means already in the treasury of the City for their payment, and that, upon their registry, a warrant for the amount will not be at once issued and paid. If the money be already in the treasury appropriated for their payment, or if provision be made for the levy and collection of taxes sufficient to pay them, it cannot be justly said that the relator is delayed in enforcing them by being required to place a certified copy of the judgments with the Controller of the City before getting a warrant on its treasury for the amount due him. If such warrant, when obtained, be not paid, or provision be not made for its payment upon the meeting of the City Council, the relator can pursue further remedies for the collection of his judgments.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 301; 107 U. S., 750, 798; 108 U. S., 519.

JOSEPH GARNEAU, *Appt.*, [230]
v.
JAMES DOZIER, AUGUSTUS WEYL, LEWIS D. DOZIER AND JOHN F. DOZIER, as DOZIER, WEYL & Co.

(See S. C., 12 Otto, 230-235.)

Re-issued patent—extent of invention.

1. A re-issued patent, which is not for the same invention as that for which the original patent was granted, is void.
2. To determine the extent of the invention secured by a patent, the state of the art, at the time the patent was granted, must be considered.

[No. 43.]

Argued Oct. 26, 1880. Decided Nov. 22, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Messrs. **Robt. H. Parkinson** and *John E. Hatch,* for appellant.

Messrs. **Edward Boyd** and *E. E. Wood,* for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

The bill of the complainant is founded upon two patents, the first of which is a re-issue granted to Hosea Ball on the 14th day of June,

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1870, and extended for seven years from September 28, 1870. The original letters were granted to Ball Sept. 28, 1856, for an alleged "new and useful improvement in ovens." This patent was surrendered and re-issued Oct. 12, 1869, and again on the 14th of June, 1870. The second patent set forth in the bill was granted to Mary Ann Elizabeth McKenzie, on the first of May, 1860, also "for a new and useful improvement in ovens." It was surrendered and re-issued April 19, 1870; re-issued again April 20, 1875, assigned to Duncan McKenzie March 24, 1874, and extended for seven years from May 1, 1874. By sundry assignments, these extended re-issues have become the property of the complainant, and it is of alleged infringements of these latest re-issues, extended as they were, that the plaintiff complains.

[231] Among the defenses set up in the answer of the defendants, is one that strikes at the validity of the re-issue of the Ball patent. It is insisted that the re-issue is not for the same invention as that for which the original patent was granted, but is "For more and other matters and things than those of which he was the original and first inventor, and more than were described or included in the specification attached to said original patent granted to him, or shown in the drawing attached thereto, or in the model forming part of the application for said patent."

It is hardly necessary to say, that if the re-issue is, in fact, what the answer alleges it to be, if it is not for the same invention as that described or shown in the specification of the original patent, or in the drawings or model accompanying it, and if this clearly appears from a comparison of the two patents, the original and the re-issue, then the re-issue is invalid. The [232] question is not a new one in this court. It was before us in the recent case of *Ball* v. *Langles*, decided at this Term [*ante*, 104], in which we held the re-issue to be void. We expressed our opinion in that case that, in the original specification, drawing or model of Ball's patent, there was no hint of conducting the products of combustion from a fire-chamber under or below an oven *directly* into or through the baking-chamber, but that what was claimed or exhibited was conducting the heat or other products of combustion into flues leading from the fire-chamber, and exterior to the baking-chamber, towards the chimney, and permitting no access to the interior chamber or the oven, except through perforations in its side or back walls. By that arrangement the oven was principally heated by radiation from its sides, and not at all by radiation directly from the fire-chamber. But the re-issue was for a very different arrangement. It claimed an invention for passing the heat or products of combustion *directly* from the fire-chamber into the oven, not by any circuitous route, but immediately through apertures in the bottom of the oven, as well as indirectly through perforations in the side flues. This we regarded as radically different from the original invention; as new matter, for which the re-issue was unauthorized. We have seen in this case no reason for changing the opinion. The Ball re-issue, therefore, is held to be invalid, and its further consideration may be dismissed from the case.

We pass, then, to a consideration of the McKenzie patent, the only one that confers any rights upon the plaintiff. The original was, as we have seen, granted on the first day of May, 1860. There have been two re-issues, the first granted April 19, 1870, and the second April 20, 1875, after an extension had been allowed.

The invention, as described in the patent, consists, first, in the combination in an oven for baking bread and other substances, of the following elements: "A furnace or fire-place, one or more; a baking-chamber arranged above such furnace or fire-place and in direct communication therewith, and a rotating reel located within said baking-chamber, and provided with gravitating pans or shelves arranged or hung around the shaft of said reel from rods attached to the [233] end plates or arms thereof," by which, as the specification declares, the patentee produced a "continuously baking oven, in which the bread or other substances are subjected to the direct action of the gaseous products of combustion, ascending from the lower portion or bottom of the oven." Second, "In an arrangement of flues or openings communicating from the fire-place or fire-places with the baking-chamber, directly through the floor of the latter;" and, third, "In certain combinations and arrangements of exit flues * * * for securing a proper circulation of the gaseous products of combustion through the oven or baking-chamber, both when baking and lighting the fire." Having thus stated, generally, the nature and object of his invention, the patentee proceeded to describe the construction and arrangements by which the oven is heated. From the back of each furnace or fire-place a flue is constructed extending horizontally to the rear wall of the oven. From the fire-places and along those flues a series of openings is made through the floor of the oven, communicating with its interior. Between the two furnaces and extending from the front to the rear of the oven, directly under the floor, another flue is constructed communicating with a vertical flue at the rear of the oven, which leads to the chimney. In this latter horizontal flue there are openings into the baking-chamber at its front and rear, which may be closed by valves operated from the front. This flue is the exit flue, by means of which the gaseous products of combustion escape from the oven through the valvular openings. In the center of the top of the oven there is also a valvular opening communicating by a horizontal flue with the vertical flue that leads to the chimney, which is also an exit for the products of combustion. Having thus described the arrangements for heating the oven, the specification next proceeds to set forth the arrangements for the reel with its gravitating pans or shelves. These it is unnecessary to notice particularly.

The specification claims five combinations, the first of which only is charged to have been infringed by the defendants. It is as follows: "The combination of the following elements, to wit: a furnace or fire-place (one or more), a [234] baking-chamber arranged above such furnace or fire-place, and in direct communication therewith, and a rotating reel located within said baking-chamber and provided with gravitating pans or shelves arranged or hung around the shaft of said reel from rods attached to the end plates or arms thereof, substantially as and for the purpose described."

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To determine accurately the extent of the invention secured by this patent, the state of the art at the time when the original patent was granted, May 1, 1860, must be considered. Before that time, ovens were well known, and they had been constructed with a baking-chamber, a fire-place or furnace (one or more) arranged immediately under the chamber, and with a rotating reel located within the chamber, and revolving around a horizontal shaft, the reel provided with gravitating shelves or pans suspended on rods attached to its arms. Some of these ovens were arranged so that a portion of the heated products of combustion should pass into and through the baking-chamber, though indirectly by a circuitous route. Such was the Carrot oven patented in France in 1840, and notably the oven patented to Hosea Ball in 1856. And the Jennison oven, in use in the spring of 1859, and patented February 1, 1859, was constructed so as to admit the products of combustion directly from the fire or furnace into the baking-chamber. It is obvious, therefore, that if the McKenzie patent can be sustained at all, it must receive a very limited construction. The element of the combination which relates to the communication between the furnace or fire-place and the interior of the oven must be restricted to the peculiar structural arrangement by which the products of combustion are admitted into the baking-chamber.

They are admitted, as we have seen, through openings in the arch or top of the furnace, and through the floor of the oven along the flues extending rearward from the furnace to the back part of the oven. But the oven has a floor which separates it from the fire-chamber. The communication with the baking-chamber is by means of flues, short it may be, but admitting the products of combustion into the baking-chamber only at intervals, and always near the side. Manifestly, neither such an arrangement nor anything equivalent to it is found in the defendants' ovens. In them the bottom of the baking-chamber is not separated by any partition or diaphragm from the fire-chamber or furnace, and there are no flues to conduct the generated heat into the chamber. The charge of infringement is, therefore, not sustained.

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The decree of the Circuit Court dismissing the bill is affirmed, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[248] CHARLES B. WILLIAMS ET AL., Partners, as WILLIAMS & ARNEST, *Plffs. in Errr.*,
v.
JASON N. BRUFFY, Admr. of GEORGE BRUFFY, Deceased.

(See S. C., 12 Otto, 248-256.)

Jurisdiction over state judgments—form of decision—mandate.

1. This court may review the decision of the highest court of a State, which affirms or denies the validity of the judgment of an inferior court, over which it has appellate authority, if such decision involves a federal question.

2. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed.

3. When this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the State, or to the inferior court whose judgment is reversed.

[No. 96, 1877.]

Submitted Oct. 18, 1880. Decided Nov. 22, 1880.

PETITION of the plaintiffs in error, that the court take proceedings to render its judgment effectual.

The report of this case, as decided by this court upon its former presentation here, is found in 96 U. S., 176, XXIV., 716. The questions now presented by the case are fully stated in the opinion of the court.

Mr. **Enoch Totten**, for petitioners.

No counsel appeared for respondent.

Mr. Justice **Field** delivered the opinion of the court:

The Court of Appeals of Virginia declines to enforce the mandate of this court issued in this case, and the petition of the plaintiffs in error is, that this court will take such proceedings as will render its judgment effectual.

The plaintiffs in error are citizens of the State of Pennsylvania, and in 1866 they instituted an action in the Circuit Court of Rockingham County, Virginia, against the administrator of the estate of one George Bruffy, deceased, who, at the time of his death, was a citizen of Virginia, for the value of certain goods sold by them to him in March, 1861.

The administrator appeared to the action and pleaded the general issue and certain special pleas, the substance of which was that Pennsylvania was one of the United States and that Virginia was one of the States which had formed a confederation known as the Confederate States; that, from some time in 1861 until some time in 1865, the Government of the United States was at war with the Government of the Confederate States; and that, by a law of the Confederate States, debts to alien enemies were sequestered; that the intestate had paid over the amount claimed in this action to a receiver in those States appointed under that law, and was thus discharged from the debt to the plaintiffs.

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To these pleas the plaintiffs demurred; but the demurrers were overruled. The case was then submitted to the court upon certain depositions and an agreed statement of facts. They established the sale and delivery of the goods for which the action was brought; the residence of the plaintiffs in Pennsylvania and of the deceased in Virginia, during the war; the payment by the latter of the debt claimed to the sequestrator of the Confederate Government, under a judgment of a confederate court. The Circuit Court of Rockingham County, therefore, gave judgment for the defendant; and the plaintiffs applied to the Supreme Court of Appeals of the State for a writ of *supersedeas* to bring the case before it for review.

In the courts of other States, a *supersedeas* is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review. But in Virginia it serves a different purpose. "There," says Robinson, in his treatise on the practice in the courts of that State, "the

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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writ of error is never used as a means of removing the judgment of an inferior court before a superior tribunal, except in those cases in which security is dispensed with. In practice, the *supersedeas* is a substitute for the writ of error in all cases in which it is designed that the judgment of the court below shall be *superseded.*" Vol. I., p.660; *White* v. *Jones*, 1 Wash. (Va.), 118; *Burwell* v. *Anderson*, 2 Wash. (Va.), 194; *Wingfield* v. *Crenshaw*, 3 Hen. & M., 245.

By the law of that State, when application is made to the Supreme Court of Appeals for a writ of *supersedeas*, the court looks into the record of the case, and only allows the writ when of opinion that the decision complained of [250] ought to be reviewed. Its action upon the record is, in effect, a determination whether or not it presents a sufficient question for the consideration of the court. If it deem the judgment of the court below "plainly right," and reject the application on that ground, and its order of rejection so state, no further application for the writ can be presented; the judgment of the court below is thenceforth irreversible. So, in effect, its refusal of the writ on that ground is equivalent to an affirmance of the judgment, for the reason that the record discloses no error.

In the present case, the Supreme Court of Appeals denied the writ, stating in its order that it was of opinion that the judgment of the court of Rockingham County was "plainly right." To review this action of the Court of Appeals, this determination as to the character of the judgment rendered in the Circuit Court, a writ of error was prosecuted from this court. It was issued to the Court of Appeals, and was returned with a transcript of the record on file in the office of its clerk, properly certified, and the case was elaborately argued here by counsel. We came to the conclusion, unanimously, that the judgment of the Circuit Court of Rockingham County was erroneous, that the demurrers to the special pleas should have been sustained, and that the plaintiffs should have had judgment upon the agreed statement of facts for the amount of their claim, with interest from its maturity, deducting in the computation of time the period during which the war continued. We accordingly directed that the action of the Court of Appeals of Virginia, in refusing a *supersedeas* of the judgment of the Circuit Court, should be reversed, and that the cause should be remanded to it for further proceedings in accordance with our opinion. The judgment of this court was accordingly certified to that court, and presented to it in April, 1879. In April of the present year that court declined to take action upon our mandate, for reasons embodied in its opinion, at the time entered in its records. That opinion is as follows:

"VIRGINIA.

[251] In the Supreme Court of Appeals, held at the State Court House, in the City of Richmond, on Saturday, the 24th day of April, 1880.

CHARLES B. WILLIAMS and JAMES D. ARNEST, partners under the firm name of WILLIAMS & ARNEST, Plaintiffs, *against* JASON N. BRUFFY Administrator of GEORGE BRUFFY, deceased, Defendant.	Upon a mandate from the Supreme Court of the United States.

This court, having maturely considered the mandate of the Supreme Court of the United States, is of opinion that, according to the true intent and meaning of said mandate, this court is required to grant a writ of error or *supersedeas* to the judgment of the Circuit Court of Rockingham County.

This court, at a former Term, held at Staunton, Virginia, had refused such writ in the same case, being of opinion that the 'said judgment is plainly right.' By such refusal the said judgment of the Circuit Court of Rockingham had become irreversible, and placed beyond the control and jurisdiction of this court. It was at one time a pending cause in this court. There is no mode by which the decision of an inferior court can be reversed here, except upon an appeal allowed or writ of error granted and duly perfected in conformity with the statutes made and provided. If, therefore, the mandate of the Supreme Court of the. United States shall be entered on the records of this court, it must be inoperative and of no effect, unless this court shall now grant a writ of error, or writ of error and *supersedeas*, to the said judgment of the Circuit Court of Rockingham County. That judgment was rendered on the 18th of April, 1871. The 17th section of chapter 178, Code of 1873, provides that no process shall issue upon an appeal, writ of error, or *superedeas*, to or from a final judgment or decree, if, when the record is delivered to the clerk of the appellate court, there shall have elapsed two years since the date of such final judgment, decree, or order; but the appeal, writ of error, or *supersedeas shall be dismissed whenever it appears* that two years have elapsed since the said date before the record is delivered to such clerk. So that, if the court should now grant the writ of error and *supersedeas*, no process could issue thereon; and if such process should [252] issue, the writ of error or *supersedeas* must hereafter be dismissed by the express mandate of the statute. It is further provided, except in certain enumerated cases, that a writ of error or *supersedeas* shall not take effect until bond is given by the petitioner in a penalty, and with certain conditions prescribed; and if two years elapse from the date of such final judgment or decree before such bond is given, the appeal, writ of error, or *supersedeas*, shall be dismissed. See, secs. 13 and 17, ch. 178, Code of 1873. In the present case, the record has not been delivered to the clerk of this court, nor has any such bond been given as is required of the petitioner, nor indeed can be. These considerations are sufficient to show that no writ of error or *supersedeas* can now be granted, or, if granted, it must be dismissed, unless this court is authorized to disregard the plain letter of the statute under which it exercises its appellate jurisdiction. It may be further added, that when this court deems the decision of the inferior court plainly right, and rejects the application for appeal on that ground, no other appeal, writ of error, or *supersedeas* can afterwards be granted by this court in the said case. See, sec. 10, ch. 178, Code of 1873.

For these reasons, this court, with the highest respect and consideration for the Supreme Court of the United States, must decline to take any further action with respect to the mandate of said court.

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This entry is made on the record book of this court in conformity with the request and at the suggestion of the counsel for the petitioners.

A copy.—Teste: GEO. K. TAYLOR, *C. C.*"

The petitioners accordingly pray that this court will take such action as may be proper and needful in the premises to give efficacy to its judgment.

We do not understand that the Court of Appeals intends by its refusal to deny or question the appellate power of this tribunal in cases arising in the State Court where the validity of a statute of or of an authority exercised under the State is drawn in question, on the ground of its repugnancy to the Constitution and laws of the United States, and the decision is in favor of its validity. Its appellate jurisdiction over the judgments of the State Courts in such cases, and other cases mentioned in the 25th section of the Judiciary Act of 1789, 1 Stat. at L., 73, re-enacted in the Revised Statutes, passed beyond the region of discussion in this court more than half a century ago. As early as 1816, in the [253] celebrated case of *Martin* v. *Hunter* [1 Wheat., 304], this court, in an opinion of unanswerable reasoning, from the general language of the Constitution, asserted its appellate jurisdiction over the state courts in the cases mentioned in the Act. It also showed that the jurisdiction had been sustained in a great variety of cases, and that the doctrine had been acquiesced in by enlightened state courts without a judicial doubt being breathed until that case arose. No doctrine of this court rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over State Courts where the Constitution, laws and treaties of the United States are drawn in question, and their authority is denied or evaded, or where any right is asserted under a state law or authority in conflict with them. And in no class of cases could that jurisdiction be more properly invoked than when, by enactments of a revolutionary organization against the Government of the United States, the property or the rights of citizens of the loyal States are attempted to be destroyed or impaired because of their loyalty to the Union.

The main reason assigned by the Court of Appeals for declining to act upon our mandate, as seen by its opinion, is the lapse of over two years from the date of the rendition of the judgment of the Circuit Court of Rockingham County and the delivery of the record to that court. The judgment was rendered on the 18th of April, 1871, and the petition for the *supersedeas* with the record was not presented to the court and delivered to its clerk until the 12th of September, 1874. The Court of Appeals, it is true, in its opinion, states that the record has not been delivered to its clerk; but this is evidently an inadvertence, as the transcript before us shows that such record was filed with him on the day mentioned. The court also adds, as further reasons for its action, that a bond, with a certain penalty and prescribed conditions, was required to be given within like period before a *supersedeas* could take effect, and that no such bond was given in the case; and also, that when the Court of Appeals deems a decision of the inferior court plainly right and rejects an application for an appeal on that ground, no other appeal or *supersedeas* can afterwards be granted.

These last two grounds do not impress us as having force, for a bond could not be required until the writ is allowed. And the ground of [254] refusing the writ, that the decision in the inferior court was plainly right, being itself held to be untenable, there could be no reason why the order of denial should not be reversed, and an order granting the writ entered in its place, as in the case of reversals of other orders.

As to the lapse of more than two years between the date of the judgment and the delivery of the record to the clerk of the appellate court, it is sufficient to observe that the Court of Appeals gave no effect to that circumstance; and we could not say it had no authority after that time to look into the record of the inferior court. We could not say what facts may have existed which prevented the operation of the statute, or what proceedings may have been necessary, according to the practice of the court, to enable parties to avail themselves of the lapse of time. The court did not refuse to receive the petition of the plaintiffs in error on the ground that it was presented too late, nor did it afterwards dismiss the petition for that reason. It took jurisdiction of it so far as to examine the record of the judgment of the court below, and to pass upon its character. In its judgment, entered in its records, it states that the petition, "Having been maturely considered, and the transcript of the said judgment seen and inspected, the court being of opinion that said judgment is plainly right, doth deny the said *supersedeas*." That judgment, thus entered, is a final determination of the character of the judgment of the inferior court. Although in the form of denying the *supersedeas*, it is not essentially different in its character and effect from a judgment dismissing such writ after it had been once granted and the merits of the case heard. So long as it remains unreversed, it will be authority to all the inferior courts of Virginia that the confiscation of debts due to loyal citizens, under an Act of the Confederate Government, enforced as a law of the State, was a valid proceeding. It is, therefore, the subject of review in this court. *Richmond, F. & P. R. R. Co.* v. *Louisa R. R. Co.*, 13 How., 71. It is enough for our jurisdiction over the case, that there was a final judgment of the Court of Appeals, and our jurisdiction [255] cannot be now ousted, after we have acted upon the case and passed upon its merits, by any suggestion that that court never took jurisdiction to look into the record of the inferior court and determine the character of its judgment; nor can we listen to any such suggestion in contradiction of the record of the case. In the elaborate argument of counsel of the case before us, though several objections were urged to our jurisdiction, no intimation was made of the want of jurisdiction by the Court of Appeals. *Skillern* v. *May*, 6 Cranch, 267; *Ex parte Story*, 12 Pet., 339; *Wash. Bridge Co.* v. *Stewart*, 3 How., 413.

Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will, upon a proper proceeding, attach. It cannot make any difference whether, after an exami-

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nation of the record of the court below, such decision be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed. And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the State, or to the inferior court whose judgment is reversed. Had the Court of Appeals, after assuming jurisdiction so far as to examine the record of the inferior court and pass upon its action, granted the *supersedeas* and rendered in the case the judgment which, in our opinion, should have been rendered, the judgment of the inferior court would have been reversed, and judgment ordered in favor of the plaintiffs in error. Having jurisdiction of the case, we can now direct that such reversal be made and such judgment be entered.

But, inasmuch as the Court of Appeals finds itself embarrassed in its action upon our mandate by reason of the statute, to which no reference was made in its original decision, we will direct that the mandate be recalled, and that final judgment be entered in this court reversing the judgment of the Circuit Court of Rockingham County, and awarding judgment to the plaintiffs for the amount appearing from [256] the record and the agreed statement of facts to be due to them on their claim, with interest from its maturity, deducting in the computation of time the period of the war; the judgment to be paid by the defendant, as administrator, out of the estate of the deceased, George Bruffy, in like manner as other claims established against his estate; *and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[278] ALEXANDER BUCHANAN, *Plff. in Errr.*,

v.

CITY OF LITCHFIELD, ILLINOIS.

(See S. C., 12 Otto, 278-293.)

Municipal bonds—estoppel—bona fide *holder.*

1. A purchaser of municipal bonds is bound to take notice of the constitutional limitation upon municipal indebtedness, and of the official assessments showing the valuation of taxable property within the municipality.
2. If the bonds contain recitals that the requirements of the Constitution have been met, then the municipality will be estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds.
3. The mere fact that the bonds were issued, without any recitals of the circumstances bringing them within the limit fixed by the Constitution, is not proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued.

[No. 51.]

Argued Oct. 29, 1880. Decided Nov. 22, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is fully stated by the court.

Messrs. **John M. Palmer** and **Frank Morrison**, for plaintiff in error.

Messrs. **J. C. Robinson** and **A. L. Knapp**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The present action is by the plaintiff in error to recover the amount of unpaid interest coupons attached to certain bonds issued by the City of Litchfield, a municipal Corporation in the State of Illinois. The declaration, besides a count upon the coupons themselves, contains the usual counts for money lent and advanced by plaintiff to the City and for money had and received by it to his use. The City defended the action upon the ground that the bonds were issued in violation of the Constitution of the State, and consequently imposed upon it no liability. The Circuit Judge being of opinion that the law was with the City, judgment was rendered in its favor. The case is now before us upon a certificate of division between the Circuit and District Judges, as to certain questions occurring on the trial, and the general import of which will appear in the course of this opinion.

In pursuance of an ordinance of the City Council, the legislative authority of the City, its Mayor and Clerk, executed and issued, on the first day of January, 1874, one hundred bonds, with interest coupons attached, of the denomination of $500 each, payable twenty years thereafter, at the Nassau Bank in New York, with semi-annual interest thereon, at the rate of ten per centum per annum, payable at the same bank.

The ordinance directed the bonds to be used in borrowing money for the construction and maintenance of a system of water-works for the benefit of the people of the City. They were so used.

Each bond, signed by the Mayor and attested by the Clerk under the corporate seal of the City, contained this recital: "This bond is issued under authority of an Act of the General Assembly of the State of Illinois, entitled 'An Act Authorizing Cities, Incorporated Towns and Villages to Construct and Maintain Water Works, approved April 15, 1873, and in pursuance of an ordinance of the said City of Litchfield, No. 184, and entitled 'An Ordinance to Provide for the Issuing of Bonds for the Construction of the Litchfield Water-Works' approved December 4, 1873."

The Act of April 15, 1873, on which the city ordinance was founded, was a general statute, conferring authority upon all cities, incorporated towns and villages in the State, to erect, construct and maintain a system of water-works for purposes of fire protection, and for the use of the inhabitants respectively, of such municipal corporations, which, to that end, were invested with power to appropriate and borrow money and collect a general tax, in the same manner as other municipal taxes may be levied and collected.

Neither the Statute of April 15, 1873, nor the ordinance of the City, made any reference to the 12th section of article 9 of the State Constitution adopted in the year 1870. That section declares that, "No county, city, town, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of taxable property therein, to be ascertained by the last assessment

NOTE.—*Recitals in negotiable bonds or securities: estoppel by; evidence of the facts recited.* See *note to* Mercer County v. Hackett, 68 U. S., XVII., 548.

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for state and county taxes previous to incurring such indebtedness."

The property of the City, as assessed for state and county taxes for the year 1873, was proved, on the trial, to have been $1,400,000, while its indebtedness, on the first day of January, 1874, excluding the water-bonds on that day issued, was shown, to have been $70,000. In other words: when the bonds were executed and issued, the City was already indebted in a sum equal to five per centum on the value of taxable property in the City, as ascertained by the last assessment for state and county taxes—an amount, it will be observed, in excess of the constitutional limit of municipal indebtedness.

The first and most important of the certified questions involves the construction of the foregoing section and article of the State Constitution.

The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the Legislative Department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the Act of April 15, 1873, to incur [288] indebtedness in the construction and maintenance of a system of water-works, could have been lawfully exercised by a city, incorporated town or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer, upon a municipal corporation, authority to contract indebtedness which the Constitution expressly declared it should not be allowed to incur. *Law* v. *People*, 87 Ill., 385; *Fuller* v. *Chicago*, 89 Ill., 282.

If, therefore, it appears, by evidence of which the City may rightfully avail itself, as against a *bona fide* holder for value of the coupons in suit, that the bonds, issued January 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the Constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued.

To the evidence upon which the City relied as showing such want of authority, objections were interposed by the plaintiff, who insisted that it was not admissible against him, as a *bona fide* holder of the coupons in suit.

That evidence was made the basis of important findings of fact and is, in substance:

That the City of Litchfield was incorporated under a special law, which defines its boundaries; that there was no assessment made of the taxable property within its limits for the year 1873, separately, but that the City is within the limits of two municipal townships organized under the township organization laws of the State; one called North Litchfield and the other South Litchfield, each six miles square; and that the taxable property in the City was assessed for state and county taxes in the township in which it was situated and to which it belonged; that the property of the City, as assessed for state and county taxes for the year 1873, was, as already stated, $1,400,000 which valuation was ascertained by the following method:

The assessors of North and South Litchfield returned to the clerk of the county court the lists and value of the property assessed for taxation for the year 1873, in said townships respectively, which lists contained a description of all the lands, lots and other real estate in said township, with the proper valuation opposite each tract or lot. With these lists and the plat of the City before him, the clerk was able to ascertain the description and value of all the real estate in the City, and by footing the value of the several lands and lots found within the city limits the aggregate value of all the real estate of the City was ascertained for 1873;

That by another special law, the City of Litchfield is made one school district, called the Litchfield school district; that it is a part of the legal duty of the township to note opposite the name of each owner of personal property assessed for taxation the school district in which he resides; that the assessor of North and South Litchfield for the year 1873 noted opposite the names of the owners of personal property in their township residing within the city limits, that they resided in Litchfield school district, and the assessed value of the personal property of the City of Litchfield was ascertained by computing the value of all the personal property assessed for taxation in the school district;

That railroad property and property of corporations was assessed by the State Board of Equalization, and the whole value of these species of property lying in Montgomery County (in which the City of Litchfield is situated) was certified by the auditor to the county clerk, and the proportions taxable in Litchfield was ascertained by the clerk;

That the assessment thus made by the town assessor of the Towns of North and South Litchfield, was the only assessment made or authorized by law to be made, of the property situated in the City of Litchfield, for state and county taxes for the year 1873, and which assessment for the purposes aforesaid was the last assessment for state and county taxes previous to the issuing and making of the bonds; that, by compiling the assessments thus made, the exact amount of the value of taxable property in said City of Litchfield for the year 1873, as assessed for state and county taxes, should be, and is ascertained to be, the sum of $1,400,000.

And it was proved, as already stated, that the debt of the City of Litchfield, on and before the first of January, 1874, exclusive of the water-bonds, was $70,000.

This evidence, introduced for the purpose of showing the value of taxable property within the limits of the City, and the extent of its indebtedness, when these water bonds were issued, is not, in our opinion, liable to any serious objection. It seemed to be the best proof upon those subjects that the law furnished.

In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the Constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the is- [289] suing of the bonds. That test was applied in this case. Had there been, under or by competent

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legal authority, an assessment for that year of taxable property within the City, separately from all other property in the county or township to which the City belonged, such assessment would undoubtedly have been controlling. But there was no such official assessment, in fact, or required by law. There were, however, official assessments for state and county taxes for 1873, embracing all taxable property within the county and townships of which the City formed a part, and from which, in connection with the map of the City, could be readily ascertained the location and taxable value of all property within the corporate limits of the City for that year. The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the City for the year 1873.

But in what way was the purchaser to ascertain the extent of the City's indebtedness existing at the time the bonds in question were issued? The extent of that indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the City. It was necessarily left, both by the Constitution and the Statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not, at all times and absolutely or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation, possessing the general power of raising money, by taxation and otherwise, to carry on local government. Its liabilities might frequently vary in their aggregate amount, and at particular periods might be of different kinds, some fixed and absolute, while others would be contingent upon events thereafter to happen. These considerations were, doubtless, present in the minds as well of those who framed the Constitution as of those who passed the Statute of 1873.

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As, therefore, neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their "existing indebtedness," it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the City that the requirements of the Constitution were met, that is: that the City's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, then the City, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Coloma* v. *Eaves*, 92 U. S., 484 [XXIII., 579], in which case we said, and now repeat that, "Where legislative authority has been given to a municipality or to its officers, to subscribe for the stock of a railroad company and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, *their recital that it has been*, made on the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." So, in the more recent case of *Orleans* v. *Platt*, 99 U. S., 676 [XXV., 404], it was said that "Where the bonds on their face *recite the circumstances which bring them within the power*, the corporation is estopped to deny the truth of the recital."

The cases cited by counsel for the plaintiff do not assert any different doctrines, as will be seen from an examination of those chiefly relied upon. In *Knox Co.* v. *Aspinwall*, 21 How., 539 [62 U. S., XVI., 208], which was a case of municipal subscription of stock in a railroad company, the statute upon which the subscription there purported to rest made the existence of certain facts essential to the exercise of authority to make the subscription and issue bonds therefor. The bonds, upon their face, however, [291] recited that they were issued *in pursuance of* the statute, which prescribed the conditions precedent to any subscription and, therefore, the court said, they imported a compliance with the law under which they were issued. It was, consequently, ruled that the purchaser was not bound to look further for evidence of a compliance with the condition annexed to the grant of the power.

In *Kenicott* v. *Supervisors*, 16 Wall., 452 [83 U. S., XXI., 319], the rule was thus stated: "If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election or the existence of that fact is, by law, to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, *with a recital that the election has been held or that the fact exists or has taken place*, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds."

In *Moultrie Co.* v. *Bk.*, 92 U. S., 631 [XXIII., 631], the validity of the bonds there in suit was questioned, upon the ground that certain precedent conditions imposed by statute had not been complied with. The bonds, however, recited their issue to be "*in conformity to the provisions*" of the statute which gave the authority to issue them. So, in *Marcy* v. *Oswego*, 92 U. S., 637 [XXIII., 748], where the statute authorizing a municipal subscription, with the sanction of three fifths of the voters interested, and the issue of bonds in payment thereof, required particular facts to exist and certain acts to be performed before the right to make the subscription and to issue bonds in discharge thereof could be exercised. The statute contained, amongst other things, a proviso to the effect that the amount of bonds sold by the township should not exceed such a sum as would require a levy of more than one per cent per annum on the taxable property of the township to pay the yearly interest. It appeared that the statute had not, in some of these respects, been complied with; that is, that the

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conditions had not been performed which the statute required before any subscription should be made or bonds issued. But, adhering to the rule announced in *Coloma* v. *Eaves*, the defense was overruled in favor of a *bona fide* holder for value, because of the *recital* in the bonds that their issue was "*by virtue of* and *in accordance with*" the statute, and "*in pursuance of* and [292] *in accordance with* the vote of three fifths of the legal voters of the township."

Returning to the case in hand, it will be observed that the bonds issued by the City of Litchfield contain no recital whatever of the circumstances which, under the Constitution of the State, must have existed before the City could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the Act of April 15, 1873, and in pursuance of the ordinance of the City based upon that statute. But that statute does not expressly restrict the exercise of the power to erect and maintain a system of works to cases in which the aggregate indebtedness of the city, was within the limit which the Constitution declared no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the Constitution of the State, or under the circumstances which permitted the issue of the bonds. Consequently, a recital, that the bonds were issued under the authority of the statute and in pursuance of the city ordinance, did not necessarily import a compliance with the Constitution. Had the bonds made the additional recital that they were issued in accordance with the Constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the City could not, as against the plaintiff, dispute the fair inference to be drawn, from such recital or statement, as to the extent of its existing indebtedness.

Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds farther than would be consistent with reason and sound policy, and farther than we are now willing to go. The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds [293] *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the Constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold.

Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the City of Litchfield with a system of water-works, the benefits of which are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case, in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.

Whether the City is under a legal obligation to make restitution of the money, obtained without authority of law, that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion.

What we have said constitutes a sufficient answer to all of the questions certified to us, and requires an affirmance of the judgment. *It is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 651; 106 U. S., 186; 110 U. S., 616; 111 U. S., 96; 112 U. S., 267; 10 Biss., 490.

PENNSYLVANIA COMPANY, *Plff. in Err.*, [451]
v.
JOSEPH E. ROY.

(See S. C., 12 Otto, 451-460.)

Carrier of passengers—duties of—liability of, for injury by negligence to passenger in sleeping-car—damages—irrelevant testimony.

*1. A carrier of passengers for hire is bound to observe the utmost caution characteristic of very careful, prudent men.

2. He is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise, upon his part, of extraordinary vigilance, aided by the highest skill.

3. Such caution and diligence extends to all the appliances and means used by the carrier in the transportation of the passenger.

4. He must provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers; and for the slightest negligence or fault in that regard, from which injury results to the passenger, the carrier is liable in damages.

5. A passenger purchased from a railroad company a ticket over its line, and, at the same time, from the Pullman Palace-Car Company, a ticket entitling him to a berth in one of its sleeping-cars, *constituting a part of the train of the railroad company.* In the course of transportation he was injured by the falling of a berth in the sleeping-car in which he was at the time riding. *Held*, that, for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and *employés* of the railroad company. Their negligence or the negligence of either of them, as to any matters involving the safety or security of passengers, was the negligence of the railroad company.

6. In such case, the passenger injured being entitled only to compensatory damages, evidence as to his poverty, or as to the number and ages of his children, is irrelevant.

7. An exception to the admission of irrelevant testimony is canceled when the court, before the final submission of the case to the jury, distinctly instructs them to disregard such evidence. The pre-

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Damages for personal injury from negligence; measure of; what may be shown to the jury.*

In an action for an injury to the person, the circumstances, condition in life and the pursuits of the plaintiff may properly be given in evidence on the question of damages; so an inquiry into the probable consequences of the injury, as transitory or permanent, is also proper. Kerr v. Forgue, 54 Ill., 482; S. C., 5 Am. Rep., 146; Caldwell v. Murphy, 1 Duer, 233.

The rate of earnings previous to the injury, and

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sumption should be, so far as this court is concerned, that the jury based their verdict upon legal evidence only.

[No. 47.]

Argued Oct. 28, 1880. Decided Nov. 22, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. **J. T. Brooks** and *Geo. Willard* and *R. Biddle Roberts*, for plaintiff in error:

On the question whether an instruction to disregard evidence improperly admitted cured the error, see, *L. B. & M. R. R. Co.* v. *Winslow*, 66 Ill., 219; *Lycoming F. Ins. Co.* v. *Rubin*, 79 Ill., 402.

The rule is, that common carriers cannot devest themselves of liability to passengers upon the duties imposed by charter, by deputing to others the performance of such charter duties; but the rule cannot in reason extend to extra and luxurious accommodations which the common carrier is not bound, under its charter, to provide.

See, *R. R. Co.* v. *Hall*, 58 Ill., 409; *Schopman* v. *R. R. Co.*, 9 Cush., 30; *Clymer* v. *R. R. Co.*, 5 Blatchf., 317; *Wright* v. *R. R. Co., L. R.*, 8 Ex., 137.

Mr. **John Van Arman**, for defendant in error:

Whenever instructions are properly given by the court below, the legal presumption is that the jury obeyed them. As to the effect of the admission of illegal evidence followed by instructions of the court to disregard the same, see, *Garfield* v. *Kirk*, 65 Barb., 465; *Unangst* v. *Kraemer*, 8 W. & S., 401; *Judge* v. *Stone*, 44 N. H., 607; *People* v. *Parish*, 4 Den., 156; *Hamblett* v. *Hamblett*, 6 N. H., 345; *Deerfield* v. *Northwood*, 10 N. H., 271; *Thomas* v. *Henderson*, 27 Ala., 529.

A corporation is bound to exercise its functions and franchises, and cannot escape its public duties or obligations by deputing them to others.

Thorpe v. R. R. Co., 13 Hun, 70; affirmed in Court of Appeals, March 18, 1879. See, The Reporter, Vol. 8, 55; *R. R. Co.* v. *Barron*, 5 Wall., 90 (72 U. S., XVIII., 591); *R. R. Co.* v. *Brown*, 17 Wall., 445 (84 U. S., XXI., 675).

In *Thorp's Case*, the court says: "The defendant was liable for the acts of the porter of the Wagner car, to the same extent as if he had been hired by and was in the immediate employment of defendant."

Mr. Justice **Harlan** delivered the opinion of the court: [452]

This is a writ of error from a judgment for the sum of $10,000, the amount assessed as damages sustained by the defendant in error, in consequence of personal injuries received while riding, as a passenger, in a sleeping-car which belonged to the Pullman Palace Car Company, but constituting, at the time the injuries were received, a part of a train of cars managed and controlled by the Pennsylvania Company, as lessee and operator of the Pittsburg, Fort Wayne and Chicago Railway. The action was commenced in the Supreme Court of Cook County, Illinois, against the Pennsylvania Company, the Pittsburg, Fort Wayne and Chicago Railroad Company, and the Pullman Palace Car Company. It was subsequently dismissed by the plaintiff against all the defendants except the Pennsylvania Company, and then removed for trial into the Circuit Court of the United States for the Northern District of Illinois, where the judgment complained of was rendered.

The facts set forth in the bill of exceptions, so far as it is material to detail them, are these:

On the 5th of June, 1876, Roy, the defendant in error, purchased at the office of the lessee Company, in the City of Chicago, a "first-class railroad ticket" from that City to Philadelphia, over the line of that Company, paying therefor the sum of $14.40. At the same time and place, and [453] of the same person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Company, for the route between the same cities, and for that ticket he paid the additional sum of $5. He took the train the same day, going immediately into the section of the sleeping-car corresponding to his ticket.

The next morning, at Alliance, Ohio, upon the invitation of a friend, traveling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so engaged, the upper berth of the section in which they were sitting fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the plaintiff upon the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment.

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the consequent loss from inability to prosecute his calling, is competent. Walker v. Erie Ry. Co., 63 Barb., 260; Grant v. City of Brooklyn, 41 Barb., 381; Nebraska City v. Campbell, 67 U. S., XVII., 271.

Any physical injury or physical suffering may be considered. Morse v. A. & S. R. R. Co., 10 Barb., 621; Curtiss v. Roch. & Sy. R. R. Co., 20 Barb., 282; affd. 18 N. Y., 534; Ransom v. N. Y. & Erie R. R. Co., 15 N. Y., 415; De Forrest v. City of Utica, 69 N. Y., 614; Spicer v. C. & N. W. R. R. Co., 29 Wis., 580.

Mental suffering and mental impairment may be also considered. T. & W. R. R. Co. v. Baddeley, 54 Ill., 19; S. C., 5 Am. Rep., 71; Matteson v. N. Y. C. R. R. Co., 62 Barb., 364; 53 N. Y., 28; *contra*, Covington St. Ry. Co. v. Packer, 9 Bush., 455; S. C., 15 Am. Rep., 752.

The continuing effect of the injury up to the trial and its probable effect in the future, may be shown. Sheehan v. Edgar, 58 N. Y., 163, and cases cited; Buel v. N. Y. C. R. R. Co., 31 N. Y., 314; Filer v. N. Y. C. R. R. Co., 49 N. Y., 42; Briant v. Trimmer, 47 N. Y., 98.

To justify exemplary damages there must be evidence of gross negligence, amounting to recklessness or indifference to the dangers and consequences to others. Shearm. & Redf. Neg., sec. 600; Caldwell v. N. J. Steamboat Co., 47 N. Y., 282; affg. 56 Barb., 425; Cleghorn v. N. Y. C. & H. R. R. R. Co., 56 N. Y., 44; Mil., etc., R. R. Co. v. Arms, 91 U. S., XXIII., 374; Beale v. R. R. Co., 1 Dill., 568; N. O. J. & G. N. R. R. Co. v. Bailey, 40 Miss., 395; N. O. J. & G. N. R. R. Co. v. Statham, 42 Miss., 607; Kennedy v. N. Mo. R. R. Co., 36 Mo., 351; M. & C. R. R. Co. v. Whitfield, 44 Miss., 466; C. & R. I. R. R. Co. v. McKean, 40 Ill., 218; Varillat v. N. O. & C. R. R. Co., 10 La. Ann., 88; Ky. Cent. R. R. Co v. Dills, 4 Bush, 593; Hopkins v. Atl. & St. L. R. R. Co., 36 N. H., 9; Taylor v. G. T. R. R. Co., 48 N. H., 305.

The injured member may be shown to the jury. Mulhado v. Brooklyn City R. R. Co., 30 N. Y., 370.

The following amounts of damages have been held excessive: $11,000, where there was no gross negligence, being more than twice the amount recoverable in case of death (Collins v. Alb. & S. R. R. Co., 12 Barb., 492; 5 How. Pr., 435); $5,875, for loss of time and injury to team, of $600, and loss of toes of left foot (C. & R. I. R. R. Co. v. McKean, 40 Ill., 218); $25,000 for an injury rendering a person a cripple for life (C. & N. W. R. R. Co. v. Fillmore, 57 Ill., 265); $8,000 reduced to $6,000 in case of a cooper and teamster for loss of a hand (Murray v. Hud. Riv. R. R.

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After the second falling of the berth the brace or arm supporting it was found to be broken.

The evidence introduced by the plaintiff tended also to show that the Pennsylvania Company provided cars in which passengers having railroad tickets could ride without purchasing a sleeping-car ticket; that Roy had much experience in traveling, and would have gone into one of those cars had he not purchased a sleeping-car ticket; that at the time he purchased the sleeping-car ticket he did not know what company ran the sleepers, but upon taking the train he ascertained it was a Pullman car; that the Pullman Palace Car Company was engaged in furnishing cars to be run in the trains of railroad companies; that, besides the general conductor of the train, there was a conductor in uniform, and a porter whose duty it was to make up the berths and attend to the wants of passengers occupying the sleeping-car.

Upon the trial, the plaintiff introduced a time and distance card of the defendant Corporation, issued, published and circulated by that Company during the year 1876, prior to the date of his injuries. That card, referring to the "Fort Wayne and Pennsylvania R. R. line," stated that three express trains left Chicago daily, one "*with popular vestibule sleeping-car*," one "with [454] drawing-room and hotel car," and one "*with drawing-room sleeping-car*." It gave notice that "passage, excursion and sleeping-car tickets" could be purchased at the defendant Company's office in Chicago. Referring to the "Fort Wayne and Pennsylvania line," the same card announced that "No road offers equal facilities in the number of through trains, *equipped with Pullman palace sleeping-cars*." It states, among the advantages of the "Pittsburg, Fort Wayne and Pennsylvania through line," that the latter was the "only line running three through trains, *with Pullman palace cars*," and "the only line *running sleeping-cars* from Chicago and intermediate stations to Philadelphia without change." The same card gave the rates charged for berths and sections in Pullman sleeping-cars from Chicago to points east of that city.

The defendant, to maintain the issues on its part, offered to prove:

1. That the sleeping-car in which the accident occurred, and all the sleeping-cars then and theretofore on the defendant's line, since the 27th of January, 1870, were owned by the Pullman Palace Car Company, a corporation of the State of Illinois, and not by the defendant; that said sleeping-cars were run in the same trains with the defendant's cars; that holders of railroad tickets were entitled to ride in said sleeping-cars, provided they also held sleeping-car tickets.

2. That the Pullman Palace Car Company, and it only, issued tickets for sale, entitling passengers to ride in said sleeping-cars; that such tickets were plainly distinguishable from railroad tickets, and were sold at offices established by said company, and indicated as places for the sale of such tickets; that the plaintiff purchased the sleeping-car ticket of the same person of whom he bought the railroad ticket; that the office where purchased indicated by plain lettering upon its door that it was a place for the sale of Pullman Palace Car Company tickets, as well as railroad tickets.

3. That the Pullman Palace Car Company employed persons to take charge of its cars and, whilst in use, they were in the immediate charge of a conductor and a porter employed by that company; that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and the appurtenances thereto.

To this proof the plaintiff objected, and the objection was sustained, to which ruling the [455] Company excepted.

The court thereupon charged the jury that the proof tended "To show that the injury was received by reason of the negligence of the defendant's agents or servants, or by some negligence in the construction of the car in which the plaintiff was riding." To that charge the Company at the time excepted, upon the ground that it was unsupported by the testimony, and because it assumed as a fact that the persons in charge of the sleeping-car were the Company's agents or servants.

The court further charged the jury that "The defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if this car composed a part of

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Co., 47 Barb., 196); $18,000 for loss of legs in case of a brakeman (C. & N. W. R. R. Co. v. Jackson, 55 Ill., 492); $2,500 for sprained ankle disabling totally two or three weeks, and partially for about same time in addition, party's salary being $1,080 and his physician's bill $25 (Spicer v. C. & N. W. R. R. Co., 29 Wis., 580); $5,000 where no bones were broken and injuries were muscular only (C. R. I. & P. R. R. Co. v. McAra, 52 Ill., 296).

The following have been held not excessive: $2,500 for severe and probably permanent injury to hand and wrist (Maloy v. N. Y. Cent. R. R. Co., 58 Barb., 182); $4,500 for loss of an arm (Mentz v. Sec. Ave. R. R. Co., 2 Robt. (N. Y.), 356); $20,000 for permanent and painful injuries to a lawyer, impairing his usefulness in his profession (Walker v. Erie R. R. Co., 63 Barb., 260); $12,000 where plaintiff was confined to bed six weeks, suffering great pain, unable to attend to business for several months, and left permanently lame, and obliged to pay $1,200 to $1,500 physician's bill and other expenses (Rockwell v. Third Ave. R. R. Co., 64 Barb., 438); $4,000 where there was conflicting evidence as to permanent injury to spinal cord (Reed v. N. Y. Cent. R. R. Co., 56 Barb., 493).

It is legitimate to show that plaintiff is a habitual drunkard. This evidence has a direct bearing on the question of compensatory damages. C. & P. R. R. Co. v. Sutherland, 19 Ohio St., 151.

The measure of damages for negligence is the same against artificial as against natural persons. P. A. & M. R. R. Co. v. Donahue, 70 Pa. St., 119.

Where exemplary damages are not warranted by the gross negligence of the defendant, they must be strictly compensatory; but this may include compensation for pain and suffering, loss of time, expense of medical attendance, and such damages as the plaintiff will probably sustain in the future. Hill v. N. O. O. & G. W. R. R. Co., 11 La. Ann., 292; P. A. & M. R. R. Co. v. Donahue, 70 Pa. St., 119; Chopin v. N. O. & C. R. R. Co., 17 La. Ann., 19; Pa. R. R. Co. v. Books, 57 Pa. St., 339; Pa. R. R. Co. v. Allen, 58 Pa. St., 276; Brignoli v. C. & G. E. R. R. Co., 4 Daly, 182; Morse v. A. & Sy. R. R. Co., 10 Barb., 621.

Parent may recover for loss of service of minor child, up to termination of minority. The child should the injury continue beyond that time, may recover for any further loss. Traver v. Eighth Ave. R. R. Co., 6 Abb. Pr. (N. S.), 46; Drew v. Sixth Ave. R. R. Co., 26 N. Y., 49.

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the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable."

To that charge also the defendant excepted.

We are of opinion that there was no substantial error, either in excluding the evidence offered by the defendant, or in the charge to the jury. The court only applied to a new state of facts, principles very generally recognized as fundamental in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and, on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In *R. R. Co.* v. *Derby*, 14 How., 468, it was said that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence; that the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. This doctrine was expressly affirmed in *The New World* v. *King*, 16 How., 469. In *Stokes* v. *Saltonstall*, 13 Pet., 181, af- [456] firming the decision of *Chief Justice* Taney on the circuit, we said that, although the carrier does not warrant the safety of the passengers, at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, where he acts by agents, shall possess competent skill and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in *R. R. Co.* v. *Pollard*, 22 Wall., 341 [89 U. S., XXII., 877], where, speaking by the present *Chief Justice*, we said that we saw no necessity for reconsidering *Stokes* v. *Saltonstall*.

These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles, used by them and from whose insufficiency injury has resulted to the passenger, belong to others.

The undertaking of the Railroad Company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, *constituting a part of the carrier's train*, for an additional sum paid to the [457] company owning such car.

As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the Railroad Company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. If it chose to make no such examination or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the Railroad Company. For the purposes of the contract under which the Railroad Company undertook to carry Roy over its line and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and *employés* of the Railroad Company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the Railroad Company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by and constitute a part of the train of the Railroad Company, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to convey. 2 Kent, Com., 600, 12th ed.; 2 Pars. Cont., 218, 219, 6th ed.; Story, Bailments, secs. 601, 601 *a*, 602; Cooley, Torts, 642; Wharton, Negl., 2d [458] ed., sec. 627, *et seq.*; Chit. Carriers, 256, *et seq.*, and cases cited by the authors.

It is also an immaterial circumstance that Roy, when injured, was not sitting in the particular sleeping-car to which he had been originally assigned. His right, for a time, to occupy a seat in the car in which his friend was riding, was not and, under the facts disclosed, could not be questioned.

Whether the Pullman Palace Car Company is not, also, and equally, liable to the defendant in error, or whether it may not be liable over to the Railroad Company for any damages which the latter may be required to pay on account of

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the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others.

2. Upon the trial below, the plaintiff was allowed, against the objection of defendant, to make proof as to his financial condition and to show that, after being injured, his sources of income were very limited.

This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned Judge who presided at the trial subsequently recognized the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rules by which such loss should be ascertained, the court proceeded: "But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being, how much his ability to earn money in the future has been impaired."

Notwithstanding this emphatic direction, that [459] the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the direction of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court, that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary, in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury and commence anew. A rule of practice leading to such results cannot meet with approval.

3. There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children; a son ten years of age, and three daughters of the ages respectively, of fourteen, seventeen and twenty-one. This evidence does not appear to have been withdrawn from the consideration of [460] the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict.

The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence touching the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn and should not be ignored in the assessment of damages.

For this error alone the judgment is reversed, and the cause remanded for a new trial.

It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—11 N. W. Rep., 574; 54 Wis., 287; 34 La., 145; 44 Am. Rep., 424; 38 Ohio, 466; 43 Am. Rep., 434.

JOTHAM SHEPHERD ET AL., *Appts.*, [200]

v.

THE SCHOONER CLARA, Her Tackle, etc., LEMUEL H. HOPKINS ET AL., Claimants.

(See S. C., "*The Clara*," 12 Otto, 200-208.)

Collision—vessel in fault—necessary proof.

1. In a collision of two vessels, where the fault is wholly on one side, the party in fault must bear his own loss and compensate the other one, if damage is sustained. If neither be in fault, neither is entitled to compensation from the other. If both are in fault, the damages will be divided.

2. The want of a proper watch is a fault of great

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weight, and if it was the cause of the collision, the vessel so in fault cannot recover damages of the other.

3. In an action for collision, the plaintiff, in order to recover entire damages, must prove care on his own part and, also, want of it on the part of the defendant.

[No. 72.]

Argued Nov. 17, 1880. Decided Nov. 29, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The case is fully stated by the court.

Mr. **Henry J. Scudder,** for appellants.

Messrs. **R. D. Benedict** and *E. L. Owen,* for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

[201] This is an appeal in admiralty. The case grew out of a collision between the schooners, Clara and The Julia Newell, on the 25th of February, 1874, inside of the Delaware Breakwater. The owners of the latter vessel libeled the former. The libel was dismissed below. Hence this appeal. The facts were found by the Circuit Court pursuant to the Act of Congress of Feb. 16, 1875, ch. 77, 18 Stat. at L., 315, which in this respect is a re-enactment of the 19th section of the Judiciary Act of 1789, ch. 20. 1 Stat. at L., 83.

The first named Act limits the power of this court upon appeals in such cases, "To a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions." Here there is no bill of exceptions. As respects the facts, we cannot, under any circumstances, look beyond the findings in the record. *The Abbotsford,* 98 U. S., 440 [XXV., 168]. The only question before us is as to the correctness of the conclusion of law arrived at by the Circuit Court. That, also, is set forth pursuant to the requirement of the Act of 1876, and follows in the record the findings of fact.

The facts as found are as follows:

1. The collision occurred inside of the Delaware Breakwater, and The Newell was thereby sunk. The Newell was a small vessel of seventy-eight tons burthen. In the afternoon of the 23d of February, 1874, she anchored within the breakwater for shelter from an approaching storm. The Clara, being on a voyage from New York to Baltimore, foreseeing the coming storm, bore away and also put into the breakwater for safety. She arrived about five o'clock A. M. on the 25th of February, 1874, and while proceeding to a proper anchorage collided with The Newell. There were then a large number of vessels in the breakwater, and others were constantly arriving:

2. That, at the time The Clara entered the breakwater, the night was cold and very dark, the moon having gone down several hours before: that The Julia Newell was improperly lying without a watch on deck: that the storm was increasing, and set in about the time The Clara came to anchor, and was a very severe snow storm.

[202] 3. If The Newell had had a sufficient watch on deck, the accident might have been prevented.

4. The Clara was well manned, and had proper lights and a proper lookout.

The conclusion of the court as to the law of the case is thus expressed:

The failure to keep a watch on the deck of The Julia Newell was the cause of the collision.

Looking at the case in the light of the findings of fact, no fault whatsoever, of omission or commission, is imputable to The Clara. It is true it was her duty, under the circumstances, to enter the breakwater and proceed to her anchorage with the greatest care and circumspection. *Culbertson* v. *Shaw,* 18 How., 584 [59 U. S., XV., 493].

Whether there was any failure on her part to comply with this requirement is not shown. But the maxim applies, *Quod non apparet non est.* The fact not appearing is presumed not to exist. The libelants brought the case into court and thus assumed the affirmative. The burden of proof rested primarily upon them. If in this or in any other respect there was delinquency on the part of the respondents, it was for the libelants to prove it. As the case is presented to us in the record, The Clara must be held entirely blameless.

Such is not the position of The Newell. The findings as to her put her deeply in the wrong. The night was dark. The moon had gone down. The tempest had begun and was increasing. A large number of vessels were already within the breakwater, and others were constantly arriving.

This condition of things demanded the greatest vigilance on the part of all concerned.

It was necessary to their safety. Life and property were both at stake. The Newell had been at anchor more than twenty-four hours, and the officers in charge of her had ample time for thought and preparation. Yet it is found that amid these perils she was "lying without a watch on deck," and if she had had "a sufficient watch" the collision that ensued "might have been prevented."

There is nothing in the record which mitigates in any degree the severe condemnation which such recklessness invokes. Her fault is without excuse.

The rules of law which apply in these cases are well settled.

Where the fault is wholly on one side, the party in fault must bear his own loss, and com- [203] pensate the other party, if such party have sustained any damage. If neither be in fault, neither is entitled to compensation from the other. If both are in fault, the damages will be divided. 1 Pars. Ship. & Adm., 525, 526; *The Morning Light,* 2 Wall., 550 [69 U. S., XVII., 862]; *Union Steamship Co.* v. *N. Y. & Va. Steamship Co.,* 24 How., 307 [65 U. S., XVI., 699].

The want of a proper watch is a fault of great weight. 1 Pars. Ship. & Adm., 576, 577; *The Sapphire,* 11 Wall., 164 [78 U.S., XX., 127]; *The Indiana,* Abb. Adm., 330; *Cohen* v. *The Mary T. Wilder,* Taney, Dec., 567; *The Ferryboat Lydia,* 4 Ben., 523. In a cause of collision, the plaintiff, in order to recover entire damages, must prove both care on his own part and want of it on the part of the defendant. 1 Pars. Ship. & Adm., 529 and *n.* 2.

This case falls clearly within the first of the categories above stated, *and the decree of the Circuit Court is affirmed.*

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[208] SOLOMON SOLOMON ET AL., *Plffs. in Err.*,

v.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

(See S. C., 12 Otto, 208-214.)

Duty Act.

Under section 8 of the Act of June 30, 1864, goods manufactured of silk and cotton are liable to a duty of fifty per cent *ad valorem*.

[No. 57.]

Argued Nov. 5, 1880. Decided Nov. 29, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The plaintiffs in error brought suit in the court below, to recover back an alleged excess of duties paid upon certain goods. Judgment having been given against them, they sued out this writ of error.

The case is fully stated by the court.

Messrs. Stephen G. Clarke, **William Stanley** and **Edwards Pierrepont**, for plaintiffs in error:

The plaintiffs' goods were plainly and explicitly provided for in the Acts of 1861 and 1862, and there can be no doubt that they would have been dutiable under those Acts, if imported after their passage and prior to the passage of the Act of 1864.

The provisions relating to mixed goods in the Acts of 1861 and 1862. were not repealed by the Act of 1864.

Arthur v. *Zimmerman*, 96 U. S., 124 (XXIV., 770); *Arthur* v. *Unkart*, 96 U. S., 118 (XXIV., 768); *Arthur* v. *Lahey*, 96 U. S., 112 (XXIV., 766), *Arthur* v. *Davies*, 96 U. S., 135 (XXIV., 810), *Reiche* v. *Smythe*, 13 Wall., 162 (80 U. S., XX., 566); *Homer* v. *Collector*, 1 Wall., 486 (68 U. S., XVII., 688), and the long list of earlier cases on commercial designation; *Arthur* v. *Homer*, 96 U. S., 137 (XXIV., 811).

Acts and parts of Acts that are not repugnant to the provisions of the Act of 1864, are not repealed. One part of a statute may be so construed by another, that the whole may, if possible, stand: "*Ut res magis valeat, quam pereat*," and this, says Story, is merely a rule of common sense.

Dwarr. St., 189; Sedg. Stat., 126, 127; *Homer* v. *Collector* (*supra*).

The case of *Smythe* v. *Fiske* (90 U. S., 381, XXIII., 49) is relied upon by the government as conclusive; but the authority of that case has been shaken by a large number of subsequent decisions, which have explicitly held that specific descriptive provisions in the Acts of 1861 and 1862, were not repealed by the general provisions for silk goods, nor by the general provisions for cotton goods.

The construction advanced is not the natural construction of the language used; and the insertion of the very important word "herein," changes entirely the natural meaning of the term which Congress did use.

The courts had uniformly held that the revenue Acts were one system and to be read together.

Stuart v. *Maxwell*, 16 How., 150, 160; *Pennington* v. *Coxe*, 2 Cranch, 33; Potter, Dwarr. St. 189, and *notes*.

It is a general rule, not to add or interpolate a word in a statute so as to change the construction.

Potter, Dwarr., St., 199; Sedgw. Stat., 245-6, and cases cited.

Mr. **Edwin B. Smith**, *Asst. Atty-Gen.*, for defendant in error:

The phrase, "not otherwise provided for," was interposed and meant to apply not to preceding Acts, which may not have been present to the mind of the draftsman, and to which there was no necessity to recur, but to the preceding enumeration in the same section, which it supplemented. The section, thus construing this clause, covers the whole subject of silk, in all its variety of forms. It was complete in itself. There was no need to refer generally or specially to any prior Act. If there was a conflict, the prior legislation yielded, necessarily, *ipso facto*, to the latter.

Smythe v. *Fiske*, 23 Wall., 381 (90 U. S., XXIII., 49) affirmed, as to this point, or that it means "not provided for in this Act," in *Movius* v. *Arthur*, 95 U. S., 147 (XXIV., 421).

The evidence is, that "said goods are generally known in trade and commerce as goods made of mixed materials, but each kind thereof is also known by its specific name."

To everybody, in trade and commerce as well as out of it, they are known to be goods made of mixed materials. This phrase, however, is not a commercial designation within the meaning of the decisions upon tariff laws, any more than that of "wearing apparel." *Maillard* v. *Lawrence*, 16 How., 260, or "goods of a similar description." *Greenleaf* v. *Goodrich*, No. 127, last Term (XXV., 845).

It is the specific name which is the commercial designation. The particular article and not the quality common to a class, must be indicated by it. If the goods in question had been specifically enumerated in the Acts of 1861 and 1862, they would not have been touched by the general clause in section 8, of the Act of June 30, 1864; as they were not thus mentioned in the earlier, they do come within this provision of the later Act.

Movius v. *Arthur* (*supra*); *Arthur* v. *Morrison*, 96 U. S., 108 (XXIV., 764); *Arthur* v. *Unkart*, 96 U. S., 118 (XXIV., 768); *Arthur* v. *Zimmerman*, 96 U. S., 124 (XXIV., 770); *Arthur* v. *Stephani*, 96 U. S., 125 (XXIV., 771); *Arthur* v. *Davies*, 96 U. S., 135 (XXIV., 810); *Arthur* v. *Rheims*, 96 U. S., 143 (XXIV., 813), and many earlier cases.

Mr. Justice **Bradley** delivered the opinion of the court:

[211] This is a suit to recover back duties paid under protest. In December, 1873, and January, 1874, the plaintiffs imported certain goods manufactured of silk and cotton, of which silk was the component material of chief value. The defendant, then Collector at New York, required them to pay a duty of fifty per cent *ad valorem* under the last clause of section 8 of the Act of June 30, 1864, 13 Stat. at L., 210, which lays a duty "On all manufactures of silk or of which silk is the component part of chief value not otherwise provided for, 50 per centum *ad valorem*."

It is obvious that the goods came under the designation of the clause in question, and that the duty was properly assessed, unless the articles

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imported were "otherwise provided for." And that is the question. The plaintiffs insisted then and insist now that a duty on these goods was "otherwise provided for" by the Acts of March 2, 1861, section 22, and July 14, 1862, section 13, as "manufactures composed of mixed materials, in part of cotton, silk, wool or worsted, or flax," on which a duty of only 30 per cent was laid by the Act of 1861, and of five per cent additional by the Act of 1862. 12 Stat. at L., 192, 557.

Previous Acts were not repealed *in toto* by the Act of June 30th, 1864, but it was declared by section 22, that "All Acts and parts of Acts repugnant to the provisions of this Act be, and the same are, hereby repealed," with a proviso "that the duties upon all goods, wares, and merchandise imported from foreign countries, not provided for in this Act, shall be and remain as they were, according to existing laws prior to 29th April, 1864."

The Act of 1864 contained no separate provision for a duty on goods composed of "mixed materials," like that in the Acts of 1861 and 1862, on which the plaintiffs rely. They contend, therefore, that those clauses still continued in force, and that the goods imported by them were embraced therein, and were not intended to be embraced in the general clause in the Act of 1864, under which the collector exacted the duty in question. The plaintiffs insist that the term "mixed materials," or "goods made of mixed materials," is a specific and well known commercial designation or name, which by usage covers the goods imported by them, and is not a descriptive phrase used merely to designate any class of goods answering to the description; and, therefore, although they may be embraced in the general description of the Act of 1864, of goods "in which silk is the component part of chief value," such a general description is not sufficient to take them [212] out of their places in the previous Acts where they are designated by name. It may be conceded that if the goods in question had a specific name, such as that applied to "reps," "tapestry," "galloons," etc., and had been designated in the Acts of 1861 and 1862 by such specific name, the argument of the plaintiffs would be well founded. It would be in accordance with the decision of this court in *Movius* v. *Arthur*, 95 U. S., 144 [XXIV., 420]. But are the terms relied on a name for goods? Are they not descriptive rather than denominative? We think it is very clear that they are merely descriptive It may be true, as stated in the agreed case, that "such goods are generally known in trade and commerce as goods made of mixed materials;" but the case also adds that "each kind thereof is also known by its specific name." The fact, that certain goods belong to the class of mixed goods or of goods made of mixed materials, does not stamp them with the name of mixed goods; for the same description is applicable to many other kinds of goods, all having different names. It is not their name; it is merely their description.

Since, therefore, the designation in the Act of 1861, of "manufactures composed of mixed materials, in part of cotton, silk," etc., is merely descriptive; and since the designation in the Act of 1864, of "manufactures of which silk is the component part of chief value," is also descriptive; and since the goods in question are confessedly embraced in both descriptions; and since the Act of 1864 contains no provision relating to mixed goods, like that in the Acts of 1861 and 1862, and lays a duty of 50 per cent *ad valorem* on goods in which silk is the component part of chief value, "not otherwise provided for," which we have construed generally to mean "not otherwise provided for in this Act", *Smythe* v. *Fiske*, 23 Wall., 374 [90 U. S., XXIII., 47], it seems to be almost a matter of demonstration that this was the duty properly demandable on the goods.

It is observable that the description of "manufactures made of mixed materials, in part of cotton, silk," etc., is more general than that of "manufactures of which silk is the component [213] part of chief value." Logically, the two phrases standing together in the same act or system of laws would be related as follows: "Goods made of mixed materials, cotton, silk, etc., shall pay a duty of 35 per cent; *but if* silk is the component part of chief value, they shall pay a duty of 50 per cent."

It is suggested by the plaintiffs' counsel, that a counterpart of the clause in the Act of 1864, relating to goods in which silk is the component part of chief value, was contained in the Acts of March 2, 1861, and Aug. 5, 1861, 12 Stat. at L., 292; and that if this clause in these Acts did not apply to the plaintiffs' goods, the like clause in the Act of 1864 should not be construed to apply to them; and, to show that the said clause in the Acts of 1861 did not apply to the goods, they refer to the fact that, prior to the passing of the Act of 1864, the goods now in question were always assessed under the "mixed materials" clause, and not under the "component material of chief value" clause. We do not think that this argument can prevail. In the first place, it does not appear by the record what the practice was prior to 1864; and if it did appear as suggested, it is observable that under the Act of March 2, 1861, it was a matter of indifference under which clause the goods should be assessed, as the duties were the same under both; and, having commenced to assess the goods in one way under that Act, the practice may have been inadvertently continued. We think the practice was at least questionable, if it obtained. At all events, the true construction of the law in its ultimate form is too obvious to admit of a reasonable doubt. The goods are aptly described by the general clause in the Act of 1864, and are not otherwise provided for in that Act nor provided for by name in any previous Act. It follows that they are subject to duty under the said general clause.

We have been unable to find anything in the clauses referred to, or in their collocation in the various Acts, or in the method of grouping or classification observed therein, that would lead us to infer an intention to exclude the goods in question from the operation of said general clause. It is sometimes the case, no doubt, that certain articles are so obviously intended to be included in a particular grouping or classi- [214] fication, as to repel any suggestion that they are meant to be embraced in a different part of the law, though literally applicable to them. But this cannot be said in the case before us. The goods in question have no such inseparable

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relation to one form of description exclusive of the other; nor are they so clearly intended to be embraced in any particular grouping or classification, as to repel or prevent the application to them of the clause under which they were assessed.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 433.

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[222] GOODYEAR DENTAL VULCANITE COMPANY, *Appt.*,

v.

CHARLES G. DAVIS.

(See S. C., 12 Otto, 222-230.)

Patent law—equivalents—infringement.

1. A patentee is protected against equivalents for any part of his invention, whether he has claimed them or not.
2. When a product, arrived at by certain defined processes, is patented, only those things are equivalents for the elements of the manufacture, which perform the same function in substantially the same way.
3. A process is not infringed by the use of any number of its stages less than all of them.
4. A celluloid dental plate is not an infringement of the Cummings patent for improved gums and plates.

[No. 67.]

Argued Nov. 16, 17, 1880. Decided Nov. 29, 1880.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is fully stated by the court.

Messrs. **B. F. Lee** and **Wm. Henry Clifford,** for appellant.

Messrs. **Henry Baldwin, Jr.,** and **Wm. D. Shipman,** for appellee.

Mr. Justice **Strong** delivered the opinion of [223] the court:

The invention described in the Cummings re-issue patent is claimed in the words following: "The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." The claim cannot be understood without reference to the details given in the specification. In that it is said to consist "in forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber, or 'vulcanite,' so called, —an elastic material possessing and retaining in use sufficient rigidity for the purpose of mastication and, at the same time, being pliable enough to yield a little to the motions of the mouth." The mode of "forming" the plate is then minutely described. The earlier steps of the process need not be particularly noticed. They relate to the formation of a plaster mold, fitted to the corresponding part of the mouth, with the artificial teeth adhering in the mold in exactly the relative position they are to occupy in the hard rubber plate. The specification then proceeds as follows: "The teeth are provided with pins projecting therefrom in such a manner that the rubber which is to constitute the plate will close around them, and by means of them hold or secure the teeth permanently in position. The plaster mold, with the teeth adhering therein, as just described, is now filled with soft rubber, a little at a time, pressed in with the finger, or in any other convenient way; and care is to be taken that the rubber is made to completely fit into the cavities and around the protuberances, including the pins, and is filled in to the thickness or depth desired to form the plate." "I then (says the patentee) lock the rubber plate in position by shutting the other half of the plaster mold over it, to insure its retaining its exact form while warming, and then heat or bake it in an oven, or in any other suitable way. The soft rubber or gum so inserted into the mold is to be compounded with sulphur, rubber, etc., in the manner prescribed in the patent of Nelson Goodyear, dated May 6, A.D. 1851, for making hard rubber, and is to be subjected to sufficient heat to vulcanize or harden it, substantially as directed in that patent. It is also to be colored in imitation of the natural gums, by mixing it with vermillion, or other suitable coloring matter, while [224] in the soft state. After the plate has been heated sufficiently to harden it, or convert it into hard rubber, or vulcanite, so called, the mold is removed, and the plate is polished ready for use."

Such is the description, both of the material of which the plate is formed and of the method or process by which it is made.

We had occasion in *Smith* v. *Goodyear D. V. Co.*, 93 U. S., 486 [XXIII., 952], to construe this patent, and determine what the invention claimed and patented really was. We held it to be "A set of artificial teeth, as a new article of manufacture, consisting of a plate of hard rubber with teeth, or teeth and gums secured thereto in the manner described in the specification, by embedding the teeth and pins in a vulcanizable compound, so that it shall surround them, while it is in a soft state, before it is vulcanized, and so that, when it has been vulcanized, the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece." We said, "The invention is a product or manufacture made in a defined manner. It is not a product alone, separated from the process by which it is created." The process detailed in the description antecedent to the claim, and referred to thereby, is as much a part of the invention as are the materials of which the plate or product is composed. Both are necessary elements of it. Hence, to constitute an infringement of the patent, both the material of which the dental plate is made, or its equivalent, and the process of constructing the plate, or a process equivalent thereto, must be employed. It is, therefore, essential to a correct determination of this case to consider what was the material, made by the patentee an element of his invention, and what can be considered an equivalent therefor.

It is impossible to read the specification of the original patent, or that of the re-issue, upon which this suit is founded, without the conviction that the patentee had in mind primarily a single substance for his material, and that one of a peculiar character, itself a compound discovered and patented not long before. Thus, in the original, which was loosely drawn, the invention was said to consist "In forming the plate and gums, to which the teeth are attached,

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[225] of rubber or some other elastic material, so indurated as to be rigid enough for the purpose of mastication, and pliable enough to yield a little to the motions of the mouth, and in one piece, the teeth being embedded in the elastic material while the said material is in a soft condition, and then baked, with the gums and plate, so that the teeth, gums and plate will all be connected, forming, as it were, one piece." And again; "The plate and gums are formed of one piece, and of rubber, and the compounds commonly employed therewith, or of gutta-percha, or, in fact, of any elastic substance which can be reduced to a soft condition, *and then vulcanized*, or hardened sufficiently to answer the purpose. The rubber or other material used is first molded to fit the shape of the mouth, and the gums formed, and while soft and pliable the teeth are embedded in the gums. * * * The teeth, gums and plate, being thus connected, are then baked until the elastic material becomes sufficiently vulcanized, when the process is completed." The claim also expressed the same thought. It was "forming the plate and gums in which the teeth are inserted, in one piece, of hard rubber or vulcanite, *i. e.* an elastic material which can be hardened sufficiently for mastication, and retain a portion of its elasticity, so as to yield a little to the motion of the mouth, as herein set forth, and for the purposes specified." Though the specification spoke of rubber, or rubber and its compounds commonly employed therewith, or of gutta-percha, or of any elastic substance that can be reduced to a soft condition and then vulcanized, or hardened sufficiently to answer the purpose, it is evident only such substances were intended as are either soft in their natural condition and capable of vulcanization, or, if hard naturally and reduced to a soft state, were then capable of being vulcanized or hardened by baking. The description implies an exclusion of all substances which have not such capabilities. If not, then gold plates would have been within the patent, if the material only be considered, for gold is elastic when in thin plates. It is capable of being reduced to a soft condition, and it hardens by cooling; but it does not harden by heat or baking, nor is it capable of vulcanization.

If, now, we turn to the specification and claim of the re-issued patent (which, of course, cannot be more comprehensive than the original), it will [226] be found that the material is still more distinctly and exclusively pointed out. The material is, so far as possible, restricted to a substance either vulcanized or capable of vulcanization. There the invention is said to consist "In forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber or vulcanite, so-called, an elastic material," of certain capabilities mentioned. Not an intimation is given that any other substance than hard rubber, or its synonym, vulcanite, would meet the requirements of the invention. Throughout the specification, the patentee speaks again and again of his invention as a hard rubber plate, and he describes minutely the process or mode of making it After having mentioned the arrangement of the teeth in a mold, he says: "The plaster mold, with the teeth adhering therein, is now filled with soft rubber, a little at a time, pressed in with the finger, or in any other convenient way," etc., etc., etc. "I then lock the rubber plate in position by shutting the other half of the plaster mold over it, to insure its retaining its exact form while warming, and then heat or bake it in an oven, or in any other suitable way. The soft rubber, or gum, so inserted in the mould, is to be compounded with sulphur, rubber, etc., in the manner prescribed in the patent of Nelson Goodyear, dated May 6, A. D. 1851, for making hard rubber, and is to be subjected to sufficient heat to vulcanize or harden it, substantially as directed in that patent." Thus it appears that, whatever the material used in the construction of dental plate, according to the patent, was required to undergo a process of vulcanization in the manufacture, and to be made what it is, whether denominated rubber, hard rubber, vulcanite, or other elastic material, by that process. Every substance not capable of vulcanization by that process was, therefore, necessarily excluded from the reach of the patentee's invention. Nothing could more plainly show that a dental plate made of any other material than a compound, vulcanized according to Nelson Goodyear's process, was not intended by the patentee and by the Patent Office to be covered by the patent. By Goodyear's patent, caoutchouc, or soft rubber, is converted into hard rubber; that is, vulcanized, by mixing sulphur with it in about the proportions of from four ounces to a half pound of the former to a pound of the rubber, and then heating the compound during a period of from three to six [227] hours, to the temperature of from two hundred and sixty to two hundred and seventy-five degrees of Fahrenheit. The use of that process was made indispensable to the invention, and it was the product of that which was the material of which the patented plate is constructed. If, when the patent was granted, there were known substances, other than rubber or caoutchouc, gutta-percha, or gums, that could be vulcanized by the Goodyear process, and converted from a soft into a hard, elastic material, any use of that material for a dental plate might have been an equivalent for the Cummings material, and an infringement of his patent.

This construction of the patent is confirmed by the avowed understanding of the patentee, expressed by him, or on his half, when his application for the original patent was pending. We do not mean to be understood as asserting that any correspondence between the applicant for a patent and the Commissioner of Patents can be allowed to enlarge, diminish or vary the language of a patent afterwards issued. Undoubtedly, a patent, like any other written instrument, is to be interpreted by its own terms. But when a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation.

In his letter to the commissioner, under date of July 30, 1855, written by his attorney, after striking out all reference to gutta-percha, he said: "I beg the office not to consider that because gutta-percha has been used heretofore with artificial teeth, Mr. Cummings' invention

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is, therefore, the mere substitution of one substance for another and a similar one." The vulcanizing process makes all the difference, and changes the article of manufacture entirely. So in his letter of the same date he amended his specification so as to make it read: "I do not claim the use of gutta-percha, or of any material which is merely rendered plastic by heat and hardened by cooling, in the manufacture of sets [228] of artificial teeth; but what I do claim as my invention, and desire to have secured to me by letters patent, is the improvement in the manufacture of sets of mineral or other artificial teeth, which consists in combining them with a rubber plate and gums, which (after the insertion of the teeth) are vulcanized by Goodyear's process, or any other process."

On a renewed application, Dr. Cummings was informed that the office would not object to the admission of a claim limited to the use of vulcanite or hard rubber. In response to this he amended his claim by inserting the word "hard" before "rubber," and also by striking out the word "other" before the words "elastic material," in the claim as previously made, and substituting therefor the words "vulcanite, *i. e.* an," so as to make it read, "forming the plate and gums in which the teeth are inserted in one piece of hard rubber, or vulcanite, *i. e.* an elastic material." Thus the patent was granted. In view of this there can be no doubt of what Cummings understood he had patented, and that both he and the commissioner regarded the patent to be for a manufacture made exclusively of vulcanites by the detailed process. We think this, to some extent, at least, tends to confirm the conclusions at which we have arrived in interpreting the patent by its own language. Indeed, we have heretofore expressed doubts whether re-issued letters patent can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters patent. *Leggett* v. *Avery*, 101 U. S., 256 [XXV., 865]. If these doubts be well founded and the claim of the re-issued letters now before us be what these complainants insist it is, a claim for the use of any other material than vulcanite or some substance capable of vulcanization, another question might arise respecting the validity of the re-issue.

We have extended our remarks sufficiently upon this branch of the case. It remains to inquire whether the manufacture, by the defendant, of dental plates, out of the material known as celluloid, or solid collodion, is an infringement of the Cummings re-issue. We think it is not.

[229] Celluloid is a substance of a comparatively recent discovery. Whether it was known at the time Cummings made his invention, or even at the time when his original patent was granted, we do not care now to inquire. It is sufficient for this case that we consider what it is. It is a compound of vegetable fiber, cellulose or gun-cotton. Undoubtedly it can be employed for manufacturing dental plates, and as the base for artificial teeth. Such a plate may have the fineness, lightness and elasticity of a plate made of hard rubber by the Cummings process; but it is a substance very different from hard rubber, and it is incapable of the same manipulation. It is not vulcanite, and neither it nor its ingredients is capable of being vulcanized. It contains no sulphur or rubber. None of its constituents are vulcanizing agents. Camphor does not perform the function of sulphur. Under the action of heat, its tendency is to soften the compounded mass rather than to harden it, as sulphur does rubber. When the ingredients of celluloid are compounded the product is hard, unlike caoutchouc, or gums generally, and heat softens rather than hardens it. When employed in manufacturing dental plates, the process is wholly unlike that employed in making hard rubber or vulcanite plates. It is put into a mold, it is true, such as was known and in use before the Cummings invention, but it is put in in a hard state, in its natural condition, and not soft or plastic and capable of being pressed around the teeth. The mold cannot be closed until heat is applied. When that is applied, the jaws of the mold are gradually screwed together as the celluloid softens, and when the jaws come together the plate is completed. The process requires pressure in addition to heat in order to reduce the plate to shape, and compress it around the teeth. There is no heating for hours, as is necessary in the vulcanizing process. The work is done in a few minutes. When allowed to cool, it is the same hard and bony substance it was before its manipulation, and in this respect, also, it is unlike vulcanite. It is obvious from all this that neither in the nature of the material of which it is made, nor in the process of manufacture, which is an essential part of the Cummings invention, as we have seen, is the celluloid plate substantially the same as one made of hard rubber.

Nor is celluloid an equivalent for hard rub- [230]
ber, for the reasons already suggested, that it is not capable of vulcanization, and that it cannot be made into a plate by the process prescribed by Cummings. It may be conceded the patentee is protected against equivalents for any part of his invention. He would be, whether he had claimed them or not. But when a product arrived at by certain defined stages or processes is patented, only those things can be considered equivalents for the elements of the manufacture which perform the same function in substantially the same way. The same result may be reached by different processes, each of them patentable, and one process is not infringed by the use of any number of its stages less than all of them.

In view of these considerations, we are constrained to rule that a celluloid dental plate is not an infringement of the Cummings patent. Celluloid is not an equivalent for the material which the patent makes essential to the invention, and in the use of it for a dental plate, the process which is inseparable from the invention is not, and cannot be, employed.

The decree of the Circuit Court is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 495.

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[273] EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY, *Plff. in Err.*,

v.

HAMBLEN COUNTY.

(See S. C., 12 Otto, 273-278.)

Immunity from taxation.

Immunity from taxation is not such a franchise of a railroad corporation as will pass by a sale under a mortgage or statutory lien on the property and franchises of the company.

[No. 71.]

Argued Nov. 17, 1880. Decided Nov. 29, 1880.

IN ERROR to the Supreme Court of the State of Tennessee.

The case arose upon an agreed statement of facts, in the Circuit Court of Hamblen County, Tennesee, to determine the liability of the plaintiff in error to taxation. That court decided that the Company was not exempt, and the Supreme Court of the State affirmed the judgment. The road had been purchased by the plaintiff in error, upon a judicial sale, for delinquency in the payment of bonds.

The case is fully stated by the court.

Messrs. **George Brown** and *John Baxter*, for plaintiff in error.

Messrs. J. C. Hodges, W. W. Langhorne and **W. Y. C. Humes**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[275] This case is, we think, governed by that of *Morgan* v. *Louisiana*, 93 U. S., 217 [XXIII., 860]. We there held that immunity from taxation was not such a franchise of a railroad corporation as would pass by a sale under a mortgage "on the property and franchises of the company," and that the term "franchises" was not synonymous with "rights, privileges and franchises," "rights, powers and privileges," and the like. The Cincinnati, Cumberland Gap and Charleston Railroad Company was by its charter invested "with all the rights, powers and privileges" of the Nashville and Louisville Railroad Company; but the statutory lien retained by the State as security for its advances covered only "the property, real and personal, stock and franchises" of the Cincinnati, Cumberland Gap and Charleston Company. The decree of the Chancery Court of Nashville provided that if the railroad company itself, or some one or more of its stockholders, should not purchase "the said railroad and all the property, real, personal and mixed, and the franchises and privileges of said railroad company, for $700,000, payable in the bonds of the State of Tennessee, with the coupons attached of and after January 1, 1871," or sell "the same to other parties * * * under the conditions, liabilities and restrictions as aforesaid, which are fully set forth in said * * * decree," then the commissioners of the State might sell "all the property and franchises of the * * * company to the best advantage, either at public or private sale." Neither the company nor its stockholders bought under this decree; but C. M. McGhee, for himself and his associates, proposed to the commissioners to pay for the road $300,000 in bonds of the State, with January, 1871, coupons attached; and in his proposal he said, "I expect a full and perfect title to the road, including the State's interest, franchises and privileges." This proposition was accepted by the commissioners, and the sale, reported to the court, was confirmed by decree in the following words: "* * * which report being seen, heard and fully understood by the court, and not excepted to, is in all things confirmed; and it appearing to the satisfaction of the court that the sales of the Knoxville and Kentucky and the Cincinnati, Cumberland Gap and Charleston Railroad, with their property and [276] franchises, have been made by the commissioners in conformity with the previous decrees, it is therefore ordered, adjudged and decreed that these said sales be confirmed, and that the commissioners retain the bonds and collect the residue of the purchase money as the same falls due, and, when the same is fully paid, make title to the purchasers according to the terms of the contract and former decrees of this court. It is further ordered and decreed by the court, that the purchasers be at once put in possession of these roads, severally bought by them, with all the property, franchises and effects so bought by them as aforesaid, and for this purpose, if necessary, the clerk and master is hereby ordered and directed, upon the application of either of said purchasers, to issue a writ of possession or writs of possession directed to the sheriff of the several counties in this State through which the roads may run, or in which any part thereof, or of the property sold, may be, directing said sheriff to put the purchasers in possession of such property at once, and make return of his action to this court. It is further ordered, adjudged and decreed, that all the acts of the commissioners in reference to said sales be, and the same are hereby, approved, sanctioned and ratified by the court."

From this it will be seen that although McGhee in his proposal said, "he expected a full and perfect title to the road, * * * franchises and privileges," the court, in passing upon the confirmation, treated the sale as of the "property and franchises," "in conformity with the previous decrees," and directed that, when the agreed price was paid in full, the commissioners "make title to the purchasers according to the terms of the contract and former decrees of this court."

In this way, as it seems to us, the title of these purchasers was confined to the property and franchises of the Company, notwithstanding the use of the additional word "privileges" in the proposal. The authority to sell embraced only "property and franchises," and the sale recognized by the court as having been made is confined within the same limit. An opportunity was afforded the Company itself or its stockholders to discharge the State lien or buy the State's interest, on the payment of $700,000 in State bonds. In that event, the original franchises and privileges of the Company were to [277 remain unimpaired or pass to the Company's vendee; but if a sale was made by the state authorities to a third party, under the statutory lien, then only the franchises which the lien covered were to be transferred, and those, as we

NOTE.—*Exemption from taxation, whether a contract or not; not implied.* See *note* to Tucker v. Ferguson, 89 U. S., XXII., 805.

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said in *Morgan* v. *Louisiana* [*supra*], were only "the positive rights or privileges, without the possession of which the road of the company could not be successfully worked." The Act of December 21, 1870, does not purport to enlarge the State's interest. It simply provided a way in which the statutory lien, as originally retained, could be enforced; and gave authority, upon a sale of "any of the franchises," to transfer and vest in the purchaser "all the rights, privileges and immunities appertaining to the franchises sold." As in this case only franchises "essential to the operations of the corporation, and without which its road and works would be of little value" (*Morgan* v. *Louisiana*), were sold, the immunity from taxation did not pass as an incident.

Our attention has been called to the case of *R. R. Co.* v. *Hicks*, decided by the Supreme Court of Tennessee at its September Term, 1877, but not yet reported in the regular series of reports as holding that this immunity did pass under a similar sale. We do not so understand that case. There it appears that the Chancery Court of Nasville, acting under the jurisdiction conferred by the Act of December 21, 1870, "distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges and immunities, as defined by the charter and laws and the decree in the cause, passed to and vested in the new company." Here, on the contrary, the same court adjudged, under the authority of the same Act, that only the "property and franchises" passed. The same difference, therefore, exists between these cases that there is between *Humphrey* v. *Pegues*, 16 Wall., 244 [83 U S., XXI., 226], and *Morgan* v. *Louisiana* [*supra*]. In *Humphrey* v. *Pegues*, we held that immunity from taxation did pass under a transfer of "all the powers, rights and privileges" of a railroad corporation, but, in *Morgan* v. *Louisiana*, that it did not by a transfer of "property and franchises" only.

This disposes of the case, and makes it unnecessary to consider whether the immunity from taxation which the Nashville and Louisville Company had by its charter was granted to the Cincinnati, Cumberland Gap and Charleston Company, or whether, if it was, this immunity could be transferred to a purchaser at a sale to enforce the statutory lien retained by the State, even with the aid of the jurisdiction conferred on the Chancery Court of Nashville by the Act of December 21, 1870.

[278]

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—12 N. W. Rep., 567.

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[294]

CITY OF LOUISIANA, *Plff. in Err.*,
v.
THOMAS J. WOOD.

(See S. C., 12 Otto, 294-300.)

Defective city bonds.

Where bonds of a city cannot be enforced, because defectively executed, the money paid for them, to the city, may be recovered.

[No. 515.]

Submitted Nov. 4, 1880. Decided Nov. 29, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Mr. **David P. Dyer**, for plaintiff in error:

The bonds being antedated and, in fact, issued after the passage of the Act referred to, the court held that the bonds were invalid.

The agent who antedated the bonds might, in a proper action against him, be made liable to the purchaser; but we submit that the agent who exceeds his authority and, in doing so, practices a fraud upon a third person cannot bind the municipality by his acts, nor will it do to say that the City afterwards ratified his acts by receiving the money, for the act of receiving the money was done by agents, and it had no authority to ratify an illegal act. It is very clear that no acquiescence would make the bonds valid.

Marsh v. *Fulton Co.*, 10 Wall., 684 (77 U. S., XIX., 1043).

In the case of *Thomas* v. *Richmond*, 12 Wall. 356 (79 U. S., XX., 457), the court says:

"Municipal and other public corporations represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly.

1 Dill. Mun. Corp. sec. 372 and *notes; Hackettstown* v. *Swackhamer*, 37 N. J. L., 196.

To permit the plaintiff now to recover, would be indirectly enforcing a claim which the law has declared absolutely void.

Messrs. **John D. S. Dryden**, and *John W. Dryden*, for defendant in error:

The facts found, show the receipt and use by plaintiff of defendant's money, paid to it without a consideration, in ignorance of facts and by reason of its receipt; also paid upon a contract invalid and incomplete, because of plaintiff's non-compliance with the requirements of the law regulating the form of such contract, and which, for want of such formality, it repudiated. Money received under such circumstances cannot, in conscience, be retained, and the law implies a liability and a promise to repay it.

Thompson v. *Gould*, 20 Pick., 134; *Reynolds* v. *Harris*, 9 Cal., 338; *Swift* v. *Swift*, 46 Cal., 266; *Cook* v. *Doggett*, 2 Allen, 439; *Hunt* v. *Sanders*, 1 A K. Marsh, 552; *Allen* v. *Booker*, 2 Stow., 21; *Brandeis* v. *Neustadtl*, 13 Wis., 142; *Scott* v. *Bush*, 29 Mich., 523; *Rice* v. *Peet*, 15 Johns., 503.

Where the infirmity in the contract, upon which the money was paid, was the want of power in one of the parties to make such a contract, it has been held, both of natural persons and of private corporations, that they are liable to repay the money thus received upon the imperfect agreement.

Shearer v. *Fowler*, 7 Mass., 31; *Packet Co.* v. *Shaw*, 37 Wis., 655; *Tracy* v. *Talmage*, 14 N. Y., 162; *Curtis* v. *Levitt*, 15 N.Y., 1, 95.

That the rule, thus established, as to the contracts and liabilities of natural persons and private corporations, applies also to those of municipal corporations; that the latter also are

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liable upon an implied *assumpsit* for money received and retained or used by them which, *ex æquo et bono*, they ought to refund, is well settled by the opinions of text writers and jurists, and by adjudicated cases.

See, Dill. Mun. Corp., 2d ed., secs. 88, *n.* 2, 388; *Dill* v. *Wareham*, 7 Met., 438; *Paul* v. *Kenosha*, 22 Wis., 266; *Nelson* v. *Mayor of N. Y.*, 63 N. Y., 535; *Mayer* v. *Mayor*, 63 N. Y., 455; *McDonald* v. *Mayor*, 68 N. Y., 29; *Gas Co.* v. *San Francisco*, 9 Cal., 468; *Argenti* v. *San Francisco*, 16 Cal. 255; *McCracken* v. *San Francisco*, 16 Cal., 631; *Pimental* v. *San Francisco*, 21 Cal., 351; *Dist. Township* v. *Township*, 11 Iowa, 506; *Marsh* v. *Fulton Co.*, 10 Wall., 684 (77 U.S., XIX., 1043); *Mayor* v. *Ray*, 19 Wall., 483, 484 (83 U.S., XXII., 171), op. of Hunt, *J.*; *Gause* v. *Clarksville*, 7 Rep., 519, Dillon, *J.*; *S. C.*, 8 Cent. L. J., 364, top; *Anthony* v. *Jasper Co.*, No. 128, Oct. Term, 1879 (XXV., 1005).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The City of Louisiana had authority in law to borrow money, at any rate of interest not exceeding ten per cent per annum, and to provide for the payment of its debts. On the 8th of January, 1867, an ordinance was passed by the city council creating the office of "city fund commissioner." It was made the duty of this officer to sell the bonds of the City for the purpose of funding or paying the indebtedness of the City, and apply the proceeds to the purchase of outstanding warrants and bonds past due, or [295] not having more than three years to run. By this ordinance he was limited in his sales to a price not less than ninety-five cents on the dollar of the par value of five-year bonds, and ninety cents for those running ten years. On the first of March, 1871, the fund commissioner reported to the city council that the bonded indebtedness of the City was about $150,000 bearing interest mostly at the rate of ten per cent per annum, and that about $100,000 would mature that year, and in the years 1872, 1873, 1874 and 1875. Upon this report an ordinance was passed authorizing the commissioner "to negotiate the bonds of the City for the purpose of raising money to liquidate the city debt, for a period not exceeding fifteen years, and at a rate of discount not exceeding fifteen per cent."

On the 28th of March, 1872, the General Assembly of Missouri passed "An Act to provide for the registration of bonds issued by counties, cities and incorporated towns," sections 4 and 11 of which are as follows:

"SEC. 4. Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case; and, also, that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor; but such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bonds, or the power of any court, city or town council, or board of trustees or other authority, to issue such bonds; and the remedy of injunction shall also lie at the instance of any tax payer of the respective county, city or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or founded under any of the provisions of this Act."

"SEC. 11. Any county, city or town that desires to place its outstanding indebtedness, under the provisions of this Act, may do so by funding the same, and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to [296] run, as may be agreed upon between the county, city or town and the holders of its bonds; *Provided, however*, That the contract for funding, with the terms of the same, shall be assented to by a majority of the qualified voters of such county, city or town, at a general or special election held therefor, and at least thirty days' public notice of the same shall be published in every paper in the county, city or town; and when there are none, then by four printed handbills put up in the most public places in every voting precinct in such county, city or town."

Other sections make special provision for the assessment and collection of taxes to pay the principal and interest of all bonds registered in accordance with the Act.

On the 16th of July, 1872, after this Act went into effect, the City, for the purpose of raising money to pay its interest-bearing debts and the expenses of its government, caused to be executed by its proper officers and sealed with its corporate seal, twenty-one bonds, payable to bearer on the first of January, 1887, for $1,000 each, with coupons attached for semi-annual interest at the rate of ten per cent per annum. These bonds contained recitals that they were issued under the authority of the charter and the Ordinance of January 8, 1867. Although not actually executed until July 16, 1872, the City, "For the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said bonds were not subject to the requirements of said law, caused said bonds to be antedated as of the first day of January, 1872, and caused it to be falsely stated in them that they were signed, countersigned, and sealed on the day last named." The bonds thus executed were, without being registered, placed by the fund commissioner in the hands of a respectable stock and bond broker in St. Louis, to sell for the account of the City. On the 25th August, 1873, the broker and agent sold and delivered to the plaintiff below, now the defendant in error, ten of the bonds at ninety per cent of their face value, and on the first of September nine more at the same rate. On the 24th of June he sold to Lewis Dorsheimer one bond, and on the 24th of February, 1874, another to John F. Gibbons, at the same price. The price was in each case paid to the broker in money, the purchasers all the time being igno- [297] rant of the fact that the bonds were actually executed after the registration law went into effect, or that the recitals were not in all respects true. They bought the bonds, and paid for

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them in good faith, believing them to be what on their face they purported to be, and obligatory on the City. The broker, with the assent of the fund commissioner, retained from the money realized on the sales five per cent on the par value of the bonds sold, for his services, and paid the residue to the commissioner, who, with the sanction of the city council, used part in the payment and redemption of matured bonds, coupons, and warrants of the City, and handed over the rest to the city treasurer. The fund commissioner reported the sales of the bonds to the city council, and charged himself with a sum equal to eighty-five per cent of the par value as the sum realized by him, making no mention of the amount retained by the broker for services. His accounts were examined and approved by the city council, and the bonds, coupons and warrants taken up by his payments were destroyed. The interest on the bonds thus sold was met in full by the City as it matured until January 1, 1876, when only forty per cent was paid, and on the first of July of that year the City declared its purpose not to pay either principal or interest, claiming that the bonds were invalid because not registered.

The bonds bought by Dorsheimer and Gibbons have been transferred to the plaintiff. And after the City repudiated its obligation, the plaintiff offered to return the whole twenty-one bonds, and demanded the repayment of the several sums paid for them. This being refused, the present suit was brought to recover back the money so paid; and upon the foregoing facts the court gave judgment against the City for $18,900, and interest at the rate of six per cent per annum from the time the payment of the interest on the bonds was stopped. To reverse that judgment, the City brought the case to this court, and the error assigned is that the facts found are not sufficient to support the judgment.

[298] That the bonds in question are invalid, is conceded. Such is the effect of *Anthony* v. *Jasper Co.*, 101 U. S., 693 [XXV., 1005], decided at the last Term. It is equally true that the legal effect of the transactions by which the plaintiff and his assignors got possession of the bonds was a borrowing by the City of the money paid for what was supposed to be a purchase of the bonds. As the broker through whom the business was done was the agent of the City and acting as such, the case, so far as the City is concerned, is the same as though the money had been paid directly into the city treasury and the bonds given back in exchange. The fact that the purchasers did not know for whom the broker was acting is, for all the purposes of the present inquiry, immaterial. They believed they were buying valid bonds which had been negotiated and were on the market, when in reality they were loaning money to the City, and got no bonds. The City was in the market as a borrower, and received the money in that character, notwithstanding the transaction assumed the form of a sale of its securities.

The City, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price paid under the belief, brought about by the conduct of the City, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the City to repudiate the bonds and keep the money borrowed on their credit. The City could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the City, in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the City.

In *Moses* v. *Macferlan*, 2 Burr., 1005, it is stated as a rule of the common law, that an action "lies for money paid by mistake, or upon [299] a consideration which happens to fail, or for money got through imposition." The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the City. And the money was got through imposition, because the City, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh* v. *Fulton Co.*, 10 Wall., 676 [77 U.S., XIX., 1040], "The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

It is argued, however, that, as the City was only authorized by law to borrow money at a rate of interest not exceeding ten per cent per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited rate, and the borrowing was, therefore, *ultra vires*. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit: that the City would, on demand, return the money paid to it by mistake, and, as the money was gotten under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other.

Again; it was contended that, as the money in this case was borrowed to take up bonded indebtedness, the transaction was *ultra vires*, because the effect of the 11th section of the Act of 1872 was to repeal all earlier laws authorizing the borrowing of money for such purposes. We [300] do not so understand that section. The old power to borrow, which the charter gave, was left unimpaired, but, under this new provision, registered bonds might be issued in place of old ones, if the City and the holders of the old bonds could agree on terms and the people gave their assent. In this way the holders of old bonds might avail themselves of the special tax which the Law of 1872 required should be levied to

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meet the obligation of all registered bonds; but the City was not prevented from borrowing money to pay old bonds if it saw fit to do so, or if it could not agree on the terms of exchange.

The judgment below was right and it is, consequently, *affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 355, 575.

ADDISON C. FLETCHER, *Appt.*,
v.
MARSHALL B. BLAKE.

131 US cxcvii Appx

Fletcher's patent for an improvement in revenue stamps is not infringed by the stamps used by the government.

[No. 685.]

Argued Nov. 1880. Decided Dec. 6, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Messrs. **Treadwell Cleveland** and **Joseph H. Choate**, for appellant.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee:

I. There was no infringement.

II. Patents for inventions do not exclude the United States from the use of the thing protected, because the United States is not named in the patent law as being excluded.

R. S., sec. 4884; *U. S.* v. *Herron*, 20 Wall., 251 (87 U. S., XXII., 275); *Lewis* v. *U. S.*, 92 U. S., 618 (XXIII., 513); see, *Green* v. *U. S.*, 9 Wall., 655 (76 U. S., XIX., 806); *Walker* v. *Congreve*, 1 Carp. Pat. Cas., 356; *Feather* v. *Queen*, 6 Best & S., 257; *Dixon* v. *Small Arms Co.*, L. R., 10 Q. B., 130.

It is admitted that *U. S.* v. *Burns*, 12 Wall., 246 (79 U. S., XX., 388), is to the contrary; but as this was not argued there, it may not be improper, in view of the late English cases above cited, to bring it again to the attention of the court.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an appeal from a decree in the Circuit Court of the United States for the Southern District of New York, dismissing a bill in equity, based upon an alleged infringement of letters patent issued to the plaintiff in error on the 8th of June, 1869, for an improvement in stamps used for revenue and other purposes.

At the time of such alleged infringement, the defendant was a Collector of Internal Revenue. The revenue stamps, the sale and use of which by him constitutes the basis of the claim herein for damages, were sold and used in pursuance of directions by the Commissioner of Internal Revenue, and in discharge of defendant's duties as such collector, and for no other purpose. The action is further defended upon the ground that the stamps so sold and used by the defendant, known as "tax paid special stamps," "rectified spirit stamps," and "wholesale liquor dealers' stamps," were not constructed in accordance with the specifications, claims and drawings of the letters patent; that there has been no infringement upon any right or privilege secured to plaintiff by his letters patent; and, lastly, that the alleged improvement was neither useful nor valuable.

The Solicitor-General, in both his oral and printed arguments, claims that, although the grant to the patentee, his heirs and assigns, was of an exclusive right for a prescribed term to make, use and vend his invention or discovery, the United States are at liberty to use the thing protected without making compensation to the patentee. This, upon the ground that the government is not named in the patent law as being excluded from using the invention or discovery which may be patented. To support that position, reference is made to several adjudged cases in the English courts: *Feather* v. *Queen*, 6 Best & S., 257; *Walker* v. *Congreve*, 1 Carp. Pat. Cas., 356, and *Dixon* v. *Small Arms Co.*, L. R., 10 Q. B., 130. In view of those decisions, we are invited, notwithstanding what was said in *Burns* v. *U. S.*, 12 Wall., 246 [79 U. S., XX., 388], repeated in *Cammeyer* v. *Newton*, 94 U. S., 235 [XXIV., 75], to re-examine the question as to the right of the United States, without the consent of the patentee and without making compensation, to use in the public business any invention or discovery for which letters patent may have been issued.

It has also been suggested that, since the Collector, in using the stamps in question, acted in accordance with orders of his superior officers, he can in no event be held individually liable to the plaintiff, and that the claim of the latter, if any he has, should be asserted directly against the United States.

We deem it unnecessary to pass upon either of the foregoing propositions, because we are all of opinion, passing by all other questions in the case, that the stamps used by the Collector are not included in the patent of the plaintiff.

That which plaintiff claimed and desired to be secured was described in the schedule, referred to in the letters patent, as "A postage or revenue stamp having a portion of its *surface* composed of thin or fragile paper, or other suitable material, *loosely attached*, and *on which* a portion of the design or other matter is printed, substantially as and for the purposes set forth." Referring to the descriptive portion of the schedule, the invention is declared to consist "In providing the stamp with a flap or flaps covering a portion of its face, and arranging the requisite design or printed matter on such stamp *to extend over the flap or flaps* and remaining or uncovered portion of said face or body of the stamp. By this application of my invention as applied to an adhesive stamp, whether for internal or other purposes, said stamp may be canceled by tearing off the flap or flaps, which if necessary may be preserved as evidence of the cancellation; or where not required to be preserved, the flap or flaps may either be torn off and thrown away or be so mutilated by the act of canceling as heretofore practiced on postage stamps (which, and other adhesive stamps, my invention is equally applicable to), as that it will be impossible to use the same stamp over again without detection of the fraud."

Upon comparing the stamp, as thus described,

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with the stamp used by the defendant, we are satisfied that the latter is not covered by the plaintiff's patent. It is a different article altogether from that described in the specifications and claim of the plaintiff. The stamp used by the government is composed of one continuous piece of paper, of uniform thickness, upon the face of which is certain printed or engraved matter, with blanks, in which are inserted at the appropriate time, certain figures and names required by law to appear upon revenue stamps. No separate paper is attached, loosely or otherwise, to the face of that stamp. Upon the back of the body of the government stamp, attached to its outside edges, is a slip of red blank paper, of less width than the stamp. When the stamp is pasted upon the barrel, that portion of it immediately over the red slip does not adhere to the barrel. It is protected from the paste on the barrel by the intervening red slip, so that when the portion thus protected is cut or torn out for preservation or for any other purpose, the slip underneath, with the remaining portion of the stamp, adheres to the barrel. An essential characteristic of plaintiff's stamp is a flap, originally a distinct piece of paper, but when used, to be loosely attached to the *face* of the body of the stamp. A further characteristic is, that, upon the piece thus loosely attached must appear a portion of the vignette, design or printed matter required to be engraved or printed on the face of revenue stamps. The government stamp has no such characteristics. It is, as we have said, one continuous paper, containing upon it the required printed matter, with no flap loosely attached to its face, which may be subsequently torn off. Neither the red slip of unprinted paper across the back of the government stamp, and which adheres to the barrel, nor that portion of the stamp which does not adhere to the barrel, answers the same purposes as the flap of plaintiff's stamp. The present claim by the plaintiff is, manifestly, broader than his claim and specifications, as set out in the schedule to his letters patent. We concur with the court below in the opinion that the whisky stamp is a modification of the inventor's idea, that had not occurred to him when he drew his specifications, which were so limited in their terms as not to include the stamps used by the government. It is clearly, not a mere colorable contrivance or imitation for evading that which had been done before.

Decree affirmed.

True copy: Test.
James H. McKenney, Clerk, Sup. Court, U. S.

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[214] THE STEAMSHIP BENEFACTOR, HER ENGINE, ETC., NEW YORK AND WILMINGTON STEAMSHIP COMPANY, Claimant, *Appt.*,

v.

WILLIAM H. MOUNT, SUN MUTUAL INSURANCE COMPANY, UNION MUTUAL INSURANCE COMPANY ET AL.

(See S. C., "*The Benefactor*," 12 Otto, 214-218.)

Sailing rules—appeal in admiralty cases.

1. Where two vessels, a steamer and a schooner, are sailing on courses which cross each other, so as to involve a risk of collision, it is the imperative duty of the steamer to keep out of the way, and of the schooner not to embarrass the steamer by any change of course.

2. On an appeal in admiralty cases, this court can only pass on such rulings of the court below as might properly be put into a bill of exceptions on the trial of an action at law, and the findings of fact sent up with the record are conclusive.

[No. 65.]

Argued Nov. 12, 1880. Decided Dec. 6, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The libel in this case was filed in the District Court of the United States for the Eastern District of New York, by the appellees, to recover for the loss of a certain schooner, caused by a collision. A decree was entered in favor of the libelants by the district court, which having been affirmed by the circuit court upon appeal, the claimant appealed to this court.

See *N. Y. & W. Steamship Co.* v. *Mount et al.*, *post*, between the same parties for another case growing out of the same collision; also for a modification of this decision.

The circuit court in affirming the decree of the district court found the following facts and conclusions of law:

Findings of Fact.

1. The collision between the Steamship Benefactor and the Schooner Susan E. Wright, in controversy in this suit, took place a little after ten o'clock in the forenoon of the 26th day of February, 1875, off Squan Beach, New Jersey, and about three miles distant therefrom.

2. The weather at and prior to the time of the collision was fine and clear, the wind about west-northwest and strong; the steamship was [215] bound from New York to Wilmington, and the schooner from Matanzas to New York.

3. The steamship was observed by those in charge of the schooner when six or seven miles distant therefrom, and from twenty to thirty minutes before the collision. At that time the steamship bore a point or two off the starboard bow of the schooner. The schooner was close-hauled, sailing on a course about north by west, at the rate of about eight miles an hour. The steamship was proceeding on a course about south-southwest at the rate of about ten miles an hour, with her sails set and the wind free, and making much leeway.

4. At this time the courses of the two vessels were such as to cross each other, if continued, and such as to bring the two vessels either together or into close proximity to each other, and the two vessels were proceeding in such directions as to involve risk of collision.

5. On the windward side of the two vessels, and about three miles distant therefrom, was the New Jersey shore, trending at that point about north by east and south by west, and on the leeward side was the open ocean, without any obstruction to safe navigation. There was nothing to prevent the steamship from seasonably

NOTE.—*Collision; vessel overtaking another.* See *note* to The Abbotsford v. Johnson, 98 U. S., XXV., 168.

Rights of steam and sailing vessels with reference to each other and in passing and meeting. See *note* to St. John v. Paine, 51 U. S. (10 How.), 557.

Rules for avoiding collision; steamer meeting steamer. See *note* to Williamson v. Barrett, 54 U. S. (13 How.), 101.

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changing her course so as to pass either to windward or to leeward of the schooner and give her a wide berth.

6. From the time when the steamship was observed, as above stated, she was watched by those in charge of the schooner, and the schooner was kept close-hauled upon her course. The steamship was also kept upon her course, without slacking speed or stopping, until the vessels were only a few lengths apart and a collision was imminent, when the peak of her mainsail was lowered, her engines slowed and stopped, and an effort made to pass to leeward of the schooner, but without success.

7. After the steamship was within a few lengths of the schooner, and a collision was imminent, the captain of the schooner attempted to avoid the impending collision or lessen its force, by porting the helm of the schooner, but after putting the schooner's wheel only about two spokes to port, he was driven away therefrom by the nearer and dangerous approach of the steamship which struck the schooner on her starboard quarter, in consequence of which the schooner sank almost immediately, with her valuable cargo.

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8. The schooner kept her course until the steamship was in close proximity, and the collision was imminent, and if there was any change in the schooner's course after that, and before the collision actually took place, it was very slight, had no effect in producing the collision, and was made *in extremis*.

9. At the time of the collision the schooner was of the value of $17,850, the cargo was of the value of $35,046.58; and both the vessel and cargo, by reason of the collision, became a total loss. The amount of damage sustained by William H. Mount, by reason of loss of and injury to his personal effects by the collision, was $1,283.85. The net freight loss by reason of the collision was $1,923.14. The amount of damages sustained by William Hirst, Charles Lukens and John Collins, by reason of the loss of and injury to their personal effects, by reason of the collision, was $244, $165 and $182.15, respectively.

Conclusions of Law.

1. Upon the steamship and schooner discovering each other proceeding in such directions as to involve risk of collision, as stated in the foregoing findings of fact, it was the right and duty of the schooner to keep her course, and the duty of the steamship to keep out of the way of the schooner, and the steamship was in fault in failing to perform that duty.

2. It was also the duty of the steamship under the circumstances stated, to pursue a course which should not needlessly put the schooner in imminent peril, and the steamship was in fault in failing to perform that duty.

3. It was the duty of the steamship, before the time when she did so, to slacken her speed or stop, and the steamship was in fault in failing to perform that duty.

4. If when a collision had become imminent by reason of the fault of the steamship, any error was committed *in extremis* by those in charge of the schooner, the schooner is not responsible therefor.

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5. The steamship had no right, under the circumstances stated, needlessly to place herself in such close proximity to the schooner, that the error of a moment would bring destruction.

6. The collision was occasioned by the fault of the steamship, and the steamship should be condemned therefor.

7. The decree of the district court was right and should be affirmed with costs.

No exception to the admission or rejection of evidence was taken by either party, at the trial in the circuit court, nor was any ruling of the circuit court excepted to at the time. *After* the final decree, the proctors for the claimants filed a paper designated "Proposed Bill of Exceptions," in the office of the clerk of the court.

To test the questions relating to the proper procedure to be adopted in such cases the learned Justice who tried the cause below settled and signed the so-called exceptions, and the claimants of The Benefactor brought the whole record to this court by appeal.

Messrs. C. Van Santvoord and **Edward L. Owen,** for appellant.

Messrs. **Evarts, Southmayd & Choate,** *R. D. Benedict,* **W. R. Beebe** and *F. A. Wilcox,* for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Upon the facts as found, the judgment below was clearly right. The vessels were on the ocean, and there was nothing to interfere with their navigation. The weather was clear and fine, and the time about ten o'clock in the forenoon. The schooner saw the steamer when six or seven miles away, and from that time steadily kept her course until the collision was imminent. While there is no special finding that the steamer saw the schooner, it would have been a gross fault on her part if she did not; and both in the answer and in the requests for finding presented to the court below it is stated that the schooner was seen when three miles off. From that time until the collision the vessels were sailing on courses which crossed each other, so as to involve a risk of collision. Under these circumstances it was the imperative duty of the steamer to keep out of the way, and of the schooner not to embarrass the steamer by any change of course. The schooner, mindful of her duty, did hold her course, but the steamer did not avoid a collision.

The theory of the steamer seems to have been that, as the schooner was bound for New York, she should have steered more to the eastward than she did, and that the steamer had the right to assume she would do so, and act accordingly. This is clearly wrong. The steamer was bound to govern herself by what the schooner actually did, not by what might have been done. When more than six miles from the steamer, and from twenty to thirty minutes before the collision, the schooner was close-hauled, and on a course which she held steadily all the time. At that distance from the steamer she had the right to choose her own way of getting to her port of destination, and the steamer could not require her to change it. As the responsibility of avoiding the collision was on the steamer, it was a fault in her to get so close that a slight change in the course of the schooner, in the midst of what seemed to be imminent peril, would bring the vessels together. It is clear to us that those on board the steamer were deceived as to the movements of the schooner by

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the leeway they themselves were making, and that they expected to pass to the windward, when they should have shaped their course to go to the leeward.

The only remaining questions are those which arise on the bill of exceptions. In the case of *The Abbotsford*, 98 U. S., 440 [XXV., 168], we decided that on an appeal we could only pass on such rulings of the court below as might properly be put into a bill of exceptions on the trial of an action at law, and that the findings of fact sent up with the record were conclusive here. If there are errors in these findings, they can only be corrected at the proper time and in the proper way by the court below. We are no longer required to weigh evidence. On an appeal, the findings have all the effect of the verdict of a jury in actions at law. This must be accepted as our final conclusion as to the effect of the Act of 1875, 18 Stat. at L., 315, in this particular.

The bill of exceptions in this case contains all the evidence, and a request made of the court by the appellant to find the facts in a certain way. From this request it appears that the only material controversy about the facts was as to whether the schooner negligently changed her course so as to cross the bows of the steamer and bring on the collision. The court, after considering the evidence, which was to some extent conflicting, found that she did not. This disposed of the case and is conclusive on us. All the exceptions taken have their foundation in this finding, and relate to questions of law which would have arisen if that had been the other way. As we cannot disturb the finding, we cannot consider the exceptions. It follows that the judgment must be affirmed, and it is consequently *so ordered*.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 731; 104 U. S., 187; 107 U. S., 500.

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[219]

A. J. HENTIG, *Appt.*,

v.

H. J. PAGE, RECEIVER, etc., and B. F. SIMPSON, U. S. MARSHAL FOR THE DISTRICT OF KANSAS.

(See S. C., 12 Otto, 219-222.)

Final decree.

Where a receiver of the rents and profits of property is appointed in a foreclosure action, and a writ of assistance issued to put him in possession, an order denying a motion to enjoin the execution of the writ, is not a final decree in a "case of equity", which this court has jurisdiction to review.

[No. 519.]

Submitted Nov. 17, 1880. Decided Dec. 6, 1880.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Messrs. **Alfred Ennis** and **C. A. Sperry**, for appellant.

Messrs. **G. C. Clemens** and *C. M. Foster*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 26th day of October, 1877, Mary A. Smith, administratrix *de bonis non* of Julia C. Wright, filed her bill in the Circuit Court for the District of Kansas, against Daniel M. Adams and others, to foreclose a mortgage made by Adams and wife on certain lands in Shawnee County, Kansas. On the 3d of September, 1878, the lands covered by the mortgage were sold by the treasurer of the county to the appellant for $64.92, being the full amount of tax, penalty and charges due on the land for the year 1877. At the time of the sale there was delivered to the purchaser a certificate, which set forth the sale, and stated that he would be entitled to a deed for the land on the 4th of September, 1881, unless redeemed in accordance with the provisions of law prior to that time. On the 8th of February, 1879, Hentig, the purchaser, leased the premises to C. E. and W. K. Gillan for one year from the first of March, 1879, at a rent of $200, and put them in possession. The certificate of tax sale was recorded November 18, 1878, and the taxes of 1879, amounting to $67.80, were paid by Hentig, March 10, 1879.

On the 4th of June, 1879, the court having become satisfied that the property was inadequate security for the mortgage debt, and that Adams, the debtor, was insolvent, appointed H. J. Page receiver of the rents and profits of the property, and ordered that "all persons in possession of such premises, whether parties to this cause, tenants under any of them, or persons who have come into possession pending these proceedings," yield up possession to the receiver on demand. On the 10th of July the receiver reported to the court that he found the Gillans in possession, who refused to surrender, claiming that they were in under a lease from Hentig, having paid $150 of their rent, and owing only $50 more, which was not due. The court thereupon issued to the marshal a writ of assistance, directing him to eject from the premises the persons described in the original order appointing the receiver, and to put the receiver in possession. On the 12th of July, an order in the suit was entered in the order-book, directing the complainant and receiver to show cause before the District Judge, at his chambers, on the 18th, why the writ of assistance should not be revoked, and directing that in the meantime nothing be done under the writ. At the time named the appellant was permitted to file in the suit what was denominated a substituted petition. This petition was addressed to the "Hon. C. G. Foster, one of the judges of the court," and set forth the claim of the appellant under the tax title with the lease to the Gillans, and concluded as follows: "Wherefore your petitioners pray that the said marshal may be enjoined from further proceeding in the execution of such writ, and that upon the hearing, said writ may be revoked by an order of this court, and that your petitioner may have such other and further relief as to equity may seem meet. And as in duty [220]

NOTE.—*Powers and duties of receivers.* See *note* to Davis v. Gray, 83 U. S., XXI., 447.

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bound will ever pray," etc. This petition was thereupon heard, and an order entered in the order-book as follows:

"MARY A. SMITH, Admrx., etc., Complt., *vs.* DANIEL M. ADAMS *et al.*, Defts. } 2055.

AT CHAMBERS, July 18, 1879.

Now comes the complainant and receiver, H. J. Paige, by G. C. Clemens, their solicitors, and A. J. Hentig, by Hentig & Sperry, her solicitors, and thereupon came on to be heard the matter of the petition of A. J. Hentig to enjoin [221] the marshal from further proceeding in the execution of the writ of assistance issued herein to put said receiver into possession of the property described in the bill of complaint and decree herein, and to revoke said writ, and was argued by counsel; on consideration whereof it is now here ordered that said petition be and is overruled and denied.

From this order and ruling said A. J. Hentig prays an appeal to the Supreme Court of the United States, which is allowed, and the bond in appeal fixed at $300, to act as a *supersedeas.*"

On the 22d of July the required bond was given and the appeal perfected. The case has been submitted under the 20th Rule, but the submission was accompanied by a motion of the appellee to dismiss for want of jurisdiction.

We think the motion to dismiss must be granted. The order appealed from is not a final decree in a "case of equity." The petition on which the order was made was in reality nothing more than a motion in the original suit by the appellant, with leave of the court, for a recall of the writ of assistance. It certainly is not a bill in equity, for it names no parties defendant and prays no process. It is addressed to one of the Judges of the court, and not to the Judges nor to the court; and the appellees were brought in on a rule to show cause in the pending suit, and not by an original writ. Although the Judge in rendering his decision gave as a reason for refusing to grant the petition that the tax certificate alone, before the expiration of the time of redemption, vested no title in the purchaser, the order as made settled no such question. The effect of what was done was simply to leave the writ of assistance in force. The rights of the parties were not changed in any particular. The appellant was still no party to the suit, and she could resist the writ as well after the order as before. She did not by her petition submit herself to the jurisdiction of the court in the cause. Her application was in the nature of a suggestion to the court that the writ had been improvidently issued, and, therefore, should be withdrawn. She has still all the legal and equitable remedies to enforce her original rights that she ever had. [222] If the writ would not justify the marshal in putting her tenants out of possession when it was issued, it will not now. If she could by a suit in equity enjoin the execution of the writ against her tenants before her motion was made, she could afterwards.

It follows that the appeal must be dismissed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

WILLIAM HERRYFORD ET AL., *Plffs. in Err.*, [235]

v.

HENRY H. DAVIS, SHERIFF OF CHARITON COUNTY, Suing to the Use of the JACKSON AND SHARP COMPANY.

(See S. C., "*Herryford* v. *Davis*," 12 Otto, 235-247.)

Letting for hire—conditional sale—recording chattel mortgage.

1. In every bailment or letting for hire, a price or compensation for the hire is essential. The amount may not be stipulated, but the contract must contemplate payment for the use of the thing let or bailed.
2. A contract between a manufacturer of cars and a railroad company, by which the latter was bound to pay the price of certain cars delivered to it by the former, either by paying its notes or surrendering the property to be sold in order to make payment, is not a conditional sale, but a mortgage.
3. To protect the cars from seizure and sale by virtue of executions against the railroad company, recording the contract was made necessary by the Statutes of Missouri in regard to recording mortgages of chattels.

[No. 79.]

Argued Nov. 23, 1880. Decided Dec. 6, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

The case, which arose in the court below, is fully stated by the court.

Messrs. Wm. Herryford and *James W. Lewis*, in person.

Messrs. J. W. Noble and **H. S. Green**, for plaintiffs in error:

I. The transaction was not a loan, as pretended on the face of the instrument; but, to say the least, a conditional sale, and subject to the rules governing such sales.

Hervey v. *Locomotive Works*, 93 U. S., 664 (XXIII., 1003).

As a conditional sale, pure and simple, it was valid and binding between the parties and, according to some cases in Missouri, even as against subsequent *bona fide* purchasers and creditors, if no laches had intervened.

Parmlee v. *Catherwood*, 36 Mo., 479; *Little* v. *Page*, 44 Mo., 412; *Ridgeway* v. *Kennedy*, 52 Mo., 24; *Robbins* v. *Phillips*, 68 Mo., 100.

When laches intervene, or acts of waiver are shown, the rights of subsequent *bona fide* purchasers and creditors will prevail; and very short delay and slight circumstances will be held sufficient in such cases. The case cited below is decisive of the case at bar. It had not been decided when the certificate of division was granted in this case, nor when the opinion in *Locomotive Works* v. *Lewis*, 4 Dill., 158, was written, and was not considered in these cases. It was the first express adjudication, in Missouri, of the questions of laches and waiver in connection with these sales, and it had the effect, as was doubtless intended, to greatly limit the evil of the other cases cited above.

Robbins v. *Phillips* (*supra*).

NOTE.—*Chattel mortgages; necessity of filing; against whom need not be filed.*

At common law, a mortgage of chattels was invalid as against third persons unless the mortgagee took and retained possession of the mortgaged property. Under the statutes of several States, registration or filing the mortgage is equivalent to delivery of the property. Sturgis v. Warren, 11 Vt., 433; Morrill v. Sandford, 49 Me., 566; Bullock v. Williams, 16 Pick.,

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The instrument was not acknowledged and placed on record, as it could have been, and thus made notice to the defendants; nor was any notice otherwise given. The case here is even stronger than *Robbins* v. *Phillips*, and should be ruled by it. The Supreme Court of Missouri, following the precedent just cited, would undoubtedly decide the case made on this record for the defendants.

2 Schouler, Pers. Prop., 301-303; *Smith* v. *Dennie*, 6 Pick., 262; *Hutchings* v. *Munger*, 41 N. Y., 155; *Bowen* v. *Burk*, 13 Pa. St., 146; *Thompson* v. *Yeck*, 21 Ill., 73.

II. The plaintiff is not entitled to recover on the facts found, because its lien under the instrument was postponed in favor of the lien of the defendants by the Legislature, Act of March 21, 1873. The facts which bring the defendants within this Act appear on the face of the judgments under which they claim.

For a discussion of the constitutionality and operation of the above Act, see *Walker* v. *R. Co.*, 2 Cent. Law J., 481; *Brooks* v. *R. Co.*, 101 U. S., 443 (XXV., 1057).

III. That the instrument in question was designed to operate as security, cannot be questioned. As such, it was an incumbrance on the rolling stock of the railroad, and upon that defendants secured a lien which, the statute declares, "Shall be prior to all mortgages or incumbrances placed upon the property affected by this lien, subsequent to the passage of this Act."

The case cited below is clearly in point here, to show that the instrument in question falls within the Act of the Legislature creating defendants' liens.

Hervey v. *Locomotive Works* (*supra*).

It was this case which caused *Judge* Dillon to doubt his judgment in *Locomotive Works* v. *Lewis* (*supra*), as explained in the *note* to that case, and to agree to a certificate of division in this case.

IV. The Registry Act of Missouri provides: "Sec. 691. Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded," etc. Section 692 makes the record notice to subsequent purchasers and mortgagees. "Sec. 693. No such instrument shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." (R. S., 1879.)

Equitable liens may be acknowledged and recorded and made notice under these provisions, and the plaintiff could not have availed itself of them.

McClurg v. *Phillips*, 57 Mo., 214.

2. These cars when placed upon the railroad became part of its rolling stock. If, however, the instrument is a mortgage at all, it is thus far void under either statute.

Jones Rail. Secur., secs. 154-163.

V. The instrument in question, considered in its true light, is, in legal contemplation, a mortgage of personal property and should have been acknowledged or proven and recorded under the statute cited. Whenever the question has been made between such sales and a mortgage, the ruling has uniformly been in favor of a mortgage.

Desloge v. *Ranger*, 7 Mo., 327; *Williams* v. *Rorer*, 7 Mo., 556; *Wilson* v. *Drumrite*, 21 Mo., 325; *Brant* v. *Robertson*, 16 Mo., 129; *Turner* v. *Kerr*, 44 Mo., 429.

When it appears, from the face of the instrument or otherwise, that security for a debt was really intended, no matter what the form of the instrument, courts of equity will decree in favor of a mortgage.

Brunt v. *Robertson* (*supra*); *Wilson* v. *Drumrite* (*supra*); *Turner* v. *Kerr* (*supra*); *Worley* v. *Dryden*, 57 Mo., 226.

The instrument contains in the last two paragraphs provisions in the nature of a defeasance, which is one of the usual features of a mortgage. The provisions simply mean, that, upon the payment of the notes, the mortgage shall become void and the property be reconveyed.

1 Jones, Mort., secs. 241, 242.

Messrs. **T. T. Crittenden** and *Lay & Belch*, for defendant in error:

The intent of the parties, as gathered from the contract, etc., will govern.

1 Pars. Cont., 553, and *note, n.*; 2 Pars. Cont., 494, 495, 504, 506, 527, and *notes k* and *l*.

If the court should construe the contract to be a conditional sale, then, on a sale with delivery of a chattel, at a fixed price to be paid on a certain day but until paid the title to rest in the seller, payment is a condition precedent

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33; Shurtleff v. Willard, 19 Pick., 202; Frank v. Miner, 50 Ill., 44; Crooks v. Stuart, 2 McCrary, 13; Field v. Baker, 12 Blatch., 438; Morrow v. Reed, 30 Wis., 81; Donaldson v. Johnson, 2 Chand. (Wis.), 160.

If, however, the mortgagee takes possession of the property, that is sufficient. The mortgage must either be filed as the law requires, or the mortgagee must take possession of the property. Morrow v. Reed, 30 Wis., 81; Cooper v. Brock, 41 Mich., 488; Gill v. Griffith, 2 Md. Ch., 270; Waite v. Mathews, 50 Mich., 392; Fromme v. Jones, 13 Iowa, 474; Gregg v. Sanford, 24 Ill., 17.

The Registry Acts do not make a chattel mortgage absolutely void for omission to file it, but simply declare it void as to judgment creditors and subsequent purchasers in good faith. As to other persons it is valid without filing. Steele v. Benham, 84 N. Y., 634; Thompson v. Van Vechten, 27 N. Y., 568; Porter v. Parmley, 52 N. Y., 185; Hayman v. Jones, 7 Hun, 238; Fraser v. Gilbert, 11 Hun, 634; Moses v. Walker, 2 Hilt., 536; Johnson v. Jeffries, 30 Mo., 423; Kohl v. Lynn, 34 Mich., 360; Hackett v. Manlove, 14 Cal., 85; Gill v. Pinney, 12 Ohio St., 38.

As between the parties themselves, it is not necessary that a chattel mortgage should be filed or recorded. Beeman v. Lawton, 37 Me., 543; Lemay v. Williams, 32 Ark., 166; McTaggert v. Rose, 14 Ind., 230; Hall v. Snowhill, 14 N. J. L., 8; Fuller v. Paige, 26 Ill., 358; Wilson v. Leslie, 20 Ohio, 161; Kilbourne v. Fay, 29 Ohio St., 264; Douglass v. Vogeler, 6 Fed. Rep., 53; Winsor v. McClellan, 2 Story, 492; Coggeshall v. Porter, 1 Holmes, 75; Griffin v. Wertz, 2 Ill. App., 487; Hudson v. Rose, 2 Harr. & J., 415; Hodgson v. Butts, 7 U. S. (3 Cranch), 138; Merrick v. Avery, 14 Ark., 370.

The general rule is that actual notice of an unrecorded mortgage dispenses with the necessity of filing. Nat. Bk. v. Sprague, 21 N. J. Eq., 530; Steele v. Adams, 21 Ala., 534; Boyd v. Beck, 29 Ala., 703; Doyle v. Stevens, 4 Mich., 87; Kohl v. Lynn, 34 Mich., 360; Stowe v. Meserve, 13 N. H., 46; Gooding v. Riley, 50 N. H., 400; Clark v. Tarbell, 57 N. H., 328; Crane v. Chandler, 5 Col., 21; Shuler v. Boutwell, 18 Hun, 171; Benjamin v. Elmira, etc., R. R. Co., 54 N. Y., 675; Wright v. Bircher, 5 Mo. App., 322; Coble v. Nonemaker, 78 P. St., 501; Paine v. Mason, 7 Ohio St., 198; Campbell v. Leonard, 11 Iowa, 489; Gregory v. Thomas, 20 Wend., 17; Lewis v. Palmer, 28 N. Y., 272.

A chattel mortgage not on file or recorded as required by statute is not void as against a wrongdoer. Johnson v. Jeffries, 30 Mo., 328; Moses v. Walker, 2 Hilt., 536.

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and, until performance, the property is not vested in the buyer.

Porter v. *Pettingill*, 12 N. H., 299; *Bigelow* v. *Huntley*, 8 Vt., 151; *Ayer* v. *Bartlett*, 9 Pick., 156; *Reed* v. *Upton*, 10 Pick., 522; *Fairbank* v. *Phelps*, 22 Pick., 535; *Copland* v. *Bosquet*, 4 Wash., 588; *Strong* v. *Taylor*, 2 Hill, 326; *Hunt* v. *Iron Co.*, 97 Mass., 279; *Trunick* v. *Smith*, 63 Pa., 18; *Clarke* v. *Farnum*, 7 R. I., 174; *Coggill* v. *R. R. Co.*, 3 Gray (Mass.), 545.

This case is clearly distinguished from the case of *Hervey* v. *Locomotive Works*, 93 U. S., 664 (XXIII., 1003), by the variance between the terms of the contracts in that and the present case, and by the variance of the laws in regard to such contracts in the States of Illinois and Missouri.

As to the law of Illinois:

In the case of *McCormick* v. *Hadden*, 37 Ill., 370, it was held that where the vendor of personal property delivers possession to the purchaser, under an agreement that the property is to be considered as belonging to the vendor until the payment of the purchase money, notwithstanding such delivery of possession, such agreement, as to the creditors of the purchaser, is fraudulent and void.

Also, to the same effect, see, *Ketchum* v. *Watson*, 24 Ill., 591; *Thompson* v. *Yeck*, 21 Ill., 73; *Murch* v. *Wright*, 46 Ill., 487.

As to the law of Missouri:

As a conditional sale, pure and simple, it was valid and binding between the parties and against subsequent *bona fide* purchaser or creditors.

Parmlee v. *Catherwood*, 36 Mo., 480; *Little* v. *Page*, 44 Mo., 412; *Ridgeway* v. *Kennedy*, 52 Mo., 24; *Robbins* v. *Phillips*, 68 Mo., 100; also, see, *Locomotive Works* v. *Lewis*, 4 Dill., 158.

Therefore, under the decision of this court in said case of *Hervey* v. *Locomotive Works* (*supra*), the law of Missouri must govern in this cause.

In the case of *Locomotive Works* v. *Lewis* (*supra*), the notes were all overdue eighteen months, and this was not laches. In this case the notes were overdue only eight months.

There is a peculiar statute of Missouri on the subject of bailment by way of loan, as appears in 1 Wagner's Statutes of Missouri, p. 280, sec. 5, and this has been construed in the cases of *McDermott* v. *Barnum*, 16 Mo., 114, and *Criddle* v. *Criddle*, 21 Mo., 522. It may be that this section had some effect upon the mind of the person who drafted the contract.

This contract was not acknowledged before a notary, was evidently never intended for record and cannot be metamorphosed into a chattel mortgage. It was clearly a conditional sale; but the conditions were never complied with and the title remained in the vendors.

[243] *Mr. Justice* **Strong** delivered the opinion of the court:

The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson and Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson and Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company. The statute of the State of Missouri enacts that "No mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are, by law, directed to be acknowledged or proved and recorded." 1 Wagn. Stat., ch. 35, article 2, sec. 8. The plain purpose of this statute was to render secret liens upon personal property ineffectual as against purchasers or creditors. The property in this case was in the possession of the railroad company when the levy upon it was made, and the contract under which the company held it was not recorded.

What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision, it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. [244]

Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company *for hire*, for four months, and delivering them for use *for hire*, it is manifest that no mere bailment for hire was intended. No price for the hire was mentioned or alluded to, and in every bailment or letting for hire, a price or compensation for the hire is essential. The amount may not be stipulated. It may be a reasonable compensation or a *quantum valebat*, but the contract must contemplate payment for the use of the thing let or bailed. Not only was no such payment provided for or required, but all intention to demand it is negatived by the strongest implications. The manufacturing company exacted and took promissory notes for the entire selling price of the property and, in addition thereto, collaterals to a large amount to secure payment of the notes. The aggregate of the notes was $6,338.40; two of them for $1,919.20 each, bearing interest from their date at the rate of ten per cent, and the third note being for $2,500. One of these notes fell due only nine days after the cars were delivered to the railroad company, and both the others before the expiration of four months from the date of the agreement. The notes were to be collected at maturity, and thus it was contemplated that, before the end of four months, the manufacturing company should have in hand in cash the full value or price of the cars. It is needless to say that all this is totally inconsistent with the idea that the parties intended a mere letting or bailment for hire.

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It appears equally clear to us that the contract was not one for a conditional sale. It is true it said the manufacturing company were to hold the three notes as collateral security, and collect the same at their maturity, and [245] "Hold the proceeds when collected for the safe custody and return to the party of the first part, when demanded, of said passenger, mail, baggage and express cars, delivered to the party of the second part for the term of four months for hire," "the said party of the second part to have the right and privilege to purchase (the cars) at any time within the said period of four months, upon payment to the party of the first part, in cash, the sum of $6,338.40, with interest at the rate of ten per cent from the date of the agreement until day of payment, but, until such payment is made in full, the said party of the second part shall have no right, title, claim or interest in and to said passenger and mail, baggage and express cars, *except as to their use or hire*, nor any right or authority in any way to dispose of, hire, sell, mortgage or pledge the same, but that the said cars are and shall remain the property of the party of the first part, to be accounted for by the party of the second part to the party of the first part, and to be redelivered to the party of the first part, when demanded in default of the payment of the aforesaid sum of $6,338$\frac{40}{100}$ with interest as aforesaid, hereinbefore described, anything to the contrary herein contained notwithstanding."

If this were all, it would necessarily be held that a conditional sale was intended. But it is not all. It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that, if possible or so far as is possible, they all may harmonize. Thus construed, it is quite plain these stipulations were inserted to enable the manufacturing company to enforce payment, not of any rent or hire, but of the selling price of the cars for which the company took the notes of the railroad company. They were intended as additional security for the payment of the debt the latter company assumed. This is shown most clearly by the other provisions of the contract. The notes became the absolute property of the vendors. As has been stated, they all fell due within four months, and it was expected they would be paid. The vendors were expressly allowed to collect them at their maturity, and it was agreed that whatever sums should be collected on account of them should be retained by [246] the vendors for their own use.

No part of the money was to be returned to the railroad company in any event, not even if the cars should be returned. On the contrary, it was stipulated expressly that if the manufacturing company should elect to take the cars into their own possession, which they reserved the right to do in case of default of payment of the notes, the property should be sold, and of the net amount realized from the sale, so much as should be needed to make the amount remaining due and unpaid on the promissory notes, with the interest that might have accrued thereon, should be retained by the manufacturing company, and the surplus, if any, should be paid over to the railroad company.

What was this but treating the notes given for the sum agreed to be the price of the cars as a debt absolutely due to the vendors? What was it but treating the cars as a security for the debt? And why stipulate that the surplus which might be obtained from the sale of the cars, after taking them back, beyond what was needed to pay the unpaid part of the debt, should be paid over to the railroad company, if that company was not the owner of the cars, even while they were in the possession of the other company, and had not even then what may be called an equity of redemption?

In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage which has no existence in a case of conditional sale.

It may be added that the notes were given to the vendors before the cars were delivered. So, also, the collaterals for the notes were taken before the delivery; and when they were taken, the president of the manufacturing company acknowledged he received them, not as additional security for the restoration of the cars at any time thereafter when demanded, but as security for the notes "given in payment" for the cars. This is confirmatory of the construction we have given to the contract. It tends to show that the transaction was a sale by which the ownership passed to the railroad company, the purchasers retaining only a lien for the consideration.

It follows, from what we have said, that, to protect the cars from seizure and sale by virtue of executions against the railroad company, recording the contract was made necessary by the statutes of Missouri, to which we have referred.

The judgment of the Circuit Court is, therefore, reversed, and the record is remitted with instructions to enter judgment, on the special finding of facts, in favor of the defendants below.

Mr. Justice **Bradley** dissenting: [247]

I dissent from the judgment in this case. I think trary, in the absence of express law to the contrary, that, not only has a man a right to make a conditional sale of his property, but that this right is not opposed to sound public policy, and should be fairly and liberally dealt with. The present case was, in my opinion, clearly a conditional sale, and nothing else; and the owners of the property had a right to reclaim it on the terms contained in the agreement. These terms were fair and just; not involving any forfeiture, but providing for a due allowance for every dollar paid, by requiring a sale of the property if the purchase should not go into effect.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[263] JOSIAS M. ROGERS, Assignee of ANDREW PALMER, JR., a Bankrupt, *Appt.*,

v

ANDREW PALMER, SR.

(See S. C., 12 Otto, 263-268.)

Attorneys acts and knowledge—fraud on bankrupt law.

*1. On the question whether the plaintiff in a judgment on which goods were taken in execution, knew of the defendant's insolvency and of the intent to evade the bankrupt law, the knowledge of plaintiff's attorney is the knowledge of plaintiff.

2. Where the debtor was son of the plaintiff and actively contributed to having judgment rendered before it could have been done without such aid, this was procuring his goods to be taken on execution within the meaning of the 35th section of the bankrupt law as modified by the Act of 1874.

[No. 74.]

Argued Nov. 18, 1880. Decided Dec. 6, 1880.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is fully stated by the court.

Mr. **E. G. Rogers**, for appellant.

Messrs. **C. K. Davis** and **Enoch Totten**, for appellee.

[264] *Mr. Justice* **Miller** delivered the opinion of the court:

The appellant, who was complainant below, is assignee in bankruptcy of Andrew Palmer, Jr., son of the appellee.

The father having procured a judgment against his son in the District Court of Freeborn County, Minnesota, for the sum of $8,433, caused execution to be issued thereon and levied upon the stock of goods of the defendant, who was a merchant in business in the Town of Albert Lea, in said county.

Within a few days thereafter, proceedings in bankruptcy were instituted against his son, and he was duly declared a bankrupt, and the assignee brought this suit in chancery for the purpose of having the levy declared void as a fraud upon the Bankrupt Act, and the goods or their proceeds subjected to administration in the bankruptcy proceeding. After answer and issue taken and considerable testimony, the Circuit Court dismissed the bill, and from that decree appeal is taken to this court.

The bankrupt was indebted to his father on three promissory notes of several years' standing, and long overdue, on which payment of interest had been made with tolerable regularity until a year before the bankuptcy About that time the father, who lived in Wisconsin, visited the son who lived in Minnesota, and received a mortgage on some land, but not sufficient in value to secure the debt. In July, 1875, he again visited his son in Albert Lea, and not long afterwards he sent the notes for collection to Lovely and Parker, attorneys of that place, and they commenced suit by the issue of a summons October 23, 1875, which was served the same day. On the 5th of November, an affidavit was made, in the case by Parker, one of the attorneys, on which an attachment was issued and levied on the entire stock of the defendant's goods. In this affidavit Parker stated, without qualification, that the defendant was about to dispose of his property with intent to delay and defraud his creditors.

By the course of procedure in the courts of Minnesota, the plaintiff in that suit was entitled to judgment on the 13th of the month, if no plea or answer was interposed; and none *was* filed by the defendant.

Two days before this time, however, other creditors of Palmer, hearing of the condition of affairs, came to look after their interests and to [265] prevent this judgment. Before they could initiate proceedings in bankruptcy they filed a bill in equity in the same court, and procured an order enjoining the plaintiff and his attorneys from taking their default and judgment, on the ground that the proceeding was fraudulent and collusive between father and son. This injunction was issued on the 12th; and on the 13th, the first day on which a judgment by default could be entered, it was dissolved and the affidavit of Andrew Palmer, Jr., drawn up by one of the attorneys for his father, denying all the allegations of the injunction bill and stating that his father's debt was a just one, was due and wholly unpaid to the amount stated in the complaint. Immediately, and on the same day, judgment was rendered and execution levied on the stock of defendant's merchandise.

In a very few days thereafter, the debtor, Palmer, was duly declared a bankrupt. By agreement, the goods were sold and the amount deposited in the bankrupt court, subject to the final decree in this suit, as the goods would have been if they had not been sold.

There is no question that, at the commencement of the suit by the father, the son was insolvent.

There are many circumstances beside the affidavit made by the son, to show that he and his father had a perfect understanding in regard to that suit. Among these are: the visit of the father only a few months before it was commenced; the absence of any special reason for suing at that time after eight years' delay, and shortly after security was given by mortgage for the debt, though insufficient; that the notes were sent to and the suit managed by the attorneys who had been usually employed by the son; that as soon as the goods were attached, the son moved his books and papers into the office of these attorneys, and that he seems to have been in full consultation with them throughout the whole proceeding.

When we come to add to these, the voluntary affidavit of the defendant, on which alone the injunction was dissolved, the effect of the dissolution being to enable the father to obtain judg- [266] ment, under which an execution was issued and a lien established on all the defendant's goods, we are satisfied that the son actively aided the father in securing this seizure of his property with a design to prevent that property being distributed equally among his creditors under the proceedings in bankruptcy, which he knew would be commenced in a few days

Several of these creditors were present when the injunction was dissolved and judgment rendered, and the injunction, as the attorneys and the debtor, Palmer, knew, was obtained to stave off the judgment until they could apply to the court in bankruptcy. To delay the judgment until that was done would be fatal to the

*Head notes by *Mr. Justice* MILLER.

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preference of the father's debt; for by the bankrupt law the attachment was dissolved when he was adjudged a bankrupt, and unless execution on the judgment could be levied before that time, the goods would pass to the assignee, relieved of any claim under the judgment, in favor of the elder Palmer.

Whether, therefore, the father should be paid in full to the exclusion of other creditors or not depended on the dissolution of that injunction, and that was obtained solely on the voluntary affidavit of the insolvent son.

We are satisfied that he procured this preference and this taking of his goods on execution with a purpose of defeating the operation of the bankrupt law, within the meaning of that Act on that subject. Sec. 35 of the Bankruptcy Act, 14 Stat. at L., 517.

But, in order that the assignee shall recover the value of the goods seized on execution, it is not alone sufficient that the bankrupt should have aided in procuring the seizure. But it is also necessary that the creditor should have had reasonable cause to believe that the debtor was insolvent, and should have known that a fraud on the Bankrupt Act was intended.

[267] We think this is the result of sections 35 and 39 of the original bankrupt law, as amended by the Act of June 22, 1874, which changed the original Act in important particulars, and which, so far as it may conflict with that Act or the revision, must be held to control them both. 18 Stat. at L., part 3, pp. 180, 181.

This latter statute carefully introduces the word *know* instead of *reasonable ground to believe*, in regard to the purpose to defraud the Bankrupt Act.

We have little difficulty in coming to the conclusion that the elder Palmer had reason to believe that his son was insolvent at the time judgment against him was taken and the execution levied on the property. We have already given the reasons for this, to which may be added that his son swears that he wrote to his father, pending negotiation with his other creditors and before the judgment was taken, asking him to consent, with the other creditors, to accept a compromise of fifty per cent for his debts.

It is a little more difficult to say that the father *knew* that the goods were seized with intent to defraud the bankrupt law. Possibly at the moment of the seizure he did not know personally all that his attorneys and his son had done, nor all that they knew. It may be that he supposed his suit would proceed in regular order, without the aid of his son or any act on the part of his attorneys intended to evade the bankrupt law. He may not have known personally that other creditors were on the ground contesting his right to a judgment, and still others on the way to the proper court to institute bankruptcy proceedings, which, if done before the goods were seized under his execution, would defeat his purpose of securing a prior lien.

But this cannot be said of the attorneys who represented him on the ground. One of these had, only a few days before, made oath that the son was about to dispose of his property to delay and defraud his creditors. This, if true, was certainly a fraud upon the bankrupt law. Instead of instituting a proceeding in bankruptcy, this attorney swore out an attachment in favor of his client, which would be a fraud upon the bankrupt law, by preventing the equal distribution of this debtor's property among his creditors.

These attorneys also procured the debtor to make the affidavit in the injunction suit, with the perfect knowledge that, if they thereby succeeded in dissolving it, their client would seize the goods, and make his debt in preference to all other creditors, though they knew that other creditors were on their way to St. Paul to initiate bankruptcy proceedings. They, therefore, knew and intended that their action in behalf of their client would work a fraud upon the bankrupt law.

Is this knowledge imputable to the appellee [268] in this case?

The case of *Hoover* v. *Wise*, 91 U. S., 308 [XXIII., 392], was one in which a creditor had procured a confession of judgment and a levy on property of his debtor, who was declared a bankrupt within four months thereafter.

The creditor had sent his note to a collection agency in Philadelphia, which had sent it to their corresponding attorney in Nebraska, where the judgment was taken. The creditor knew nothing of what was done until the money was made by sale of the goods, and had given no direction as to the mode of proceeding, and held no communication with his attorney. This court held that the attorney was the agent in the transaction of the collecting agency and not of the creditor, and that he could not be held to know what the attorney knew in regard to the insolvency of the debtor, and other matters in the case. Three of the Judges dissented from this view. But an examination of the opinion will show that all were agreed that if the creditor had sent the note directly to the attorney, the latter would then have been the agent of the creditor, whose acts and whose knowledge, obtained in the course of the employment, would have been the acts and the knowledge of his principal. And such, we think, is the true rule of law.

That the attorneys of the elder Palmer and the son were aware of his insolvent condition and were co-operating to have the property of the latter seized in execution before the bankrupt law could be set in force, with intent to defeat its operation on the son's property, we think is quite clear. And this we understand to be a fraud upon the bankrupt law, where the debtor contributes actively to that end. *Wilson* v. *Bk.*, 17 Wall., 473 (84 U. S. XXI., 723); *Little* v. *Alexander*, 21 Wall., 500 (88 U. S., XXII., 625).

The result of these considerations is that the decree of the Circuit Court must be reversed, and a decree for plaintiff below in conformity to this opinion; and *it is so ordered.*

Dissenting, *Mr. Justice* **Field.**

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—19 Blatchf., 333; 86 N. Y., 262.

JOSEPH S. FINCH ET AL., Partners Under the Firm Name of JOSEPH S. FINCH & COMPANY, *Appts.*, [269]

UNITED STATES.

(See S. C. 12 Otto, 269-273.)

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Distillery.

A distiller cannot recover from the United States the price paid by him for meters, required by law to be placed in his distillery, but which never worked properly and the use of which was abandoned; which price he had deposited with the collector for the manufacturer.

[No. 83.]

Argued Nov. 24, 1880. Decided Dec. 6, 1880.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Messrs. **Lewis Abraham,** *O. S. Lovell* and **Nathaniel Wilson** for appellants.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellee.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal from the Court of Claims. The case is spread over a large surface in the record, but a very condensed statement of the facts will be sufficient for the purposes of this opinion.

In the years 1868 and 1869 the appellants were distillers, and had two distilleries in Pittsburgh, Pa. The distilleries were designated as 1 and 4. In October, 1868, the appellants made application, in due form, to the Commissioner of Internal Revenue for Tice meters for distillery No. 1, and at the same time deposited with the collector of the district in which the distilleries were situated the sum of $2,050, the price of the meters, to be paid over to the manufacturer when the meters were delivered to them. The meters were delivered, and the money was paid accordingly.

These meters were never used, the distillery having ceased to run long before anyone went to make the attachment necessary to utilize them. [270]

In March, 1869, the appellants made a like application for such meters for distillery No. 4, and made a like deposit with the collector, of $2,100 to pay for them. They were delivered to the distillers in July, 1869, and the $2,100 was thereupon paid to the manufacturer. These meters never worked properly.

There is no proof that they were tested before they were shipped from the manufactory, nor that any officer of the Internal Revenue Bureau was detailed to attach them, or to test them after their attachment, or that their indications were ever in anywise regarded by the storekeeper in making his daily reports, or by the assessor in making his monthly computation of the products of the distilleries.

By the Act of July 20, 1868, ch. 186, 15 Stat. at L., 125, the commissioner, for the prevention and detection of fraud by distillers of spirits, was "authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments or other means for ascertaining the quality, gravity and producing capacity of any mash, wort or beer used or to be used in the production of spirits, and the strength and quantity of spirits subject to tax," as he might deem proper.

Under these provisions, orders, regulations and instructions, covering the subject of the meters in every aspect, were issued by the commissioner. They compelled the distillers to buy and pay for Tice meters, as was done in the case in hand, and left them no choice to do otherwise. One of those regulations was as follows: "Under the provisions of the law the distiller is required to furnish and attach meters at his own expense, and also to furnish all pipes, materials, labor and facilities necessary to complete such attachment. The first duty of a distiller is, of course, to procure a meter. The manufacturer is not required to furnish the meters on credit, and ought not to be expected to do so. When he ships a meter to a distiller in accordance with the application, the manufacturer is entitled to the pay for it. The law does not require the manufacturer to attach it, but, on the contrary, requires the distiller to attach at his own expense."

Another specified that "The expenses and transportation and attachment of meters, and of changes required to be made in the distillery, are to be paid by the distiller," and "distillers must furnish all lumber and other materials necessary for the attachment of the meter, and such workmen and assistants as may be required." By a circular of June 8, 1871, the commissioner announced substantially that the meters were a failure, and from that time they ceased to be used.

By the Act of June 6, 1872, sec. 12, ch. 315, 17 Stat. at L., 239, all the provisions of the Act of 1868 touching meters were repealed, and the use of meters was thereupon abandoned by law. Upon the passage of this Act, the commissioner issued a circular advising distillers that "All meters attached to distilleries may be detached," and "that the meters being the property of the distillers, they will be permitted to dispose of them as they may desire." [271]

By this suit the appellants seek to recover from the United States the aggregate of the $2,050 and $2,100 paid by them for the Tice meters as before mentioned.

The appellants insist that there was an implied warranty by the United States that the meters they thus bought would be effectual for the purposes they were designed to accomplish, and that there being a clear breach of this warranty, the United States is liable accordingly.

To this there are two answers:

1. The meters were solely for the benefit of the United States. The appellants had no interest in their working well. If they had any interest in the result, it was in the other direction.

The sole object of the meters was to prevent or expose frauds by the distillers. If the meters were effectual for these purposes, so much the better for the Government. If they were a failure, so much the worse. If the distillers were honest, the success of the meters was to them wholly immaterial. If dishonest, the failure would have helped to make their frauds lucrative, while efficiency might have cut off their fraudulent profits and subjected them to exposure and punishment. The distillers did not pay out a dollar more because the meters were a failure, nor would they have paid a dollar less if the tests thus provided had fully answered the expectations of the Government.

In either event the pecuniary result to the distillers, if honest in their business, must have been exactly the same.

The essence of their complaint is that the Government found the means lawfully provided to detect their frauds, if they committed any, unavailing, and therefore used none. Their argument implies that if those means had been

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effectual and had been used, they would have
[272] been satisfied and their claim could not have arisen.

Both the proposition and the argument seem to us to involve a palpable solecism. There is nothing in the facts of which any contract relation, express or implied, between them and the Government, can be predicated.

2. Regulations established pursuant to law made it obligatory upon the distillers to procure the meters, if they continued to carry on the business. They were required to buy and pay, and did so. The Government neither paid nor agreed to pay anything. The purchase of the meters was an incident and burden of the business. The right to engage in the business was not unqualified. It could only be done when authorized by the Government, in the mode prescribed. No one was compelled to procure that authorization, but whoever elected to do so took it necessarily *cum onere*, and hence has no right to complain of any condition imposed and assented to, or of anything resulting from it. Certainly, no consequence such as that here in question can constitute a cause of action against the United States, any more than would any other expenditure or any other loss arising from the business.

Nor can there be any valid demand against the United States, upon the ground of money paid and expended for their benefit. The meters were bought and paid for by the appellants. They chose to give the order and pay the money rather than give up the business. The meters were delivered to them by the manufacturer. They owned them and still own them. The United States never asserted any claim to them. After their use was finally dispensed with by the Government, the distillers had the right, as they still have, to dispose of them according to their discretion. Upon the passage of the Act of 1872, a circular from the commissioner notified them accordingly.

Nor is there any foundation for a claim against the United States for money had and received. It is true, their officer received the price of the meters from the appellants; but it was for the manufacturer and not for the Government, and it was paid over, accordingly, upon the delivery of the meters. The officer was a mere conduit for passing the money from one party to the
[273] other. The regulation which prescribed the arrangement was intended to secure certainty and promptitude of payment to the manufacturer, and corresponding promptitude on his part in the delivery of the meters when ordered.

Not a dollar of the funds in question is or ever was in the National Treasury.

We concur in the views expressed by the Court of Claims, *and their judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[378] UNITED STATES, *ex rel.*, THOMAS MCBRIDE, *Plff. in Err.*,

v.

CARL SCHURZ, SECRETARY OF THE DEPARTMENT OF THE INTERIOR.

(See S. C., 12 Otto, 373-408.)

Mandamus—*to compel issue of patent—title of claimant, by patent—ministerial duty—acceptance of grant.*

*1. The Supreme Court of the District of Columbia is authorized to issue the writ of *mandamus* as an original process, in cases where, by the principles of the common law, the party is entitled to it.

2. When a patent to a citizen for a part of the public lands has been regularly signed by the President, and sealed with the seal of the Government, countersigned by the recorder and duly recorded, the right to its possession by the grantee is perfect, and a writ of *mandamus* will lie, to the officer in whose possession it is, to compel its delivery.

3. In the progress of the proceedings to acquire, under the laws of the United States, a title to the public lands, there must, in all cases where the claimant is successful, come a period when the power of the executive officers, who constitute the Land Department over those proceedings, ceases. That period is precisely when the last official act has been performed which is necessary to transfer the title from the Government to the citizen.

4. Title by patent from the United States is title by record; and delivery of the instrument to the grantee is not essential to pass the title, as in conveyances by private persons.

5. Therefore, when the officers, whose action is rendered by the laws necessary to vest the title in the claimant, have decided in his favor, and the patent has been duly signed, sealed, countersigned and recorded, the title of the land has passed to the grantee, and there remains nothing more to be done by the Land-Office but the ministerial duty of delivering the instrument, which can be enforced by *mandamus.*

6. An acceptance of the grant will, in such case, be presumed from the efforts of the grantee to secure the favorable action of the department, and especially from the demand for possession of the patent.

[No. 707.]

Argued Nov. 9, 10, 1880. Decided Dec. 10, 1880.

IN ERROR to the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. **W. H. Smith, James H. Mandeville,** *V. S. Brooks*, and *James K. Redington*, for plaintiff in error:

The Government grants and the patentee takes by matter of record.

Bac. Abr. Tit., Pre. "F."; 2 Bl. Com., 344; 3 Washb. Real Prop., 520; 1 Cov. & Hughes, 733; *Willis* v. *Jermin*, Cro. Eliz., 167; *Ex parte Beck*, 1 Bro. (C. C.), 578; *Ex parte Koops*, 6 Ves., 599; *Leighton's Case*,, 2 Vern., 173; *Slingsby's Case*, 3 Swanst., 178, *note*; *Ex parte O'Reily's Case*, 1 Ves., Jr., 112; *People* v. *Livingston*, 8 Barb., 255; *Doe, ex dem. Smalley* v. *McKilvain*, 14 Ga., 254.

"It is a rule of the common law, that the King can only give by matter of record. Therefore, the King's grants are contained in charters or letters patent, under the great seal enrolled."

5 Cruise, Real Prop. (marg.), 40; *Green* v. *Liter*, 8 Cranch, 247.

The record is complete when patent is signed, sealed and recorded.

"If the instrument be the deed of the Government, that is, its patent, it is in that condition ready for acceptance by grantee, when the last formalities required by law, of the officers of the Government, are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the books of the General Land Office."

Leroy v. *Jamison*, 3 Sawy., 369, per *Justice* Field.

Entries or memoranda made on the record after recording are no part of the patent.

*Head notes by *Mr. Justice* MILLER.

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Foster v. *Dugan*, 8 Ohio, 87; *Merrick* v. *Wallace*, 19 Ill., 486; *Bk.* v. *Bronson*, 14 Mich., 361; *Bigelow* v. *Stilphens*, 35 Vt., 527; *Fawcetts* v. *Kimmey*, 33 Ala., 264; *Henfree* v. *Bromley*, 6 East, 310; *Jackson* v. *Malin*, 15 Johns., 293; *Nichols* v. *Johnson*, 10 Conn., 192; *Rees* v. *Overbaugh*, 6 Cow., 746; *Owings* v. *Norwood*, 2 H. & J., 104.

The same doctrine, as to the finality of a record once made by a public officer, is maintained in the following cases:

Lick v. *Diaz*, 30 Cal., 72; *Leblanc* v. *Ludrique*, 14 La. Ann., 785; *Medlien* v. *Platte Co.*, 8 Mo., 235.

When an officer, vested with special and limited jurisdiction, once exercises the same, he is thereafter without further power and *functus officio*.

Crepps v. *Durden*, Cowp., 646; *Ex parte Randolph*, 2 Brock, 447; *Bours* v. *Zachariah*, 11 Cal., 281;

The law will not permit an officer to impeach his own record.

Quod per recordum probatum, non debet esse negatum.

6 Ops. Attys-Gen., 226, Cushing; *Holmes* v. *Budd*, 11 Ia., 190; *Babb* v. *Carroll*, 21 Tex., 765; *Wheeler* v. *Lothrop*, 16 Me., 20; *Dews* v. *Ryley*, 7 Eng. L. & E., 469; *Hudgins* v. *Kemp*, 18 How., 530 (59 U. S., XV., 511); *Bours* v. *Zachariah* (*supra*); *Lick* v. *Diaz*, 30 Cal., 65.

No officer can correct, amend or reverse the acts of his predecessor.

2 Ops. Attys-Gen. 9, Wirt; 5 Ops. Attys-Gen. 29, Toucy.

To the same effect is the doctrine of each of the following cases:

5 Ops. Attys-Gen., 123, Johnson; 5 Ops. Attys-Gen., 285, Crittenden; 9 Ops. Attys-Gen., 32, 101, Black; 12 Ops. Attys-Gen., 355, Stanbery; 13 Ops. Attys-Gen., 33, Hoar; 13 Ops. Attys-Gen., 337, Akerman; 13 Ops. Attys-Gen., 457, Bristow; *Riley* v. *U. S.*, 1 Ct. Cl., 299; *Chorpenning* v. *U. S.*, 3 Ct. Cl., 147; *Mitchell* v. *Cobb*, 13 Ala., 137; *Franklin* v. *Woodland*, 14 La. Ann., 184; *Wilcox* v. *Jackson*, 13 Pet., 511; *U. S.* v. *Bk.*, 15 Pet., 401; *Kendall* v. *Stokes*, 3 How., 93; *Bours* v. *Zachariah* (*supra*).

If any delivery of a patent is necessary, the transmission of the same to the Register or Surveyor-General, for delivery to patentee, is, in law, a delivery.

Doe v. *Knight*, 5 Barn. & C., 671; *Church* v. *Gilman*, 15 Wend., 656; *Tate* v. *Tate*, 1 Dev. & B. (Eq.), 26; *Steele* v. *Lowry*, 4 Ohio, 74; *Tibbals* v. *Jacobs*, 31 Conn., 431; *Warren* v. *Swett*, 11 Fost. (N. H.), 340.

A delivery may be by words without acts or by acts without words; and it may be to the grantee or a third person, without any special authority, for the use of the grantee.

Verplank v. *Sterry*, 12 Johns., 536; *Jackson* v. *Phipps*, 12 Johns., 418; *Jackson* v. *Bodle*, 20 Johns. 187; *Souverbye* v. *Arden*, 1 Johns. Ch., 254; *Jones* v. *Jones*, 6 Conn., 111; *Scrugham* v. *Wood*, 15 Wend., 546; *Porter* v. *Cole*, 4 Me., 21; *Blight* v. *Schenck*, 10 Pa., 285; *Bullitt* v. *Taylor*, 34 Miss., 741; *Hatch* v. *Hatch*, 9 Mass., 307; *Stevens* v. *Hatch*, 6 Minn., 64.

The patent takes effect without delivery. *Stockton* v. *Williams*, 1 Doug. (Mich.), 562.

Congress has never provided by statute, that delivery should constitute a part of the transaction.

So, too, the adjudicated cases in an almost unbroken line, declare that no delivery is necessary in the case of a grant by the Government.

Bevil's Case, 4 Coke, 9; *Hill* v. *Dyer*, 3 Me., 441; *Enfield* v. *Permit*, 8 N. H., 512.

The grant of the State, as the same appears of record, is equivalent to livery of seisin in the case of individuals at common law.

3 Wash., R. P. (Marg.), 520; *Bellows* v. *Copp*, 20 N. H., 492; *McCaughal* v. *Ryan*, 27 Barb., 376; *Robinson* v. *Lake*, 14 Ia., 424; *Dow* v. *Craft*, 1 Kerr (N. B.), 546; *Enfield* v. *Day*, 11 N. H., 520; *McGarrahan* v. *Mining Co.*, 96 U. S., 316 (XXIV. 630); *Philips* v. *Erwin*, 1 Over. (Tenn.), 235.

And to the same effect are the following cases: *People* v. *Livingston* (*supra*); *Smalley* v. *McKilvain* (*supra*); *Hulick* v. *Scovil*, 4 Gilm., 174; *U. S.* v. *Johns*, 4 Dall., 416; see, 5 Cruise, R. P. (marg.) 40; *Willis* v. *Jermin* (*supra*).

A patent, having once passed the great seal, is a legal grant without further proceedings.

Ex parte Koops, 6 Ves., 598; *Ex parte Beck*, 1 Bro. (C. C.), 578; *Marbury* v. *Madison*, 1 Cranch, 150.

The land department cannot recall or cancel a patent.

It was an executive act to sign the patent; such an act could only be performed by the President. U. S. Const., Art. II.

This determination could not be overruled except by the courts, even though the determination was arrived at by fraud; because, upon the question of fraud or no fraud or irregularity in obtaining the patent, the patentee is entitled to be heard; or in other words, the patentee is entitled to his day in court;

Hughes v. *U. S.*, 4 Wall., 232 (71 U. S., XVIII., 303); *Field* v. *Seabury*, 19 How., 324-332 (60 U. S., XV., 651-654);

So that, when the land department made out the patent and recommended the President to sign it, and it was signed, sealed and recorded, the subordinate could not annul the action of the President.

O'Brien v. *Perry*, 1 Black, 132 (66 U. S., XVII., 114).

Messrs. **Chas. Devens**, *Atty-Gen.*, and **Jos. K. McCammon**, *Asst. Atty-Gen.*, for defendant in error:

The court has no jurisdiction.

The law which the court in *Kendall* v. *U. S.*, 12 Pet., 524, and in subsequent cases, including that of *The Secretary* v. *McGarrahan*, 9 Wall., 298 (76 U. S., XIX., 579) decided in December, 1869, held, as vesting the Circuit Court of the District of Columbia or the Supreme Court of said District with power and jurisdiction to issue the writ of *mandamus* to an executive officer to perform mere ministerial acts not involving the exercise of judgment or discretion, is repealed.

If the Supreme Court of the District of Columbia has jurisdiction to issue the writ to executive officers of the United States in any case, such jurisdiction does not extend to acts involving the exercise of judgment and discretion. The issue of a patent for public land of the United States under the laws of Congress, is such an executive act. The adjudicated cases upon these points are numerous and explicit. It is not necessary to restate the argument upon which the decisions rest. The authorities are all agreed upon both propositions.

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See *McIntire* v. *Wood*, 7 Cranch, 505; *McCluny* v. *Silliman*, 6 Wheat., 599 *et seq.*; *Kendall* v. *U. S.*, 12 Pet., 526; *Decatur* v. *Paulding*, 14 Pet., 497; *Brashear* v. *Mason*, 6 How., 92; *U. S.* v. *Seaman*, 17 How., 225 (58 U. S., XV., 226); *U. S.* v. *Guthrie*, 17 How., 284 (58 U. S., XV., 102); *Bell* v. *Hearne*, 19 How., 252 (60 U. S., XV., 614); *Doswell* v. *De La Lanzo*, 20 How., 29 (61 U. S., XV., 824); *Maguire* v. *Tyler*, 1 Black, 195 (66 U. S., XVII., 137); *S. C.*, 8 Wall., 664 (75 U. S., XIX., 324); *Comr.* v. *Whiteley*, 4 Wall., 534 (71 U. S., XVIII., 338); *U. S.* v. *Commissioner*, 5 Wall., 563 (72 U. S., XVIII., 692); *Riggs* v. *Johnson Co.*, 6 Wall., 197 (73 U. S., XVIII., 776); *Gaines* v. *Thompson*, 7 Wall., 347 (74 U. S., XIX., 62); *Secretary* v. *McGarrahan* (*supra*); *Litchfield* v. *Register*, 9 Wall., 575 (76 U. S., XIX., 681); *U. S.* v. *Wright*, 11 Wall., 648 (78 U. S., XX., 188); *Johnson* v. *Towsley*, 13 Wall., 72 (80 U.S., XX., 485); *Shepley* v. *Cowan*, 91 U. S., 336 (XXIII., 426); *Moore* v. *Robbins*, 96 U. S., 530 (XXIV., 848); *Snyder* v. *Sickles*, 98 U. S., 211 (XXV., 101); *Marquez* v. *Frisbie*, No. 78 Oct. Term, 1879 (101 U.S., XXV., 800); *Vance* v. *Burbank*, No. 553 Oct. Term, 1879 (101 U. S., XXV., 929).

These cases sufficiently explain the general doctrine announced in *Marbury* v. *Madison*, 1 Cranch, 150, cited by counsel for McBride in this case. See, especially, *Gaines* v. *Thompson* (*supra*), wherein the power of the commissioner to cancel an entry of the public land is expressly sustained, and the classification made in the *Marbury* case is modified.

To the complete issue of such patent, delivery is essential.

Section 459 provides for a special officer to complete the issue, "In pursuance of instructions from the commissioner, by certifying, affixing the seal, engrossing, recording and transmiting such patents." These are the prescribed executive duties which relate to the issuing of the patent as previously assigned. Each statutory proceeding is essential to the whole.

In *McGarrahan* v. *Mining Co.*, 96 U. S., 316 (XXIV., 630), it is said that "The patent, executed in the prescribed form which issues from the General Land-Office, is made the instrument of passing title out of the United States." Here it is obvious that the execution in the prescribed form is referred to as quite distinct from and independent of the issue of the general Land-Office. Execution is not issue, nor does it issue by the record, for it is immediately said by the court, that "The record called for by the Act of Congress is made by copying the patent to be issued into the book kept for that purpose. Settled rules are published, governing the transmission of patents to the patentees through the intervention of the district officers as agents of the Government, or directly from the general Land-Office; possession of the instrument never being given to the grantee except upon surrender of the duplicate receipt, or proof by affidavit of its loss." For authority to issue such regulation, see *Snyder* v. *Sickles*, 98 U. S., 208 (XXV., 97); Sec. 2478, R. S.

This delivery then, is an official executive act, necessary to the complete issue of the patent and essential to its operation to pass the title of the United States. The delivery personally by the recorder, is said to be a better recognition of its validity than the record itself.

McGarrahan, *supra*, 322 (634).

And again, on page 323 (635), in speaking of the effect of an imperfect instrument perfectly recorded, or a perfect instrument imperfectly recorded, to prove a grant, it is said, "If a perfect patent has in fact issued, it must be proved in some other way than by the record."

Moore v. *Robbins* (*supra*).

In *Bell* v. *Hearne* (*supra*), and *Maguire* v. *Tyler* (*supra*), patents had been prepared and delivered, but the court held that, as there was no acceptance, the delivery was not good and the recall and cancellation were proper, leaving the *status* of the land precisely as it was before execution of the instrument.

Never having been effectually delivered, its possession by the commissioner gave him jurisdiction for good cause to cancel it.

Doswell v. *De La Lanzo* (*supra*).

In the case of *McBride*, we accordingly submit, that he can take nothing by the mere execution and recording of his patent without delivery; and that if mistake occurred in the condition of the title, or want of authority to issue it before completion of issue by its delivery, no title nor right depending on such execution has passed to him, and the department may treat it as void, and proceed to dispose of the land according to law.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the District of Columbia.

In that court it was commenced by a petition for a writ of *mandamus* to compel the Secretary of the Interior to deliver to the relator, McBride, a patent for a quarter section of the public lands which, it was alleged, had been signed by the President, the seal of the United States affixed to it, and duly recorded in the proper book in the General Land-Office, and countersigned by the recorder. For this instrument, while in the immediate possession of the Secretary, McBride made demand and was refused; whereupon he filed the petition for *mandamus*. The court, instead of issuing the alternative writ, proceeded by ordering a rule on the Secretary to show cause why the writ should not issue. A supplemental petition was filed, and Secretary Schurz, in due time, filed his answer, accompanied by certain exhibits, to which the relator replied by taking issue, according to the rules of practice prescribed by that court, on every allegation of the answer.

Upon these pleadings and the following agreed statement of facts signed by counsel for each party, the case was heard and the rule was discharged:

"*Agreed Statement of Counsel.* [381]

In the Supreme Court of the District of Columbia, this 14th day of November, 1879.

THE UNITED STATES, *ex relatione* THOMAS MCBRIDE, *v.* CARL SCHURZ, Secretary of the Department of the Interior.	At law. No. 21200.

Be it remembered, that, on the hearing of this cause before the Supreme Court of the District of Columbia, sitting in General Term, on the 28th day of October, 1879, it was conceded by both parties, that all the allegations of the original petition were true, except the one that

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the premises named in the petition were in 1862 subject to pre-emption filing or homestead entry.

It was also conceded that the case relating to said premises, set out in the answer of respondent, had been appealed from the decision of the Commissioner of the General Land-Office to the Secretary of the Interior, and was pending before the said Secretary at the time the demand for said patent was made on him, as set forth in the said original petition of relator, and for some days thereafter, and that at the time of said demand, and for some days thereafter, the said patent was, with the papers in said case, as an exhibit in said case, in the office of the Secretary of the Interior, and was not in the office of the Commissioner of the General Land-Office.

It was also conceded that the incorporated Town of Grantsville, set forth in the answer of the respondent, was in fact the incorporated City of Grantsville, and that it was incorporated by the Territorial Legislature of Utah on the 12th day of January, 1876, and that said Act should be treated as referred to and made a part of this case.

All other matters in said case stood upon the original and supplemental petition, the answer of respondent, and the replication thereto. There was no other or further proof or evidence offered by either party.

One of the rules of this court is as follows:

[382] 33. The joinder in issue may be—

'The plaintiff joins issue upon the defendant's first plea.

'The defendant joins issue upon the plaintiff's replication to the first plea.'

And this form of joinder shall be deemed to be a denial of the substance of the pleading to which it relates, and an issue thereon.

And thereupon the said court, upon the 10th day of November, 1879, upon the evidence and pleading aforesaid, gave judgment for the said respondent.

The foregoing facts are stipulated to be a full and true statement of this case, and made part of the record therein.

Nov. 14, 1879. W. H. SMITH,
Atty. for Plff.
U. J. BAXTER,
Of Counsel for Respondent.

Whereupon the court orders the said stipulation to be made of record in the case." * * *

Some question was made, on the argument in this court, as to the effect of the answer as evidence, and the practice in the Court of King's Bench, in England, has been referred to as making the return to the writ conclusive, or at least evidence, of all it states. We are relieved of any difficulty on this point by the stipulation of the parties.

No writ of *mandamus*, alternative or otherwise, was issued. And there was, therefore, no technical return to such a writ, and in strictness the rule applicable to such a writ does not apply. If, however, it could be held that the answer to the rule to show cause stands in the place of a return to a writ of *mandamus*, the parties have voluntarily made their own issues, and stipulated as to the evidence which shall be considered by the court.

By this stipulation the allegations of the original petition, except one which is specified, are to be taken as true. Certain other facts are then set out. It is then added, that all other matters stand upon the original and supplemental petitions, the answer and replication, and that there was no other or further proof offered by either party. As the replication distinctly put in issue every paragraph of the answer, as no evidence was offered in support of [393] the answer, and as the rule of the court is recited which makes the replication in this case a denial of the substance of the pleading to which it relates, we must exclude the supplemental petition and the answer of the respondent as evidence, and decide the case on the allegations of the original petition and the facts stipulated in the agreed case.

The petition alleged that McBride, who had the requisite qualification to assert a claim under the preemption or homestead laws, settled upon the land covered by the patent in the year 1862, with intent to appropriate it under the laws of the United States; that he erected a dwelling-house, cultivated the land and has continuously occupied and resided on it ever since; that, in May, 1869, he made a homestead entry of the land at the proper land-office in Salt Lake City; that he duly presented this claim according to law and the rules of the land department, with such effect that a patent to him for the land was signed by the President on the 26th of September, 1877, sealed with the seal of the United States, countersigned by the recorder of the General Land-Office and duly recorded by him in the proper record book of that office; that this patent was transmitted by mail to the local land officers at Salt Lake for delivery to the petitioner, and was, while there, demanded by him of those officers who refused to deliver it; that said patent was afterwards, by order of the Commissioner of the Land-Office, returned to that office, and coming into the possession of the Secretary of the Interior on some proceedings by other parties contesting petitioner's right to the land, petitioner again demanded its delivery to him of the Secretary, who also refused. He thereupon filed his petition for the *mandamus*.

We are met at the threshold of this inquiry by a denial of the authority of the Supreme Court of the District of Columbia to issue a writ of *mandamus*, as an original process.

The argument is, that the jurisdiction of that court over this class of subjects is governed by section 760 of the Revised Statutes, relating to the District of Columbia. That section enacts that "The Supreme Court shall possess the same power and exercise the same jurisdiction as the circuit courts of the United States." As this court decided in *McIntire* v. *Wood*, 7 Cranch, 504, and in *McClung* v. *Silliman*, 6 Wheat., 598, that the circuit courts of the United States possessed no such power, the argument would be perfect if no other powers on that subject existed in the Supreme Court of the District than what is conferred by the above section.

But this court, in the case of *Kendall* v. *U. S.* held that by the Act of February 27, 1801, 12 Stat. at L., 103, organizing originally the courts of this District, the clause of that Act which declared the laws of Maryland in force at that date, continued in force in that part of the District which had been ceded by that State, invested the Circuit Court, as it was then called, with this very power, because it was a common law jurisdic-

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tion, and the common law on that subject was then in force in Maryland. 12 Pet., 618, *et seq.* This proposition has been repeatedly upheld by the court since that time, and up to the date of the revision it was no longer an open question that in a proper case the court had authority to issue the writ.

It is now said, however, that this section being enacted as of the first day of December, 1873, defines the jurisdiction of the Supreme Court of the District as governed by the powers of the Circuit Courts of the United States over the same subject at that date, at which time it is clear these latter courts had no such power; and that, as the revision repealed all other laws on the same subject, the Act concerning the law of Maryland no longer applied to the case.

[394] This leaves out of the process of reasoning the 92d section of the revision, which declares again, that "The laws of the State of Maryland, not inconsistent with this title, as the same existed on the 27th day of July, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District." Thus the argument is precisely the same as it was in the case of *Kendall* v. *U. S.*, for it was urged there, as here, that as the Act creating the court measured its jurisdiction by that of the Circuit Courts of the United States, which had no such jurisdiction, there could be none in the former; to which the court replied, the provision which continued in force the laws of Maryland.

The revision has merely separated the different sections of the Act of February 27, 1801, and placed part of it in section 760 and part of it in section 92. Neither provision is repealed, but we think both of them are retained, with the construction placed on them by this court in *Kendall* v. *U. S.*, and the subsequent cases. But this question would seem to be set at rest by the Act of 1877, "To perfect the revision of the Statutes of the United States, and the Statutes relating to the District of Columbia." The Act amends section 763 of the Revision of the Statutes of the District, by enacting that "Said courts shall have cognizance of all crimes and offenses committed within said District, and in all cases in law and equity between parties, both or either of which shall be resident or be found within said District, and also of all suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants." 19 Stat. at L., 253.

We are of opinion that the authority to issue writs of *mandamus* in cases in which the parties are by the common law entitled to them is vested in the Supreme Court of the District of Columbia.

We proceed to inquire whether the relator has made such a case.

If the relator was entitled to the possession of the patent as his property, and it was the plain duty of the Secretary to deliver it to him when demanded, then, under all the authorities, [395] and especially the decisions of this court, he is entitled to the remedy he asks. From the case of *Marbury* v. *Madison*, 1 Cranch, 137, down to the present time, such has been the settled doctrine of this court. And though it may be said that the opinion of *Chief Justice* Marshall in that case was not necessary to the decision made, which was that *this* court ha⊥ no *original* jurisdiction in that case, the principles of the opinion have been repeatedly recognized and acted upon in this court since, and the case cited with approval, in its definition of the circumstances under which persons holding public offices will be compelled to perform certain duties which are merely ministerial. *Kendall* v. *U. S.* [*supra*]; *Decatur* v. *Paulding*, 14 Pet., 497; *Kendall* v. *Stokes*, 3 How., 87; *Comr.* v. *Whiteley*, 4 Wall., 522 [71 U. S., XVIII., 335].

The next objection to issuing the writ which we are called to consider is, that the Secretary, in deciding whether he would deliver the patent to McBride or not, was called upon to exercise a judgment and discretion on the case presented to him which were not merely ministerial, but which were rather judicial in their character, and in regard to which many matters were to be considered, such as the validity of the title conferred by the patent, the circumstances under which it was signed, sealed and recorded, and the conflicting rights of other parties to the land covered by it. In short, that this execution of the patent concluded nothing, and the authority of the Secretary and the Commissioner of the General Land-Office to deal with the whole subject, including the relator's right to the land, remained unaffected by the patent. Whether this be so or not must depend upon the authority conferred by Congress upon those officers, and the effect of the patent in the stage to which it had come when the demand for its possession was made by McBride.

The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior.

To aid him in the performance of this duty, a Bureau has been created, at the head of which [396] is the Commissioner of the General Land-Office, with many subordinates. To them, as a special tribunal, Congress has confided the execution of the laws which regulate the surveying, the selling and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen, and this court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring title were as yet *in fieri* before this special tribunal created by Congress for deciding the questions which should arise in the course of these proceedings, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the land has passed from the Government, the question of who is the real owner of it is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the United States shall sue to set aside the patent and recover back the title so conveyed, as in *U. S.* v. *Stone*, 2 Wall., 525 [69 U. S., XVII., 765], or an individual shall sue

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to have the title conveyed by the patent held by the patentee in trust for that individual, on account of equitable circumstances which entitle him to that relief. *Johnson* v. *Towsley*, 13 Wall., 72 [80 U. S., XX., 485], and other cases.

In the case before us, it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the land in controversy, is not effectual for that purpose for want of delivery; that, though signed and sealed and recorded and sent to the register of the land-office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the Land Department, and that the instrument is invalid as a deed of conveyance, for want of delivery to the grantee. If it were conceded that delivery of this patent is essential to its power to transfer title to the grantee, and that such delivery is required as that which is necessary between man and man, it would be a question of some difficulty to decide whether [397] such delivery has taken place in this case. The well known principle by which the intention of the grantor in a deed to make an act, which falls far short of manual delivery, to stand for delivery, when so designed, might well be applied to the act of the commissioner in transmitting the patent by mail to the local office for the purpose of delivery; while, on the other hand, it is argued with much force that the instrument never actually passed from the land-office or the control of its officers. We do not think the decision of this point necessary to the case before us.

We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent is in that office made out and signed by the President and when the seal of the United States is affixed to the instrument, countersigned by the recorder of the Land-Office, and duly recorded in the record book kept for that purpose, it becomes a solemn public Act of the Government of the United States, and needs no further delivery or other authentication to make it perfect and valid. That in such case the title to the land conveyed passes by matter of record to the grantee, and that delivery as in cases of deeds of private individuals is not necessary to give effect to the granting clause of the instrument.

The authorities on this subject are numerous and they are uniform. They have their origin in the decisions of the English courts upon the grants of the Crown evidenced by instruments called there, as here, patents.

Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurance: the first of which is by matter *in pais* or deed; the second by matter of record, or an assurance transacted only in the king's public courts of record; the third by special custom; and the fourth by devise in a last will or testament.

In the chapter devoted to alienation by deed he enumerates, among the requisites to its validity, the act of delivery. (Book 2, ch. 20.) But in chapter 21, devoted to alienation by matter of record, nothing is said about delivery as necessary to pass the title, and under this head he includes the King's grants. These, he says, are all made matter of public record, and are contained in charters or letters patent. He then recites the processes by which patents are prepared and perfected, the various officers through [398] whose hands they pass, and the manner of affixing the seal to them, and their final enrollment. They are then perfect grants, and no mention is made of delivery as a prerequisite to their validity. After this they can only be revoked or annulled by *scire facias* or other judicial proceeding. 2 Com., 346. The importance attached to the delivery of the deed in modern conveyancing arises largely from the fact that the deed has taken the place of the ancient livery of seisin in feudal times, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investiture of the title to the land. This became gradually diminished in importance, until the manual delivery of a piece of the turf and many other symbolical acts, became sufficient. When all this passed away, and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seisin. Sheppard, Touch., 54; Co. Litt., 266 *b*; Washb., Real Prop., book 3, 308. Finally, any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title. *Church* v. *Gilman*, 15 Wend., 656; *Butler* v. *Baker*, 3 Co., 25 *b*; *Warren* v. *Swett*, 31 N. H. (11 Foster), 332; *Hatch* v. *Hatch*, 9 Mass., 307.

But in regard to the transfer of title by matter of record, whether this record were a judgment or decree in a court of justice, as fines and recoveries, or the record made in the proper office (generally in the Court of Chancery by the Lord Chancellor) of the King's grant, called enrollment, no livery of seisin was necessary, nor any delivery of the document sealed with the King's seal; for when this seal was affixed to the instrument and the enrollment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the King. Hence, Mr. Cruise, in his Digest of the English Law of Real Property, says: "The King's letters-patent need no delivery; nor his patents under the great seal of the Duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them." Title xxxiv. sec. 1, par. [illegible]

In the case of *Marbury* v. *Madison*, 1 Cranch, 137, to which we have already referred, the [399] court, likening the commission of the justice of the peace, which was signed and sealed by the President and left in the hands of the Secretary of State, to a patent for lands, uses this language: "By the Act passed in 1796, 1 Stat. at L., 464, authorizing the sale of lands above the mouth of the Kentucky River (Vol. III., p. 229), the purchaser, on paying his purchase money, becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the Treasurer, upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State and recorded in his office. If the Secretary of State *should choose to withhold this patent* or, the pa-

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tent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured party no remedy? *It is not believed that any person whatever would attempt to maintain such a proposition.*"

In another part of the opinion it is said: "In all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the President and the seal of the United States are those solemnities."

The same principle is found in the opinion of the court, delivered by *Mr. Justice* Story, in the case of *Green* v. *Liter*, 8 Cranch, 229.

Many decisions of state courts of the highest character, to the same effect, are cited in the brief of counsel for relator in this case, among which may be mentioned *Ex parte Kuhtman*, 3 Rich. Ch., 257; *Donner* v. *Palmer*, 31 Cal., 500; The subject is very fully and ably discussed by *Mr. Justice* Field in the case of *Leroy* v. *Jamison*, 3 Sawy., 369.

It is also said that there was no acceptance of this patent by the grantee, and for that reason it is ineffectual to convey title. It is not necessary to enter into much discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case.

[400] The doctrine on this point is well stated by Attorney-General Crittenden, in the case of Pierre Mutelle, in 1841, as found in 3 Ops. Attys-Gen., 654, which was a case like the present, in regard to the duty of the Secretary to deliver the patent then lying in the office.

"My opinion," said he, "is that the title to the land *did pass to Pierre Mutelle at the date of the patent to him, though that patent still remains in the land-office without any actual tradition of it to any one.* The patent was issued by authority and direction of law, and upon general principles, *where the patentee does not expressly dissent*, his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent and amount to an acceptance of it. The patent, in the meaning of the Act referred to, *is granted to the patentee from its date, though he may never actually see or receive it*, and is valid and effectual to pass the title to the land.

All legal muniments of title belong to him who owns the land, * * * but as the patent is a recorded evidence of title, always accessible, no material prejudice can result to the true owner from a stranger getting possession of it."

The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, are ample proof of his acceptance of the grant of which it is the evidence.

It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend. And the [401] case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, are confided, as we have already said, the administration of the laws concerning the sale of the public lands. The land in the present case had been surveyed, and the lands in that District generally had been opened to preemption, to homestead entry and to sale, under their control. The question whether any particular piece of land belonging to the Government, was open to sale, to preemption or to homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question is judicial in its character, as also the decision of conflicting claims to the same land by different parties.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade, up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. How can it be said that when their decision of such a question is finally made and recorded in the shape of a patent, that instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the Government never had land, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

The mode of avoiding it, if voidable, is not [402] by arbitrarily withholding it, but by judicial proceeding to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it and the grant carried into effect by a patent under the seal of the United States and the signature of the President, that instrument carried with it the title of the United States to the land.

From the very nature of the functions per-

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formed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceeding their authority in the matter ceases.

It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title-deeds destroys his title.

What is this final act which closes the transaction?

In the case of *Marbury* v. *Madison*, this court was of opinion that when the commission of an officer was signed by the President and the seal of the United States affixed to it, the commission was complete, and the officer appointed entitled to its possession so that he could enforce its delivery by the writ of *mandamus*. In regard to patents for land, it may be somewhat different, and it is not necessary in this case to go quite so far.

But we may well consider that in all Nations, as far as we know, where grants of the property of the government or of the Crown are made by written instruments, provision is made for a record of these instruments in some public government office. Our experience in regard to Mexican, Spanish and French grants of parts of the public domain purchased by us from [403] those governments, teaches us that such is the uniform law of those countries. We have already shown that under the English law all letters patent are enrolled, and that this is the last act in the process of issuing a patent which is essential to its validity.

We are safe in saying that every State in the Union has similar provisions in reference to its grants of land, and it has been the effort of most of them to compel public record of all conveyances of land by individuals or corporations.

The Acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called the Recorder, is appointed by law to make and to keep these records. This officer is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction, the legally appointed act which completes what Sir William Blackstone calls title by record; and when this is done, the grantee is invested with that title.

We do not say that there may not be rare cases where all this has been done, and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If, for instance, the clerk, whom the President is authorized by law to appoint to sign the President's name to the patent should do so when he has been forbidden by the President, or if, by some mere clerical mistake, the intention of the officer performing an essential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

But we are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

No further authority to consider the patentee's case remains in the land-office. No right to consider whether he ought, in equity or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner; a duty which, within all the definitions, can be enforced by the writ of *mandamus*. [404]

It is not always that the ill consequences of a principle should control a court in deciding what the established law on a particular subject is, and in the delicate matter of controlling the action of a high officer of the executive branch of the Government, it would certainly not alone be sufficient to justify judicial interposition. But it may tend to reconcile us to such action as we feel forced to take, under settled doctrines of the courts, to see that any other course would lead to irremediable injustice.

If the relator in this case cannot obtain his patent, he is wholly without remedy. He cannot sue the United States, in whom is the title in the absence of the patent; for the United States can be sued in no other court than the Court of Claims, and we have decided that that court has no jurisdiction in such a case. *Bonner* v. *U. S.*, 9 Wall., 156 [76 U. S., XIX., 666]. There is no one else to sue, for the title is either in the relator or the United States. It may be many years before the City of Grantsville, the party now claiming against relator, will get a patent, and it may never do so.

The relator is, therefore, utterly without remedy, if the land be rightfully his, until he can obtain possession of this evidence of his title.

On the other hand, when he obtains this possession, if there be any equitable reason why, as against the Government, he should not have it—if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee—the United States can, by a bill in chancery, have a decree annulling the patent, or possibly a writ of *scire facias*. If another party (as the City of Grantsville) is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before. So that it is plain that, by non-action of the Land Department, the legal rights of the parties may remain indefinitely undecided, and the rights of the relator seriously embarrassed or totally defeated, while the delivery of the patent, under the writ of *mandamus*, opens to all the parties the portals of the courts where their rights can be judicially determined. [40

We are of opinion that the relator in the case, as presented to us, is entitled to the possession of the patent which he demanded; that the writ of *mandamus* by the Supreme Court of the District of Columbia is the appropriate rem-

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edy to enforce that right; *and the judgment of that court is reversed, and the case remanded with instructions to issue the writ.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

Mr. Chief Justice **Waite** dissenting:

I am unable to agree to this judgment. There are very few, if any, of the general principles of law so well stated in the opinion of the court, to which I do not give my assent. My objection is to the application which is made of them to the facts of this case.

In the stipulation of the parties, it is "Conceded that *the case* relating to said premises, set out in the answer of the respondent, had been appealed from the decision of the Commissioner of the General Land-Office to the Secretary of the Interior, and was pending before the said Secretary at the time the demand for the patent was made on him, as set forth in the original petition of relator, and for some days thereafter, and that at the time of such demand, and for some days thereafter, the said patent was, with the papers in said case, as an exhibit in said case, in the office of the Secretary of the Interior, and was not in the General Land-Office." This is, as I think, an admission that the case set out in the answer was pending, and permits us to look into the answer and find what that case was. The facts on which the case rests may not be admitted. but the existence of the case as set out is.

Looking, then, to the answer, we find that case to have been as follows: on the 24th of February, 1877, the corporate authorities of the City of Grantsville made an application for the cancellation of the entry of McBride on the lands in controversy. This application was forwarded to the Commissioner of the General Land-Office for final adjudication and decision under the law and established rules and practice of the department, and it came to a final decision by the Commissioner of the General Land-Office February 7, 1879. On the 8th of April, 1879, McBride appealed to the Secretary of the Interior. In his appeal he claimed: 1, that the decision of the commissioner was contrary to the preponderance of the evidence as shown in the record of the case, and, 2, that the decision is contrary to the law of the case. [406]

In the original petition for this *mandamus* it is stated that the patent was dated Sep. 26, 1877. It thus appears distinctly that when the patent was signed, sealed, and recorded there was a contest authorized by law pending in the department between McBride and the corporate authorities of Grantsville as to who had the better right, under the laws of Congress, to the land. It is not pretended that any formal decision was made by any of the department officers charged with that duty, that the patent should issue. Under these circumstances it may fairly be inferred, irrespective of the positive averments to that effect in the answer, that the patent was improvidently issued through the neglect of some of the clerks having charge of the business details of the office. In my opinion, it was the imperative duty of the Commissioner of the Land-Office, when these facts were brought to his attention, to direct that the delivery of the patent be withheld.

I agree that, when the right to a patent has become complete, the execution and delivery of the patent itself are the mere ministerial acts of the officers charged with that duty; and I further agree that when the right to a patent has been determined, and the patent has actually been signed, sealed, countersigned and recorded, no actual delivery is necessary to pass the title. When the last formalities of the law prescribed for the due execution of a patent have been complied with, the grant is complete, if it has before that time been determined in some appropriate way that the right to the patent exists. Ordinarily, the due execution of the patent will be evidence of such a determination. But certainly, as between the United States and the patentee, such evidence will not be conclusive. Different questions may arise if the rights of third persons intervene; but, as between the original parties, until the patent *ought* to issue, it may, in my opinion, be recalled at any time before it gets out of the actual possession of the United States. In reality, it can convey only what the officers of the United States have the lawful right to grant; and, if it can convey nothing, the Secretary of the Interior ought not to be required by *mandamus* to do a vain thing. [407]

The contest here was as to the right of McBride to his homestead entry. Confessedly, the land is within the incorporated City of Grantsville, and his entry was not made at the land-office until after the town was incorporated, although he settled on the land long before. It was a question, therefore, whether, under the circumstances, he had the right to his entry. That question was pending before the department in the orderly course of proceedings when the patent was executed. It involved the investigation of facts. This is apparent, both from the case, as set forth in the petition, and the appeal papers which McBride himself filed. That the facts were disputed, too, is apparent from the statement in the appeal that the decision of the commissioner was contrary to the *preponderance* of the evidence. The patent ought not to have been executed if the entry was unlawful. Whether it was lawful or not was, at the time, the question at issue between McBride and the authorities of Grantsville in the contest then pending in the department. Contests of such kind are provided for by law; and we have over and over again held that, in the absence of fraud, the decision of the officers on the facts is final. *Johnson* v. *Towsley*, 13 Wall., 72 [80 U. S., XX., 485]. As the right of McBride to a patent depended on the result of that contest, will the execution of the patent have the effect of a judgment on the facts before the hearing is concluded?

I will not pursue the subject further. Enough has already been said to show the grounds of my dissent. In my opinion, to direct the Secretary to deliver the patent is to give McBride execution in his pending suit before judgment rendered, and may lead to inextricable confusion.

I am authorized to say that *Mr. Justice* **Swayne** concurs with me in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Cited—109 U. S., 458.

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CHARLES McLAUGHLIN, *Plff. in Err.*,
v.
J. M. FOWLER.

SAME
v.
EDWARD THORPE.

154 US 663 Appx

In the review of state judgments this court can only look beyond the federal question, involved in the case, when that has been decided erroneously; and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to sustain the judgment, notwithstanding the error in the decision of the federal question.

[Nos. 94, 95.]
Argued Dec. 2, 1880. Decided Dec. 13, 1880.

IN ERROR to the Supreme Court of the State of California.

The case is stated by the court.

Mr. **Henry Wise Garnett,** for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The only federal question in these cases is, whether the patents to the Western Railroad Company for lands within the limits of the Moquelomnes grant are valid. If that question was not decided by the court below, we have no jurisdiction; if it was, the judgment was right, because in accordance with *Newhall* v. *Sanger*, 92 U. S., 761 [XXIII., 769], brought here in 1875, for the determination of the same identical question. Such being the case, the judgment must be affirmed. We can only look beyond the federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. *Murdock* v. *Memphis*, 20 Wall., 591 [87 U. S., XXII., 429].

The judgment in each of these cases is affirmed on the authority of Newhall *v.* Sanger.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY KAISER ET AL., *Appts.*
v.
GEORGE W. STICKNEY, Surviving Trustee, and JOHN A. J. CRESWELL, ET AL., COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

131 US clxxxvii Appx.

1. In the District of Columbia, a wife, by uniting with her husband in a deed of trust, can charge her property with the payment of a debt.
2. A bill may not be dismissed because of an immaterial variance between the proof and the allegations of the bill.

[No. 90.]
Argued Nov. 30, and Dec. 1, 1880. Decided Dec. 13, 1880.

APPEAL from the Supreme Court of the District of Columbia.

In April, 1871, Henry Kaiser and Caroline, his wife, made their promissory note to the Freedman's Savings and Trust Company for $12,000 for money borrowed. To secure the payment of this note they gave a trust-deed upon the property involved in this action. Afterward, in October of the same year, the appellants borrowed $4,000 from the Trust Company, and gave another promissory note and trust-deed upon the same trust property to the same trustees.

The original bill was filed Aug. 6, 1875, by the appellants, for the purpose of preventing a threatened sale of the property. The bill alleged that the first deed of trust was not the result of the joint act of husband and wife, but that Henry Kaiser signed the deed by request as a witness. The bill further avers that, as the husband of Caroline, Henry Kaiser was her legal agent and entitled to the management of her sole and separate estate. The Commissioners of the Trust Company filed an answer and also a cross-bill, asking that the property might be sold by a trustee appointed by the court, and also set up the matter of the second trust-deed. To this cross-bill Caroline Kaiser filed an answer, in which, among other things, she set up that her husband was *non compos mentis.*

It would appear that the property in question was conveyed in 1869 by Henry Kaiser to Frederick Johnson, who immediately conveyed the same to Caroline Kaiser, "To have and to hold the said pieces or parcels of ground and premises and appurtenances unto the said party of the second part, her heirs and assigns, to her or their sole use, benefit and behoof forever."

The case further appears in the opinion.

Mr. **Mike L. Woods** and *Mrs.* **Belva A. Lockwood,** for appellants.

Mr. **Enoch Totten,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

It is very clear that the property in question was not, under the provisions of section 727 of the Revised Statutes of the District of Columbia, the sole and separate property of Mrs. Kaiser. She could not, therefore, convey it, or contract with reference to it, "in the same manner and with the same effect as if she were unmarried" (secs. 728 and 729); but it was her general property which she could convey by uniting with her husband in a deed executed in the form required by sections 450, 451 and 452 of the same statutes. In this way she could charge her property with the payment of a debt, although she might not be able to bind herself individually. Her husband did unite with her in the execution of the deed under which the appellees claim, and the requirements of the law as to the form of execution were in all respects complied with. The note secured was valid as the note of the husband, and the deed was, therefore, binding. We have not overlooked the fact that Mrs. Kaiser, both in her original bill and in her answer to the

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cross-bill, has averred that her husband signed the deed only as a witness to her signature; but the fact was clearly otherwise. His signature is affixed both to the note and deed as maker, and his due execution of the deed was properly acknowledged before a competent officer. An attempt was made to prove that he was mentally incapable of entering into a contract, but the evidence falls short of establishing this fact, notwithstanding the wife in her testimony said he only did what she told him to do. We have no hesitation in deciding that the deed was well executed and that it binds the property for the payment of the debt it was intended to secure. It is not claimed, either in the original bill or in the answer to the cross-bill, that the Trust Company did not in fact loan on the faith of the security all the money the note calls for. Consequently, upon the case as made, the decree was properly rendered for the full amount of the note and interest, deducting only what was shown to have been paid.

It is insisted, however, that there is a variance between the proof and the allegations in the cross-bill, and that on that account there can be no recovery by the Trust Company in this suit. The objection is that in the cross-bill the property is proceeded against as the separate property of the wife; whereas, the proof shows it to have been her general property. We do not so understand the effect of the pleadings. In the original bill the appellants sought to set aside the trust-deed because it was executed by the wife alone for the conveyance of her general property, and, therefore, not binding. The appellees, on the contrary, in their cross-bill sought to enforce the deed because it was executed by both the husband and wife. The single point put in issue is the validity of the deed as a conveyance in trust of the property owned by the wife to secure the debt which was described and, inasmuch as the wife insists that the property was her general property, the cross-bill ought not to be dismissed because of a single alternative averment that it was her separate property.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES G. GIBBS, *Appt.*

v.

WEIPKE DIEKMA ET AL.

131 US clxxxvi Appx

1. Where a contract for the sale of lands specifically describes the lands and states the quantity as so many acres, more or less, the contract cannot be extended to cover other lands than those thus described, although it contains a clause that the purchase is intended to be of all the lands still belonging to the vendor.

2. Under a contract for the sale of government lands for which no patents have been issued, if the vendee receives from the Government patents for more lands of the vendor than those described in the contract he holds the title to such lands in trust for the vendor.

3. The objection that proper parties have not been joined in a suit, comes too late for the first time in this court, if such parties are not indispensable parties.

4. This court has power to adjudge damages for delay on appeals as well as on writs of error, and such power is not confined to money judgments.

[No. 88.]

Argued Nov. 30, 1880. Decided Dec. 13, 1880.

APPEAL from the Circuit Court of the United States for the Western District of Michigan.

The bill in this cause was filed in the court below, to compel appellant to convey 3,808 $\frac{47}{100}$ acres of land, alleged to have been wrongfully granted to him by the State of Michigan.

It is alleged in the bill and admitted in the answer, that the complainants had, by virtue of several Acts of the Legislature of the State of Michigan, and in virtue of the labor done by them in drainage and reclamation in pursuance of said several Acts, become entitled to all the state swamp lands in Townships six north, of range fourteen west, and six north, of range fifteen west, in the State of Michigan, amounting in the aggregate to upwards of 11,000 acres, for the benefit of the City and Township of Holland, Michigan, to aid in the improvement of the Holland harbor.

Prior to the 22d of November, 1870, the said complainants, in the progress of the work, and in pursuance of their duties, had disposed of all these lands, either by deed or contract, except 1,560 acres, which they on that day contracted to sell to one Robert M. Risdon.

The last description and clause of the contract are as follows:

"The northwest (1-4) one fourth of northwest (1-4) one fourth, of section number two (2) in town six (6) north, of range fifteen (15) west 40 acres; in all fifteen hundred and sixty (1,560) acres, more or less."

At the conclusion of this contract is this clause:

"This purchase is intended to be, of all the lands still belonging to the said Holland Harbor Board, the same being fifteen hundred and sixty acres, more or less, and at ninety (90) cents per acre. If it shall be found that any of the above described lands have, before this date, been conveyed to other parties, such lands shall not be included in this sale."

Risdon sold and assigned said contract to defendant Gibbs, who paid to the Harbor Board the balance upon the contract, and received an order on the Commissioner of the State Land Office for patents of the lands in the following words:

"Office of the Holland Harbor Board,"
Holland, Mich., Oct. 10, 1872.

"To the Commissioner of the State Land Office,
Lansing, Mich.:

Please issue patents to James G. Gibbs for all the balance of the lands, more or less, sold by and belonging to said Holland Harbor Board, to Robert M. Risdon, of Manistee, as described in contract; the same being part of the lands granted to the Harbor Commissioners of the Township and City of Holland, in the County of Ottawa, Mich., for the improvement of Black Lake Harbor.

W. DIEKMA, Chairman. B. LEDEBOER, Secretary."

Gibbs presented this order to the Commissioner of the State Land-Office, with a written request indorsed thereon, and signed by himself, to issue patents for all the vacant swamp lands

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in towns six north, of ranges fourteen and fifteen west. The land commissioner issued patents to Gibbs for over 5,000 acres, instead of 1,560 acres.

A decree having been entered in favor of the complainants, the respondent appealed to this court.

Messrs. **Alfred Russell** and *Nathaniel Wilson*, for appellant.

Mr. **J. W. Stone**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The contract with Risdon embraced the lands specifically described and no more. The last clause in the contract was evidently added by way of limitation, so as to exclude from the sale any of the parcels specifically described which should be found to have been previously contracted to other parties. The order on the Commissioner of the Land-Office in favor of Gibbs was for patents for the lands sold Risdon, as described in his contract. No other reasonable interpretation can be put on the language of that instrument. It follows that Gibbs took the title to all lands patented to him, and not included in the Risdon contract, in trust for the complainants.

If either Risdon or the other vendees of the complainants were proper parties to the suit, they certainly were not indispensable parties. The objection that they have not been joined in the suit comes, therefore, too late in this court. The claim that the complainants are not entitled to a decree because in some cases title was left in the State to avoid the payment of taxes, is frivolous.

The decree is affirmed, and it is so apparent that the appeal was vexatious and for delay only, that we adjudge to the appellees $500 as just damages for their delay. While section 1010 of the Revised Statutes includes, in express terms, writs of error only, section 1012 provides that appeals from the circuit and district courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error. This gives us authority to adjudge damages for delay on appeals as well as writs of error, and our power is not confined to money judgments only.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

ROBERT CORNELL WHITE, *Appt.*,
v.
UNITED STATES.

154 US 661

1. Where a vessel is chartered to the Government, repairs rendered necessary by her condition when discharged from the charter, are not chargeable to the Government unless they resulted from the risks assumed by it.
2. The Government is not responsible for repairs, necessary from ordinary wear and tear, when it was provided in the charter-party that the Government need not make good any loss arising from that cause.
3. Nor is the Government responsible for losses arising from the disobedience by the master, of the orders of a military officer in command of an expedition on which she was properly sent, under her charter.
4. The neglect of the master was a marine risk which the owner assumed, and where such neglect, and not the war, was the proximate cause of the loss, the owner must bear it.
5. A payment made to a third person to avoid a controversy with the United States, furnishes no ground of recovery against the latter.

[No. 82.]

Argued Nov. 29, 1880. Decided Dec. 13, 1880.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Messrs. **John J. Weed** and **M. H. Carpenter**, for appellant.

Mr. **Edwin B. Smith**, *Asst. Atty-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Court of Claims has found expressly that the condition of the vessel (when she was discharged from the charter, which made the repairs sued for, necessary) resulted from the ordinary wear and tear of the service in which she was engaged under the charter-party. This is conclusive against any recovery for these repairs. It was expressly provided in the charter-party, that the Government need not make good any loss arising from ordinary wear and tear. Although, if this one fact had been omitted from the findings, a different judgment might with more propriety have been contended for, with it found, the conclusion reached by the court below was unavoidable.

This finding is not inconsistent with anything else that appears in the case. The vessel was sent up the Ashepoo River as a transport. She did land, under the orders of the general in command of the expedition, at a place selected by him against the objection of the master put in charge of her navigation by her owner, and she did ground and was badly strained while at the landing; but it is nowhere found that she would have grounded, or that she would have been unusually strained, if the master had obeyed the further order of the general and moved her away from the shore into the stream after the troops and horses were off. Certainly the Government cannot be held responsible for losses arising from a disobedience by the master of the orders of a military officer in command of any expedition on which she was properly sent under her charter. She was chartered for war service and bound accordingly. If loss happened from a "war risk," that is to say, if the war was the proximate cause of the loss, the damage was to be made good by the Government; but if it was caused by the refusal of the master to obey those in command of a military expedition to which the vessel was attached, the neglect of the master and not the war would be the proximate cause. This neglect of the master was a marine risk which the owner assumed. Damages arising from such a risk the owner was bound to repair under his covenant to keep and maintain the vessel tight, stanch and strong during the continuance of the charter. The findings, taken as a whole, are to be construed as meaning that the repairs put on the vessel after she was discharged from service were not rendered necessary by any of the risks assumed by the Government under the charter.

What has thus been said is applicable also to the claim for deductions from the pay of the vessel during the month of August, 1864, for

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lost time and repairs after her return from the Ashepoo River. The charter expressly provided that time lost in consequence of any breach of the covenants by the owner should not be paid for, and the court below in effect found that the damages repaired were caused by the neglect of the master to move the vessel out into the stream after the landing had been completed. No complaint is made in the petition of the amount of the charge. The right to recover is put entirely on the ground that the damages were such as the Government was bound to repair, and, therefore, that the repairs were not chargeable against the owner. In the petition the quartermaster's and commissary's stores are included as part of the cost of the repairs, which was, no doubt, in accordance with the facts.

The money paid to Cannon for his services on board the vessel cannot be recovered from the United States. The claim was made by Cannon against the owner and not by the United States. It was voluntarily paid, with a full knowledge of all the facts. It may be that the payment was made to avoid a controversy with the United States, but that furnishes no ground of recovery. *Silliman* v. *U. S.*, 101 U. S., 465 [XXV., 987].

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[314] THEODORE HAWLEY, *Plff. in Err.*,

v.

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT WESTERN INSURANCE COMPANY, a Bankrupt.

(See S. C., 12 Otto, 314-317.)

Subscription for stock—delivery of certificate.

1. Where one executed a paper by which he acknowledged the receipt from an insurance company of ten shares of its stock, and agreed within the time named to pay to the company $200, or twenty per cent of its par value, this amounted to a subscription for the stock.

2. The delivery of a stock certificate was not needed, to perfect the subscription, and its non-delivery would not prevent a recovery by the assignee of the company for the unpaid installments.

[No. 101.]

Submitted Dec. 3, 1880. Decided Dec. 13, 1880.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is fully stated by the court.

Messrs. **Parsons** *& Runnells*, for plaintiff in error.

Messrs. **Nourse**, *Kauffman & Jackson*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case presents the following finding of facts and certificate of division of opinion thereon in the court below:

"The plaintiff is assignee in bankruptcy, as alleged in the petition.

"On the 2d day of January, 1871, Rossitur, agent of the Great Western Insurance Co., the bankrupt, requested defendant to take stock in said company.

"Defendant, on certain representations by Rossitur, signed the following paper or bond:

"No. —.) ($200.

THE GREAT WESTERN INSURANCE COMPANY.
(Stamp.)

"Capital stock $500,000, with liberty to increase to 5,000,000 dollars. Stock non-assessable.

"Organized July 20th, 1857, under Act of Legislature approved March 4th, 1857.

"Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Co. of Chicago, Ills., received by me, I am held and firmly bound, and agree to pay the Great Western Ins. Co. of Chicago the sum of two hundred dollars in installments, as follows: twenty-five per [315] cent thereof upon receipt of stock certificate, twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest ten per cent after due.

"CHICAGO, 7th Jan'y, 1871.

"THEO. HAWLEY.

"Signed and delivered in presence of—

"At the time the said bond or paper was issued to Hawley the latter paid Rossitur $25.00 and delivered to him the bond. It was not delivered on any particular conditions. It was delivered to an agent of the company's, namely: the said Rossitur.

"The company afterwards came into possession of the bond, and entered Hawley's name on their books as a stockholder, and published him in their publications as one of their stockholders, Hawley having no knowledge of the publications. Hawley paid no other money, and no calls made upon him prior to the bankruptcy.

"No certificate of stock was ever sent or delivered to Hawley, and he made no demand on the company for any certificate of stock.

"Bankruptcy of the insurance company was caused by fire in Oct., 1871.

"The defendant signed no subscription paper or any other paper than the bond above set out."

On the foregoing facts and the pleadings judgment was rendered for the plaintiff. The judges were opposed in opinion on the following questions:

"1. Whether the delivery of a stock certificate under the above circumstances was necessary to constitute the relation of stockholder between the defendant and the insurance company.

"2. Whether the above facts constitute a defense to the action.

"The Judges being divided in opinion on the above questions, hereby certify such division to the Supreme Court, pursuant to the statute in such case made [and] provided.

"JOHN F. DILLON.
"J. M. LOVE."

It cannot be doubted that one who has become [316] bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts

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can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed, until the contribution has actually been made or the obligation in some lawful way extinguished.

These are elementary principles, *Upton* v. *Tribilcock*, 91 U. S., 45 [XXIII., 203]; *Webster* v. *Upton*, 91 U. S., 65 [XXIII., 384], and the only question we have to consider is whether from the facts found it appears that Hawley, the plaintiff in error, had become an accepted subscriber to the stock of the company before the bankruptcy. There can be no doubt that he was approached by an agent of the company with a view of securing him as a subscriber. It is equally true that, after the representations made to him, he was willing to become a stockholder. The result was that he executed the paper set out in the findings, by which he acknowledged the receipt from the company of ten shares of its stock and agreed within the time named to pay to the company $200, or twenty per cent of its par value. As the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else. It is true the stock he took purported to be non-assessable, but that in law could only mean that no assessment would be made beyond the percentage he had specially bound himself to pay, unless the legal liabilities of the company required it. *Upton* v. *Tribilcock*, *supra*.

The paper he signed was delivered to the company by the agent who got it. That it was accepted by the company as a subscription is shown conclusively by the fact that his name was entered on the books as a stockholder and publication made accordingly. It matters not [317] that he had no knowledge of such a publication. His receipt for the stock was an acknowledgment, so far as he was concerned, that he had become a stockholder, and, after an acceptance by the company, his liability was fixed whether any publication was made or not. The publication is only important as a means of showing that his subscription made to an agent had been accepted and ratified by the company. The entries on the books had the same effect. The publication only made it more notorious. The ultimate fact to be established is that a subscription had not only been made by Hawley, but accepted by the company.

Both in the pleadings and the argument, the defense was put principally on the fact that no certificate of stock had been issued. It may be conceded that if a suit had been brought by the company on the express promise to pay the twenty per cent, there could have been no recovery without a tender of the certificate; but that is not this case. Here the creditors of the bankrupt company are proceeding against Hawley as a stockholder, to compel him to contribute to the fund which the law had provided for their security, what he by his subscription agreed he would pay. The suit is not brought on his special agreement to pay the twenty per cent, but on his general liability as a subscriber to pay for his stock whenever it was wanted to meet the liabilities of the company. As the certificate was not needed to perfect the subscription, its non-delivery cannot stand in the way of a recovery in this action.

We have no hesitation in answering each of the questions certified in the negative and *the judgment is, consequently, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL J. LANAHAN, *Appt.* [318]

v.

JAMES E. SEARS AND CLARA SEARS, His Wife.

(See S. C., 12 Otto, 318-322.)

Deed, when a mortgage—sale of homestead.

1. A deed, executed as security for promissory notes, which is absolute in form, and a defeasance, are to be taken together as if forming one instrument, and constitute a mortgage.
2. Where, by the Constitution of the State, which was in force when the notes were given and the mortgage executed, the homestead of the family was not subject to forced sale for debts, such prohibition of the Constitution extends to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise.

[No. 112.]

Argued Dec. 3, 1880. Decided Dec. 13, 1880.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

The case fully appears in the opinion of the court.

Mr. **Bernard Carter,** for appellant.

Messrs. **Bailie Peyton** and *R. Q. Mills*, for appellees.

Mr. Justice **Field** delivered the opinion of [321] the court:

The premises described in the complaint are in the City of Waco, in the State of Texas. They have been the homestead of the complainants from the time of their purchase, in May, 1870. The conveyance to Robertson in 1873 was accompanied by a defeasance from him, stating that the deed was executed as security for certain promissory notes of the husband. The two documents—the deed, which was absolute in form, and the defeasance—are, therefore, to be taken together as if forming one instrument. They together constitute a mortgage, and as such would be treated in the courts of Texas.

By the Constitution of that State, of 1868, which was in force when the notes were given and the mortgage executed, the homestead of a family was not subject to forced sale for debts, except for the purchase money, or for taxes, and for labor and materials expended thereon. The premises in question, therefore, could not be sold under any decree in a suit for the foreclosure of the mortgage. The prohibition of the Constitution extended to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise.

NOTE.—*Parol evidence admissible to prove a deed absolute, a mortgage; action to have it declared a mortgage; where deed is absolute, but is as between the parties a mortgage, a* bona fide *purchaser is protected, but a purchaser with notice stands in place of the equitable mortgagee.* See *note* to Conway v. Alexander, 11 U. S. (7 Cranch), 218; and *note* to Hughes v. Edwards, 20 U. S. (7 Wheat.), 489.

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A similar prohibition in the Constitution of 1845 was so construed by the Supreme Court of the State in *Sampson* v. *Williamson*, contained in the 6th of Texas Reports, 102. In that case *Chief Justice* Hemphill said that "The Constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or from any forced disposition of the property, whether partial or total, which would disturb the family in the quiet and uninterrupted possession of their home with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from any extents or deliveries of the property, or from any forcible appropriation of its rents, issues and profits. It protects the domestic sanctuary from every spe-
[322] cies of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts."

The appellant [who] is the owner of the mortgage in this case, and aware—so states his counsel—that he could not enforce it against the homestead in the state courts, as there, mortgages can only be enforced by a decree of sale, commenced an action of ejectment for the premises in the Circuit Court of the United States, contending that the mortgage passed the legal title as against the mortgagors, and that, as its owner, he had a right to recover the possession of the premises for default in the payment of the notes secured. He sought, in other words, to get around the State Constitution by the form of his procedure in the Federal Court. We do not think that its wise and beneficent purpose of securing a home to the family against the vicissitudes of fortune, can be thus easily evaded. A forced dispossession in ejectment is as much within the prohibition as a forced sale under judicial process. We think, therefore, that *the decree in the suit, enjoining the action of ejectment, was properly rendered upon the undisputed facts stated in the complaint; and it is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[322] JAMES S. CLARK AND EDWARD FULTON, Partners, as J. S. CLARK & Co., *Appts.*,

v.

UNITED STATES.

(See S. C., 12 Otto 322-332.)

Bribery—recovery of the money.

One who bribes a government officer is *in pari delicto* with him, and cannot recover back from him the money paid, nor from the United States, after it has been taken from him as a punishment for his faithlessness to his trust.

[No. 36.]

Argued Nov. 29, 30, 1880. Decided Dec. 13, 1880.

APPEAL from the Court of Claims.

The petition in this case was filed in the court below to recover the sum of $10,000 alleged to have been extorted from the petitioners by the provost-marshal of New Orleans in 1864 for the release of a cargo of cotton.

The claimants' right to bring in cotton rested on the following permit of the President and agreement of the Secretary of the Treasury. It was insisted on the trial that these instruments rendered the acts of the officers extortion, and relieved the payment from the vice of bribery.

"Treasury Department, October 26, 1864.

J. S. Clark and E. Fulton allege that, prior to the 2d day of July, 1864, under authority of George S. Denison, special agent of the Treasury Department at New Orleans, they purchased in the Parishes of East and West Feliciana, in the State of Louisiana, 3,435 bales of cotton, upon which they advanced the sum of $123,200 in United States currency, as part payment for the same, and became liable to pay the balance of the purchase money;

That, after purchasing and becoming owners of said cotton, and while in the act of moving the same to market for sale, they ascertained that, by the passage of the Act of July 2, 1864, they were prevented from proceeding with the shipment of said cotton, or in any way interfering with the same, and it now remains at the points above named exposed to the depredations of guerrillas. They, therefore, ask that authority may be granted them to complete the transaction commenced and conducted thus far under the prescribed rules and regulations of the Treasury Department.

After full examination, and in view of the fact that the loyalty of the parties is not questioned, and that there are no adverse claimants to said cotton known to the Department, authority is hereby given to the said J. S. Clark and E. Fulton to transport, by way of New Orleans (where all government fees and dues shall be paid before shipment therefrom), the cotton in question; provided they shall first present to the acting Collector of Customs at New Orleans the original authorities or permits under which they acted, or copies thereof certified by the officer with whom they are filed, with proof to his satisfaction that the cotton was actually purchased in good faith, under and by virtue of said authorities, and payment made and liabilities incurred as alleged; and provided, further, that the said J. S. Clark and E. Fulton shall first execute, to the satisfaction of the said acting collector at New Orleans, a bond, with sufficient security, in the penalty of $250,000, conditioned that all fees and taxes, in any way due or accruing to the Government of the United States from said cotton, shall be paid on its arrival at New Orleans, and any cotton transported or attempted to be transported under this authority without the original permits or authorities, or certified copies thereof and proof herein required, shall be seized and proceeded against for forfeiture and condemnation to the United States.

The acting collector at New Orleans shall record and file in his office a copy of this authority, and deliver the original to the said J. S. Clark and E. Fulton, after indorsing upon it his certificate, attested by his official seal, that the required bond has been duly executed and delivered.

NOTE.—*Whether, when parties are in pari delicto or participes criminis, equity will relieve.* See *note to* Sample v. Barnes, 55 U. S. (14 How.), 70.

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The conditions herein stipulated having been complied with, the cotton moving under this authority, or under permits given in pursuance hereof, will be allowed to be transported without hindrance or delay.

The leave hereby granted is confined to so much of said cotton as had been actually paid for, or said parties had become legally liable to pay for, under and by virtue of permits properly issued by authority of this Department, prior to the said 2d day of July, 1864, and the power to revoke the authority hereby granted at any time, should satisfactory cause appear, is reserved to this Department.

W. P. Fessenden,
Secretary of the Treasury."

"EXECUTIVE MANSION, October 26, 1864.

The Secretary of the Treasury having, by the terms of and upon the conditions contained in the foregoing paper by him signed, directed that J. S. Clark and E. Fulton be allowed to transport from certain localities in the State of Louisiana to markets in the loyal States or elsewhere 3,435 bales of cotton owned by them in said State and that permits be given them for that purpose by the acting Collector of Customs at New Orleans;

It is ordered that all cotton moving in compliance with such direction of the Secretary of the Treasury, or permits granted in pursuance thereof, shall be free from seizure or detention by any officer of the Government; and commandants of military departments, districts, posts and detachments, naval stations, gunboats, flotillas and fleets will observe this order, and give the said J. S. Clark and E. Fulton, their agents and transports, proper facilities and passes for the purpose of getting said cotton through the lines, and safe conduct within our lines while the same is moving, in strict compliance with the directions of the Secretary of the Treasury and permits above referred to.

Abraham Lincoln."

The court found the following facts:

I. Oct. 26, 1864, the Secretary of the Treasury signed and delivered to the claimants the [323] paper of that date annexed to the petition; and on the same day Abraham Lincoln, President of the United States, signed the order of that date, accompanying said paper and also annexed to the petition.

II. Nov. 16, 1864, the claimants delivered to George S. Denison, the acting Collector of Customs at New Orleans, a bond duly executed, with proper and sufficient sureties, in the sum of $250,000, as required by the aforesaid paper signed by the Secretary of the Treasury.

III. Dec. 13, 1864, on the United States ship, Choctaw, off Bayou Sara, La., John J. Cornwell, Lieutenant-Commander of the United States Navy, commanding the Second and Third Districts of the Mississippi River, issued the following order, addressed to naval officers between Bayou Sara and New Orleans: "Pass the steamer, Sciota, Captain Owesney, with a cargo of three hundred and thirty-six (336) bales of cotton, to New Orleans, without molestation. The cotton was taken on board at Bayou Sara by my consent."

IV. On arrival of the steamer, Sciota, at New Orleans, she and her cargo were seized by the United States military police, under the control of Col. Harai Robinson, then acting as provost-marshal-general of the Department of the Gulf, of which department Gen. S. A. Hurlbut was then in command.

V. After the seizure of The Sciota and her cargo, General Hurlbut issued a special order stating that, by direction of the major-general commanding the Military Division west of the Mississippi, the cotton brought by the steamer, Sciota, should be disposed of as follows: a certain number of bales (number not shown) to be given to the claimants; the remainder to be turned over to O. N. Cutler, the United States purchasing agent; and that the claimants should give bonds for their appearance when required. On said Robinson's receipt of said order he sent for the claimants and they appeared before him and gave bonds; at which time they did not exhibit to him any papers in relation to shipment of cotton. It was not the province of said Robinson to have anything to do with the receiving or disposing of the cotton.

VI. On or about Dec. 21, 1864, in the evening, after office hours, the claimants called at [324] the dwelling of the said Robinson and showed him the papers aforesaid, dated Oct. 26, 1864, signed by the Secretary of the Treasury and the President, which the said Robinson had not before seen or had any knowledge of, and the claimants asked him what he thought of that permit. He told them that he thought it was a sweeping one; that it covered all ground. They answered that, notwithstanding that permit, the cotton aboard The Sciota had been seized and detained, and themselves put under bond. He asked how that could be. They answered that the permit was of no account unless signed by the major-general commanding the department. He asked them if they had presented it to the general commanding. They said, yes and it had been refused. He then advised them to go to General Canby, who commanded the Military Division west of the Mississippi, and show the permit to him. They replied, "You know that it is useless by the very order which put us under bond; it stated, by order of the general commanding the Military Division west of the Mississippi." They further said they were satisfied that it could not be done except by money; that money was wanted; and that they were willing to pay most liberally to have it signed; that that would cover and release the cotton. They said they would pay $10,000 to have that presidential permit indorsed and their cotton released. He then told them to leave the permit with him and he would see about it.

The next day the said Robinson took the permit to General Hurlbut and told him the parties wished to have it signed by him. General Hurlbut replied, "Yes, I have seen this permit before. I have refused to sign it." Robinson then said: "General, these men have offered a large amount of money to get this permit indorsed; there's money in it." Hurlbut perused the permit carefully, and said, "You must take that to Mr. Denison and have him certify that the proper bonds have been filed by these parties, Clark and Fulton." Robinson took the permit to said Denison and advised him of the wishes of General Hurlbut. Denison then indorsed on the permit the following certificate:

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[325] "Custom-House, Collector's Office,
New Orleans, La., November 16, 1864.

I certify that J. S. Clark and E. Fulton have delivered to me a bond, duly executed, with proper and sufficient sureties, in the sum of $250,000, as required by the foregoing authority from the Secretary of the Treasury.

(Seal.) GEO. S. DENISON,
Sp. Agt. of Treasury Dept. & Actg. Collector of Customs."

Robinson then took the permit back to Hurlbut, who placed on it the following indorsement:

"Headqrs., Dept. Gulf, Dec. 23d, 1864.

The above executive order will be obeyed & respected by all military officers within this department.

S. A. HURLBUT, M. Ge."

That day, or the next, the claimants handed Robinson, at his dwelling, $5,000; and subsequently, on the same day, he handed that money back to them, stating to them that it did not suit him to receive it in that manner. They asked him how he would receive it. He told them he would receive it through Denison, the collector of the port. The next morning Denison handed him an envelope with $5,000 in it, out of which Robinson took $2,000 or $3,000 and gave it to General Hurlbut, and laid away the balance in the provost-marshal-general's office.

After that money was given to Robinson, the claimant, Clark, saw him again and said to him: "Now, I have the permit indorsed, see if you can get my cotton released; see if General Hurlbut will give an order releasing or justifying the release of my cotton." Robinson then saw Hurlbut and stated the facts to him, and Hurlbut then wrote the following paper:

"Headquarters, Department of the Gulf,
New Orleans, Dec. 24, 1864.

Pursuant to executive order of his Exc'y, the President of the United States, J. S. Clark & E. Fulton are permitted to bring the number of bales of cotton in said order mentioned from Ratcliff's Landing, on the Miss. River, 25 miles above Bayou Sara, on the steamer, Sciota, provided the same is received under the protection of a gunboat. The taking of any passengers or [326] freight to be landed at any point, or the payment of anything but United States Treasury notes, will work forfeiture of steamer and cargo. The cotton returning on the boat will be reported & identified by Mr. O. N. Cutler & the prov. mar. Gen'l.

S. A. HURLBUT, M. G. C."

The claimants then paid Robinson another $5,000, which was disposed of in the same manner as the first.

Afterwards, and prior to Feb. 13, 1865, they paid Robinson the further sum of $3,000, of which he gave $1,000 to General Hurlbut, and the rest was disposed of by Robinson in the provost-marshal-general's office.

Besides the money so received by Robinson from the claimants, other moneys were paid him by C.A. Weed & Co., the amount of which does not appear, and also the sum of $1,000 was paid him by one Courtrey.

Of the whole amount paid him by all those parties, $8,000 went into the hands of General Hurlbut, who returned the same amount to Robinson on or about Apr. 4, 1865. With the remainder of said whole amount or a part of it, Robinson purchased gold coin, which he deposited in the First National Bank of New Orleans, taking therefor certificates of deposit in favor of different officers of the bank, which they indorsed over to him, to the amount of $7,602.25.

VII. In January, 1865, a special commission in New Orleans was appointed by the Secretary of War, with the sanction of the President, and was in session there until May 5, following.

Feb. 13, 1865, that commission placed the said Robinson in solitary confinement, and the same day stopped the payment of said certificates of deposit; and the amount of them, in gold coin, was afterwards turned over by the commission to the Secretary of War, by whom the same was put as a special deposit in the Treasury Department until June 16, 1869, when, at the request of the Secretary of War, the same was covered into the Treasury.

That commission also took $8,000 from said Robinson, which was likewise turned over to the Secretary of War, by whom it was, with the addition of $40 interest accrued on compound interest notes, paid into the Treasury June 10, 1869.

VIII. The money paid, as aforesaid, by the claimants to said Robinson was paid by them [327] with the corrupt motive and purpose on their part of procuring official action whereby their cotton should be released.

The following additional finding was allowed on the request of the claimants:

It does not appear that there were any interviews between the claimants and the said Robinson upon any subject, nor any offer of the payment of any sum or sums of money by them to the said Robinson, for any purpose, until after the seizure by the United States military police, of the claimants' steamer, Sciota, and the cargo of cotton thereon, which had been shipped from Bayou Sara, La., under the pass and supervision of Lieut. Commander John J. Cornwell, of the United States steamship, Choctaw, Dec. 13, 1864.

Upon these facts the court below found for the defendant and dismissed the petition. Whereupon the petitioners appealed to this court.

Messrs. **John J. Weed, S. Shellabarger** and *J. M. Wilson*, for appellants.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opin- [330] ion of the court:

Upon the facts found, the court below was right in treating this as a case of bribery rather than extortion. The claimants undoubtedly held an executive license to transport by way of New Orleans, notwithstanding the Act of July, 1864, 13 Stat. at L., 377, sec. 9, any cotton they had bought in the Parishes of East and West Feliciana, under the authority of the special agent of the Treasury at New Orleans, if they gave the required bond and presented to the acting Collector of Customs at that port the original authorities or permits under which they [331] acted, or copies thereof certified by the officer with whom they were filed, with proof to the satisfaction of the acting collector that the cotton was actually purchased in good faith under and by virtue of such authorities. By the express terms of this license any cotton transported

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or attempted to be transported, under it, without the original permits or authorities or certified copies and proof required, was subject to seizure and condemnation. It is not pretended that when the seizure was made the claimants had in their possession any evidence of their right, under this authorization, to transport the cotton which was seized. While it has been found that the bond was executed and delivered to the acting collector on the 16th of November, 1864, the findings are entirely silent as to the presentation of the original permits or the required proof before the transportation was entered upon. Neither did the executive license have upon it the prescribed certificate that the bond had been executed and delivered. Under such circumstances the seizure could not have been wrongful in the first instance. It was the duty of the military authorities at that point to see that nothing passed out from the enemy's country under this authority until the requisite evidence was furnished. New Orleans was a military post, and Congress had seen fit to restrict materially the power of the President to permit commercial intercourse with the inhabitants of the insurgent territory. The executive license, when construed in connection with this new congressional action, was evidently intended only to protect such rights as had become vested under previous authorities or permits rightfully issued. Therefore, nothing could pass except what the collector had been satisfied by proof was "actually purchased in good faith under and by virtue of said authorities."

The claimants, when the seizure was made, did not attempt to secure a release by producing the necessary evidence of their rights, but by tempting a subordinate officer in the military service by a liberal offer of money. He made no demands, but accepted what they voluntarily gave him. In this way the executive order was evaded and a pass through the lines secured by corrupting an officer. Clearly this was [332] bribery, and placed the claimants and the man they corrupted *in pari delicto*. They could not recover back from him the money they paid, neither can they from the United States after it has been taken from him as a punishment for his faithlessness to his trust.

It is insisted, however, that when the claimants presented to the military authorities the executive license, with the certificate of the acting collector indorsed to the effect that the requisite bond had been delivered to him, they had done all that was required to get their property back and proceed with the transportation. They evidently did not so understand the effect of what they had done, for they voluntarily offered and paid more money to secure what they wanted, and that they interpreted the instrument correctly is, to our minds, clear. The execution of the bond is one thing, and the production of the original permits and proof, another. It is true that in the license the provision as to the bond follows that as to the permits and proof, but the delivery and acceptance of the bond were no more evidence of the presentation of the permits than the presentation of the permits would have been of the delivery of the bond. The certificate of the bond on the license was evidence of the performance of that condition, but nothing more. The execution of the bond was not at all dependent on the presentation of the permits and proof. The penalty of the bond was fixed in Washington and specified in the license itself, and it was entirely immaterial, so far as the requirements of the license were concerned, whether the bond was delivered before or after anything else was done. Before, therefore, the commanding general could be required to release the seizure, it must have been shown to him that the acting collector was satisfied the original permits had been given, and that the purchases had been in good faith made, as alleged by the claimants. Instead of attempting to make such a showing, bribery was resorted to and in that way the necessary order obtained.

Beyond all doubt the judgment below was right and it is, consequently, *affirmed*.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SWAIN TURBINE AND MANUFACTURING COMPANY, *Appt.*, [40

v.

JAMES E. LADD.

(See S. C., 12 Otto, 408-415.)

Re-issued patent—extension of, when fatal.

1. A re-issued patent should be construed in accordance with the limitation of the invention in the original patent, and can only be granted for the original patented invention.
2. Any extension of a re-issued patent, beyond the scope of the invention set forth and fairly indicated in the original specification, drawings and model, is fatal to the patent itself.

[No. 41.]

Argued Oct. 26, 27, 1880. Decided Dec. 13, 1880.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is fully stated by the court.

Messrs. **John S. Abbott** and **H. W. Boardman**, for appellants.

Messrs. **Mitchell**, *Hungerford* and *C. Browne*, for appellee.

Mr. Justice **Bradley** delivered the opinion [4 of the court:

The appellants in this case filed a bill against the appellee, alleging that the latter had infringed certain letters patent owned by the appellants, which had been granted to Asa M. Swain on the 15th of May, 1860, for a new and improved water-wheel, and which had been surrendered and re-issued on the 19th of November, 1872. The bill sought an account of profits, damages for the infringement, and a perpetual injunction against further use of the alleged invention. The defendant filed an answer denying infringement, and assailing the patent of the complainants on various grounds, such as prior discovery and invention by other persons, illegality of the new issue, etc. Proofs having been taken and the cause heard, the Circuit Court dismissed the bill, on the ground that, according to the true construction of the patent sued on, the defendant did not infringe.

It was conceded that if the re-issued patent should be construed literally, without restraining the generality of its claims by a reference to the original patent, the wheels made by the

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defendant would be an infringement; but the court, in view of the state of the art at the date of Swain's invention, and of the distinct limitation of that invention in the original patent to a wheel of specific construction and form, considered itself bound to construe the claims of the re-issued patent in accordance with such limitation, in order to avoid the conclusion that it was for another and different invention from that originally patented. From a careful examination of the evidence in the case we are satisfied that this was the most favorable view that could have been taken for the complainants. A comparison of the original letters-patent, including the drawings and model, with the re-issued [410] patent, makes it very evident that the latter is the result of an effort to enlarge the scope of the patent so as to include and embrace within it matters and things that were not embraced in the original invention. The original specification, drawings and model all agree in describing a specific wheel and associated apparatus as the subject of the invention secured by the letters patent. They distinctly describe a wheel with its floats, each made of a single piece of metal, having their face sides, where the water strikes, of a paraboloidal form, with their bottoms formed by revolving the curves on their axes, and arranged in a particular direction to receive the water from the guides; and having the rim of the wheel covering the floats so curved as to force the water down rapidly in the lower curved parts or bottoms of the floats; the water being turned down between the curb and wheel and lower curb: they describe an annular chamber situated above and outside of the wheel, with slots in its bottom to receive and steady the guides when raised with the gate, and which is filled with water, forming a sort of stuffing-box: they describe a cylindrical gate, below the annular chamber surrounding the curb below the wheel, provided at top with a flange to which the guides are attached, and which is opened by being lowered to let the water into the wheel through the guides, and is shut by being raised up to the bottom of the annular chamber: lastly, they describe a particular contrivance for adjusting the wheel on its step, which is of no consequence in the disposal of the present case. Substantially, this is the entire description: the wheel, formed and made as stated; the annular chamber; the cylindrical gate, with the guides attached to its flange; and the contrivance for adjusting the wheel on the step. There is also a description of the enclosing case and curbs, and the machinery for raising and lowering the gate and the wheel; but these parts have nothing to do with the controversy.

The claim of the patent was threefold: first, for the annular chamber, with slots in the bottom to receive the guides; secondly, the combined arrangement of the guides, the cylindrical gate, and the annular chamber, as unitedly related to the wheel; thirdly, the step arrangement. Here we have a clear and distinct specification of an invention, and of the particular [411] machinery which is its subject-matter. The wheel is not claimed, either as to its form or fashion, or mode of operation; nothing is claimed but the annular chamber, the peculiar gate and guide arrangement, and the step adjustment—none of which things are in controversy in this suit.

But a change comes over the scene: the patent becomes the property of a corporation that manufactures wheels; a monopoly of the business is very desirable; other manufacturers make turbine wheels approaching somewhat in appearance to that described in Swain's patent. The usual remedy in such cases is resorted to. A re-issue of the patent is sought, with expanded claims, sufficiently general and comprehensive to embrace a wide monopoly of structure, and to shut up competing establishments. In this way, the patent laws have been made the instruments of great injustice and oppression. The real object and design of a re-issue of a patent have been abused and subverted. The intent of the law was to allow a correction to be made "Whenever a patent is inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee's claiming in his specification as his own invention more than he has a right to claim as new; and when the error has arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention." These are the words of the law granting the right. It was never intended to allow a patent to be enlarged; but to allow the correction of mistakes inadvertently committed, and the restriction of claims which had been improperly made, or which had been made too broad—just the contrary of that which has come to be the practice. In a clear case of mistake—not error in judgment—the patent may undoubtedly be enlarged; but that should be the exception, not the rule; whereas the enlargement of claims has become the rule, and their contraction the exception.

These remarks are well illustrated in the case before us. We have shown what was the original invention described and claimed. After the lapse of twelve years and a half the patentee (or rather his corporation assignee) discovers that through inadvertence and mistake his specification is wrong, and needs correction; and a re-issue is obtained, with eleven different claims. These claims are quite different from those of the original patent and are intended to give to the present proprietors a large and val- [412] uable monopoly. Here are some of the claims:

1. A water-wheel, the floats of which have a discharge line extending from the crown at their inner edge, to the lower outer edge of the wheel.

2. The combination in a water-wheel of a crown, band and floats, having their discharge line extending from the crown at their inner edge to their lower outer edge.

3. The combination in a water wheel of a crown and floats having their discharge line extending from the crown at their inner edge to the lower outer edge.

5. A water-wheel having an effective inward flow and discharge of part of the water, and an effective downward flow and discharge of part of the water simultaneously in one wheel, whereby the effective area of discharge is increased without increasing the diameter of the wheel.

Here is a sweeping generalization, which, taken literally, would give to the patentee a monopoly of all water-wheels having, simulta

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neously, an effective inward and downward flow and discharge, whatever might be the shape of the floats, or of the crown. This was certainly not the invention described or suggested in the original patent. The invention of a wheel was not claimed at all: a wheel was described, but it was a wheel made after a particular pattern or form, and adjusted to a particular apparatus for the reception and discharge of the water. Its buckets were described as paraboloidal; its rim over the buckets curved downward and inward so as to force the water down rapidly in the lower curved parts or bottoms of the floats. No intimation is given that a wheel of a different form would answer the purposes of the invention. The defendant does not copy either of these features, in his wheels. Their floats are not paraboloidal, but waving; the rim is not curved downward and inward, but is horizontal. It is very apparent why the claim has been generalized as it has been. The patentees desire to secure the monopoly of every center-vent wheel, of whatever shape or form, which discharges the water both inwardly in the center of the wheel and downwardly from the bottoms of the floats beneath the wheel. But that would [413] be a new invention, very different from what was described and claimed in the original patent. To warrant this extension of the claim the specification of the re-issued patent contains material variations from that of the original, frequently stating that a particular part *may* be constructed thus and so, when the original *required* it to be thus and so; it speaks of "the upper horizontal edge of the floats," when no such thing is mentioned in the original, but on the contrary the rim over the floats was described as curving inward and downward and as being so curved for a special purpose and effect. Instead of correcting inadvertent mistakes in the specification, which rendered the patent inoperative and void, the pretended corrections are evidently intended to widen the scope of the patent, and to make it embrace more than it did at first. So far as description went, the original specification was as perfect as the new one.

The mistake of the patentee, or his assigns, seems to have been in supposing that he was entitled to have inserted in a re-issued patent all that he might have applied for and had inserted in his original patent. The appellants produced on the argument exhibits, tending to show that the patentee before obtaining his original patent had made and done all those things which are embraced in or covered by the re-issued patent. If this were true, it would be nothing to the purpose. A re-issue can only be granted for the same invention which was originally patented. If it were otherwise, a door would be opened to the admission of the greatest frauds. Claims and pretensions shown to be unfounded at the time, might after the lapse of a few years, after a change of officers in the Patent Office, the death of witnesses, and the dispersion of documents, be set up anew and a reversal of the first decision obtained, without an appeal and without any knowledge of the previous investigations on the subject. New light breaking in upon the patentee as the progress of improvement goes on, and as other inventors enter the field, and his monopoly becomes less and less necessary to the public, might easily generate in his mind a idea that his invention was really more broad and comprehensive than had been set forth in the specification of his patent. It is easy to see how such new light would naturally be reflected, in a re-issue of the patent, and how unjust it [414] might be to third parties who had kept pace with the march of improvement. Hence there is no safe or just rule but that which confines a re-issued patent to the same invention which was described or indicated in the original.

Since, therefore, any extension of the re-issued patent beyond the scope of the invention set forth and fairly indicated in the original specification, drawings and model, would be fatal to the patent itself, we think that the appellants ought to be satisfied with the course taken by the Circuit Judge in so construing the patent with reference to those original tests as to restrain and confine the intent and meaning of the claims within legitimate and admissible bounds. And so construed, there is no plausible pretense that the defendant is guilty of an infringement.

If the appellants insist on the broad construction of the claims in the new patent, they must take the risk of being met with previous achievements in the same line of improvement, which may very seriously endanger the validity of their patent. Several structures have been produced on the hearing antedating the invention of Swain, of which it will be very difficult to contend that they do not embrace the principal feature in Swain's wheel, sought to be appropriated by him.

If the evidence with regard to Stowe's wheels, constructed in 1837, 1841 and 1850, is to be relied on, it is not a sufficient answer to say that they were merely spout-wheels, and were never used under water as turbines. They are substantially the same wheel as Swain's, and whether used as turbines, or only under the operation of a spout, they anticipate his structure. The mere change of use by placing them in a different position with regard to the water is not patentable.

The Temple wheel, the Whitney wheel, and the Greenleaf wheel all conduct the water in the same lines that Swain's does from its entrance into the wheel to its final departure from it; and if, on an investigation of dates, we should find that either of these wheels antedated Swain's invention, we should probably be forced to the conclusion that they each contained the fundamental element of a simultaneous inward and [415] downward flow and discharge of water through the wheel, which the appellants claim as the principle of Swain's invention.

We do not deem it necessary to go into a more particular examination of the evidence at this time. We have examined it carefully, and have come to the conclusion that the view taken of the case by the Circuit Court was as favorable to the appellants as they could reasonably ask.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[415] WILLIAM B. DANIELS ET AL., *Plffs. in Err.*,

v.

EDWARD TEARNEY ET AL., Exrs. of COLIN C. PORTER, Deceased.

(See S. C., 12 Otto, 415-422.)

Jurisdiction over state judgments—persons in pari delicto—*insufficient defense—estoppel.*

1. This court has jurisdiction of a state judgment in a case where there was a right of exemption from liability, claimed under the Constitution of the United States, and the decision was against the right so claimed.

2. If parties are *in pari delicto*, the law will help neither, but leaves them as it finds them; but if two persons are *in delicto*, but one less so than the other, the former may in many cases maintain an action for his benefit against the latter.

3. Where a party has availed himself of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense.

4. When a bond is voluntarily entered into and the principal enjoys its benefits, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

[No. 97.]

Argued Dec. 2, 3, 1880. Decided Dec. 13, 1880.

IN ERROR to the Circuit Court of Jefferson County, State of West Virginia.

The case is fully stated by the court.

Mr. **Daniel B. Lucas,** for plaintiffs in error.

Mr. **Charles J. Faulkner,** for defendants in error.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error, brought to reverse a judgment of the Supreme Court of Appeals of the State of West Virginia.

The case, as disclosed in the record, may be sufficiently stated for the purposes of this opinion, as follows:

[416] On the 18th of April, 1861, a convention of the State of Virginia passed an Ordinance of Secession, and on the thirtieth of that month a law entitled "An Ordinance to Provide against the Sacrifice of Property and to Suspend Proceedings in Certain Cases." This Ordinance declared that thereafter no execution (except in favor of the Commonwealth and against nonresidents) should be issued, and that no sales should be made under the deeds of trust or decrees without the consent of the parties interested, until otherwise provided by law; and that where executions were in the hands of the officer, whether levied or not, if the debtors should offer bond and security for the payment of the debt, interest and costs, when the operation of the Ordinance should cease, the property should be restored and the bond should be returned, as in the case of a forthcoming bond, and should be a lien on the realty of the obligors. If the debtor offered no bond, his property was to be appraised by three freeholders, at its value on the 6th of November, 1860, and unless the property would sell for the amount of the valuation, it should be restored to the debtor without lien.

The declaration sets forth that the defendants, on the first day of June, 1861, made their joint and several bond, whereby they bound themselves to pay to the plaintiff the sum of $1,597.18 when thereunto requested; and that there was a condition affixed to the bond, which was, "That, whereas, on the 25th day of March, 1861, a writ of *fieri facias* was issued from the clerk's office in the name of Colin C. Porter against Benjamin F. Daniels, for $747.92, with interest from the 2d day of January, 1860, until paid, and $31.97 costs; if, therefore, the said B. F. Daniels should pay the debt, interest and costs, when the operation of the Ordinance before mentioned should cease, then the obligation to be void, otherwise to be in full force." It was averred that the operation of the Ordinance had long since ceased, and yet that the defendants, though often requested so to do, had not paid the said sums of money nor any part thereof, whereby an action had accrued, etc.

Among other pleas, the defendants filed one *in hæc verba:*

"For further plea to this action, the defendants say, that the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by William B. Daniels and D. M. Daniels, as his securities, in pursuance of the requirements and conditions of a statute passed in violation of the Constitution of the United States, heretofore, to wit: on the 30th of April, 1861, by the convention of the State of Virginia, and that said statute was subsidiary to and in aid of and in furtherance of the objects and policy of the Ordinance of Secession passed theretofore by said convention, to wit: on the —— day April, 1861, in violation of the Constitution of the United States. [417]

"And the defendants say, that they rely on the fact that said Statute and Ordinance were in violation of and repugnant to the Constitution of the United States for their defense and plea in this case; and that they are unconstitutional the defendants are ready to verify."

The plaintiff demurred. The court sustained the demurrer, and the defendants excepted. The parties thereupon waived a jury and submitted the case to the court, and a judgment was entered in favor of the plaintiff.

The defendants removed the case to the Supreme Court of Appeals for review. That court affirmed the judgment of the lower court and this writ of error was thereupon sued out.

The objection raised as to the jurisdiction of this court is untenable.

In *Ins. Co.* v. *Augusta*, 93 U. S., 121 [XXIII., 825], we said: "Where a judgment or decree is brought to this court by a writ of error to a state court for review, the case to warrant the exercise of jurisdiction on our part, must come within one of three categories:

"1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain.

2. Or there must have been drawn in question a statute of, or authority exercised under, a State, upon the ground of repugnance to the Constitution, or a law or treaty, of the United States; and the decision must have been in favor of the validity of the State law or authority in question.

3. Or a right must have been claimed under the Constitution, or a treaty, or law of, or by virtue of a commission held or authority exercised under, the United States; and the decision must have been against the right so claimed. R. S., [418]

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132, sec. 709; *Sevier* v. *Haskell*, 14 Wall., 15 [81 U. S., XX., 827]; *Weston* v. *Charleston*, 2 Pet., 449; *McGuire* v. *Com.*, 3 Wall., 385 [70 U. S., XVIII., 165]."

The plea is neither full nor technical, but it does aver the invalidity of the statute under which the bond was taken, because it was in violation of the Constitution of the United States, and was passed "in aid and furtherance of the objects and policy of the Ordinance of Secession," and that the defendants "rely on the fact that said Statute and Ordinance were in violation of, and repugnant to, the Constitution of the United States, for their defense and plea in this case." This implies clearly that the defendants claimed, in addition to what was averred, that the bond was void in every aspect, and that they had a right, by reason of the premises, to exemption from liability under it. What is thus averred in a pleading is as effectual as if it were expressed. *Haight* v. *Holley*, 3 Wend., 258.

It thus appears that there was drawn in question the authority of the sheriff, exercised under a law of the state, in taking the bond, and that the decision was in favor of the validity of that authority; and that there was also a right of exemption from liability, claimed under the Constitution of the United States, and that the decision was against the right so claimed. These claims give us jurisdiction. Whether they are well founded remains to be considered. Jurisdiction is only "the right to hear and determine." The result of its exercise is the judgment of the court.

That the Ordinance of Secession was void, is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms and the repeated adjudications of this court. *Texas* v. *White*, 7 Wall., 700 [74 U. S., XIX., 227]; *Hickman* v. *Jones*, 9 Wall., 197 [76 U. S., XIX., 551]; *Dewing* v. *Perdicaries*, 96 U. S., 193 [XXIV., 654]. It was supplemented and complemented by the statute authorizing the bond to be taken. The latter was one of a series of Acts passed by the secession convention, all looking to the conflict of arms which was foreseen to be approaching. They were intended to prepare the State for the struggle, and were means [419] to that end. The saving in the statute as to executions in favor of the Commonwealth and against non-residents was characteristic. It obviously contemplated the confiscation of the property of the latter as a war measure. We cannot doubt that the Statute was invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. The provision that no executions should issue, and that no sales should be made under decrees or deeds of trust without the consent of the parties interested, "until otherwise provided by law," was clearly in conflict with the contract clause of the national Constitution. *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Hayward*, 2 How., 608; *Edwards* v. *Kearzey*, 96 U. S., 595 [XXIV., 793].

The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them. *Brown* v. *Piper*, 91 U. S., 37 [XXIII., 200].

We have already pointed out the infirmities of the statute. One of them is expressly embodied in the bond. The condition is that the obligors shall pay when the statute, under which it was taken, *ceases*. That is, that payment was to be made at the time of its cessation, and not before. In the meantime, the statute was to operate as a stay-law, and the condition of the bond was framed accordingly. This, as we have shown, was directly repugnant to the constitutional provision which forbids the impairment of contracts by state laws. The bond, as a statutory instrument, cannot have more validity than the statute which prescribed it as the means of giving effect to the statute in the way it was intended to operate. To hold the bond valid as a statutory bond, and the statute void, would be an inversion of reason. Viewed in this light, it is void, for exactly the same reasons that the statute is void. They rest on the same basis, and must stand or fall together. The creditor was not to be consulted. His assent was not required. So far as he was concerned the sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent were alike immaterial. He was powerless in any event to control the result.

The cases are numerous in which it has been held that where a bond contains conditions, [420] some of which are legal and some illegal, and they are severable and separable, the former may be enforced and the latter disregarded. *U. S.* v. *Hodson*, 10 Wall., 395 [77 U. S., XIX., 937]. But this bond does not belong to that class. The condition is a unit and indivisible. There are no separate elements into which it can be resolved. It must be considered as an entirety, and can be viewed in no other light. As a statutory bond, therefore, the instrument is clearly void. Whether it is void also as a voluntary bond is a point upon which the opinions of all the members of the court are not entirely in accord. We pass from the subject without further remark, because, irrespective of that question, there is a view decisive of the case, in regard to which we are unanimous and our minds are free from doubt.

Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed.

A corporation is liable for negligent and malicious torts, including libel, assault and battery, malicious prosecution, and false imprisonment. In such cases the plea of *ultra vires* is unavailing. The corporation is estopped from setting up such a defense. *Bk.* v. *Graham*, 100 U. S., 699 [XXV., 750].

The same result is produced in like manner in many instances where a corporation having enjoyed the fruits of a contract fairly made, denies, when called to account, the existence of the corporate power to make it. *R. Co.* v. *McCarthy*, 96 U. S., 258 [XXIV., 693].

The principle of estoppel thus applied, has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a

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conservator, and without it society could not well go on.

If parties are *in pari delicto*, the law will help [421] neither, but leaves them as it finds them. But if two persons are in *delicto*, but one less so than the other, the former may, in many cases, maintain an action for his benefit against the latter. *White* v. *Bk.*, 22 Pick., 181.

It is not necessary here to consider the extent and limitations of the rule. They are fully examined in the authority referred to. In the case in hand, the obligee must be deemed wholly innocent, because the contrary is not alleged and it does not appear. *Quod non apparet, non est. De non apparentibus et non existentibus, eadem est ratio.* "If the contract be executed however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract, for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege." 1 Story, Contr., sec. 610; *Taylor* v. *Weld*, 5 Mass., 109.

It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. *Ferguson* v. *Landram*, 5 Bush, 230; see *Same* v. *Same*, 1 Bush, 548; *Vanhook* v. *Whitlock*, 26 Wend., 43; *Lee* v. *Tillotson*, 24 Wend., 337; *People* v. *Murray*, 5 Hill, 468; *Burlington* v. *Gilbert*, 31 Iowa, 356; *R. R. Co.* v. *Stewart*, 39 Iowa, 267.

In the case first cited, an injunction was applied for to prevent the collection of a tax authorized by an Act of the Legislature passed during the late civil war, to enable the people of a county to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked, "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration [422] and repudiate the statute?"

In *U. S.* v. *Hodson*, *supra*, this court said, "When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are *estopped* from availing themselves of such a defense."

Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice.

The judgment of the Circuit Court of Jefferson County, West Virginia, affirmed by the Supreme Court of Appeals of the State, is re-affirmed by this court

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—51 Wis., 660; 98 Ill., 429; 38 Am. Rep., 108; 39 Ohio St., 308; 48 ALL. Rep., 451.

WILLIAM B. DANIELS ET AL. *Plffs. in Er.*, [422]
v.
EDWARD TEARNEY ET AL. EXRS. of COLIN C. PORTER, Deceased.

(See S. C., 12 Otto, 422.)

The case of Daniels v. Tearney, *ante*, followed.

[No. 96.]

Argued Dec. 2, 3, 1880. Decided Dec. 13, 1880.

IN ERROR to the Circuit Court of Jefferson County, State of West Virginia.

The case is sufficiently stated by the court in No. 97 *ante*, 187, between the same parties.

Mr. **Daniel B. Lucas**, for plaintiffs in error.

Mr. **Charles J. Faulkner**, for defendants in error.

Mr. Justice **Swayne** delivered the opinion of the court:

There are no material points of difference between this case and case No. 97 [*ante*, 187] between the same parties, just decided. Our opinion in the former decides the latter.

The judgment of the Circuit Court of Jefferson County is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS L. McELRATH, *Appt.*, [426]
v.
UNITED STATES.

(See S. C., 12 Otto, 426-441.)

President's power to dismiss army or navy officer—discharge of officer—end of rebellion—Act in regard to Court of Claims—settlement, effect of.

*1. By the law in force on 20th June, 1866, the President had the power to summarily dismiss from the army or navy, any officer for any cause which, in his judgment, either rendered him unsuitable for, or whose dismission would promote the public service.

2. On the 20th June, 1866, the President nominated to the Senate Lieut. H. to be a first lieutenant in the Marine Corps, *vice* Lieut. McE. The Senate confirmed the nomination, and Lieut. H. was commissioned July 13, 1866. By the laws then in force, such appointment followed by a commission, operated to discharge Lieut. McE. from the service as effectually as if he had been dismissed by direct order of the President, under the authority conferred by the 17th section of the Act of July 17, 1862, 12 Stat. at L., 599.

3. The Act of July 13, 1866, 14 Stat. at L., 92, was not in effective operation, and did not control the President in the matter of dismissing officers of the army and navy, until on and after August 20, 1866, on which day, in the sense of the law, the rebellion against the national authority was closed, and peace inaugurated.

4. The provision in the Court of Claims Act of March 3, 1863, authorizing that court, without the intervention of a jury, to hear and determine claims against the Government, and also any set-off, counter claim, claim for damages or other demand asserted by the Government against the claimant, does not violate the Seventh Amendment of the National Constitution.

5. A claimant received from the Government the

*Head notes by *Mr. Justice* HARLAN.

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amount ascertained by the proper accounting officers to be due him, protesting at the time that he was entitled to a larger sum, and announcing his purpose not to be bound by such settlement of his accounts. He then sued the Government for the additional amount claimed by him. *Held*, that the Government was entitled to go behind the settlement of its accounting officers, and reclaim any sum which had been improperly allowed the claimant in such settlement.

[No. 87.]

Argued Nov. 30, 1880. Decided Dec. 13, 1880.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Mr. **Frank W. Hackett**, for appellant.

Messrs. **Chas. Devens**, *Atty-Gen.*, and *John S. Blair*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 5th of June, 1866, the appellant who was claimant below, transmitted to the Secretary of the Navy his resignation as a first lieutenant in the Marine Corps. By an official communication from the Navy Department, dated June 19, 1866, and signed by Mr. Welles, as Secretary of the Navy, he was notified that the [427] *department* declined to accept his resignation, the Secretary adding: "As you deserted from The Monongahela on the eve of her sailing for the West Indies, you are hereby dismissed from the service from this date." On the 27th of June, 1866, the President nominated to the Senate, Second Lieutenant Geo. B. Haycock of the Marine Corps, to be a first lieutenant in that corps, from June 20, 1866, "*vice* Thomas L. McElrath, *dismissed*." To that nomination the Senate gave its advice and consent; and Haycock was accordingly commissioned, July 13, 1866, to be first lieutenant, on the active list, from June 20, 1866. Thus matters stood for more than six years, and until May 14, 1873, when McElrath made a formal application to the department for the revocation and annulment of the order of dismissal of June 19, 1866, submitting therewith evidence tending to show that he was not a deserter, as charged in the order of that date. Pending that application, on the 10th of July, 1873, he tendered his resignation as a first lieutenant in the Marine Corps. On the same day, Mr. Robeson, then Secretary of the Navy, notified him in writing, that "the order of June 19, 1866, dismissing you (him) from the service, is hereby revoked, having been issued under a mistake of facts." The Secretary added: "You are thus restored to the position which you held at the date of that order. The resignation which you now tender is accepted, to take effect this day."

On the 8th of January, 1874, the claimant was further notified, in writing, by the Secretary of the Navy, as follows: "Your dismissal from the Marine Corps, as a first lieutenant, dated 19th of June, 1866, is revoked, and your resignation as a first lieutenant in that corps, tendered in your letter of the 10th of July, 1873, is accepted from that date."

Why this second notification is given is not explained, and, in the view which the court takes of the case, it is not material to inquire.

In January, 1874, the claimant made application to the Fourth Auditor of the Treasury for the settlement of his account as first lieutenant in the Marine Corps. That officer, upon examination and settlement of such account, certified to the Second Comptroller that the sum due claimant was $6,106.53, which was the amount of the *half-pay* and allowances of a first lieu- [428] tenant of marines from June 21, 1866, to July 10, 1873, inclusive. The Second Comptroller, having examined the Auditor's settlement, certified its correctness to the Secretary of the Navy, who issued his requisition, properly countersigned, to the Secretary of the Treasury, requesting a warrant in behalf of the claimant for the amount so ascertained. A warrant was accordingly issued, and the foregoing sum was paid to the claimant, who, at the time he received it, declared his belief that he was entitled to full pay and allowances for the period in question; that he accepted the amount paid him under protest, and would not hold himself in any manner concluded as to the balance claimed to be due.

All of the foregoing facts, and the further fact that the number of first lieutenants in the Marine Corps, from June 5, 1866, to July 10, 1873, was thirty, were known to the Fourth Auditor, the Comptroller and the Secretary of the Navy when they respectively acted upon the claimant's account.

It also appears that, from June 19, 1866, to June 10, 1873, he was engaged in business in New York, earning $30 per week. In other words, he earned in private business, when not performing service in the navy, during the above period, more than $10,000.

The present action is by McElrath to recover from the United States the balance, nearly $7,000, alleged to be due him on account of pay and allowances as a first lieutenant in the Marine Corps of the United States. The Government, denying its indebtedness to claimant in any sum whatever, asserted a counter-claim for the sum of $6,106.53, which amount it contends, was paid to McElrath by the accounting officers of the Treasury Department without warrant of law. A judgment was rendered in behalf of the United States for the sum last named, and from that judgment the present appeal is prosecuted.

The first and second assignments of error proceed upon the ground that, notwithstanding the order of dismissal of June 19th, 1866, and the [436] subsequent appointment, by and with the advice and consent of the Senate, of Haycock as a first lieutenant in the Marine Corps, *vice* McElrath, the latter was never legally dismissed from the service, but was, in law, a first lieutenant in that corps during the whole period from June 20, 1866, to July 10, 1873 and as such entitled to full pay and allowances.

In discussing the questions of law involved in this position, counsel for claimant starts with these propositions: that the order of dismissal issued from the Navy Department, under the official signature of Secretary Welles, was without authority of law; that the President alone, at that time, was invested with power to summarily dismiss from the service a commissioned officer of the Marine Corps; and, since the order in question simply purported to be the act of the Secretary of the Navy, and did not purport to be the act of the President, nor to have been issued in pursuance of any previous direction, by him given, that the presumption cannot be indulged, that the dismissal of Lieutenant McElrath was by order of the President.

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These propositions open up a very broad field of inquiry as to what exceptions there are to the general rule that the direction of the President is to be presumed in all instructions and orders issuing from the proper department concerning executive business, notwithstanding they may contain no express statement of any direction from him as to the matters to which such instructions or orders refer. There are, undoubtedly, official acts which the Constitution and laws require to be performed by the President personally, and the performance of which may not be delegated to heads of departments, nor to other officers in the executive branch of the Government. It is equally true that, as to the vast multiplicity of matters involved in the administration of the executive business of the Government, it is physically impossible for the President to give them his personal supervision. Of necessity he must, as to such matters, discharge his duty through the instrumentality, or by the agency, of others. Whether a particular act belongs to one or the other of these classes, may sometimes be very difficult to determine, and we shall not attempt now to lay down any general rule upon the subject. Nor shall we extend this opinion by any consideration of the question whether the particular order, signed by Secretary Welles, should not be presumed to [437] have been issued by direction of the President. The determination of that question is not essential to the disposition of this case, since, if that order should, for the reasons urged by the claimant's counsel, be deemed a nullity, the nomination and confirmation, subsequently, of Lieut. Haycock, followed by his commission, as a first lieutenant in the Marine Corps in place of Lieut. McElrath, as certainly operated, under the law as it then was, to remove the latter from the service, as if he had been dismissed by direct order of the President under his own signature. This, because, as is conceded, the President, at the time he asked the advice and consent of the Senate to the nomination of Lieut. Haycock in place of Lieut. McElrath, had the power to dismiss the latter, summarily, from the service. That power, if not possessed in time of war by the President, in virtue of his constitutional relations to the army and navy, and as to that question we express no opinion, was given by an Act of Congress approved July 17, 1862. The 17th section of that statute declared "That the President of the United States be and hereby is authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, in the United States, any officer, for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote the public service." 12 Stat. at L., 596. The message of the President informing the Senate of the dismissal of Lieut. McElrath, and the consent of the Senate to the nomination of Lieut. Haycock, in his stead, followed by a commission, in due form, clearly invested the latter with the office which McElrath had held, and gave him from that time the exclusive right to the pay and allowances attached to that position.

But we are here met with the suggestion that a vacancy did not exist, and Lieut. Haycock's right to the office did not attach until he received his commission on the 13th day of July, 1866, on which day, and from the first moment of that day—as is claimed upon the authority of *Lapeyre* v. *U. S.*, 17 Wall., 191 [84 U. S., XXI., 606], and *U. S.* v. *Norton*, 97 U. S., 164 [XXIV., 907]—it was the law that "No officer of the military or naval service shall, in time of [438] peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." Act of July 13, 1866, 14 Stat. at L., 92. To this suggestion one obvious answer is, that the Act of July 13, 1866, was not, on that day, in effective operation. That Act manifestly controls the President, in the matter of dismissing officers from the military and naval service, only in *time of peace*. Its purpose was, upon the declaration of peace, to suspend the broad power given him during the recent rebellion, when prompt, vigorous action was often demanded, to dismiss any officer from the service whenever, in his judgment, the public service would thereby be promoted. But when, in the sense of the law, was the rebellion suppressed and peace inaugurated? Not until the 20th day of August, 1866, on which day the President announced, by Proclamation, that the insurrection against the national authority was at an end, and that "peace, order, tranquillity, and civil authority" then existed "in and throughout the whole of the United States of America!" 14 Stat. at L., 814, *U. S.* v. *Anderson*, 9 Wall., 71 [76 U. S., XIX., 619]; *The Protector*, 12 Wall., 702 [79 U. S., XX., 465]. The effect of that Proclamation, as fixing the time when the rebellion closed, was distinctly recognized by Congress in the Act of March 2d, 1867, 14 Stat. at L., 422, which declared that the previous Act of June 20, 1864, 13 Stat. at L., 144, increasing the pay of soldiers in the army, should be continued in full force and effect for three years "After the close of the rebellion, as announced by the President of the United States, by Proclamation, bearing date August 20th, 1866." 14 Stat. at L., 814. Since peace, in the sense of the law, could not exist while rebellion against the national government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority, as announced by the President and recognized by Congress, must be accepted as the beginning of the "time of peace," during which the President was deprived of the power of summarily dismissing officers from the military and naval service.

It results, that neither when Lieut. Haycock was nominated to and confirmed by the Senate, nor when commissioned in place of Lieut. McElrath, was the sentence of a court-martial, or any commutation thereof, required as a condition [439] precedent to the exercise by the President of the power of dismissal, or to the appointment by him of an officer in the service, by and with the advice and consent of the Senate.

It, also, necessarily follows, from what has been said, that the orders which issued from the Navy Department under the signature of Secretary Robeson, in 1873 and 1874, even if issued by direction of the President, were inoperative for the purpose of re-instating Lieut. McElrath in his position as a first lieutenant in the Marine Corps. The position to which it was attempted to restore him had, as we have seen, been previously filled by constitutional appoint-

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ment, and by the laws *then* in force, the incumbent could neither be displaced, nor dismissed, except "upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." The attempted restoration was ineffectual for the additional and equally conclusive reason, that the complement of first lieutenants in the Marine Corps was, at that time, full. The order assuming to restore Lieut. McElrath was, of course, for the reasons already given, equally inoperative to entitle him to pay and allowances for any portion of the period covered by the account settled by the officers of the Treasury. The requisition upon the Secretary of the Treasury, by the Secretary of the Navy, was, consequently, without warrant of law. During the period for which Lieut. McElrath was allowed half-pay, he was not an officer in the service, and the allowance to him of pay, after the appointment of his successor, was illegal.

We come now to inquire whether the Court of Claims erred in awarding judgment against the appellant for the amount paid to him out of the Treasury of the United States upon the foregoing settlement of his accounts.

Upon this branch of the case, counsel for the claimant contends that so much of the Act of March 3, 1863, 12 Stat. at L., 765, as invests the Court of Claims with power to render judgment in favor of the United States against a claim- [440] ant, is in violation of the Seventh Amendment of the National Constitution, which provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

That section, referring to the trial of causes in which the Government may plead against the claimant any set-off, counter-claim, claim for damages, or other demand, provides that the court shall hear and determine such claim and demand both for and against the Government and claimant; and if, upon the whole case, the court finds that the claimant is indebted to the government, it "shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law." There is nothing in these provisions which violates either the letter or spirit of the Seventh Amendment. Suits against the Government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any set-off, or counter-claim which the Government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the Act in question, informs the claimant that if he avails himself of the privilege of suing the Government in the special court organized for that purpose, he may be met with a set-off, counter claim, or other demand of the Government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the Government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject.

The remaining objection against the judgment in behalf of the Government upon its counter claim deserves notice at our hands. It is, in substance, this: that the Secretary of the Navy, the second comptroller, and the fourth auditor, having examined the claim of Lieutenant McElrath, and, with full knowledge of all the facts, having decided that he was legally entitled to half-pay and allowances for the period in question, the amount paid him cannot be reclaimed because of the subsequent discovery that, in [441] point of law, appellant was not an officer in the Marine Corps during the period for which he was allowed such half-pay. This view is controverted by the Attorney-General, who contends that the right of the Government to reclaim money paid out of the Treasury under a mere mistake of law, is not subject to the same limitations which, under like circumstances, would be applied between individuals. The Attorney-General goes even further, and insists that whether the mistake be one of fact or of law, or of both, the Government may always recover from third persons money improperly paid out of the public Treasury by its accounting officers, not in pursuance of previous judicial determination. Whether the one or the other of these views, in the broad terms in which they are announced, is correct, we will not now inquire. For if the general rule applicable in such cases would preclude the Government from reclaiming money that had been paid under a mistake of law simply, that rule is inapplicable under the circumstances disclosed in the present case.

Had the claimant rested upon the settlement of his account by the proper officers of the Government, his right to invoke the general rule, to which we have referred, would have been entitled to more consideration than it can now receive. Upon receiving the amount awarded to him by the representatives of the Government, he distinctly announced his purpose not to abide by their settlement of his accounts; but, in disregard thereof, to demand an additional sum upon the basis of full pay and allowances from June 20, 1866, to July 10, 1873.

This suit itself invites the court to go behind that settlement, to re-examine all the questions arising out of the claim of appellant for full pay and allowances, and to correct the error which he insists was committed to his prejudice by the accounting officers of the Government. The Government, declining to plead the settlement of 1874 in bar of the suit, meets the claimant upon his own chosen ground, and insisting that its officers, misapprehending the law, paid to him out of the Treasury money to which he was not legally entitled, asks, as we think it may rightfully do, judgment for the amount thus improperly paid to claimant.

For the reasons we have given, the judgment must be affirmed, and

It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 125.

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JOSEPH SWIFT ET AL., *Appts.*,

v.

42] JANET SMITH, Admrx. of DAVID SMITH, Deceased.

(See S. C. 12 Otto, 442-451.)

Purchaser of negotiable paper—fraud of trustee—right of redemption from sale.

1. One who purchases mercantile paper before due, from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it; he can lose his right only by actual notice or bad faith.

2. Where a trust-deed is executed to secure a note, the trustee cannot fraudulently release the deed of trust, without payment of the note, to one who has actual or constructive notice that the note was not paid.

3. The statutory right of redemption, after a judicial sale under a decree of foreclosure of a mortgage or deed of trust, is a rule of property in Illinois, and it must be accorded in the Federal Courts, equally as in those of the State.

[No. 91.]

Argued Dec. 1, 2, 1880. Decided Dec. 13, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. **W. C. Goudy** & *Orrin Skinner*, for appellants.

I. The court found to be due to complainant, $34,658, while the correct amount was $34,103.73, being $554.27 too much.

II. A strict foreclosure was decreed, and a deed ordered to the purchaser with an order for possession and perpetual injunction, instead of a certificate of purchase, and a period of redemption for fifteen months.

Brine v. *Ins. Co.*, 96 U. S., 627 (XXIV., 858).

III. No lien was created by the deed of trust purporting to be made Oct. 1, 1868, by the supposed George N. Williams to Obadiah Jackson, because Williams was a fictitious person, or an *alias* of Jackson, and that being so, the pretended deed was void, as no man can convey to himself.

3 Washb. Real Prop., 567; *Miller* v. *Chittenden*, 2 Iowa, 368; *Hulick* v. *Scovil*, 4 Gilm. (Ill.), 191.

IV. The note for $30,000, purporting to be executed by Williams, did not belong to the complainant, but to Silas M. Waite, and therefore, the complainant was not entitled to a lien.

Broom, Leg. Max., 689; *Smith* v. *Ayer*, 101 U. S., 320 (XXV., 955).

V. The complainant did not have a lien, if any, prior to the Swifts or the Carrolls.

The act of Jackson, the trustee, in making the release, and causing it to be recorded, protects the appellants from the Williams deed of trust.

R. R. Co. v. *Kennedy*, 70 Ill., 360; *Miller* v. *R. R. Co.*, 36 Vt., 452; *Munn* v. *Burges*, 70 Ill., 604; *Robbins* v. *Kinzie*, 45 Ill., 356.

VI. The complainant is not entitled to relief, because of laches.

Story, Eq., sec. 64 *a*, 1520; *Munn* v. *Burges* (*supra*); *Harwood* v. *R. R. Co.*, 17 Wall., 78 (84 U. S., XXI., 558); *Oil Co.* v. *Marbury*, 91 U. S., 587 (XXIII., 328); *Cox* v. *Montgomery*, 36 Ill., 396; *Hamilton* v. *Lubukes*, 51 Ill., 416; *Winchell* v. *Edwards*, 57 Ill., 41; *Dempster* v. *West*, 69 Ill., 614; *Kenyon* v. *Shreck*, 52 Ill., 384; *Robbins* v. *Bates*, 4 Cush., 104.

Messrs. **Van H. Higgins**, and **W. T. Burgess**, for appellee:

The first rule of law, that appellee asks to have applied to the facts in this case, is: that, wherever there is a trust and notice of that trust appears by record, any party dealing in relation to the trust fund, takes it burdened with the trust and charge imposed upon the property; or, to state it in the language of the books, the purchaser of the property is bound to see to the application of the purchase money.

Story, Eq. Jur., secs. 1127, 1131 *a*; *Duffy* v. *Calvert*, 6 Gill., 487; *Downman* v. *Rust*, 6 Rand., 587; *Bugbee* v. *Sargent*, 23 Me., 269; *Leavitt* v. *Wooster*, 14 N. H., 550; *St. Mary's Church* v. *Stockton*, 4 Halst. (Ch.), 520; *Cadbury* v. *Duval*, 10 Pa., 265; *Gardner* v. *Gardner*, 3 Mas., 178; *Wormley* v. *Wormley*, 8 Wheat., 422; *Dalzell* v. *Crawford*, 1 Pars. Eq., 57; Hill, Trust., 342, 363; Adams, Eq., 156 (top), 330.

The defendants had notice of the trust, by the record of the original trust-deed. They were bound to see to it that the trustee did not violate his duty, but applied the money in discharge of the trust. The trustee had no right to release the trust-deed, except upon payment of the debt; and even upon payment, the purchaser was bound to see that the money was applied in liquidation of the debt.

The second principle in this case, and upon which complainant insists that she is entitled to a decree, is: that a party claiming title to land is bound by all recitals and agreements contained in the chain of title under which he claims.

The defendants in this case claim under Jackson; and in the deed to Jackson, dated June 1, 1872, it is recited that it is subject to the trust-deed of complainant for $30,000, and that Jackson expressly assumes the payment of it.

Mrs. Moody took the land clothed with the trust of paying that incumbrance, and is estopped from asserting its validity or non-existence, and so are all persons claiming under her.

Powell v. *Smith*, 30 Mich., 451.

The doctrine that recitals in a deed duly recorded bind grantees and all claiming under them, is elementary and universal.

3 Washb. Real Prop., 100; *Croskey* v. *Chapman*, 26 Ind., 333; *Carver* v. *Jackson*, 4 Pet., 85; *Wiseman* v. *Hutchinson*, 20 Ind., 40; *Stow* v. *Wyse*, 7 Conn., 214; *White* v. *Kibby*, 42 Ill., 510; *Armentrout* v. *Gibbons*, 30 Gratt. (Va.), 632.

But the Swifts had no right to rely upon the statement of Jackson, especially when such statements were in his own interest.

Le Neve v. *Le Neve*, Amb. 436, 2 Lead Cas. in Eq., 159; *Russell* v. *Petree*, 10 B. Mon., 186; *Bunting* v. *Ricks*, 2 Dev. & Bat. (Ch.), 130; *Price* v. *McDonald*, 1 Md., 403; *Hudson* v. *Warner*, 2 Harr. & G., 415.

A release, then, by Jackson to Dr. Dyer, was a release of debt assumed by Jackson, and was a release of Jackson's own property from the lien of a mortgage, which he admitted was a valid lien, and which he had agreed to pay.

Swarthout v. *Curtis*, 5 N. Y., 301; *Harrison* v.

NOTE.—*Who is entitled to redeem from the lien of a mortgage.* See *note* to Noyes v. Hall, 97 U. S., XXIV., 999.

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R.R. & T. Co., 19 N.J. Eq., 489; *Hawkins* v. *Taylor*, 61 Ga., 171, decided by the Supreme Court of Georgia, August Term, 1878, published in the Recorder, Vol. 7, p. 105.

The third principle is: that defendants, Swift had actual notice of the release being executed by Jackson as trustee, at the very time when Jackson was conveying the property in his own right. Jackson could not be owner and trustee; and parties dealing with him as owner had no right to accept of a release made by him as trustee.

The Swifts had no right to accept the statement of Jackson, that the note was paid.

Price v. *McDonald*, 1 Md., 408; *Russell* v. *Petree* (*supra*); *Bunting* v. *Ricks* (*supra*); *Le Neve* v. *Le Neve* (*supra*).

Mr. Justice **Strong** delivered the opinion of the court:

The appellants complain of the decree of the circuit court because it adjudged that the plaintiff, as administratrix of David Smith, deceased, had a lien on the lots described in the bill, by virtue of the deed of trust purporting to have been made by George N. Williams to Obadiah Jackson on the first day of October, 1868, and because it adjudged that lien to be prior to the lien in favor of Joseph Swift and Edwin Swift, and that in favor of Elizabeth Carroll and Ellen Carroll. There are other objections to the decree, but the two mentioned are the most important, for they strike at all the relief sought by the complainant's bill.

[443] Both the defendants below (now appellants) and the complainant claim under Charles C. Waite, who, it is agreed, was the owner of the lots on the 1st day of October, 1868. On that day Charles C. Waite made his deed of the lots to one George N. Williams, which was duly recorded on the 24th day of the same month. To secure the payment of part of the purchase money, Williams gave two promissory notes, both dated Oct. 1st, 1868, payable to the order of Charles C. Waite—one for six thousand dollars, payable in one year from its date, and the other for thirty thousand dollars, payable four years after its date, with interest at the rate of eight per cent, payable semi-annually. On the same day (Oct. 1) Williams made and delivered his deed of trust of the lots, sold to him by Charles C. Waite, to Obadiah Jackson, to secure payment according to the tenor of the promissory notes he had given. This deed was duly acknowledged and recorded concurrently with Waite's deed to him. In effecting the sale from Waite to Williams, and in taking the notes and security for the payment of the purchase money, Jackson was the attorney and agent for the vendor, and during some years thereafter the interest on the thirty thousand dollar note appears to have been paid through him. The six thousand dollar note was paid at its maturity. The other note came into the hands of Waite, the vendor, then living in New York, and he soon afterwards transferred and indorsed it to the order of his brother, Silas M. Waite, who subsequently, and before it fell due, indorsed it generally in blank to Obadiah Jackson. Thus Jackson became clothed with apparent ownership of the note, and with apparent power to transfer it by his indorsement.

On the 18th day of April, 1871, Jackson borrowed from David Smith, the complainant's intestate, the sum of thirty-one thousand five hundred dollars, giving his promissory note therefor, and to secure the payment of his note he indorsed and delivered to Smith the Williams note for thirty thousand dollars as a collateral. This was nearly a year and a half before its maturity. At the time when the note was thus indorsed to Smith there were entries upon its back of payments of interest upon it up to May 17, 1871. These entries purported to be acknowledgments of "S. M. Waite, by O. Jackson." There was also a regular chain of indorsements by Charles C. Waite, the payee, to Silas M. Waite or order; by Silas M. Waite to Obadiah Jackson or order, followed by an indorsement by Obadiah Jackson in blank. There was also [444] on the margin of the note the following: "This note secured by trust-deed of even date herewith, duly stamped."

Thus far the facts appear without any real controversy, and unless there is something in the case to qualify them, they unquestionably establish that on the 18th of April, 1871, Smith became the *bona fide* holder of the thirty thousand dollar note for value paid, and as such entitled to the benefit of the deed of trust given by Williams to Jackson to secure its payment. Though he took it only as a collateral security for a loan made to Jackson at the time, he was entitled to the protection of a purchaser for value, without notice of anything to impeach his right.

Conceding what appears to be more than probable: that Jackson was not, in fact, the owner of the note when he transferred it to Smith; that he simply held it as agent or attorney of S. M. Waite for collection, and that in transferring it to Smith he perpetrated a fraud upon the true owner, it is still certain that he was clothed by Waite with power to transfer the ownership as he did. Waite's indorsement of the note to him gave him that power and, though its exercise was a fraud, if Smith advanced his money in good faith, relying upon Jackson's apparent ownership, he was justified in so doing, and S. M. Waite, who enabled Jackson to negotiate the note, thereby lost his title. He was bound by Jackson's act.

There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the indorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those [445] facts. *Goodman* v. *Simonds*, 20 How., 343 [61 U. S., XV., 934]. He can lose his right only by actual notice or bad faith. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and his purchase will not be held to be *bona fide*. *Fowler* v. *Brantley*, 14 Pet., 318.

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Nothing of this kind existed in the present case. Everything upon the note tended to show that it belonged absolutely to Jackson when Smith bought it. And we fail to discover anything in the entries of interest payments, or in any other circumstances, that should have aroused even suspicion to the contrary.

We are unable, therefore, to comprehend how it can be maintained, as the appellants contend, that the note did not belong to the complainant, but belonged to Silas M. Waite. Whatever may have been the fact before its indorsement to David Smith, and even after its indorsement to Jackson, Waite was estopped against asserting any claim to it by its transfer to Smith. It is true Waite is not a party to this suit. The decree does not bind him. But there is enough without the decree to estop him. He was examined as a witness for the appellants on the 12th of May, 1877. Then, if not before, he was informed that the note had been transferred to Smith, and that Smith's administratrix was proceeding to collect it. Plainly, then, it became his duty to assert his claim to it, if any he then had. He could not innocently lie by without intervention or any action to vindicate his claim, while Mrs. Smith was proceeding to enforce the trust. His laches, if he had any right, was inexcusable. But he made no movement in this case and, so far as it appears, none elsewhere.

Without further remark upon this part of the case, we think we have said enough to warrant the conclusion at which we have arrived, that the complainant's intestate, on the 18th of April, 1871, became the owner of the note, and thereby entitled to the benefit of the trust declared in the trust-deed of Williams to Jackson.

The appellants, however, contend that no lien was created by the deed of trust of Williams to Jackson, because, as they assert, Williams was a fictitious person, or an *alias* of Jackson, and, therefore, that the pretended deed was void, since no man can convey to himself. This is a strange [446] position for the appellants to take. If there was no such person as Williams, then Waite's deed to Williams was a nullity, for there was no person to take and, as all the rights which the appellants assert come from Waite through Williams, as will appear hereafter, they have no interest in resisting the demand of the complainant, and are not entitled to be heard in the case. And so, as all the rights they assert are by virtue of a deed subsequently made by Williams, a deed hereafter to be noticed, it is not easy to see how they can have any standing; or, if Williams was but another name for Jackson, and Waite's deed was made to Jackson under the name of Williams, then the note, though signed by the name George N. Williams, was Jackson's note, and the trust-deed signed by the same name would be construed as a declaration of trust for the security of the note, equivalent to a covenant to stand seised to uses for the holder. But we are of opinion that Williams was not a myth. Beyond doubt Waite's deed was made to a person calling himself Williams, and made to the same person who signed the note and signed and acknowledged the deed of trust. Whether that was his real name or not is immaterial. He appeared before the notary and acknowledged the deed as his. He was not Jackson, it is clear. The evidence that the witnesses called in 1877 knew no such person as George N. Williams, in a city containing several hundred thousand inhabitants, is hardly worthy of respect as proof that no such person was in Chicago in 1868. The existence of the lien, or of the trust declared by the deed, is not to be disproved by such evidence.

Concluding, then, that David Smith, on the 18th of April, 1871, obtained a lien on the lots described in the bill by virtue of the deed of trust from Williams to Jackson, we come to consider the second leading objection urged against the decree of the Circuit Court. It is that the court erred in decreeing that lien to be prior to the liens in favor of the appellants Swift and Carroll.

To comprehend this assignment of error, it is necessary to observe the facts as they appear in the record.

On the 5th day of April, 1868, Williams, who had then become the purchaser of the lots, and who held them subject to his deed of trust to Jackson, sold and conveyed them by warranty deed to Mrs. Mary P. Moody for the consideration of $60,000, subject to the deed of [447] trust to secure the payment of the $30,000 note which the grantee agreed to assume and pay as part of the consideration of the purchase. This deed was recorded Oct. 24, 1868.

On the 17th of May, 1871, Mrs. Mary P. Moody, by warranty deed, recorded May 25, 1871, conveyed the lots, for the consideration of $45,000, to Charles V. Dyer, subject to the trust-deed aforesaid, describing it as given to secure the note for $30,000, which amount, with interest from date, the grantee covenanted to pay as part of the consideration.

Afterwards, on the first day of June, 1872, Charles V. Dyer and wife, by deed of that date with warranty, conveyed the lots to Obadiah Jackson aforesaid, expressly subject "to a trust-deed given by George N. Williams to Jackson, dated October 1, 1868, * * * to secure a certain note on which is due $30,000 and interest." This deed was filed of record June 18, 1872.

Subsequently, Jackson, with his wife, made a deed of trust of the same property to Norman Perkins to secure the payment of an indebtedness by two bonds, each for $25,000, given by Jackson, one to Joseph Swift and the other to Edwin Swift. This deed was dated June 1, 1872, acknowledged June 29, 1872, and filed for record August 3, 1872.

On the same day, August 3, 1872, there was filed for record an instrument purporting to be a release by Jackson, to Charles V. Dyer, for the consideration of one dollar, of the right, title, interest, claim and demand of him, the said Jackson, which he had acquired by virtue of the trust-deed given to him by Williams to secure payment of the $30,000 note. This release was dated Oct. 2, 1871. It was not acknowledged until Aug. 3, 1872, the day when the deed of trust to Perkins was filed for record, nor did it acknowledge the payment of the note.

On the 18th day of Nov., 1876, Jackson and wife made a second deed of trust, conveying the lots with other property to George Chandler to secure the payment of notes which he had given to Elizabeth Carroll and Ellen Carroll. This deed was filed for record on the next following day.

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This recital of the conveyances exhibits the fact that the lien of the trust-deed to Jackson, [448] given to secure the payment of the note for $30,000, was long prior in time to the liens of the Messrs. Swift, and Elizabeth and Ellen Carroll, and it was certainly in existence on the 18th of April, 1871, when that note was indorsed to Smith, the complainant's intestate.

But it is earnestly insisted by the appellants that the act of Jackson in making the release to Dyer protects them against the Williams deed of trust. That the release was a gross fraud upon the rights of Smith, the holder of the Williams note, is plain enough, and we think both the Swifts and the Carrolls had constructive, if not actual, notice that it was fraudulent. They were bound to know what was in the line of their title, that title being upon record. They are presumed to have known, and they are affected by the recitals in the deed under which they assert their rights. The trust-deed to Jackson informed them of the trust to protect the $30,000 note, and informed them that when the release was made and put upon record the note had not matured. The deeds to Mrs. Moody, to Dyer, and from Dyer to Jackson, all recited the continued existence of the debt, down to June, 1872, and each grantee, including Jackson, assumed its payment. The record assured them that Jackson was the owner of the lots when the release to Dyer was made, and that Dyer had no interest in the trust deed to be released. They, therefore, were informed that the release was substantially a release by Jackson to himself, of a debt which he had assumed to pay. Even if his power to execute the trust confided in him by the trust-deed was not extinguished by his acquisition of the property, it was evident that he could not release the lien, while he remained the owner of the lots, without a gross abuse of his trust. In regard to Mr. Perkins, who was the trustee in Jackson's deed to secure the Swifts' loans, and who was their attorney to examine the title before the loans were made and the trust-deed was executed, it appears that he knew there was no release of the trust for the protection of the Williams note, and required one to be filed. The release was brought to him by Jackson, unacknowledged. It was, therefore, in Jackson's possession, and, in fact, Dyer had never seen it. It was dated in 1871, Oct. 2, and Perkins was informed [449] that was not the date when the instrument was made. Jackson told him, indeed, it was the date when the debt was paid, but he was not authorized to rely upon Jackson's assertion, more especially when he had before him, in Dyer's deed of the lots to Jackson, the acknowledgment that the note was unpaid on the first day of June, 1872, nine months after the time when Jackson affirmed it had been paid, and had in view also Jackson's assumption, at that time, to pay it. The evidence leaves no doubt that the release was not made until August, 1872, when it was put upon record. Then Jackson, being the owner of the lots subject to the operation of the Williams deed of trust, was in such a situation that he could not, without an abuse of his trust, destroy the rights of the holder of the note. It is impossible, therefore, to maintain that there was not enough on the face of the recorded title under which the Swifts' claim, and in the facts attending the execution of the release, to make it their duty to inquire whether the Williams note had been in fact paid; enough to apprise them that the holder of that note could not be postponed or injured by the fraudulent release.

The other appellants are in no better condition. When the deed of trust was made to Chandler to secure the debt due to the Carrolls, the prior trust protecting the Williams note was on the record in the line of their title. They were affected by notice of it. And though the subsequent release to Dyer also appeared upon the record, the fact that Dyer had no interest in the property when the release was acknowledged and recorded; that Jackson was then the owner; that he then held the lots under a deed from Dyer, declaring the property to be subject to the payment of the thirty thousand dollar note, which he assumed to pay; that the note was not then mature and that, therefore, the release was practically a release by Jackson to himself—these facts were all before them when they took their lien, that is, the trust-deed to Chandler. The Carrolls were dealing with one who they knew had been a trustee for the holder of the Williams note, and who was still such trustee, unless the trust had been extinguished, or had been transferred. The facts by which they were confronted were more than enough to put them upon inquiry whether the Williams note had been in fact paid. They revealed a plain abuse of his trust by Jackson, from which, with the knowledge of it that [450] they must be presumed to have had, they could derive no advantage. In the face of it, they could not obtain a priority over the earlier equity held by Smith.

We conclude, therefore, that the circuit court correctly decided that the complainant has a lien on the lots described in the bill, by virtue of the deed of trust purporting to have been made by George N. Williams to Obadiah Jackson, and that the lien is prior to the liens held by the Messrs. Swift and by the Carrolls.

We may add that there is no evidence of such laches as should postpone the complainant's lien to those of the appellants, or either of them.

It is agreed, however, that in the decree in the circuit court there was an error in calculating the amount due to the complainant. The amount is too large by $554.27. The sum decreed to the complainant should have been $34,101.73, thirty-four thousand one hundred and one dollars and seventy-three cents.

We think, also, the court erred in not according to the defendants the right of redemption after the sale ordered by the master, according to the provisions of the statute of the State. In *Brine* v. *Ins. Co.*, 96 U.S., 627 [XXIV., 858], we held that the statutory right of redemption after a judicial sale, under a decree of foreclosure of a mortgage or deed of trust, is a rule of property in Illinois, and that it must be accorded in the Federal Courts equally as in those of the State. It may be admitted that if the sale ordered in this case had been made by the trustee named in the deed of trust, or by a substitute under the power which the deed gave him, and made in accordance with its directions, no right of redemption would exist. But such was not the sale directed. A strict foreclosure was not decreed. The bill prayed for nothing of the kind. It prayed for a sale, in default of payment,

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under the order and decree of the court, and the court decreed that its master should make the sale, after giving notice of the time and place thereof, according to the course of practice of the court, not according to the provision of the trust-deed. Henry W. Bishop, it is true, was substituted as trustee in place of Jackson, but he was one of the masters of the court, and he [451] was ordered to sell as *master*. He was required to make a report to the court, to pay into court any surplus arising from the sale, there to abide the court's order. The decree also contemplated a report of the sale by the master, and a confirmation of it by the court. The sale, therefore, as ordered, was in all respects a judicial sale, instead of a sale by the trustee under the power conferred by the deed. Hence it comes within the rule declared in *Brine* v. *Ins. Co.*, and the right to redeem should have been preserved in the decree.

For this error, as well as for the mistake in the amount adjudged to be due the complainant, the decree must be reversed. In all other particulars the decree was correct.

Decree reversed, and the record remitted to the circuit court, with instructions to enter a decree in accordance with this opinion.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 158; 111 U. S., 227; 10 Biss., 248.

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[472] MINOR MERIWETHER, Receiver, etc., of CITY OF MEMPHIS, ET AL., Comprising the General Council of Memphis, *Appts.*,

v.

ROBERT GARRETT AND SONS, ET AL.

(See S. C., 12 Otto, 472–583.)

Public property cannot be sold for debt—taxation—authority of Legislature—collection of taxes.

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose carriages, engine-houses and engineering instruments, cannot be subjected to the payment of the debts of a city. Upon the repeal of the charter of the city, such property passes under the immediate control of the State.

2. The private property of individuals within the limits of the territory of a city cannot be subjected to the payment of the debts of the city, except through taxation.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.

4. Taxes can only be collected under authority from the Legislature.

5. The receiver and collector can be compelled, by appropriate and judicial orders, to proceed with the collection of taxes, by sale of property or by suit or in other way authorized by law, and to apply the proceeds upon judgments.

[No. 575.]

Argued Dec. 12, 15, 1879. Decided Dec. 13, 1880.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The case is fully stated in the concurring opinion delivered by *Mr. Justice* **Field**, *post*, 201. See, also, the dissenting opinion of *Mr. Justice* **Strong**, *post*, 207.

The Judges, sitting, certified a division of opinion on the questions raised by the record; which are as follows:

1. Whether, inasmuch as the first of the original bills filed in these consolidated causes, was filed in this court prior to Jan. 29, 1879, the date of the Act of the General Assembly of the State of Tennessee, repealing the charter of the City of Memphis, this court had or has any jurisdiction to seize and impound the assets, revenues and properties of the Corporation in being, described in complainants' bill, and to place those assets, revenues and properties in the hands of a receiver, appointed by the court to collect, administer and disburse the same in the payment of creditors of such Corporation. [497]

2. Whether the Act of the General Assembly of the State of Tennessee, entitled An Act to Repeal the Charters of Certain Municipal Corporations, and to Remand the Territory and Inhabitants thereof to the Government of the State, passed Jan. 29, 1879, and which Act, in terms as shown therein, repealed the charter, and all laws incorporating the City of Memphis, was and is a valid law, or whether the said Act is contrary to the Constitution of the State of Tennessee, or to the Constitution of the United States, as against creditors holding bonds and debts contracted prior to the repeal. [498]

3. Whether the court has jurisdiction to seize and impound and administer the assets, properties and revenues of said municipal Corporation, when it appears, as it does by the pleadings in this cause, that the Mayor and other officers of said municipal Corporation had abandoned their offices and their duties; and when it also appeared, as it does by the pleadings in this cause, that the General Assembly of the State has passed a series of these Acts; one repealing the charter of Memphis; the second creating a taxing district in the same territory and providing a government therefor; and the third to collect and dispose of the taxes assessed for municipal corporations in this State, etc., being chs. 10, 11 and 92 of the Acts of 1879.

4. Whether, if the Act of the General Assembly, repealing the charter of the City of Memphis, be valid, the effect thereof was to extinguish all claims, debts, dues and demands to and from said municipal Corporation, including the claims of the various complainants in these causes.

5. Whether, if said Act repealing the charter be declared valid, and that the effect thereof was not to extinguish all claims, debts, dues and demands to and from said municipal Corporation, this court has jurisdiction to collect the taxes which had been lawfully assessed by said municipal Corporation and due before the repeal of its charter, but which have not been collected.

6. Whether, if this court has jurisdiction to collect delinquent or back taxes, it can do so by directing its receiver to sue the delinquent tax payers; and if so, in what court, State or Federal, must such suits be brought; or can the [499] court, by proceedings in the nature of garnishment, require the delinquent tax payers to come before the court and pronounce judgment against each for the amount found to be due?

7. Whether this court has jurisdiction to enforce the lien on real estate for taxes which the said municipal Corporation possessed, by proceedings in these cases or otherwise.

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8. Whether, upon the entire record, the court has jurisdiction to entertain the bills, and grant any relief to complainants.

9. Whether, after the taxes already levied and uncollected, due said Corporation, and the other property named in these bills, shall have been ascertained to be insufficient to pay all the creditors of said city, that then this court has power to bring all or any of the inhabitants and corporations within the limits of said dissolved Corporation, by process, and make assessments against them, or their property, to pay the balance of entire debt found owing from said Corporation, *pro rata*, and render judgments and decrees against each of them for the *pro rata* share of amount found due from said dissolved Corporation, and enforce liens against specific property against which taxes shall have been levied.

10. Whether, where the charter of a municipal corporation has been repealed, the creditors of such municipal corporation have a right to any relief, except such as the State, through and by its legislative enactments, may afford to such creditors.

11. Whether the 4th section of the Act of the Legislature of Tennessee, approved January 31, 1877, chapter 10, Acts of 1879, repealing the charter of the City of Memphis; and the 14th section of the Act of the Legislature of Tennessee, approved Jan. 31, 1879, being chapter 11 of the Acts of said State for 1879; and Act of the Legislature of the State of Tennessee, approved March 13, 1879, being ch. 92 of the Acts of said Legislature of 1879, and particularly sections 4, 5, 6, 7, 11 and 13 of said Act, as far as complainants are concerned, and those creditors who have made themselves parties, and the receiver of this court who was appointed before said Act was passed, are in violation of the Constitution of the United States and the State of Tennessee, and void.

Messrs. **J. B. Heiskell,** *L. D. McKissick,* **Gantt** *& Patterson, C. F. Vance* and **Minor Meriwether,** for appellants:

It is certainly clear that the bill, filed before the repeal of the city charter, cannot be maintained. A court of equity has no power to seize the revenues and other property of an existing municipal corporation, which it holds for purposes of government, and apply the same in satisfaction of the debts of such corporation.

2 Dill. Mun. Corp., sec. 512, and *note* "*U. S.* v. *R. R. Co.*, 17 Wall., 328, 329 (84 U. S., XXI., 600); *Darlington* v. *Mayor, etc.*, 31 N. Y., 164; *Chicago* v. *Hasley*, 25 Ill., 575; *Erie* v. *Knapp*, 29 Pa. St., 175; *McDougal* v. *Supervisors*, 4 Minn., 184; *Burnham* v. *Fond du Lac*, 15 Wis., 193; *Triebel* v. *Colburn*, 64 Ill., 376.

This bill is not aided by the Act of the Tennessee Legislature, passed Mar. 19, 1877.

That Act has reference alone to the State Court of Chancery at Memphis, and is, therefore, no authority for jurisdiction in any other court.

It undertakes to confer legislative powers on a chancery court. This is forbidden by the State Constitution. These powers properly belong to a different arm of government.

Const. Tenn., art. 2, sec. 3; *State* v. *Armstrong*, 3 Sneed, 634; Cooley, Tax., 33, 34; *Hardenburgh* v. *Kidd*, 10 Cal., 402.

Courts of equity have no inherent jurisdiction, nor can jurisdiction be conferred on them by statute, to carry on the affairs of a municipal corporation.

The highest court of the State, in an able opinion fortified by a great array of authority, has decided that the Act of Jan. 29, 1879, which in terms repeals the charter of the City of Memphis, was passed in accordance with the State Constitution, and is a valid enactment.

See, *Memphis Taxing District* v. *Briggs*, 2 Lea, 425.

This court will not review the opinion of the State Court on such a question, but treat it as conclusive.

R. R. Co. v. *Georgia*, 98 U. S., 359 (XXV., 185); *Bronson* v. *Rodes*, 7 Wall., 253 (74 U. S., XIX., 147); *Gut* v. *State*, 9 Wall., 35 (76 U. S., XIX., 573).

Over municipal corporations, the Legislature, as the trustee or guardian of the public interest, has exclusive and unrestrained control; and, acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interests will be best subserved.

Ang. & Ames, Corp., 10th ed., sec. 31; 2 Kent, 12th ed., p. 305; *Daniel* v. *Memphis*, 11 Humph., 582; *Dart. Coll.* v. *Woodward*. 4 Wheat., 630; *Memphis* v. *Memphis Wat. Co.*, 5 Heisk., 528; *Laramie Co.* v. *Albany Co.*, 92 U. S., 307 (XXIII., 552); Ang. & Ames, Corp., 10th ed., sec. 31; *McKim* v. *Odom*, 3 Bland (Ch.), 417.

It is urged in argument that section 8 of article 11, of the Constitution of 1870, saves the right of the corporate creditors, and makes the repealing Act inoperative so far as they are concerned.

This constitutional provision obviously has no reference to the grant of political powers to a municipal corporation. It is clothed with no "vested rights." Its existence involves no element of contract upon the part of the State. Its objects and duties are incompatible with everything in the nature of a contract, or of vested rights.

Ang. & Ames, Corp., sec. 31; Burroughs, Tax., 22, 23; *People* v. *Chicago*, 51 Ill., 17; *Governor* v. *McEwen*, 5 Humph., 288; *Memphis* v. *Wat. Co.* (*supra*); *McCallie* v. *Chattanooga*, 3 Head, 317; *McKim* v. *Odom* (*supra*); *People* v. *Flagg*, 46 N. Y., 405; *N. Yarmouth* v. *Skillings*, 45 Me., 141.

It is said in the opinion, in *Broughton* v. *Pensacola*, 93 U. S., 268, 269 (XXIII., 897), that the modern doctrine is applicable to a dissolved private corporation, for the benefit of its creditors; and that if "A municipal corporation, upon the surrender, or extinction in other ways, of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of creditors."

What is the property of a dissolved municipal corporation, which a court of equity will administer for creditors?

It is not the public buildings, hospitals, streets, water-works, fire-engines and the like. These belong to the public, and not to its corporate agent, the municipal corporation. As to all such property, the corporation is a mere trustee; and the trust property cannot be subjected to its debts.

2 Dill Mun. Corp., sec. 446; *Halladay* v. *Frisbie*, 15 Cal., 630; *Wheeler* v. *Miller*, 16 Cal.,

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125; *Davenport* v. *Ins. Co.*, 17 Iowa., 276; *Louisville* v. *Com.*, 1 Duv., 295; *Schaffer* v. *Cadwallader*, 66 Pa., 126; *President, etc.*, v. *Indianapolis*, 12 Ind., 620.

Taxes imposed for purposes of government, are not property of the corporation, which its creditors may seize and have applied to the satisfaction of the debts of the corporation.

1 Dill. Mun. Corp., secs., 64, 65; 1 Baxt. Leg. Rep., 290; Cooley, Tax., 14, and *n.* 3; Burroughs, Tax., 391; Cooley, Tax., 33, 34; *Rees* v. *Watertown*, 19 Wall., 107, 120 (86 U. S., XXII., 72, 76); *Heine* v. *Levee Comrs.*, 19 Wall., 661 (86 U. S., XXII., 226).

Taxes imposed for carrying on the affairs of a municipal corporation, if uncollected, upon the dissolution of the corporation, would lapse, if not kept in force by legislative action, showing a contrary intent. The repeal of a tax law before the tax is collected, puts an end to the tax itself, where no rights are reserved in the repealing Act, and nothing in the Act indicates a contrary intent.

Cooley, Tax., 14; *Fenelon's Petition*, 7 Pa., 173; *Augusta* v. *North*, 57 Me., 392; *Mitchell* v. *Board of Tr.*, 71 N. C., 400; *Abbott* v. *Britton*, 23 La. Ann., 511; *McGuilkin* v. *Doe*, 8 Blackf., 581; *Ross* v. *Lane*, 3 S. & M., 695, 714.

Taxes imposed to carry on the affairs of local government, are not debts in the ordinary sense of the term.

Cooley, Tax., 13,14.

They are the positive acts of government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their consent individually is not required.

Pierce v. *Boston*, 3 Met., 520; *Perry* v. *Washburn*, 20 Cal., 318; *Webster* v. *Seymour* 8 Vt., 135; *Johnson* v. *Howard*, 41 Vt., 123.

The repeal of the charter of a municipal corporation does not extinguish the debts which it owes. The obligation of its contracts survives, and they may be prosecuted against any property owned by the corporation at its dissolution.

Mumma v. *Potomac Co.*, 8 Pet., 281; *Broughton* v. *Pensacola* (*supra*); *Pres., etc.*, v. *Moore*, 13 Sm. & M., 157.

But the uncollected revenue imposed for its own use as an arm of government, and the property held by it for public uses, do not constitute a fund for creditors. The one is held, and the other "levied and collected for the public use and upon public trusts." To these the state sovereignty at once attaches, upon the revocation of the local agent of government, in behalf of the public. Corporate creditors do not succeed to them.

Complainant can subject under these bills, nothing but such property as the corporation owned at its dissolution, in its own right, and which was charged with no public trust.

Broughton v. *Pensacola* (*supra*); 1 Dill. Mun. Corp., sec. 446.

The inhabitants are not joint and several debtors with the Corporation, nor does their property stand in that relation to the Corporation or to the creditors.

Rees v. *Watertown* (*supra*); *Heine* v. *Levee Comrs.* (*supra*); *Queensbury* v. *Culver*, 19 Wall., 93 (86 U. S. XXII., 105); *Broughton* v. *Pensacola* (*supra*); Burr. Taxation, 456, 457.

Neither the devices and contrivances of the corporate officers, aided by the Legislature, whereby the remedy at law is rendered fruitless, nor the resignation of officers to evade the process, nor the want of officers, *de jure or de facto* to whom it may be directed, nor the destruction of the Corporation, will furnish grounds upon which a court of equity has jurisdiction, at the instance of creditors, to give relief of any kind or in any way, by a direct proceeding for that purpose, against the citizen and his property.

These questions were presented for decision, and decided adversely to creditors in *Rees* v. *Watertown* (*supra*); *Heine* v. *Levee Comrs.* (*supra*); *Barkley* v. *Levee Comrs.*, 93 U. S., 258 (XXIII., 893).

Elementary writers treat the question as at rest by the unanswerable force of these thoroughly considered cases.

Cooley, Tax., 33, 34; Burroughs Tax., 457.

Messrs. **William Randolph, Julius A. Taylor** and **Myers** & *Sneed*, for appellees:

That, under the facts alleged in the original, amended and supplemental bills, filed in equity, the circuit court has the jurisdiction and power to impound the property and assets of a dissolved municipal corporation, and particularly trust property and funds, and appoint a receiver to take charge of the same, and to administer such assets and properties for the benefit of creditors, and enforce all liens for that purpose, where citizenship and amount involved sufficiently appear, as in this case, see,

Bacon v. *Robertson*, 18 How., 480, 486 (59 U. S., XV., 499, 502), and authorities.

As to the specific funds on hand and the special taxes levied and uncollected, the City of Memphis, its tax collectors and other officers, were trustees; and their offices having been abolished, and they having abandoned their trusts and duties, a court of equity had the inherent power to appoint a new trustee or a receiver.

It had equally the power to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee.

1 Dill. Mun. Corp., sec. 37; 2 Story, Eq. Jr., secs. 976, 1060, 1061; *Batesville Inst.* v. *Kauffman*, 18 Wall., 151 (85 U. S., XXI., 775); *Maenhaut* v. *New Orleans*, 2 Wood, 108; *People* v. *Bond*, 10 Cal., 570; *Milner* v. *Pensacola*, 2 Wood, 641; *Ranger* v. *New Orleans*, 2 Wood, 128; 2 Dill. Mun. Cor., sec. 729, and authorities; *Char. Corp.* v. *Sutton*, 2 Atk., 406; *Atty-Gen.* v. *Eastlake*, 21 Eng. L. & E., 43; *Sturge* v. *Eastern R. Co.*, 7 De G. M. & G., 158; *People* v. *Ingersoll*, 58 N. Y., 35; High, Receivers, 304; *Peter* v. *Beverly*, 10 Pet., 532; *R. R. Co.* v. *Howard*, 7 Wall., 411 (74 U. S., XIX., 120); *Morgan* v. *Beloit*, 7 Wall., 613 (74 U. S., XIX., 203); Code, Tenn., secs. 3000, 3426, 3431, 3768, 4294, 4295; Perry, Trusts, secs. 42, 43; Potter, Corp., 698, 699, 702; *Curran* v. *State*, 15 How., 307; Cooley, Const. Lim., 209, 4th ed.; *Morgan* v. *Beloit*, 7 Wall., 619 (74 U. S., XIX., 205); *Von Hoffman* v. *Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403); Dill. Corp., secs. 62-112; *Batesville Inst.* v. *Kauffman* (*supra*).

The court has the power to impound all the assets and property of the dissolved corporation, even treating them all as general assets, including unpaid taxes.

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Broughton v. *Pensacola* (*supra*); *Curran* v. *State*, 15 How., 307; *Beckwith* v. *Racine*, 7 Biss., 142; Dill. Mun. Corp., sec. 118; Potter, Corp., secs. 713–715; *Ultra Vires*, 654, *n.*; *Maenhaut* v. *New Orleans*, 2 Wood, 112–114.

A court of equity has power to fully administer all the assets of a dissolved municipal corporation, for another reason, to wit: a municipal corporation possesses a dual character, the one governmental, legislative or public, the other proprietary or private. Over its first or governmental aspect, which is political, the legislative control is said to be omnipotent or supreme. But as to its second or private character, under which it purchases and holds property, makes contracts, incurs debts and issues evidences thereof, borrows money, etc., it is "*quo ad hoc*, a private corporation," and over this character of it the legislative power is not omnipotent.

Dill. Mun. Corp., sec. 39; Ang. & Ames Corp., secs. 31, 33; Cooley, Const. Lim., pp. 251, 252; Potter, Corp.; *R. R. Co.* v. *N. Orleans*, 26 La. Ann., 481; *Grogan* v. *San Francisco*, 18 Cal., 613; *Commissioners* v. *Detroit*, 28 Mich., 235; *Moodalay* v. *Morton*, 1 Bro. (Ch.), 469, 471, top. 412; *Bailey* v. *Mayor N. Y.*, 3 Hill, 539; *Small* v. *Danville*, 51 Me., 361; *Louisville* v. *University*, 15 B. Mon., 666; *Jones* v. *New Haven*, 34 Conn., 14; *Oliver* v. *Worcester*, 102 Mass., 500; *Western College* v. *Cleveland*, 12 Ohio St., 377; *Gas Co.* v. *San Francisco*, 9 Cal., 468; *Detroit* v. *Corey*, 9 Mich., 186; *Western Sav. Soc.* v. *Philadelphia*, 31 Pa., 181; *Co. Comrs.* v. *Duckett*, 20 Md., 476; *Louisville* v. *Com.*, 1 Duv., 298.

This case holds that vacant lots, market houses, fire-engines and the like are private property.

Weightman v. *Washington*, 1 Black, 50 (66 U. S., XVII., 57), recognizes this principle.

Richmond v. *Long*, 17 Gratt., 378; *De Voss* v. *Richmond*, 18 Gratt., 345; *Dubuque* v. *R. R. Co.*, 39 Iowa., 63–65; *Smoot* v. *Wetumpka*, 24 Ala., 120.

The above authorities illustrate, in various forms, the full and complete double character of a municipal corporation, and the connection between the two while it is in existence, and the complete power and control of the Legislature over the public character thereof. They further illustrate and define the private character of the same, establishing the proposition that, where the rights of creditors and debtors exist, the Legislature cannot destroy the corporation to such an extent as to impair the obligation of contracts.

The market houses, fire-engines, engine houses, horses, wagons and other property including the City Hall and square, etc., which the Corporation owned at the date of its dissolution, are assets for the creditors.

Louisville v. *Com* (*supra*); *Weightman* v. *Washington* (*supra*); Cooley, Const. Lim., 235, 236, 239; 1 Dill. Mun. Corp., sec. 39, *n*; *Oliver* v. *Worcester*, 102 Mass., 489–490.

Have the creditors of Memphis a right in equity to be subrogated to the rights of the City of Memphis as to claims for taxes, etc., due it at the date of dissolution, or in any way have these claims subjected to payment of their debts? And if so, by what remedy?

We cannot see that, under the law, there is anything in the position, that the collection of this kind of debt due a dissolved municipal corporation is a governmental or legislative function. Certainly a court of equity, administering the assets of such dissolved corporation, has the power to collect for the payment of creditors, and particularly when the tax was levied to pay the very debts and claims, and parties who are now creditors. *Marr* v. *Bk.*, 4 Cold., 471.

Can creditors be subrogated? On this question, see, *Kyner* v. *Kyner*, 6 Watts, 225; 1 Story, Eq., sec. 493; Burroughs, Tax., 275; *Wallace Estate*, 59 Pa., 401; *Cottrell's Appeal*, 23 Pa., 295.

Mr Chief Justice **Waite** announced the conclusions reached by the court in this case, as follows: [501]

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the City, such property passed under the immediate control of the State, the power once delegated to the City, in that behalf having been withdrawn.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the City, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the City. Such taxes can only be collected under authority from the Legislature. If no such authority exists, the remedy is by appeal to the Legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the Legislature to perform that duty, is not decided, as the case does not require it.

5. The receiver and back tax collector appointed under the authority of the Act of March 13, 1879, is a public officer, clothed with authority from the Legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appro- [502]
priated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments.

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6. The bills in this case cannot be amended so as to obtain relief against the receiver and back-tax collector, without making an entirely new suit. They were not framed with a view to any such purpose.

7. *The decree of the court below is reversed.*

8. *The cause is remanded, with instructions to dismiss the bills, without prejudice.* If, on the settlement of the accounts of the receiver herein, it shall be found he has any money in his hands collected on taxes levied under judicial direction to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

Upon the 1st, 2d, 3d and 5th of these propositions the judgment of the court is unanimous. Upon the 4th, 6th, 7th and 8th it is by a majority only.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field** delivered the following opinion for himself, *Mr. Justice* **Miller** and *Mr. Justice* **Bradley.**

Mr. Justice Miller, *Mr. Justice* Bradley, and myself concur in the judgment rendered, but as the judgment is not accompanied by a statement of the reasons on which it is founded, I proceed to state those which have controlled us.

In January, 1879, the City of Memphis in the State of Tennessee, was financially in a bad condition. She had been for many years a municipal corporation, and was invested with the ordinary powers of such bodies to make contracts and incur obligations for municipal purposes, and to levy and collect taxes to meet her expenditures. Her authorities were also at different times specially empowered by the Legislature of the State to subscribe for stock in railroad corporations, to aid in the construction of [503] lines of railway leading to and from the city, and to issue interest bearing bonds for the amount subscribed; also to issue bonds of like character to raise the means to erect waterworks, construct pavements, and make "any public improvements" that might be necessary, and to acquire property for the public use of the city. Indeed, the powers conferred at various times upon the authorities, to undertake public works and engage in enterprises for the benefit of the city, were as large as the supposed necessities of a municipality with great expectations of future growth could suggest; and these powers appear to have been exercised with a liberality proportionate to the expectations. Taxes were levied to meet the consequent expenditures of the City and the interest on her bonds, but these were not always enforced with the readiness with which the obligations were incurred.

The record shows that, for several years preceding 1879, not more than three fifths of the annual taxes were collected. Whether this arose from the viciousness of the system of taxation adopted, or the inefficiency of the officers of collection, is immaterial. Probably it arose partly from both causes. The natural result followed: the revenues received became insufficient to meet the just claims of creditors; obligations were not paid as they matured; coupons for interest on bonds were not provided for; the City was in default for much of the principal and all of the interest of her indebtedness; she was insolvent. Suits were soon commenced against her by creditors: some in the Federal Courts, some in the State Courts; and from the Federal Courts in several cases a *mandamus* was issued to the authorities of the City to levy a special tax for the payment of judgments recovered. With taxes uncollected, debts maturing, and both principal and interest unprovided for; with numerous suits commenced and more threatened; with credit gone and the property of her citizens already subjected to burdens difficult to be borne, the City was in a condition out of which she was almost helpless to extricate herself.

While the City was thus burdened with debts and pursued by creditors, the State interfered; and on the 29th of January, 1879, repealed the charter of the City, took the immediate control [504] and custody of her public property, and afterwards assumed the collection of the taxes levied and their application to the payment of her indebtedness.

The repealing Act was in terms general, and applied to all municipal corporations in the State having thirty-five thousand inhabitants at the date of its passage, to be ascertained by the Governor, and declared by his proclamation. The City of Memphis had that number of inhabitants; and it was so proclaimed by the Governor. The Act not only repealed the charters of all such corporations, with their amendments, but declared that all municipal offices, held under them, were abolished; that the population within their territorial limits were resolved back into the body of the State; that all power of taxation in any form previously invested in their authorities was withdrawn and reserved to the Legislature; and that the public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, engine-houses, engineer instruments, and all other property, real and personal, previously used for municipal purposes, were transferred to the custody and control of the State, to remain public property, as previously it always had been.

On the same day with the passage of the repealing Act, the Legislature passed another Act to establish taxing districts in the State, and to provide the means for their local government. It declared that the several communities embraced in the territorial limits of the repealed corporations, and of such other corporations as might surrender their charters under the Act, were created taxing districts in order to provide the means of local government for their peace, safety and general welfare; that the necessary taxes for the support of the governments thus established should be imposed directly by the General Assembly, and not otherwise; that in administering the affairs and providing the means of local government the following agencies and instrumentalities were established, namely: a Board of Fire and Police Commissioners; a committee on ordinances or local laws, to be known as the legislative council of the taxing district; a Board of Health, and a Board of Public Works; and it prescribed in detail the duties and powers of these local agencies. The Act prohibited the commissioners from issuing any bonds, notes, scrip or other evidences of [505] indebtedness, or from contracting for work, material, or services in excess of the amount levied

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for them for that year; and declared that no property, real or personal, held by them for public use should ever be subject to execution, attachment or seizure under any legal process, for any debt created by them; that all taxes due, or moneys in the hands of the county trustee, or on deposit should be exempt from seizure under attachment, execution, garnishment or other legal process. It also declared that no writ of *mandamus* or other process should lie to compel them or other governing agencies to levy any taxes, and that neither the commissioners, nor trustee, nor the local government, should be held to pay or be liable for any debt created by the extinct corporations, and that none of the taxes collected under the Act should ever be used for the payment of any of said debts. The Act also declared that all the property previously used by the corporations for purposes of government was transferred to the custody and control of the Board of Commissioners of the taxing districts, to remain public property for the uses to which it had previously been applied, and that all indebtedness for taxes or otherwise, whether in litigation or not, due to the extinct municipalities, should vest in and become the property of the State, to be disposed of for the settlement of their debts as should thereafter be provided by law.

On the 13th of March following such provision was made. By an Act passed by the Legislature on that day, the Governor was directed to appoint an officer for municipal corporations whose charters had been repealed under the first Act mentioned, or might be subsequently surrendered, to be known as a receiver and back tax collector. It required him to take possession of all books, papers and documents pertaining to the assessment and collection of taxes, which had been levied at the time of the repeal of the charters. It ordered him to file a bill in the Chancery Court of the county in which the corporation was situated, in the name of the State, in behalf of all creditors against all its delinquent tax payers, and provided that taxes assessed prior to 1875 might be [506] settled in the valid indebtedness of the extinct municipality, whether due or not, and that the receiver should receive evidences of such indebtedness at certain designated rates. It also prohibited him from coercing payment of a greater sum than one fifth of the taxes in arrears annually, so as to distribute the whole through five equal annual installments, commencing from his appointment and qualification. It authorized the Chancery Court to enforce all liens upon property for the payment of taxes, and to order all sales necessary for their collection; and to settle and adjust all equities, priorities and liens; and to give to the defendants and creditors all the relief which might be given if there were as many separate suits as there were creditors and delinquent tax payers. It provided that the taxes as collected should be paid into the State Treasury, and be paid out to parties entitled to receive them, as adjudged by the Chancery Court, upon the warrant of the receiver, countersigned by the Chancellor. It required the receiver, in paying the money collected into the treasury, to distinguish the sources whence it was derived, showing the amount from each special and general tax, so that they might be kept separate, and be paid out to creditors according to the priority, lien or equity determined. The Act was accompanied with a proviso that it should not interfere with any vested rights entitling parties to a speedy collection. On the passage of the repealing Act there was a large amount of uncollected taxes, which had been levied upon property in the City of Memphis, such as taxes to pay certain specified creditors under writs of *mandamus*, a special tax to pay interest upon bonds, a special sinking fund tax, a school tax, a wharfage tax, a tax upon merchants to pay police and firemen, a tax to pay interest upon bonds issued to certain railroads, and a tax for general purposes of government. Under the provisions of the Act of March 13th, the defendant, Minor Meriwether, was appointed by the Governor Receiver and Back Tax Collector of that city. He accepted the appointment, and proceeded at once to the performance of his duties.

The day previous to the passage of the Act repealing the charter of Memphis, and probably in anticipation of the contemplated legislation of the State, Robert Garrett and others, creditors [507] of the corporation, filed a bill against the city, alleging in substance that the city owed them over one hundred thousand dollars, upon much of which they had recovered judgments and obtained writs of *mandamus* to compel the levy of taxes for their payment; that various writs of *mandamus* had been issued against the city for over eight hundred and fifty thousand dollars; that through the malfeasance and incompetency of its officials only about three fifths of the taxes imposed had been collected, and that this practice had run through a series of years, resulting in delinquent taxes of about two and a half millions of dollars; that the taxes levied, pursuant to the writs of *mandamus* issued, constituted a trust fund which could only be used for the payment of the judgments; that the city was a trustee for the same and [had] been requested to press the collection but had neglected to do so, and that this neglect was a fraud on the complainants relievable in a court of equity.

It also set up that the Legislature, by an Act of the 19th of March, 1877, had authorized the Chancery Court of the State to appoint a receiver to take charge of the affairs of the city, upon application of creditors owning demands against her exceeding $100,000, when it was made to appear that writs of *mandamus* had been issued against her to enforce debts against the city amounting to over $850,000. And averring that the court had jurisdiction, both upon general principles of jurisprudence and by authority of that Act, the bill prayed the appointment of a receiver to take charge of the assets of the city, including its tax-books and bills for unpaid taxes, and to collect the taxes levied, for the purpose of paying the judgments.

After the repealing Act was passed, the complainants filed a supplementary bill setting up the passage of the Act, alleging its invalidity, and repeating its prayer for the appointment of a receiver.

Subsequently several other parties instituted like suits against the city. All the suits were, in February, 1879 consolidated into one without objection, and by amendment to it, in April, following, Meriwether, the Receiver appointed by the Governor, was made a defendant, as also

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sundry parties upon whose property taxes had [508] been levied. With the consolidation a receiver of the assets and property of the City was appointed to hold and dispose of the same under the direction of the court; and he immediately qualified, and proceeded to take possession, so far as practicable, of the property and assets, and to exercise the powers with which he was invested.

To the bill as consolidated and amended a demurrer was interposed by the defendants, upon which several questions arose, on which the Judges of the Circuit Court were divided in opinion. The prevailing opinion of the presiding Judge being against the demurrer, it was overruled, and the defendants electing to stand upon it, judgment final was rendered in favor of the complainants, from which the defendants have appealed to this court.

The Receiver appointed by the court was invested with larger powers than probably any officer of a court was ever before intrusted with. He was required to demand, receive and take possession of all the assets and property of the City of Memphis, including real and personal property, and debts due to it and taxes which had been previously levied, except the taxes appearing on the tax-books for the year 1878, for which special provision was made; and except, also, the public highways of the city, the public squares, the public landings and wharves, the hospital and certain property used in connection with it, and property of the fire, engineer, and police departments, and the taxes levied for the support of the public schools, which excepted articles he was not to take possession of or interfere with until the further order of the court. It does not appear that the court entertained any doubt that it could at some future time place all this public property in the hands of its receiver, as its subsequent decree shows. The Receiver was also required to take possession of all the tax books of the city on which unpaid taxes were charged, except the tax books for the year 1878; and also all the safes, books, papers, desks, office furniture, and other property belonging to the offices of mayor, comptroller, register, treasurer, tax collector, inspector, and city attorney, necessary to the discharge of his duties as receiver, and of the buildings in which the General Council of the city had previously assembled, and the property in, and belonging to such buildings not previously excepted, and keep them subject to the order of the court; and parties having possession or control of such property or any part of it, were [509] required to surrender the same to him on demand.

By the order appointing the receiver, the trustee of Shelby County, within which the City of Memphis is situated, was required to pay over to him all the moneys he had on hand collected for taxes levied by the city for the year 1878, except such as were levied for the support of public schools. The former treasurer of the city was also required, with the like exception, to turn over to the Receiver, on demand, all the money in his hands or on deposit in the German National Bank, received for the city. The mayor of the city was also to pay over to him any money, and deliver to him any property, belonging to the city, and the papers and vouchers necessary for the discharge of the Receiver's duties; and the clerk of the county of Shelby was also to pay over any moneys received by him on account of the redemption of property sold for taxes due the city. The receiver was also required to lease the property of which he might have possession from month to month, and to collect the rents and hold the same subject to the order of the court; and, if he found it necessary, he was authorized to bring actions at law or suits in equity against parties indebted to the city, or for any tax or taxes appearing on the tax books, and to enforce any specific liens on the property, real or personal, for the payment of such taxes; and to employ as many clerks and assistants as he might deem necessary; to make use of the buildings and offices in the city hall, and of such safes, desks, tables, chairs and other furniture and property of the city [as] he might need; to buy and pay for necessary books, stationary, fuel and lights, and whatever else might be necessary to fit his office or offices for use to enable him to discharge his duties; to insure any property, real or personal, which might come into his hands, when he thought it prudent to do so; to employ one or more attorneys, if necessary, to conduct the prosecution or defense of suits that he might find necessary to bring or defend under the authority conferred by him. Other powers were also vested in the Receiver, but what has already been said is enough to show the extraordinary character of those conferred and of the duties imposed upon him. He was, in fact, invested with the administration of the financial affairs of the city, so far as might be necessary [510] for the collection of taxes and debts and disposing of the property of the city to pay the claims of creditors. Executive and administrative functions were invested in him which, it has not been supposed, could adequately be performed by the same person in any government of a city properly conducted.

The decree adjudged that the complainants in the several suits, and other creditors who had made themselves parties by leave of the court, or who might thereafter make themselves parties, should recover from the city the several debts due them respectively, the amounts to be thereafter fixed by the court, and that all the assets and property of the city, "of every description," or so much thereof as might be necessary for that purpose, including taxes previously assessed and remaining unpaid and due the city, should be applied to the payment of their debts. The decree also adjudged that the Receiver should retain possession of all the assets and property, books, papers and writings previously placed in his hands to be disposed of as the court might order in the progress of the suit, and that he proceed to collect the assets and property in the manner directed by previous orders for the payment of the debts. It also enjoined the defendant, Minor Meriwether, the Receiver and Back Tax Collector appointed by the Governor of the State, from taking possession of, collecting or attempting to collect, suing for or in any way interfering with the assets and property, books, papers and writings in the possession of the receiver of the court. And the decree further adjudged that all the property within the limits of the territory of the City of Memphis was liable and might be subjected to the payment of all the

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debts of the city, and that such liability would be enforced thereafter, from time to time, in such manner as the court might direct.

This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public uses, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which [511] the circuit court would take possession and enforce the trust; and that the private property of the inhabitants of the city was also liable, and could be subjected by the circuit court to the payment of its debts. In both particulars the theory is radically wrong.

The right of the State to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. *U. S.* v. *R. R. Co.*, 17 Wall., 322 [84 U. S., XXI., 597]; *Comrs.* v. *Lucas*, 93 U. S., 108 [XXIII., 822]; *People* v. *Morris*, 13 Wend., 325; *Philadelphia* v. *Fox*, 64 Pa. 169; *Montpelier* v. *E. Montpelier*, 29 Vt., 12; Ang. & A., Corp., 10th ed., sec. 31; Dill. Mun. Corp., sec. 30; Cooley, Const. Lim., 192, 193. By the repeal, the legislative powers previously possessed by the Corporation of Memphis reverted to the State. A portion of them the State immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the State retained; it reserved to the Legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the State to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.

[512] But while the charter of a municipal corporation may be repealed at the pleasure of the Legislature, where there is no inhibition to its action in the Constitution of the State, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution. The language used by us in the case of *Broughton* v. *Pensacola* on this subject is quoted by counsel, under the impression that it tends to sustain the position of the complainants. We there said:

"The ancient doctrine that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution, and the contracts may be enforced by a court of equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation." 93 U. S., 268 [XXIII., 897.]

We approve of the doctrine stated in this citation. It expresses what we believe to be sound law. It means that whatever property a municipal corporation holds subject to the payment of its debts, will, after its dissolution, be so administered and applied by a court of equity. It does not undertake to determine what is to be deemed the property of a municipal corporation, which, after the extinction of its charter, is thus applicable. In the case from which it is taken, the bill alleged that the City of Pensacola, upon the surrender of its charter, did not possess any property and, of course, the question here raised could not have been before the court. The question there was as to the continuation of the city's liability under a new organization.

What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the pay- [513] ment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not devest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing. 2 Dillon, Mun. Corp., secs. 445 and 446; *Schaffer* v. *Cadwallader*, 36 Pa., 126; *Davenport*

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v. *Ins. Co.*, 17 Iowa, 276; *Askins* v. *Com.*, 1 Duv., 275; *President, etc.*, v. *Indianapolis*, 12 Ind., 620.

In the third place, we say that taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Lane Co.* v. *Oregon*, reported in 7th Wallace, 71 [74 U. S., XIX., 101]. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the tax payer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States, and we believe in Tennessee, an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *Augusta* v. *North*, 57 Me., 392; *Camden* v. *Allen*, 2 Dutch., 398; *Perry* v. *Washburn*, 20 Cal., 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. *Philadelphia* v. *Greble*, 38 Pa., 339; *Howell* v. *Philadelphia*, 38 Pa., 471; 2 Dillon, Mun. Corp., sec. 659. Levied only by authority of the Legislature, they can be altered, postponed or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing Act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected—being mere imposts of the government, created and continuing only by the will of the Legislature—have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the Legislature may otherwise provide. When they are collected, the moneys in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the Legislature may change, postpone or release, at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

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It is the province of the courts to decide causes between parties and, in so doing, to construe the Constitution and the Statutes of the United States, and of the several States, and to declare the law and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.

This doctrine is not new in this court. It has been repeatedly asserted, after the most mature consideration. It was asserted in *Rees* v. *Watertown*. There the plaintiff, being the owner of certain bonds issued by the City of Watertown, in Wisconsin, to a railroad company, brought suit upon them in the Circuit Court of the United States and recovered two judgments amounting to about $10,000. Upon these judgments he issued executions, which were returned, unsatisfied. He then applied to the circuit court and obtained a writ of *mandamus* upon the authorities of Watertown to levy and collect a tax upon the taxable property of the city to pay the judgments; but before the writs could be served a majority of the members of the council resigned their offices. Subsequent writs of *mandamus* obtained by him proved ineffectual for similar resignations. He then filed a bill alleging that the corporate authorities were trustees for the benefit of the creditors of the city; that the property of the citizens was a trust fund for the payment of its debts, and that it was the duty of the court to lay hold of such property and cause it to be applied; and he prayed that the court would subject the taxable property of the city to the payment of the judgments. To this bill the city made answer; and on the argument of the case, among other points, the question arose whether

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it was competent for the court, on the failure of the officers of the city to levy the tax as required by law, to appoint the marshal of the court to levy and collect the tax to pay the judgments. Upon this question, the Judges being divided, the point was certified to this court. In disposing of it we said: "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a State in the exer- [517] cise of this authority at once so delicate and so important." 19 Wall., 116 [86 U. S., XXII., 74].

In the case of *Heine* v. *Levee Comrs.*, the question again arose whether it was competent for the Circuit Court of the United States to direct its officers to levy and collect a tax to pay the claims of the plaintiffs, who were holders of bonds issued by the commissioners; and the answer was equally emphatic both in the Circuit Court and in this court.

In the Circuit Court, over which *Mr. Justice* Bradley then presided, the possession of the power of taxation had been denied. "The judicial department," said the Justice, "has no power over the subject. If the officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the Legislature has expressly conferred upon it further powers." 1 Woods, 247.

And when the case came before this court, we here said, *Mr. Justice* Miller delivering the opinion: "The power we are here asked to exercise is the very delicate one of taxation. This power belongs, in this country, to the legislative sovereignty, state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State Government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." *Heine* v. *Levee Comrs.*, 19 Wall., 655 [86 U. S., XXII., 223].

These authorities, and many others to the [518] same purport might be cited, are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal Court, it cannot seize the power which belongs to the Legislative Department of the State and wield it in their behalf.

To return to the question propounded: what is the property of a municipal corporation which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer: it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual; it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court, proceeding upon a different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally [519] untenable. It adjudges that "All the property within the limits of the territory of the City of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the inhabitants of towns, parishes and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said,

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can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal Courts cannot by reason of it take any additional powers which are not judicial.

In *Rees* v. *Watertown*, from which we have already quoted, the power asserted by the decree was claimed by counsel, but was rejected by the court. "Assume," said the court, "that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defense to the debt itself, or, if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are, in some cases, beyond legislative interference. The proceeding supposed would violate the fundamental principle contained in [520] chapter twenty-ninth of *Magna Charta*, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law; that is, he must be served with notice of the proceeding, and have a day in court to make his defense." 19 Wall., 122 [86 U. S., XXII.,76].

It is pressed upon us with great earnestness by counsel, that unless the Federal Courts come to the aid of the creditors of Memphis, and enforce, through their own officers, the taxes levied before the repeal of its charter, they will be remediless. But the conclusion does not follow. The taxes levied pursuant to writs of *mandamus* issued by the circuit court are still to be collected, the agency only for their collection being changed. The Receiver appointed by the Governor has taken the place of the collecting officers of the city. The funds received by him upon the special taxes thus levied cannot be appropriated to any other uses. The Receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes by the sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments. If relief is not thus afforded to the creditors, they must appeal to the Legislature. We cannot presume that the appeal will be in vain. We cannot say that on a proper representation they will not receive favorable action.

It is certainly of the highest importance to the People of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State.

The federal judiciary has never failed, so far as it was in its power, to compel the performance of all lawful contracts, whether of the individual, or of the municipality, or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it, and apply the proceeds. In some instances, where [521] the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax, nor provide for one, the federal judiciary cannot assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the federal judiciary cannot remove them and put others more competent in their place. If the State appoints no officers of collection, the federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of state legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the Legislative Department of the State.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Strong**, dissenting:

The several bills of the complainants were consolidated in the circuit court, and so far as it appears, without objection. They are, therefore, to be considered as one case. The important facts averred in the bills and confessed by the demurrer are the following:

The complainants are creditors of the City of Memphis. For a part of their claims they had recovered judgments against the city before the bills were filed, and had obtained writs of *mandamus* to enforce the levy of taxes to satisfy the judgments. In obedience to these writs the proper city authorities had levied the taxes required, but had neglected to collect them, in large measure, and even when a portion of the taxes had been collected, had failed to appropriate the money collected, to the payment of the judgments for which it had been specially levied and to which alone it could be lawfully applied. Some of the money thus collected remained on deposit. These levies were made during the years 1875, 1876, 1877 and 1878, the city ordinances by which they were ordered specifying the amounts and the parties for whom the taxes were levied. The complainants were also [522] large general creditors of the city, holding its obligations, upon which no judgments had been recovered.

Besides the special levies, made as above stated, the city authorities had made others for the purpose of paying interest on the city debt and for general uses. These taxes also remained uncollected. Meanwhile the city had nothing liable to execution at law, and no property except what it held for public uses, in distinction from private, such as public municipal buildings, parks, streets, fire apparatus, etc., etc. It was insolvent.

Such was the situation when these bills were filed. Their object was to obtain the appointment of a receiver to take possession of the assets of the city, including the collected but not appropriated taxes, as well as the claims and

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bills for past du. and uncollected taxes, and to collect the same with a view to their being applied according to equity and legal right.

The principal one of the consolidated bills was filed on the 28th day of January, 1879, by Garrett *et al.* Almost immediately after it was filed, the next day, indeed, an Act of the Legislature of the State was passed, approved January 31, 1879, by which the charter of the city was repealed, all power of taxation in any form was withdrawn from its authorities, and all persons holding office under the repealed Acts, which constituted the charter and endowed it with power, were prohibited from attempting to exercise any of the functions of their offices. The public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, engineer instruments, and all other property, real and personal, theretofore used for municipal purposes, were declared to be transferred to the control and custody of the State, to remain public property, as it always had been, for the uses to which it had theretofore been applied. The Act contained no reservation of the rights of creditors, and said nothing of any outstanding taxes which had been levied but not collected, and it was declared to take effect from and after its passage.

On the same day, January 29, 1879, another Act of the Legislature was passed, approved January 31, 1879, by which the identical territory that had been embraced in the territorial limits of the City of Memphis was erected into what the Act calls a "taxing district." The Act [523] declared that the necessary taxes for the support of the government thus established should be imposed directly by the General Assembly of the State and not otherwise. It established a Board of Fire and Police Commissioners, a committee on ordinances, or local laws, to be known as the legislative council, consisting of the commissioners of the fire and Police Boards and the supervisors of the Board of Public Works. It established also a Board of Health, and a Board of Public Works. The Act prohibited the commissioners from issuing any evidences of indebtedness, and declared that no property real or personal, held by them for public use, should ever be subject to execution or attachment or seizure under any legal process for any debt created by said commissioners, and that all taxes due, or moneys in the hands of the county trustee, or on deposit, should be exempt from seizure under attachment, execution, garnishment, or other legal process. The Act also declared that neither the commissioners, nor the trustee, nor the new government created by the Act, should pay or be liable for any debt created by the extinct corporation, *i. e.* the City of Memphis, and that none of the taxes collected under the Act should ever be used for the payment of any of the said debts. The Act was declared to take effect from its passage. Its 14th section, as subsequently amended, declared that all the property of the city mentioned as transferred to the State by the Act first mentioned should be thereby transferred to the custody and control of the Board of Commissioners of the taxing district, and that all indebtedness for taxes, or otherwise, whether in litigation or not, due the municipality, namely, the city, should vest in and become the property of the State, to be disposed of as should thereafter be provided by law.

These two Acts were passed, as has been noticed, on the 29th of January, 1879, and approved two days thereafter.

On the 4th of February, 1879, the complainants, Garrett *et al.*, filed, by leave of the court, an amended and supplemental bill, averring what had been charged in the original, and setting forth, *inter alia*, these Acts of the Legislature, denying their constitutionality and pray- [524] ing, as in the original bill, for the appointment of a receiver, and praying also that the bill might be taken as a general creditors' bill for all creditors who might come in within a limited time and prove their claims.

The other bills were filed severally on January 30, 1879, February 3, 8, and 10, next following, and on the 12th of February the cases were consolidated, and T. J. Latham, Esq., was appointed a receiver in accordance with the prayer of the complainants. He gave the required bond on the same day, and took immediate possession of the tax books, bills, etc., of the city.

Subsequently, on the 13th of March, 1879, the Legislature of the State passed another Act, the 1st section whereof directed the Governor to appoint an officer for municipal corporations whose charters had been repealed, the City of Memphis being the only one, to be known as a receiver and back tax collector. Subsequent sections required such receiver and collector to take possession of all books, papers, and documents pertaining to the assessment and collection of the taxes embraced by the Act, namely: the taxes due at the time of the repeal of the charter. It further directed that the receiver should file a bill in the Chancery Court (of the State) an original creditors' bill, in the name of the State, on behalf of all the creditors, against all the delinquent tax payers; and it provided that taxes assessed prior to 1875 might be settled in the valid indebtedness of the extinct municipality, to wit: in valid bonds, whether due or not, due coupons, and any other valid debts of such municipality, with accrued interest, whether in the shape of scrip, warrants, judgments, ledger balances, paving certificates, or receipts for money paid by tax payers to paving contractors. It directed the receiver and back-tax collector to receive such evidences of debt at the following rates, *viz.*: compromise bonds, at their face value; all other indebtedness at fifty cents on the dollar, except judgments, which should be received at fifty-five per cent of their face value.

The Act also directed that the receiver should receive in payment of taxes levied after 1874 the indebtedness of the municipality, when there was no lien or equity requiring payment there- [525] of in current money. It also prohibited the collector or receiver from coercing payment of a greater sum than one fifth of the taxes in arrear annually, so as to distribute the whole through five equal annual installments, commencing from his appointment and qualification—and it remitted all costs of condemnation, penalties, and charges—provided, however, that nothing therein contained was intended to interfere with any vested rights entitling the party having such right to a speedy collection.

Under the provisions of this Act, Minor Meriwether, the principal appellant, was appointed Receiver and Back Tax Collector by the Governor

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of the State. He accepted the appointment, and proceeded to demand the payment to him of the taxes in arrears, interfering with the receiver previously appointed by the circuit court, and impeding that receiver in the discharge of his duties. The complainants then filed a supplemental bill, making Meriwether a party defendant, together with some defaulting tax payers, and praying, among other things, for an injunction against such interference.

To the consolidated bill thus amended and supplemented a general demurrer was filed, which was not sustained by the circuit court and, the defendants electing to stand upon it, a final decree was entered in favor of the complainants. From that decree this appeal has been taken.

Whatever may be said of the equities of the complainants and of their power to enforce those rights in a court of equity, I agree that the decree as entered was too broad. It declared and adjudged that all the assets and property of every description theretofore belonging to the City of Memphis, or so much thereof as may be necessary for the purpose, including taxes theretofore assessed and remaining unpaid and due the city, should be applied to the payment of the debts due to the complainants and other creditors who had made or might thereafter make themselves parties to the suit. This included not only the private property of the city, but also that which it had held for public uses; *viz.*: for governmental purposes and as a trustee for the State, such as the public buildings, streets, squares, parks, school-houses, promenades, fire-engines, hose and hose carriages, engine-houses, engineering instruments, and generally everything held by the city for merely municipal purposes. To this extent, I think, the decree cannot be sustained. Such property [526] cannot be subjected to the payment of the debts of the corporation. Its public character forbids such an appropriation. It could not be subjected to taxation at the instance of the municipality. It was never held for the payment of debts. Instead thereof, it was held by the city merely as a trustee for the public. It would not be contended that it could have been taken in execution at law, and for the same reason it cannot be reached in equity to satisfy creditors.

I think, also, that part of the decree which adjudges that all the property within the limits of the territory of the City of Memphis is liable and may be subjected to the payment of all the debts owing by the city, and that such liability shall be enforced hereafter, from time to time, in such manner as the circuit court might order and direct, is erroneous. Notwithstanding what has been held in some of the New England States, I think the doctrine is generally accepted, that the private property of individuals within the territorial limits of a municipal corporation cannot be reached by its creditors directly, any more than the private property of stockholders in other corporations can be thus reached. It may, it is true, be subjected to taxation for the payment of the corporate debts, but the levy of taxes must be made by the corporation itself, or by the State. It is not a judicial act, and courts of equity, at least the Circuit Courts of the United States, cannot by their own officers, levy a tax. *Rees* v. *Watertown*, 19 Wall., 107 [86 U. S., XXII., 72].

And certainly they have no power to compel the levy of a tax by a corporation which is without officers and which has ceased to exist.

But while, in these particulars and for these reasons, the decree entered by the Circuit Court cannot be sustained in its full extent, I am of opinion that the complainants are entitled to some of the relief granted them by the decree. If they are not, then a new way has been discovered to pay old debts. It cannot be that a corporation, whether municipal or not, can be dissolved, and that by its dissolution its property can be withdrawn from the reach of its just creditors by any process of law or equity. No doubt there are technical difficulties in the way of maintaining proceedings at law against a corporation after its charter has been repealed, but a [527] court of equity is competent to enforce justice to some extent, even where the processes of law fail.

A case, I think, was made by the bill, for the appointment of a receiver to take into the possession of the court those taxes which had been levied by judicial direction for the payment of judgments recovered against the city, taxes which had been only partially collected. Those taxes were in a most legitimate sense charged with a trust and a trust for the complainants.

The fund to be raised by the levies was set apart for a special purpose. It could be used lawfully for no other. The ordinances which directed the levies specified the amounts to be raised, and the judgment creditors for whose use the levies were made. Those creditors were, therefore, *cestuis que trust* in the fullest sense of the term, the legal interest alone being in the city. The case shows that this trust had been neglected and abused by the trustee. The taxes, which it was the duty of the city as trustee to collect, had been suffered to remain uncollected in great measure, and for an unreasonable time, and even the portions which were collected had not been paid over, as the writs of *mandamus* required. This breach of duty by the trustee had continued from 1875 to 1879. Had the trustee been a natural person, or a private corporation, no one would doubt the power of a court of equity to interfere and take the trust out of the hands of the faithless trustee, either by removing him and appointing another trustee, or by administering the trust by its own officers. It can make no difference that the City of Memphis was a municipal corporation. Its character as such does not affect the nature of its obligations to its creditors, or its *cestuis que trust*, nor impair the remedies they would have if the city was a common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities, as attend such persons. Over its public duties, it may be admitted, the Legislature has plenary authority. Over its private obligations it has not. *Bailey* v. *The Mayor of N. Y.*, 3 Hill, 531; *Small* [528] v. *Danville*, 51 Me., 359; *Oliver* v. *Worcester*, 102 Mass., 489; Dillon, Mun. Corp., sec. 89, and cases cited in the notes.

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Moreover, if, as contended by the appellants, the City of Memphis ceased to have any legal existence on the 31st day of January, 1879, when the Legislative Act repealing the charter was approved, the case then became one of a trust without a trustee, pre-eminently fit for equitable interference. A court of equity will not permit a private trust to fail for want of a trustee. And this rule is applicable to cases in which a municipal corporation has been nominated the trustee. *Girard* v. *Philadelphia*, 7 Wall., 1 [74 U. S., XIX., 53]; *Philadelphia* v. *Fox*, 64 Pa., 169; *Montpelier* v. *E. Montpelier*, 29 Vt., 12. In such cases, as in cases where a natural person or a private corporation is the trustee, and the person has died or the corporation has been dissolved, the court will appoint a new trustee, or execute the trust by its own officers or agents. In Potter on Corporations, section 699, it is said: "Where, in any way, the legal existence of municipal trustees is destroyed by Legislative Act, a court of equity will assume the execution of the trust and, if necessary, will appoint new trustees to take charge of the property, and carry into effect the trust." In High on Receivers, 304-5, it is said: "When creditors of a corporation have a charge upon a particular fund, in the nature of a trust fund, the mismanagement or waste of such fund by those entrusted with its control will warrant the appointment of a receiver."

So in *Batesville Inst.* v. *Kauffman*, 18 Wall., 151 [85 U. S., XXI., 775], this court, when speaking of the power of a court to appoint a new trustee in place of one deceased, said: "It is, however, within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee," citing Story Eq., 976-1060.

Without further citations, which might easily be made, enough has been said to show that in the present case the Circuit Court was authorized to seize by the hands of its own receiver, for administration, those taxes which had been levied specially for the payment of judgments recovered, in regard to which the city had occupied the relation of a trustee, at least practically.

[529] Much of what I have said is equally applicable to the taxes which the city during its corporate existence had levied for the payment of interest on its debt, or for other purposes, and had not collected, and generally to all the assets of the city of every character, except such as I have heretofore mentioned, held for strictly public uses, such as public buildings, parks, fire apparatus, etc. These general assets, though not held specially in trust for any particular creditors, were held by the corporation, in a very just sense, for the benefit of its creditors. The corporation having ceased to exist, it was perfectly within the power of the Circuit Court, sitting as a court of equity, to seize all its assets to which its creditors have an equitable or legal claim, and hold them for administration. Such assets cannot be appropriated to any other use until the creditors are satisfied. Even legislative action cannot divert them to other uses. These principles have been fully recognized, and particularly in the Code of Tennessee. Referring to dissolved corporations, that Code enacts, sec. 3426: "The court shall appoint a receiver, with full power to take possession of all the debts and property, and sell and dispose of, collect and distribute, the same among the creditors and other persons interested, under the orders of the court." This statute is only an affirmance of equitable remedies before acknowledged and found in text books. Thus, in Potter on Corporations, secs. 714, 715, the rule is thus stated: "Whatever technical difficulties exist in maintaining an action at law against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in a creditor's following the property of the corporation into the hands of one not a *bona fide* creditor or purchaser, asserting his lien thereon, and obtaining satisfaction of his debt." In *Broughton* v. *Pensacola*, 93 U. S., 266 [XXIII., 896], the language of the court was: "The ancient doctrine that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified that [530] a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors, and its contracts may be so far enforced by a court of equity, as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of the debts to creditors, and if a municipal corporation, upon the surrender of its charter, be possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation."

So in *Curran* v. *Arkansas*, 15 How., 307, it was said, "The assets of a corporation are assets for the payment of its debts, and are trust funds for that purpose." See, also, *Maenhaut* v. *New Orleans*, 2 Woods, 108-114.

In Dillon on Municipal Corporations, sec. 37, the rule is stated thus: where the legal existence of a municipal trustee is destroyed by legislative act, a court of chancery will assume the execution of the trust, * * * take charge of the property, and carry into effect the trust.

In *Beckwith* v. *Racine*, 7 Biss., 142, the court said: "where a contract cannot be enforced at law against a municipal corporation owing to a repeal of its charter, and there are any funds, a court of equity will administer them for the benefit of creditors."

It is hardly necessary to say that the private property of a municipal corporation is so decidedly stamped with a trust in favor of its creditors, that it is incapable of being diverted to other uses by the legislation of the State. This law has again and again been declared. *Grogan* v. *San Francisco*, 18 Cal., 590, by Field, *J.; Comrs.* v. *Detroit*, 28 Mich., 228; *Dubuque* v. *Ill. Cent. R. R. Co.*, 38 Ia., 56, 67, 68.

The citations I have made (many others might be added) are sufficient to maintain the jurisdiction of the circuit court in this case and its power to lay hold, by its receiver, of all the property and assets belonging to the City of Memphis, when its charter was repealed, including all taxes levied and collected but undisposed of, and [5: all taxes uncollected, all property purchased by the city in sales for taxes, and all assets of every description, except the property above

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mentioned held for strictly public uses, and also to administer such assets for the benefit of the creditors.

I do not contend that a court of equity can itself *levy* a tax. I agree it cannot, and so this court has decided. *Rees* v. *Watertown* [*supra*]. The argument which has been submitted to prove that the circuit court has no such power is quite unnecessary. It is inapplicable to the case we have in hand. The complainants' bill asked for no assessment or levy of a tax, and the circuit court decreed none. The levy of a tax is a very distinct thing from the collection of a tax already levied. The levy is generally a legislative or a *quasi* judicial act. The collection of a tax after it has been levied is a ministerial act, which a court has power to enforce.

I have said, and I earnestly maintain, that the taxes which the City of Memphis had levied before the repeal of its charter, some of which were collected, but remained on deposit or undisposed of, and some of which are not collected, are assets of the Corporation, which its creditors have an equitable right to have seized and appropriated to the payment of the corporate debts. By the lawful assessment and levy of a tax the tax payer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law; or, when it is a lien, by a bill in equity. Such certainly is the law of Tennessee. *Jonesboro* v. *McKee*, 2 Yerg., 167; *Rutledge* v. *Fogg*, 8 Cold., 554; *Marr* v. *Bk.*, 4 Cold., 487. The imposition of a tax creates a legal obligation to pay. In the *Bk.* v. *U. S.*, 19 Wall., 227 [86 U. S., XXII., 80], this court ruled that, independently of an Act of Congress authorizing them, suits at law may be maintained by the United States to recover taxes assessed and levied. The statutes of Tennessee leave the matter in no doubt, so far as it relates to the rule in that State. And in the Civil Code, sections 554, 555, it is enacted that assessed taxes shall be and remain liens upon all taxable property of the person against whom they are assessed. If they are liens, they are enforceable in equity.

It is passing strange if those claims, which, by the law of the State, are debts due to the [532] city and collectible as such by the ordinary processes of law, are not assets of the corporation for the payment of its debts. And if they can be collected in the State Courts, I am unable to see why the Circuit Court of the United States, sitting in Tennessee, and having jurisdiction, may not also collect them, or seize them as assets of an insolvent and dissolved corporation. I cannot perceive why they are not as truly assets of the city as are the assessments, made by an insolvent mutual insurance company, its assets. Nobody would deny that such assessments could be seized by a court of equity, through the agency of its receiver, and administered for the benefit of the creditors of the company. No difficulty would be found in the way of collecting them.

Thus far I have considered the merits of the case as unaffected by the legislation of the State, heretofore spoken of, except so far as that legislation repealed the charter of the city. That legislation was certainly very extraordinary, and quite unprecedented in the history of the country since the Federal Constitution was adopted. Whatever may have been its purpose, and however carefully that purpose may have been disguised, if it can be sustained, its *effect* is to obstruct, if not totally destroy, all the power of the creditors of the city to enforce payment of the debts due them. They are remanded to the mere grace and favor of the Legislature. If ever legislation impaired the obligation of contracts, this did. If it had been simply the repeal of the municipal charter, no one could have called it in question. Undoubtedly the Legislature of a State may amend or dissolve the organization of a municipal corporation, so far as its governmental powers are concerned. But no legislature can so dissolve a corporation, municipal or private, as to destroy or impair the obligation of any contracts the corporation may have made. Dillon, Mun. Corp., sec. 114; *Von Hoffman* v. *Quincy*, 4 Wall., 535 [71 U. S., XVIII., 403]. Creditors of municipal corporations are as completely within the protection of the Constitution as any other creditors. What is meant by "impairing the obligation of a contract" is well defined. Embarrassments thrown by a statute in the way of enforcing payment of a debt, or a statutory substitution for the obligation and liability of the debtor, of the will of some other person, [533 though that person be a State, have not heretofore been recognized as consistent with the Constitution. The protection afforded by its provisions and its prohibition of certain state legislation relate, not to the mode and form of state statutes, but to their operation or effect.

In the view I take of the case, however, it is unnecessary to decide how far the legislation of the State is constitutional, or how far it is in conflict, if at all, with the paramount law which controls alike State and natural persons. Certainly the appointment by the Governor of Mr. Meriwether as a Receiver and Back Tax Collector can have no effect upon the prior appointment of Mr. Latham by the circuit court. It cannot confer upon Meriwether any right to interfere with the performance of the duties which the court had imposed upon its receiver. The jurisdiction of the circuit court had fully attached and, by the action of its receiver, the assets of the city, the tax bills and books, had come into the possession of the court before Meriwether's appointment. That jurisdiction and possession cannot be devested by any state action. The injunction decreed against Meriwether was, therefore, I think, properly adjudged.

I have thus stated, as briefly as possible, my reasons for dissent from the action of the majority of the court, reversing the decree of the court below and ordering a dismissal of the complainants' bill.

I think the decree should be modified by striking out so much of it as subjects to the payment of the debts of the city the property held exclusively for public uses, and so much as subjects to such payment the private property of all persons within the city's territorial limits.

Thus modified, I think the decree should be affirmed. And I am authorized to say that my brethren *Mr. Justice* **Swayne** and *Mr. Justice* **Harlan** concur with me in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 368; 9 N. W. Rep., 740, 742; 18 N. W. Rep., 501.

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JOSIAH D. WHITNEY, *Plff. in Err.*, v. FIRST NATIONAL BANK OF BRATTLEBORO.

154 US 664

1. National Bank v. Graham, XXV., followed.
2. A national bank is liable for the loss of a special deposit.

[No. 125.]

Argued Dec. 8, 1880. Decided Dec. 20, 1880.

IN ERROR to the Supreme Court of the State of Vermont.

The case is sufficiently stated by the court.

Mr. **Chas. N. Davenport,** for plaintiff in error.

Mr. **E. J. Phelps,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case is clearly settled by that of *National Bank* v. *Graham*, 100 U. S., 699 [XXV., 750]. The identical question there decided is presented by the record, and we have no doubt it was the only question considered by the Supreme Court of the State. We certainly cannot say, from anything that appears in the bill of exceptions, that there might not have been enough evidence of negligence on the trial in the lower court to make it necessary to send the case to the jury. There is nothing whatever in the record to indicate that the positive instruction to the jury to bring in a verdict for the defendant below, was based on anything else than a ruling that, as a matter of law, a national bank was not liable for the loss of special deposits.

The judgment is reversed, and the cause remanded with instructions to reverse the judgment of the county court, and award a venire de novo.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM S. RELFE, Superintendent of the Insurance Department of the STATE OF MISSOURI, Substituted for the LIFE ASSOCIATION OF AMERICA, *Plff. in Err.*, v. LETITIA V. WILSON.

131 US clxxxix Appx

1. A case ought not to be reversed for the admission of testimony which did no harm, although technically inadmissible; nor for the exclusion of immaterial testimony.
2. Where an exception, to a charge which contains several distinct propositions, is general, if any one of the propositions is correct, the exception must be overruled.
3. Repeals by implication, of statutes, are not favored.
4. A verdict is sufficiently certain, when the amount of the judgment to be entered on it can be ascertained by simple arithmetical calculation; as a verdict for the amount of a policy with six per cent interest.

[No. 92.]

Argued Dec. 2, 1880. Decided Dec. 20, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

Suit was brought by the defendant in error upon a policy of life insurance, in the Circuit Court of St. Louis County, Missouri, and removed, upon petition of defendant, to the court below, where judgment was given for the plaintiff upon verdict of a jury; whereupon the defendant sued out this writ of error.

The assignments of error sufficiently appear in the opinion of the court.

Messrs. James Carr, **Geo. D. Reynolds** and *John R. Shepley*, for plaintiff in error.

Mr. **E. T. Farrish,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The testimony of Mrs. Wilson and Huff was admitted only on account of its bearing on the question of vexatious delay.

The matter testified to had none of the characteristics of "confidential overtures of pacification", and there is nothing from which to infer "that the parties agreed together that evidence of it should not be given". But even if technically inadmissible, it is difficult to see what harm was done the Insurance Company. An agent of the Company went to Mrs. Wilson and, in substance, told her he wanted to settle by paying less than the face of her policy. She told him if she was entitled to anything, she was to the whole, and refused to entertain any proposition. He intimated that the policy was obtained by a misrepresentation of facts. This offended her, and he apologized. Certainly we ought not to reverse the judgment for the admission of such testimony.

The exclusion of the testimony of Hoover could do no harm, under the charge of the court upon that branch of the case. The jury were told in substance they must find for the Company on the issue to which this testimony related, unless the person who took the application of Wilson and made it out was, at the time, the agent of this Company, and knew that the previous application, about which Hoover was called to testify, had been made and rejected. In this view of the case, the excluded testimony was immaterial.

The general charge included all that the Insurance Company in its special requests asked. The language was not the same, but, if anything, the charge as given was more favorable to the Company than that requested.

The exception to the charge, as given, is general. The charge embraced several distinct matters, most of which are not now objected to.

This exception, therefore, was not well taken. Our decisions are uniform and numerous, to the effect that, "If a series of propositions are embodied in instructions and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled." *Johnston* v. *Jones*, 1 Black, 220 [66 U. S., XVII., 120]; *Beaver* v. *Taylor*, 93 U. S., 54 [XXIII., 798]. Rule 4 of this court, promulgated more than twenty years ago, 21 How., VI. [Book XX.], was intended to give substantial effect to this line of decisions, and requires of parties, in excepting to the charge of the court, to state distinctly the several matters to which they except.

Section 1, chapter 90, of the General Statutes of Missouri, revised in 1865, which gives damages in actions against insurance companies for a vexatious refusal to pay policies, was not repealed by the Acts of March 10, 1869, for the

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incorporation and regulation of insurance companies. Acts of 1869, pp. 26, 45. That section is not inconsistent with any of the provisions of the later Acts, and repeals by implication are not favored. There is nothing in the new Acts which relates to the same subject-matter, and the presumption is, therefore, that it was intended this section should stand. Such was evidently the understanding of the Legislature when it revised and promulgated the statutes of the State in 1879, under the provisions of the Constitution, for the section is brought into the revision, not as a new enactment, but as an existing law. Rev. Stat. Mo., sec. 6026

The verdict is sufficiently certain to authorize the judgment. It is for the full amount of the policy, with six per cent interest, and ten per cent damages for vexatious delay. The amount of the policy and the date from which interest is to be calculated is stated in the petition and admitted in the answer. The amount of the judgment to be entered on the verdict can, therefore, be ascertained by simple arithmetical calculation, which may as well be done by the court as the jury. Every material fact at issue was found by the jury, and all the elements of the calculation to be made were indicated with sufficient certainty.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF BENTON, *Plff. in Error,*

v.

WILLIAM H. ROLLENS ET AL., Trustees of the Estate of JAMES F. SHORES, Deceased.

154 US 665

1. Scotland Co. v. Thomas, XXIV., and Schuyler Co. v. Thomas, XXV., followed.
2. The amendment to the charter of the Osage Val. and S. Kan. R. R. Co., adopted in 1871 and changing the route of the road, did not extinguish the power granted to counties by the original charter to subscribe to the stock of the Company.

[No. 147.]

Argued Dec. 15, 1880. Decided Dec. 20, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

The case sufficiently appears in the opinion of the court.

Mr. **T. T. Crittenden,** for plaintiff in error.

Messrs. **John D. Stevenson** and **J. B. Henderson,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is affirmed on the authority of *Scotland Co.* v. *Thomas*, 94 U. S., 682 [XXIV., 219], and *Schuyler Co.* v. *Thomas*, 98 U. S., 169 [XXV., 88]. Under the rulings in those cases, the amendment to the charter of the Osage Valley and Southern Kansas Railroad Company, adopted in 1871, and changing somewhat the route of the road, did not extinguish the power granted to counties by the original charter, to subscribe to the stock of the company. The amendment was not a new charter, but an alteration of the old one, in a way which left the power to subscribe in full force.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.S.

UNITED STATES, *Appt.* [372]

v.

DOMINGA G. ATHERTON, EXRX., and A. B. GROGAN, EXR. of FAXON D. ATHERTON, Deceased.

(See S. C., 12 Otto, 372-375.)

Bill to set aside judgment for fraud—bill to annul a patent—requisites of.

*1. A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it and the manner in which the court or the party injured was misled or imposed on.

2. So also a bill to set aside or annul a patent of the United States for public lands, or to correct such a patent, on account of fraud or mistake, must show, by like averments, the particulars of the fraud and the character of the mistake and how it occurred

[No. 124.]

Argued Dec. 6, 1880. Decided Dec. 20, 1880.

APPEAL from the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Messrs. William J. Johnson, **James K. Redington,** and *L. A. Luce,* for appellant.

Mr. John B. Harmon, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This was a bill in chancery in the Circuit Court for the District of California, brought as stated in its caption by the United States Attorney for that District by the direction of the Attorney-General, as well on behalf of the United States as of certain persons afterwards named, settlers and preemptors upon the public lands described in the bill.

The object of the bill is to set aside a decree of the District Court for that district, made in 1860, confirming a claim which had been formally passed upon by the Board of Commissioners for the settlement of private land claims in California, and which had come into the District Court by appeal. The bill was filed in 1877.

The history of the case given by this bill is that the claim was originally presented to the Board of Commissioners as a Mexican grant, and confirmed by that Board. On appeal to the District Court, that order was reversed and the claimant's petition dismissed.

About four years after this, a grantee of the claimant filed a bill of review in the District Court, in which the former order of dismissal was set aside, and the order of the Board of Commissioners confirming the grant was affirmed. Something of a history of the origin of the [373] Mexican grant is given in the bill, from which it would appear that it was founded in forgery and was otherwise illegal; and, certainly on the face of this bill, if it were an open question, the title could not be sustained.

But before we can reach this inquiry, it is necessary to get rid of the decree of the District Court. That the Board of Commissioners and the District Court had jurisdiction, the one original and the other by appeal, of this claim is not doubted. Nor is it denied by counsel nor

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Patents for lands may be set aside for fraud.* See *note* to Miller v. Kerr, 20 U. S. (7 Wheat.), 1.

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can it well be doubted, that the District Court had jurisdiction by bill of review in a proper case to set aside and correct its former decree. The present bill does not set out that bill of review, or even its substance. It does not show whether any defense was made to it by the United States, or any process served on any of its officers. It gives no more of the proceedings in that case than it chooses, and this is scant indeed. The case was heard on demurrer to this bill, which was dismissed, and of course every presumption not inconsistent with the allegations of the bill is to be made in favor of the decree of the District Court. It is, therefore, to be presumed that, on the questions raised by the bill of review, there was a full and fair hearing, and that the rights of the parties were duly considered.

The only impeachment of that decree is in a single paragraph of the present bill, which reads as follows: "And your orator charges that the action of said United States District Court for the Southern District of California in the premises, in setting aside and vacating its former decree and confirming said claim, was irregular and without authority of law, and that said former decree rejecting said claim had become final."

A decree of a court of record is not to be set aside, seventeen years after it has been rendered, because it was irregular nor because it was erroneous. We have already said that the court had jurisdiction of the matter, and if its action was in any other respect without authority of law, it surely should have been shown what that was. The decree rejecting the claim had only become final in the sense that any other decree had which settles the rights of the parties; and like any other decree, it was subject in a proper case to be opened by a bill of review within five years after it was made. There is no allegation of fraud in the decree of the court or in procuring it; no imputation upon the court.

The present bill alleges that no new testi- [374] mony was offered on the hearing of the bill of review, but that the bill itself was founded on the allegation that the former decree was erroneous, and ought to be reversed for error apparent in the record. It was so reversed, and the final decree simply confirmed the action of the Board of Commissioners.

It is impossible to hold that such a decree should be opened for a new hearing on such allegations as these, so long after it was made: no fraud charged against it: no error of law pointed out: no want of jurisdiction: a loose, disconnected effort to show that, if another hearing could be had, the result would be different.

The bill also alleges that the patent issued by the United States does not conform to the survey which was finally approved in the surveyor's office. This patent bears date February 16, 1875, and the present bill was filed two years after. The discrepancy alleged between the amount of land covered by the survey and that covered by the patent is very large. The bill was filed within a reasonable time after the patent issued. We should be very much inclined to sustain any bill showing such a squandering of the public land if the allegations had been sufficiently specific to call upon the defendant to answer. Such a bill must rest, however, on the ground of fraud or mistake, and it is too clear for argument that the particulars of the fraud, or the manner in which the mistake occurred should be set out.

No copy of the patent is exhibited, nor of the survey with which it is said to differ.

There is only the general allegation that certain persons, not named therein, conspired together, and by false and fraudulent representations and suppression of facts imposed upon the officers connected with the Land-Office at Washington, and fraudulently procured the patent to be issued.

No names of the parties who committed the fraud, no names of the persons or designation of the officer imposed on, are given. It is at war with the whole character of proceedings in courts of equity to call in aid its extraordinary power to set aside such solemn public record as a patent of the United States on such allegations as these.

We had occasion to discuss this matter so re- [375] cently in the case of *Marquez* v. *Frisbie*, 101 U. S., 473 [XXV., 800], that we will content ourselves with a reference to that case.

It is urged that, after the court had sustained a demurrer to the bill, the complainant asked leave to amend; which was refused, on the ground that no amendment could be made which would justify the relief prayed. The right to amend after the demurrer is sustained, must rest largely, if not wholly, in the discretion of the court; and while we are not prepared to hold that in no case will the action of the court in such matter be reviewed here, we have no hesitation in saying that the abuse of this discretion must be made plain, to authorize us to do so. In the case before us, there is no suggestion of the nature of the amendment proposed to be made. No amendment to the bill was offered for the consideration of the court, nor do we know in what particulars the parties desired to amend. We have no foundation, therefore, on which to affirm that the court erred in refusing the request.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 426.

JAMES DENSMORE ET AL., *Appts.*, [375

v.

WILLIAM C. SCOFIELD ET AL.

(See S. C., 12 Otto, 375-378.)

Void patent.

The patent re-issued to Densmore for an improved oil car has neither novelty nor utility, and is void.

[No. 131.]

Argued Dec. 10, 1880. Decided Dec. 20, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The case is fully stated by the court.

Messrs. **J. C. Clayton** and **A. Q. Keasbey**, for appellants.

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Mr. **Geo. Willey,** for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity by the complainants. The bill was brought upon a re-issued patent. The summation and claims, as set forth in the re-issue, are as follows:

[376] "The nature of our invention consists in combining two large, light, tight, firm, stout tanks with an ordinary railway car, making the tank practically a part of the car, so as to carry the desired substance in bulk in the car itself, or in a permanent fixture or part thereof, instead of in barrels, casks, hogsheads, tierces, or other movable vessels or packages, as is now universally done on railway cars, and thereby save carrying the weight of the barrels, casks, hogsheads, tierces, or other movable vessels or packages.

"What we claim as our invention, and desire to secure by letters patent, are,

"*First*, The two tanks B, B, or their equivalent, when constructed and operating in combination with an ordinary railway car, substantially as and for the purposes set forth.

"*Second*, The two tanks B, B (or their equivalent), when set directly (or nearly so) over the car trucks, and when constructed and operating in combination with an ordinary railway car, substantially as and for the purposes set forth.

"*Third*, The frames C, C, C, C, the bolts 1, 2, 3, and 4, and the cleats H, H, H, H, when constructed and operating in combination with tanks B, B, the man-holes and manheads D, D, and the faucets E, E, and the runway G, when constructed and arranged in combination with tanks B, B, and an ordinary railway car, substantially as and for the purposes set forth and described."

The bill alleges infringement, and prays for an account of profits and a decree for a perpetual injunction, and for such further relief as may be deemed proper.

Among other defenses, the answer sets up that the re-issued patent is too broad and is, therefore, void, and denies infringement.

We pass by these topics, because we deem it proper to dispose of the case upon a more radical and comprehensive objection.

A witness, called by the appellees, testified that he was largely engaged in shipping petroleum, from 1861 to 1872. His language is:

"In 1863, and prior to this and after, I shipped large quantities of it in old whaling casks holding from 1½ to 8 and 10 barrels each. I shipped a great many thousands of barrels in said casks, which were sent forward, returned empty, refilled, and forwarded again.

[377] "I attach two leaves of my shipping-book, showing some shipments in casks and return casks in 1863; they are correct.

"My practice was to spike down cleats to prevent the casks from shifting. In nearly every shipment there were small and large casks as above. The casks would go to and fro on the railroad many times, carrying oil, and returning in the same cars empty to be filled and shipped again by me."

Another witness testifies "That he has been general freight agent on the Lake Shore and Southern Michigan Railway and its predecessors for about twenty years. That all this time he has been familiar with the practice and usage in railways as to loading, and that it has always been their practice or usage to place or distribute loads so that they should rest, as far as possible, over the trucks."

A third witness, speaking of wooden tanks like those of the complainants, says:

"During the year 1871, their use was discontinued, because of the large percentage of leakage, and their consequent liability to be burned up; and, in case of accident on the railroad, if a tank was thrown off a car and it was destroyed, a fire was almost certain to result from the accident. A single iron tank built in boiler shape, and nearly as long as a car, and placed horizontally on the car, was substituted then.

"*Q.* State whether they use that description of tank down to the present time.

"*A.* That kind of tank car is still in use, and is giving universal satisfaction because of being tight, little or no leakage, and the liabilities to fire are less; and, in case of accident, the tank is of sufficient strength to even be thrown off a car without injury.

"*Q.* State whether or not tanks of the kind described in the defendants' patent have gone into disuse in the carrying of petroleum generally.

"*A.* So far as I know, they have.

"*Q.* In loading freight cars, what has always been the practice and custom in reference to loading over the trucks where the weight can be thus distributed?

"*A.* It is the universal custom, so far as is possible, to place the weight over the trucks."

These witnesses are unimpeached and uncontradicted.

This testimony leaves nothing of the substance of the plaintiffs' alleged invention. No [378] one, we apprehend, would seriously contend for a moment that what is left is sufficient to constitute the basis of a valid patent. See *Brown* v. *Piper*, 91 U. S. 37 [XXIII., 200], and the authorities there cited. But, irrespective of this testimony and of any testimony, upon looking this re-issue in the face and examining its several claims by their own light, we find nothing that brings any of them within the sphere of what is properly patentable. There is no novelty and no utility. It does not appear, to use the language of appellants' brief, that there was "a flash of thought" by which such a result as to either was reached, nor that there was any exercise of the inventive faculty, more or less thoughtful, whereby anything entitled to the protection of a patent was produced. It strikes us that the entirety and all the particulars of the summary and the claims are frivolous, and nothing more.

Patents rightfully issued are property, and are surrounded by the same rights and sanctions which attend all other property. Patentees as a class are public benefactors, and their rights should be protected. But the public has rights also. The rights of both should be upheld and enforced by an equally firm hand, wherever they come under judicial consideration.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[422] UNITED STATES, *ex rel.*, CITIZENS' NATIONAL BANK OF LOUISIANA, *Plff. in Err.*,

v.

JOHN J. KNOX, Comptroller of the Currency.

(See S. C., 12 Otto, 422-426.)

Liability of stockholders of bank—insolvency.

1. The shareholders of an insolvent national bank are liable, individually, equally and ratably, for the debts of the bank to the extent of the amount of their stock therein.
2. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in anywise affect the liability of another.

[No. 889.]

Argued Dec. 6, 1880. *Decided Dec. 20, 1880.*

IN ERROR to the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. **Durant** & *Hornor*, for plaintiff in error.

Mr. **Charles Case**, for defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court:

This case is a petition to the Supreme Court of the District of Columbia for a writ of *mandamus* directed to the Comptroller of the Currency. [423] It was fully heard in that court upon the merits. The writ was refused and judgment was rendered against the relator for costs. This writ of error was thereupon sued out, and the case is thus brought before us for review.

There is no controversy as to the facts. The only question presented for our consideration is a question of law. The case made in the record, so far as it is necessary to be stated for the purposes of this opinion, is as follows: on the 7th of April, 1874, the Crescent City National Bank of New Orleans was, and for some time had been, insolvent and in the hands of a receiver. On that day the comptroller assessed each shareholder seventy per cent upon the par value of each share of his stock, and ordered the receiver to collect the assessment. This the receiver proceeded to do by filing a bill in equity in the Circuit Court of the United States for the District of Louisiana, against all the shareholders. Thereafter he obtained a decree against all the defendants severally, who were within the jurisdiction of the court, for the amount due from each one according to the assessment, and the cause was thereupon continued to await any further assessment the comptroller might deem it proper to make, and it is still pending.

The capital stock of the bank was $500,000; seventy per cent, therefore, was $350,000.

This sum, if it could have been collected in full, would have paid all the debts of the bank and left a balance over. But by reason of the insolvency of many of the shareholders the assessment netted only $112,658.13, and nothing or very little more will hereafter be realized from it. From the proceeds of the assessment and other assets of the bank, eighty per cent of the principal of its debts have been paid.

The relator being a large creditor of the bank, requested the comptroller to order a further assessment of thirty per cent upon each share of the capital stock, for the discharge of the balance of principal and interest still due to its creditors, and to direct the receiver to proceed as before to collect the amount of the new assessment. The comptroller refused, because the enforcement of such an assessment would compel the solvent shareholders to pay the sums and proportions due from the shareholders who are insolvent. [424]

He holds that no such liability is imposed on the solvent shareholders, and that he has, therefore, no right or power to make the assessment as requested.

The point to be decided is whether he is clothed with this power and duty, and whether the shareholders are thus liable.

The first bank law was passed February 25, 1863 ch. 58, 12 Stat. at L., 665. The last clause of section 12 is as follows:

"For all debts contracted by such association for circulation, deposits or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares."

This provision was changed in 1864, and has been since and is now in force in these terms: "The shareholders of every national banking association shall be held individually responsible, *equally and ratably, and not one for another*, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." R. S., sec. 5151.

The Act of 1863 made no provision for enforcing the personal liability of shareholders, while that of 1864, 13 Stat. at L., 100, provided that it might be done through a receiver appointed by the comptroller, and acting under his direction. R. S., sec. 5234.

The difference between the clause creating the individual liability as it was originally, and as it was after it was amended and altered, is obvious and striking. The change was plainly made *ex industria*, to prevent the possibility of doubt as to the meaning of Congress. What the effect of the clause would have been without the change is a point we are not called upon to consider. The charter of a private corporation is a contract between the law-making power and the corporators, and the rights and obligations of the latter are to be measured accordingly.

By the common law, the individual property of the stockholders was not liable for the debts of the corporation under any circumstances. Here the liability exists by virtue of the statute and the assent of the corporators to its provisions, given by the contract which they entered into with Congress in accepting the charter. With respect to the character of that liability, [425] it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, "one for another," as to the amount which each might be required to pay.

In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1), the whole amount of the par value of all the stock held by *all the shareholders;* (2), the amount of the deficit to be paid after exhausting all the assets of the bank; (3), then to apply the rule

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that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock.

The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in anywise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly. *Crease* v. *Babcock*, 10 Met., 525.

These rules have been applied in several well considered judgments of other courts, where the words we have italicized were not in the statutes upon which they proceeded. We have found no case in conflict with them. See *Crease* v. *Babcock*, *supra*; *Atwood* v. *Bk.*, 1 R. I., 376; *Matter of the Hollister Bk.*, 27 N.Y., 393; *Adkins* v. *Thornton*, 19 Ga., 325; *Robinson* v. *Lane*, 19 Ga., 337; *Wiswell* v. *Starr*, 48 Me., 401. See, also, Morse, Bkg., 503.

Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction.

[426] Nothing in this opinion is intended in anywise to affect the authority of *Kennedy* v. *Gibson*, 8 Wall., 498 [75 U.S., XIX., 476], and *Casey* v. *Galli*, 94 U. S., 673 [XXIV., 168]. On the contrary, we approve and re-affirm the rule laid down in those cases.

The comptroller decided correctly as to his duty in this case.

The judgment of the Supreme Court of the District of Columbia is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[461] CATHARINE HALL ET AL., *Appts.*

v.

WILLIAM H. LAW.

(See S. C., 12 Otto, 461-467.)

Partition of real estate—conclusive decision—color of title—statutory bar—defense in ejectment—stale claim.

1. In proceedings in Indiana to partition real estate, the order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given.

2. This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it. It is not void because no petition or complaint appears in the record.

3. Whenever an instrument, by apt words of transfer from grantor to grantee, whether such grantor act under the authority of judicial proceedings or otherwise, in form passes what purports to be the title, it gives color of title.

4. Even if invalid, possession under it for the period prescribed by statute bars the right of the true owners as effectively as possession under the most perfect title.

5. It is an absolute defense to the action of ejectment; and a suit in equity, brought after that period, for the determination of the title and for possession of the property, will not be entertained, as it is founded on a stale claim.

[No. 114.]

Submitted Dec. 6, 1880. Decided Dec. 20, 1880.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The case fully appears in the opinion of the court.

Messrs. **James C. Denny** and **Charles E. Marsh,** for appellants.

Messrs. Azro Dyer, **Asa Iglehart** and **J. E. Iglehart,** for appellee.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit to quiet the title to certain real property in the State of Indiana, of which it is charged that one William P. Hall, who died intestate in 1857, was seised in fee. By the law of Indiana, his real estate descended to the complainants.

The premises in controversy are situated in [462] the City of Evansville, in that part known as Lamasco. They constitute a part of a fractional section in the subdivision of the public lands in a township of the State. A small stream runs through the section, known as Pigeon Creek, on the west of which four sevenths of the section lie, and on the east three sevenths. The premises in suit are on the west side of the creek.

In 1831, the deceased, William P. Hall, became the owner of two undivided sevenths of the section. In 1833, proceedings were taken in the Circuit Court of the county in which the section lies, at the instance of the possessor of an undivided interest, for a partition of the land and an assignment in severalty of the interests of the different owners. These proceedings resulted in a partition, by which the interest of Hall was set apart out of that portion of the section lying east of Pigeon Creek. If these proceedings are valid, the claim of the complainants, as the heirs and the widow of the deceased, is without foundation. He was devested of all interest in the property in controversy several years before his death.

The proceedings were taken under an Act of the State, of February, 1831, entitled "An Act to Provide for the Partition of Real Estate," the 1st section of which enacts:

"That when two or more persons are proprietors of any real estate, any of whom are desirous of having the same divided, it shall and may be lawful for the Circuit Court of the county where such real estate may be situate, on the application of any such person (notice of such application having been previously given by the party so applying, for at least four weeks in some public newspaper in the State), to appoint three disinterested freeholders, residents of said county, not related to either of the parties, as commissioners for dividing the said estate; and said commissioners having previously taken an oath or affirmation, before some justice of the peace in said county, honestly and faithfully to execute the trust reposed in them as commissioners aforesaid, shall proceed to make division of said estate, as directed by the court, among the owners and proprietors thereof, according to their

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respective rights; which partition being made by the said commissioners or any two of them, and return thereof being made by the said commissioners, in writing, under their hands, to said court, particularly describing the lots or portions allowed to each respective owner or proprietor, mentioning which of the owners or proprietors are minors, if any such there be, which return being acknowledged by the commissioners making the same, before any one of the judges of the court aforesaid for the said county, and accepted by the court, and entered and recorded in the clerk's office, shall be a partition of such lands, lots and tenements therein mentioned." Rev. Laws of Ind., 1838, 426.

[463]

The record of the proceedings of the partition in this case consists of the order of the Circuit Court of September 12th, 1832, appointing three commissioners to divide the section between the several proprietors, and to report to the court at the next Term; their report at the next Term, in March, 1833, showing the partition made and the part assigned to each proprietor; the confirmation of the report at that Term by the court, and its apportionment of the expenses of the partition among the proprietors.

The order appointing the commissioners recites that it was proved to the satisfaction of the court that David Miller, one of the proprietors, had given due and legal notice that he would, on the third day of the court, which was that day, Sep. 12, make application for the appointment of commissioners to divide among the several proprietors thereof the fractional section.

The report gives the boundaries of the section, and sets forth with proper description the portion assigned to each proprietor. It complies in its details with the requirements of the statute and is accompanied with a plat of the land showing the tracts assigned.

The validity of this partition is assailed because no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, and without one it is contended that they were void.

The statute does not in terms require the application of the proprietor seeking a partition to be presented in writing, or, if one be presented, to be filed among the records of the court. All that it designates as necessary to authorize the court to act is, that there should be an application for the partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks. When application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication upon these matters.

[464]

The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises upon the presentation of the application, accompanied with proper proof of previous notice of it. The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it. *Voorhees* v. *Bk.*, 10 Pet., 449; *Thompson* v. *Tolmie*, 2 Pet., 157; *Comstock* v. *Crawford*, 3 Wall., 396 [70 U. S., XVIII., 34].

The cases of *Lease* v. *Carr*, 5 Blackf., 353, and *Shaw* v. *Parker*, 6 Blackf., 345, cited by complainants, do not support their position. In the first case, the Supreme Court of Indiana, having the proceedings in partition before it for review on writ of error, held that the petition of the appellant should show the extent and nature of his interest in the land, and that he holds it in common with the defendants, whose interests, if known to him, should also be stated; and that as the petition in that case was silent in these particulars, and merely requested the appointment of commissioners to divide the land, it was defective, and the order made thereon was erroneous. But the court did not hold or intimate that the order and subsequent proceedings were, from the defective character of the petition, absolutely void. It was the common case of the reversal of proceedings because of intervening error. If not thus corrected, the existence of the error in no respect impairs the validity and efficacy of the subsequent proceedings, or the order or judgment thereon. The distinction between erroneous and void orders and judgments is too familiar to call for extended observation, and is fully recognized, not only in the courts of Indiana, but in those of every State in the Union. *Horner* v. *Doe*, 1 Ind., 130; *Doe* v. *Smith*, 1 Ind., 451; *Doe* v. *Harvey*, 3 Ind., 104; *Ashley* v. *Laird*, 14 Ind., 222; *Cox* v. *Matthews*, 17 Ind., 367; *Evans* v. *Ashby*, 22 Ind., 15; *Waltz* v. *Borroway*, 25 Ind., 380; *Hawkins* v. *Hawkins*, 28 Ind., 67; *Comparet* v. *Hanna*, 34 Ind., 74; *Gavin* v. *Graydon*, 41 Ind., 559; *Burk* v. *Hill*. 55 Ind., 419; *Hays* v. *Ford*, 55 Ind., 52; *Hunter* v. *Burnsville, Turnpike Co.*. 56 Ind., 218; *Wiley* v. *Parey*, 61 Ind., 457. The second case, *Shaw* v. *Parker*, also came before the Supreme Court on a writ of error, and follows in its decision *Lease* v. *Carr*. We see nothing in either to impeach the validity of the order of the Circuit Court of the county appointing the commissioners, or its order confirming their report. Thus confirmed, the report constituted in the language of the statute, a partition of the lands described in it.

[465]

The complainants, treating as invalid the partition proceedings, sue for the undivided two sevenths of that portion of the fractional section lying west of Pigeon Creek, and assume in their bill of complaint that the title of the defendant rests upon a deed made under a decree in a suit in chancery commenced against the deceased in 1836, three years after the alleged partition. It seems that a claim was made at that time that the two undivided sevenths of the fractional section was conveyed by its then owner, Nathaniel Ewing and his wife, to one William Prince, upon a condition which had failed; that upon the death of Prince, his estate being insolvent, the Property had been sold by order of the probate Court to one William Daniel, for $45, and for the like sum had, by him and wife, been conveyed to the deceased William P. Hall; and the suit in chancery was brought by parties who had obtained another conveyance from Ewing and wife to set aside the probate sale, and to compel the deceased to convey his interest to them. The suit resulted in a decree directing the execution of a deed of the

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title and interest of the deceased to the complainants in that suit, of whom the defendant was one, by a commissioner appointed by the court. The decree describes the two undivided sevenths as being the same tract assigned to the deceased in the partition proceedings. The father of the deceased was appointed the commissioner, and he executed the deed ordered.

[466] The complainants here assail the validity of this decree, as being rendered without service upon the deceased, who was then a minor under ten years of age, upon an answer filed by a guardian *ad litem*, who was not authorized to waive service on his ward. It is not necessary to examine into the validity of the decree for this or other reasons. This deed purports to pass whatever title the deceased possessed in the lands conveyed under the probate sale, whether it be considered as the two undivided sevenths of the whole fractional section, or the tract assigned to him on the partition. It gave at least color of title. Whenever an instrument, by apt words of transfer from grantor to grantee, whether such grantor act under the authority of judicial proceedings or otherwise, in form passes what purports to be the title, it gives color of title. The deed of the commissioner in this case, with the return of the commissioners in the partition proceedings, gave such color. Even should they be considered as invalid, possession under them for the period prescribed by statute bars the right of the true owners as effectively as possession under the most perfect title. It is an absolute defense to the action of ejectment. And a suit in equity, brought after that period, for the determination of the title and for possession of the property, will not be entertained, as it is founded on a stale claim. As the statutes of limitations in most States, and in Indiana, among them, apply in terms only to legal remedies, courts of equity are considered as bound by them only in cases of concurrent jurisdiction. In other cases they are said to act only by analogy, and not in obedience to the statutes. Though the present case is in form a suit in equity, and as the bill asks for an injunction it may be so treated, it is essentially a suit to recover the possession of the land. The complainants are out of possession, and the defendant, or parties claiming under him, are in possession. The determination in favor of the complainants' title is only preliminary to a decree for the surrender of possession. If not a concurrent remedy with the common law action of ejectment, it so nearly resembles the latter as to justify the rule that in such cases the statute equally applies.

The defendant and his associates in the deed of the commissioner, or persons claiming under them, have been in possession of the entire fractional section for over forty years, and during all this period have exercised acts of ownership of almost every kind. They have laid out [467] the land into lots, blocks, streets and alleys, and have made extensive improvements either upon them or in connection with them. They have also sold parcels to a large number of persons, who have gone into possession, and still hold them, and have erected buildings thereon. The Town of Lamasco, laid out by them upon the land, reached a population of over ten thousand inhabitants before it was annexed to the City of Evansville, of which it now forms a part.

The Statute of Indiana reserved to the deceased a right of action to recover the premises for five years after he came of age, and though he lived for ten years after that period, within the vicinity of the property, and was cognizant of the possession of the defendant and his associates, and of parties holding under them, of their claim of ownership and of their improvements, he made no attempt to disturb them in its possession, use and enjoyment, or in the sale of portions of it.

The claim now set up by the complainants is a stale one and, under the facts disclosed, without merit. *The decree dismissing the bill must, therefore be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

Cited—20 N. W. Rep., 781.

UNITED STATES, *ex rel.* THOMAS MCBRIDE, [407]
Plff. in Err.,
v.
CARL SCHURZ, Secretary of the DEPARTMENT OF THE INTERIOR.

(See S. C., 12 Otto, 407, 408.)

Costs against public officer—general rule.

1. In an action against a public officer, as Secretary of the Interior, in regard to the manner in which he has discharged his official duties, although no intentional wrong is charged or proved against him, yet costs may be recovered against him.
2. The general rule should be followed that the prevailing party should recover his costs of the unsuccessful one.

[No. 707.]

Submitted Dec. 20, 1880. Decided Jan. 10, 1881.

IN ERROR to the Supreme Court of the District of Columbia.

On motion to modify decree.

The case is stated by the court.

Messrs. **J. H. Mandeville** and **W. H. Smith**, for plaintiff in error.

Messrs. **Charles Devens**, *Atty-Gen.*, and **J. K. McCammon**, *Asst. Atty-Gen.*, for defendant in error.

Messrs. B. S. Brooks and *James K. Redington*, for defendants in error in No. 266, filed a brief in this case by leave of court.

Mr. Justice **Miller** delivered the opinion of the court:

In this case, a motion is made to modify the order that each party should pay his own costs and give the plaintiff his costs against the defendant.

Our first impression was that as the defendant was sued in regard to the manner in which he had discharged certain official duties as Secretary of the Interior, in which no intentional [408] wrong was charged or proven against him, it would be unjust to make him pay the costs of the proceeding, out of his own pocket.

But a careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights.

In the case of *Kendall* v. *U. S.*, 12 Pet., 524, which is the leading case establishing the right

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of a citizen to the use of the writ of *mandamus* to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that case, as in the present, was one demanded of a cabinet officer, namely: the Postmaster-General, and which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court, as shown by the report of the case, rendered judgment for costs against him.

In the case of *U. S.* v. *Boutwell*, 17 Wall., 604 [84 U. S., XXI., 721], which was the case of a writ of *mandamus* against Mr. Boutwell, as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said: "It is the personal default of the defendant that warrants the impetration of the writ, and if a peremptory writ of *mandamus* be awarded, the costs must fall upon the defendant." And it is argued that as it would be unjust to make the successor in office of the delinquent Secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate.

We cannot in the face of these cases, refuse the order for costs, however much we might wish it were otherwise. There may be a contingent or other fund of the department out of which these costs can be paid. If there is no such provision, Congress may provide for it or enact generally that when the officers of the Government are sued with reference to the manner in which they have performed or failed to perform their official duties, they should be relieved from expense of the suit if they have acted with good motives and upon reasonable grounds as in revenue seizures and similar cases.

The plaintiff must have judgment for his costs.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[467] WILLIAM R. WALKER, Assignee in Bankruptcy, of NORTH MISSOURI INSURANCE COMPANY, *Appt.*

v.

JOSEPH T. REISTER ET AL.

(See S. C., 12 Otto, 467-472.)

Conversion of bonds.

A bill brought against the officers and directors of a company for an unlawful conversion of bonds of the company, cannot be sustained where they were not the company's property, but were borrowed for temporary use and were returned to their true owners.

[No. 110.]

Argued Dec. 7, 1880. Decided Jan. 10, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Mr. **Nathaniel Myers,** for appellant.

Mr. **James O. Broadhead,** for appellees.

[468] *Mr. Justice* **Miller** delivered the opinion of the court:

The appellant, who was assignee in bankruptcy of the North Missouri Insurance Company, filed his bill in equity in the District Court for the Eastern District of Missouri against the appellees, who had been the officers and directors of the corporation prior to the bankrupt proceedings. The District Court, after answer, replication, and voluminous depositions, dismissed the bill, and the Circuit Court affirmed that decree on appeal. From this latter decree the assignee appeals to this court.

The bill, in substance, sets forth that, at a certain date prior to the institution of proceedings in bankruptcy, the corporation was the owner of bonds of the Counties of Macon, Schuyler, Knox and Adair, and other securities, amounting in the aggregate to over $136,000; that the bonds were in the possession of the company in the month of May, 1875, when they were exhibited to the superintendent of the insurance department of the State of Missouri, and a similar officer of the State of Ohio, by the defendants, or some of them, as investments of the funds of the Company, and as evidence to these superintendents of the sound condition of the company and its right to continue the business of insurance. The foundation of the relief sought is thus stated in the language in the bill:

"Yet your orator further shows that, notwithstanding the premises, the said directors and officers, unmindful of their duty aforesaid, but intending to cheat and defraud the said insurance company and its creditors aforesaid, prevailed upon and procured the said treasurer to unite and co-operate with them, as in fact he did unite and co-operate with them, in parceling out and distributing the said notes and bonds among themselves and their friends at some time prior to the 19th day of June, 1873, wholly without consideration whatever, and in gross disregard of their duty as such directors and officers of said company, and thereby and through the neglect of duty, and through the fraud and breach of trust of the said officers and directors of said Company, the said bonds and notes became and were wholly lost to the said Company and its creditors, and to your orator as assignee aforesaid."

The answer denied that the Company ever owned the bonds and that they were so parceled out and distributed among the defendants and their friends.

The clear result of a large amount of testimony in regard to the bonds in controversy is that they were borrowed from divers persons and corporations who owned them, or were placed in the temporary possession of the officers of the Insurance Company for the purpose of being shown to the examining superintendents as property of that Company, with the understanding that as soon as the examination was over they should be returned to their owners; and that this was done. It is also established that the parties who actually owned the bonds were aware of the fraudulent use which was to be made of them, and were willing in this way to contribute to the deception practiced on the official examiners. [469]

Nothing of this, however, is alleged in the bill or is found in the answer. The relief sought is based squarely on the ground that the bonds in question, being in possession of the defendants as the property of the Insurance Company, were by them unlawfully converted to their own use, whereby the Company and the creditors of the Company, by reason of its insolvency, were

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defrauded of their value. The bill makes a case of conversion for which an action in the nature of trover at common law would lie, and it is difficult to see any sufficient ground for the interposition of a court of equity.

But, apart from this, it seems that unless the complainant has sustained both of the principal allegations of the bill, namely: that the bonds were the property of the Company, and that the defendants unlawfully converted them to their own use, his bill was properly dismissed.

Now, the testimony makes it very clear that the defendants did not convert the bonds to their own use or distribute them among their friends, as alleged in the bill. It is also quite apparent that they received no consideration for the return of the bonds to their owners, and committed no fraud on the Insurance Company in the transaction, and that, in fact, they were acting with a mistaken zeal in what they supposed to be the interest of their corporation.

They do not, therefore, occupy the position [470] of embezzlers of funds intrusted to their charge by the Company; but that is precisely the effect of the allegations of the bill which we have copied, and it is also the only inference to be drawn from the whole of its scope and tenor.

So, also, we do not think that the evidence establishes that the Insurance Company was ever the owner of these bonds. It never paid anything for them, nor gave consideration in any other way. It lost nothing by the transaction in which the bonds came into the possession of its officers and passed out of that possession.

It had not, therefore, any honest claim to the ownership of the bonds; and if the dishonest purpose for which they were used can be imputed to the corporate entity, it is very certain that when the transaction was over it could confer no rightful authority on that corporation to retain or reclaim the bonds. As between the Insurance Company and the owners of the bonds the title never passed from the latter, nor did any vested ownership pass to the former. How, then, can it be said that these officers cheated or defrauded the Company, or that the bonds were lost to the Company by their neglect or their fraud or breach of trust? How could the corporation lose what it did not own? How could it be cheated out of that to which it had no right? How could it be defrauded out of property belonging to others and in the hands of those who owned it?

A very ingenious argument is made by counsel of appellant, on which he places much reliance, to the effect that, having proved that these bonds were once in the possession of the Insurance Company and were not to be found when its assets were turned over to the assignee, he has made a *prima facie* case, and that defendants cannot set up in their defense the fraudulent transaction which shows their own guilt.

It is not necessary to decide here whether, if the plaintiff had brought an action of trover, and had proved before the jury by some competent witness that these bonds were in the hands of the officers of the Company, who asserted them to be the bonds of the corporation, they would in defense have been permitted to show the facts we have stated because of the turpitude of their action in the matter. We need [471] not decide this, for the reason that, in proving the possession of these bonds, the plaintiff has proved at the same time the character of that possession. He has proved that the possession of the Insurance Company was not with claim of ownership, but it was a temporary loan, not of the bonds, but of their possession for a definite purpose, which being accomplished they were returned to their real owners. It was one transaction, and must be so considered in the broad view of a court of equity; a transaction in which the fraudulent purpose is fatal to the title of the Insurance Company, or any right which that Company could assert under it. A court of equity will not stop half way in the investigation of a fraud which is quite apparent, to give one of the parties to it affirmative relief at the expense of the other. In such cases, better is the condition of the defendant.

It is also argued that the fraud was against the creditors of the Company, and the assignee can pursue the party who defrauded them.

To this there are several sufficient answers:

1. The bill is not framed on that foundation, but distinctly on the ground of a conversion of the funds of the Company, which, if true, is to that extent a fraud on the Company's creditors. But as we have already shown, the Company was defrauded of nothing, because it did not own the bonds.

2. Though the bill alleges in a general way that the exhibition of these bonds was a fraud upon the creditors, it is difficult to see how that can be if the bonds were, as the bill alleges, at that time the property of the Company. If that was so, the officers had a right and were in duty bound to exhibit them.

3. There is no allegation that any particular creditor ever became so, or was influenced in his action toward the corporation by reason of this exhibition of these securities, and it is denied in the answer that any creditor was so influenced, and no proof to establish the charge is given.

4. And, last, it seems to be reasonable that if any creditor was misled to his loss by this fraudulent misconduct of the officers of the Company, he would have a corresponding right to a remedy in his own name against them to the extent of his individual injury, quite independent of the right of the assignee to recover for property of the corporation embezzled or converted by [472] these officers.

In short, whatever remedy there may exist to anyone to pursue these parties and others for their share in this transaction, either at law or in equity, this bill, founded on a devastavit of assets of the Company, if language borrowed from a kindred branch of the law may be thus used, cannot be sustained, because it is clear that the bonds which are said to have been converted were never the bonds of the bankrupt corporation. *The decree of the Circuit Court is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM B. WADSWORTH, *Appt.*, [534]

v.

BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

(See S. C., 12 Otto, 534-541

*The principles announced in *Aspinwall* v. *Commissioners* [XVI]., re-affirmed.

*Head note by *Mr. Justice* HARLAN.

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[No. 153.]

Argued Dec. 16, 1880. Decided Jan. 10, 1881.

APPEAL from the Circuit Court of the United States for the Western District of Wisconsin.

The case is fully stated by the Court.

Messrs. L. S. Dixon and **M. H. Carpenter,** for appellant.

Messrs. **Bartlett** *& Hayden,* for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

By an Act of the Legislature of Wisconsin, approved April 1, 1864, the legal voters of certain counties, among which are the Counties of Eau Claire and St. Croix, were authorized to vote upon the subject of municipal aid in the construction of a railroad from Tomah to Lake St. Croix, by the Tomah and Lake St. Croix Railroad Company, subsequently called the West Wisconsin Railway Company.

The Act declared that "If a majority of the ballots cast in any of said counties be *for railroad aid*, the County Board of Supervisors of said counties shall have *power, by resolution*, to cause to be issued bonds of the denomination of $100 to $1,000 each, to an amount not exceeding $50,000 for each of said counties, payable thirty years after the date thereof, with interest at the rate of seven per centum payable semi-annually in the City of New York, at such place as the Treasurer of the State shall designate." The Board of Supervisors of each of the counties voting such aid were required to "Annually cause to be levied and collected, as other state and county taxes are collected, a sum of money sufficient to pay the interest accruing and existing by reason of the bonds which either of said counties *may* issue, at the rate aforesaid, and such further amount to defray any expense attending the payment of such interest."

The Act further provided that "The said bonds, *when authorized to be issued as aforesaid* shall be *held* by the county Board of Supervisors of each of said counties, and the same or the avails thereof, shall be expended in the counties which issue the same (provided the railroad passes through the said county), in the grading of said railroad, or in the purchase of ties therefor; and the said bonds shall be delivered to the said railroad company when the Board of Supervisors of each of said counties are satisfied that the same will be applied for such purpose." [535]

On the 5th of November, 1867, an election was held in the County of Eau Claire, at which a majority of votes were cast in favor of aid, to the extent of $50,000, to the Tomah and Lake St. Croix Railroad Company. The road was constructed through the county prior to March 10, 1870, but it does not appear when the work of such construction was commenced. The entire road was, however, fully constructed on or about December 1st, 1871, since which date it has been operated as a railway.

On and prior to March 15th, 1870, the company demanded of the Board of Supervisors for the County of Eau Claire, county bonds to the amount of $50,000, and payable as required by the statute. The Board refused to comply with that demand, and made the following record of such refusal, viz.: "The county Board of Supervisors of Eau Claire County met at the office of the clerk, all members present. The Board took up the subject of issuing the bonds of the county to the West Wisconsin Railroad Co. as voted in 1867, and expressed themselves as willing to issue the bonds of the county if they could be paid by a tax as understood at the time the vote was taken, but as our highest courts have decided that it is illegal to levy and collect a tax to pay such bonds, they refuse to issue them. They are unwilling to issue the bonds of the county, which cannot be paid but must be repudiated in the end, for the reason that it would be unjust to the bondholder, and a disgrace to the county, and requested the county Board of Supervisors of said county to cause said bonds to be issued and delivered to the said company as required by law and the aforesaid vote of the electors of said county."

There is some confusion in the language employed in this minute of the proceedings of the County Board, but there can be no doubt as to the grounds upon which it refused to execute and deliver the bonds. [536]

By an Act approved March 25, 1872, so much of the Act of April 1, 1864, as authorized the Counties of St. Croix and Eau Claire to issue bonds in aid of the construction of a railroad from Tomah to Lake St. Croix was *repealed.*

On or about September 1, 1875, the railroad company for a valuable consideration, assigned and transferred to Wadsworth all and every cause of action, in law or equity it then had or to which it was entitled, against the County of Eau Claire, by reason of the failure and refusal of its Board of Supervisors to issue and deliver county bonds in accordance with the vote of the people.

The object of the present suit in equity, by Wadsworth as assignee of the company, is to compel the execution and delivery to him of such bonds. To the bill filed, a demurrer was sustained, and judgment was entered for the defendants.

In the view which the court takes of this case, it may be assumed that due notice was given of the election held on the 5th of November, 1867.

The main question then presented is, whether the County of Eau Claire ever came under a legal obligation to execute and deliver to the railroad company, county bonds to aid in the construction of the road from Tomah to Lake St. Croix? The decision of that question, it seems to the court, is controlled by the principles announced in *Aspinwall* v. *Comrs.*, 22 How. 364 [63 U. S., XVI., 296]. That case involved the validity of certain county bonds which were in the hands of *bona fide* holders for value, having been issued by the Board of Commissioners for Daviess County, Indiana, in payment of a subscription made in behalf of the county to the capital stock of an incorporated railroad company. The subscription was made under the sanction of a popular vote and in conformity with the charter of the railroad company, which made it the duty of the commissioners to subscribe for the stock and issue bonds in payment thereof, whenever a majority of qualified voters of the county, at an election held for that purpose, should declare in favor of such subscription.

It however appeared that after the people had voted in favor of the subscription, but before [537]

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any subscription was in fact made, a new constitution for Indiana went into operation, containing among others, the provision that "No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription, nor shall any county loan its credit to any incorporated company; nor borrow money for the purpose of taking stock in any such company."

It was argued in that case, that as the statute under which the election was held made it the duty of the commissioners to subscribe for the stock and issue county bonds in payment thereof, the right of the railroad company to receive the bonds became complete and perfect when a majority of legal voters declared in favor of the subscription; and that such right was not, and consistently with the contract clause of the National Constitution could not be, affected by any subsequent changes in the organic law of the State. To that position this court was unable to give its assent. The reluctance expressed in its opinion is not to be construed as implying doubt as to the correctness of the legal conclusions there reached, but only as referring to the fact that the bonds in suit were in the hands of those who, for aught that appeared, had purchased them in the belief that they were valid obligations of the county. We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to issue stock for the bonds. "Until the subscription is made," said *Mr. Justice* Nelson, speaking for the whole court, "the contract is unexecuted and obligatory upon neither party." Hence, the new State Constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and under the circumstances prescribed by that instrument.

Applying the doctrines announced in *Aspinwall* v. *Comrs.*, to the present case, it is clear that there was no binding agreement or contract between the railroad company and the County of Eau Claire, by which the latter became legally bound, through its Board of Supervisors, to execute and deliver bonds to aid in the construction of the road from Tomah to Lake St. Croix. The Act of April 1, 1864, neither in express words nor by necessary implication, made it imperative upon the Board of Supervisors to issue bonds in pursuance of the popular vote. The Act was an enabling one, and its legal effect was to invest the Board with power to supplement the expressed will of the people by an issue of bonds. We find nothing in its provisions justifying the conclusion that the popular vote was to be taken as an absolute direction that the supervisors should issue the bonds, at all events, and without regard to the circumstances intervening after the people had voted in favor of county aid to the enterprise in question.

[538]

It will be observed that the Act of 1864 did not contemplate a subscription of stock upon the part of the county, but simply a donation of bonds to aid in the construction of the road. We can understand why the Legislature might invest the constituted authorities of the county with large discretion as to the exercise of a power to issue bonds by way merely of donation to aid in the construction of a railroad. But whether sound policy indicated such a course, it is not material to inquire, since our duty is to ascertain the legislative intent and, if possible and consistent with the law, to give it effect according to the reasonable interpretation of the words employed to express that intent.

As the statute only declared that the supervisors should have *power*, by resolution, to cause bonds to be issued when the people voted in favor of railroad aid, we are not at liberty to say that the Legislature meant such vote to be a positive command to exercise that power without regard to the circumstances arising after the expression of the popular will.

But if we should be mistaken in this construction of the statute—if the statute had, in terms, made it the duty of the supervisors to issue bonds, to the extent indicated by the popular vote—we should feel bound, upon the authority of *Aspinwall* v. *Comrs.*, to hold that the Legislature could, at any time before the bonds were in fact issued, or before the county came under a legal obligation to issue them, repeal, as it did, the statute conferring the power to issue, and thereby withdraw from the supervisors all authority in the premises. The election at which the people gave their sanction to railroad aid had, as we have seen, no other effect than to confer power upon the supervisors to issue bonds, and did not place them under any legal obligation *to the railroad company* to exercise the power granted. The railroad company had not, prior to the passage of the Act of 1872, acquired any perfect or vested right to the donation. The Repealing Statute of 1864 was, under the circumstances, a total abrogation or obliteration of the law repealed, as much so as if the latter had never existed.

[539]

We have not overlooked the averments in the bill that the company constructed its road through Eau Claire County at a cost, in grading and in the purchase of ties, exceeding the sum of $50,000; that such work was done, and such money expended upon the faith of the aid voted, and with "the full understanding and belief" that the bonds would be issued and delivered to the company; and that the company would not have built the road and expended the money except in reliance upon an issue of the bonds as authorized by the statute.

With whom such understanding was had, and upon what special facts such belief was based, does not appear from any specific allegations in the bill. The 7th section of the Act of 1864 directed that the bonds, "when authorized to be issued as aforesaid," that is, when issued under the power conferred by popular election, should be *held* by the supervisors, and not delivered until they should be satisfied that the proceeds would be expended in the grading of the road in the county issuing them, or in the purchase of ties therefor. Had the bonds been in fact executed before the Act of 1872, but retained by the supervisors under an agreement for their delivery when the purposes indicated by the section just cited had been met, there might have been some ground for holding that the power given by the statute to issue the bonds

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had been finally and fully exercised by the Supervisors, and that, in such case, the railroad company would have been entitled to enforce their delivery, upon the completion of the road through the county, or after the expenditure of an equal amount, either in the grading of the [540] part of the road which lay in that county, or in the purchase of ties therefor. But we have seen that the bonds had not in fact, been executed, when the power to issue and deliver them was withdrawn by the Legislature. The discretion conferred upon the Supervisors had not then been exercised. If the company chose to enter upon the work of construction in the county before the Supervisors had, in fact, elected to exert the power conferred by the statute, and without any agreement, upon sufficient consideration, binding the county to execute and deliver the bonds, their understanding, however induced, and their belief, upon whatever facts based, that the bonds would, at some future time, be issued and delivered, could not trammel the power of the Legislature, nor prevent it from withdrawing the authority conferred upon the Supervisors in the Act of 1864.

Nor do we think it at all material in the determination of this case that the Supervisors expressed upon their records a willingness to issue the bonds, and that they were restrained from so doing by the circumstance that the Supreme Court of Wisconsin had judicially declared that the payment of the bonds, if issued, could not be enforced The cases in that court to which, as we suppose, the Supervisors referred were *Curtis* v. *Whipple*, 24 Wis., 350, and *Whiting* v. *R. R. Co.*, 25 Wis., 167, in the former of which, decided in 1869, it was held that the Legislature had no power to raise money, nor to authorize it to be raised, by taxation, for the purpose of donating it to a private educational institution; and in the latter, decided in 1870, that no such power existed to make a donation in aid of the construction of a railroad owned, managed and operated by a corporation in all respects private, except that in its behalf the power of eminent domain might be exercised, and except also that it was charged with certain public duties and was subject to certain public uses. Notwithstanding the reasons assigned by the Supervisors for the non-issue of the bonds, the fact remained that they did not, prior to the Repealing Act of 1872, assume to impose any legal obligation upon the county, either by an actual issue of the bonds or by an agreement to issue and deliver them upon the completion of the road through the county. Under this [541] view of the case we need not consider the question, suggested by counsel, as to how far the rights of parties are to be controlled by the decisions of the Supreme Court of the State, rendered after the election of 1867, upon the subject of municipal donations to railroad and other private corporations.

What has been said is sufficient to dispose of the case.

The judgment below, sustaining the demurrer, was correct and is affirmed

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ISAAC W. LORD, *Plff. in Err.* [541]
v.
GOODALL, NELSON & PERKINS STEAMSHIP COMPANY.

(See S. C., 12 Otto, 541-545.)

Power of congress over commerce.

Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State.

[No. 37.]

Argued Oct. 21, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Messrs. **C. A. Kent** and *S. F. Leib*, for plaintiff in error:

The application of the statute in question in the case at bar cannot be supported under the "admiralty clause."

No case can be found in which this court has based the validity of any Act of Congress upon the provision defining the jurisdiction of the judiciary.

If an Act of Congress could be supported by the provision of the Constitution under consideration, it, and not the "commerce clause," would have been made the foundation of the judgment in the case of *The Daniel Ball*, 10 Wall., 557 (77 U. S., XIX., 999), and in *Hall* v. *DeCuir*, 95 U. S., 485 (XXIV., 547).

The fact then that The Ventura was, when lost, sailing in the navigable waters of the United States, and so clearly within the admiralty jurisdiction, is no reason why the United States law should determine the construction of the contract between the shippers and the owners of the vessel.

Nor can the application of the statute under consideration, to the case at bar, be supported under the provision of the Constitution which gives Congress power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

So far as The Ventura was engaged in commerce among the States, she was subject to the United States law, and all who used her for such commerce may well have their contracts determined by the same law. But the United States law as to these questions can be fully administered without affecting, in the least, persons engaged in purely state commerce. The United States law cannot affect the liability of the vessel for the breach of contracts in reference to purely state commerce; but, at any rate, it cannot affect personal contracts of the owner of the vessel in reference to such commerce.

The decisions which have been thought to bear most upon the point in question are *The Daniel Ball* (*supra*), and *Hall* v. *DeCuir* (*supra*).

The first bears upon the case at bar only in showing that The Ventura was subject to laws of inspection and license, a point conceded.

The most that defendant in error can justly claim from the second decision is, that the law of the United States regulating inter state and foreign commerce is valid, though in its necessary operation it incidentally affects state commerce. I do not quarrel with this principle. I say that section 4283 of the Revised Statutes of

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the United States can have the fullest operation in controlling the interstate and foreign commerce for which it was designed, without interfering in the least with the claim of the plaintiff.

Messrs. **John E. Ward** and **Hall McAllister**, for defendant in error:

Congress had in several previous Acts, provided for the better security of the lives of passengers and the safety of merchandise, to be transported by steamships and other vessels, by making requirements unknown to the common law, and had enforced the performance of those requirements by fines and forfeitures and penalties, civil and criminal. As a counterpoise to such requirements this Act was passed, limiting the personal liability of the owner, in the language of this court, "To encourage shipbuilding, and to induce capitalists to invest money in this branch of industry." *Norwich Co.* v. *Wright*, 13 Wall., 121 (80 U. S., XX., 591).

The subject over which Congress was legislating was an instrument of commerce, and strictly within the regulating power of Congress.

The contract between the plaintiff and defendant was purely maritime. Over all such subjects the jurisdiction of the United States Courts, and the power of Congress to legislate, has never been doubted.

To restrict the power of Congress to legislating upon the subject of commerce and navigation only between ports in different States would, in the language of this court, in the case of *The Belfast*, 7 Wall., 641 (74 U. S., XIX., 271) "Produce incalculable mischief, as vessels are often obliged, in the course of the voyage from one port in a State to another port in the same State, to go outside of any particular State, and more than half the voyage is necessarily upon the high seas."

In the case now before the court, almost the entire voyage was upon the Pacific Ocean.

Commerce necessarily includes navigation, and the power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation, and subject to all the necessary legislation by Congress.

Gilman v. *Philadelphia*, 3 Wall., 724 (70 U. S., XVIII., 99); *S. C.* v. *Ga.*, 93 U. S., 4, 10 (XXIII., 782, 783); *Hall* v. *DeCuir*, 95 U. S., 485-506 (XXIV., 547-554).

The power of Congress to legislate concerning transportation on the navigable waters of the United States cannot be confounded with the power of Congress over interstate commerce, when carried on by land transportation.

The Daniel Ball, 10 Wall., 566 (77 U. S., XIX., 1002).

The vessel transporting these goods being a steamship of eight hundred tons burden, could, of course, carry no goods except upon the ocean or in navigable waters.

When the plaintiff concedes, as he does in his brief, the right of the United States to regulate by law the ship in which these goods were being transported, and that the ship was subject to such regulations, the whole controversy is ended.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Sections 4283 and 4289 of the Revised Statutes are as follows:

"SEC. 4283. The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the value of the interest of such owner in such vessel, and her freight then pending."

"SEC. 4289. The provision of the seven preceding sections relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

Sec. 4283 was one of the seven sections referred to in sec. 4289. [542]

The steamship Ventura, owned by the defendant in error, was employed in navigation between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of four hundred and eighty miles on the Pacific Ocean. She formed part of a transportation line which was largely engaged in foreign and interstate commerce, but was herself only employed on her own route, and neither took on nor put off goods outside of the State of California. While on one of her regular voyages from San Francisco to San Diego she was totally lost, with all her pending freight and cargo, on the coast of California, without the privity or knowledge of her owner. This suit was brought against her owner as a common carrier to recover the value of the goods lost. The cargo was mostly owned by retail merchants in San Diego and other places in California who had made purchases for their business from wholesale merchants in San Francisco and was in transit from there. The steamship company pleaded its exemption from liability as owner of the vessel under section 4283 of the Revised Statutes. On the trial the court instructed the jury "That if the jury believed that the said losses occurred solely by reason of the negligence of the master of said ship and without the privity or knowledge or neglect of said defendant, that said section 4283 of the Revised Statutes fully exonerated the defendant from liability for any such losses, notwithstanding the goods so lost were being transported on a journey when lost, the final *termini* of which were different points in the State of California." To this charge an exception was duly taken. The jury found in favor of the defendant, and judgment was rendered accordingly. To reverse that judgment the present writ of error has been sued out.

The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that, while The Ventura carried goods [543]

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from place to place in California, her voyages were always ocean voyages.

Congress has power "To regulate commerce with foreign Nations and among the several States, and with the Indian Tribes" (Const., art. 1, sec. 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State, and do not affect other Nations or States or the Indian Tribes. This has never been disputed since the case of *Gibbons* v. *Ogden*, 9 Wheat., 1. The contracts sued on in the present case were in [544] effect to carry goods from San Francisco to San Diego by the way of the Pacific Ocean. They could not be performed except by going not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This also was settled in *Gibbons* v. *Ogden*, *supra*, 189. "Commerce with foreign Nations," says *Mr. Justice* Daniel, for the court, in *Veazie* v. *Moor*, 14 How., 568, 573, "must signify commerce which, in some sense, is necessarily connected with these Nations, transactions which either immediately or at some stage of their progress must be extra-territorial."

The Pacific Ocean belongs to no one Nation, but is the common property of all. When, therefore, The Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other Nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial Nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other Nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If, in her navigation, she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign Nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the Nation as a nation in its external affairs. It must, therefore, be subject to the national government.

This disposes of the case, since, by section 4289 of the Revised Statutes, the provisions of section 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection [545] that proved fatal to the trade-mark law which was considered in *Trade-Mark Cas.*, 100 U. S., 82 [XXV., 550]. The commerce regulated is expressly confined to a kind over which Congress has been given control. There is not here, as in *Allen* v. *Newberry*, 21 How., 244 [62 U.S., XVI., 110], a question of admiralty jurisdiction under the law of 1845, 5 Stat. at L., 726, but of the power of Congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a State, but, impliedly at least, connect themselves with the commerce of the world, because in their performance the laws of Nations on the high seas may become involved, and the United States compelled to respond.

Having found ample authority for the Act as it now stands in the commercial clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*, [548]

v.

MILES H. MORRIS, SINA D. PINSON, EXRX. of RICHARD A. PINSON, Deceased, ET AL.

(See S. C., "*United States* v. *Pinson*," 12 Otto, 548-556.)

Officers' accounts, how authenticated to be evidence.

*The account of a delinquent revenue officer or other person accountable for public money, as *finally adjusted* by the proper officers of the Treasury Department, to be admissible *as evidence* under section 886, of the Revised Statutes, should be certified and authenticated to be a transcript from *the books and proceedings of the department*. It is not sufficient that the certificate states the account or accounts offered as evidence to be *copies of originals on file*. The latter is the form of certificate used in reference to mere copies of bonds, contracts or other papers connected with the final adjustment, and which, duly certified and authenticated, have the same effect as the originals would have if produced in court.

[No. 80.]

Argued Nov. 23, 24, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The case is fully stated by the court.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for plaintiff in error.

Messrs. Estes & **Ellett**, for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action against the executrix of one of several sureties on the official bond, executed April 9, 1858, of Miles H. Morris, formerly a purser in the navy. The Government claims that deceased failed to account for certain clothing [549] received by him as purser on board the ship Vandalia, and for a large amount of public money received by him as purser and disbursing officer on board the ship Seminole.

The bill of exceptions states that the district attorney, after reading in evidence a certified copy of the bond of Morris, as purser in the navy, offered to read to the jury, as evidence in behalf of the United States, "The account of

*Head note by *Mr. Justice* HARLAN.

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Miles H. Morris, as purser in the United States Navy, as certified by the Treasury Department." The account, thus offered, is made up of several distinct papers, as follows: *Brief to accompany the account of Miles H. Morris, late Paymaster U. S. Navy; abstract of expenditures of Miles H. Morris, Paymaster U. S. S. Vandalia; abstract of clothing and small stores; abstract of expenditures of Miles H. Morris, Paymaster U. S. S. Seminole; statement of the account of Miles H. Morris, a Purser U. S. S. Vandalia, from May 19, 1858, to January 6, 1860; statement of the account of Miles H. Morris, Paymaster U. S. S. Seminole, from May 1, 1860, to March 12, 1861, report 4,805; statement of the account of M. H. Morris, late Paymaster U. S. Navy, supplementary to report 4,805; statement of the account of M. H. Morris, late Paymaster U. S. Navy, supplementary to report 161 A.*

To these abstracts and statements is appended a certificate or communication by the Fourth Auditor in the Treasury Department, under date of January 19, 1874, addressed to the Second Comptroller of the Treasury, stating that he had examined and adjusted the account of Morris, late paymaster U.S.N., supplementary to his account of Seminole report 161 A, and found that there was due from him to the United States the sum of $5,922.60 under certain heads of appropriations which are specified, and also that the statements and accounts showing such balance were therewith transmitted to the Second Comptroller for his decision thereon. There is also appended a statement by the Second Comptroller, under date of January 20, 1874, to the effect that he admitted and certified the balance reported by the Fourth Auditor.

Prefixed to the foregoing papers is the certificate of the Secretary of the Treasury, under the seal of that department, to the effect that William B. Moore, who certified the "annexed [550] transcript," was then, and at the time of doing so was, deputy Fourth Auditor of the Treasury, and that full faith and credit were due to his official attestations.

Following that of the Secretary was a certificate in these words:

"TREASURY DEPARTMENT,
FOURTH AUDITOR'S OFFICE,
July 23, 1875.

"Pursuant to an Act of Congress to provide for the prompt settlement of public accounts, approved 3d of March, 1817, I, William B. Moore, deputy Fourth Auditor of the Treasury Department, do hereby certify that the annexed transcripts are true copies of the originals on file in this office. WM. B. MOORE."

To the reading of the foregoing "account" or "transcript" the defendant objected, and the objection was sustained, to which ruling an exception was taken by the Government. Under instructions from the court, a verdict was then returned for the defendant.

Whether the papers offered in evidence by the Government are competent evidence in support of its claim, is the general question presented for our determination.

By the law, as it has long existed, it is the duty of the Fourth Auditor of the Treasury Department to receive and examine all accounts accruing in the Navy Department or relating thereto, and after such examination to certify the balances, transmitting such accounts, with the vouchers and certificates, to the Second Comptroller for his decision thereon. R. S., sec. 277. Upon their examination by the latter officer, it becomes his duty to certify the balance arising thereon to the Secretary of the Navy. R. S., sec. 273. The statute also provides that "The auditors charged with the examination of the accounts of the departments of war and navy shall keep all accounts of the receipts and expenditures of the public money in regard to those departments, and of all debts due to the United States or moneys advanced relative to those departments; shall receive from the Second Comptroller the accounts which shall have been finally adjusted, and shall preserve such accounts, with their vouchers and certificates; [551] and record all requisitions drawn by the secretaries of those departments, the examination of the accounts of which has been assigned to them." R. S., sec. 283.

When an account has thus been examined, passed upon, and the balance certified, it is *adjusted*, as well within the meaning of the section last quoted, as of section 957 of the Revised Statutes. The latter section, in part, provides that "When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the *adjustment* of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant in open court, the United States attorney being present, makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted." This section is referred to for the purpose of showing as well the importance attached to the final adjustment of accounts by the proper officers of the Treasury, as the difficulty in going behind or disputing the correctness of such adjustment when made the basis of a suit instituted to recover the balance reported to be due the Government.

We come now to section 886 of the Revised Statutes, upon the construction of which depends the solution of the question to which we have already referred. That section declares that "When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a *transcript* from *the books and proceedings of the Treasury Department*, certified by the register, and authenticated under the seal of the department, or, when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted *as evidence*, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all *copies* of *bonds*, [552] *contracts*, or *other papers relating to or connected with the settlement of any account* between the United States and an individual, when certified by the register or by such auditor, as the case

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may be, to be true *copies of the originals on file*, and authenticated under the seal of the department, may be *annexed* to *such transcripts*, and shall have equal validity and be entitled to the *same degree of credit* which would be due to the *original papers*, *if* produced and authenticated in court; *Provided*, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract or other paper specified in such affidavit."

This section embodies the provisions found in the 2d section of the Act of March 3, 1797, 1 Stat. at L., 512, providing more effectually for the settlement of accounts between the United States and receivers of public money, and the 11th section of the Act of March 3, 1817, relating to the prompt settlement of public accounts. 3 Stat. at L., 367.

It will be observed that section 886 refers to "Transcripts from the books and proceedings of the Treasury Department," as well as to "copies of bonds, contracts or other papers relating to or connected with the settlement of any account between the United States and an individual." The former, certified and authenticated as required by the statute, "shall be admitted *as evidence*," while the latter, certified and authenticated in like manner, "may be *annexed* to *such transcript*," and have "equal validity and be entitled to the same degree of credit which would be due to the *original papers*, if produced and authenticated in court." Commenting upon similar language in the Act of March 3, 1817, this court, in *Smith* v. *U S.*, 5 Pet., 300 (which was a suit against a paymaster in the army for a balance alleged to be due to the government) said, that, under the head of "A transcript from the books and proceedings of the Treasury Department" were included "charges of money advanced or paid by the department to the agent, and claims suspended, [553] rejected or placed to his credit." These all appear, said the court, upon the "books" of the department; and the decision on the vouchers exhibited, and the statement of the amount due, constitute, in part, the "proceedings" of the Treasury. The court, in that case, recognizes the transcript from the books and proceedings of the department as a document which shows the account of the government debtor, as finally adjusted by the proper officers, and as it appears upon the records of the department. Such adjusted accounts, says *Chief Justice* Taney, necessarily show the charges against as well as the credits of the disbursing officer. "They could not," said he, "be adjusted on the books in any other manner, and the transcript; or, in other words, the copy of the entire account, as it stands on the books (which must include debits as well as credits), are made evidence by the law. Nor do we see any reason for restricting the words of the Act of Congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and are always open to inspection of the party interested." *Bruce* v. *U. S.*, 17 How., 437 [58 U. S., XV., 129].

Unless, therefore, the transcript offered, as evidence, upon the trial below is certified by the proper officer, and authenticated under the department seal, to be "A transcript from the *books and proceedings of the Treasury Department*," it is not such a transcript as the statute makes evidence.

We are of opinion that the transcript offered is not certified and authenticated to be of that character which the statute declares shall be admitted as, in itself, evidence. The certificate of the Deputy Fourth Auditor is that the "transcript" thereto annexed, that is, the statement and abstracts heretofore described, are "true *copies* of the *originals on file*" in his office. That is precisely such a certificate as the officer would make in reference to mere copies of bonds, contracts or other papers relating to or connected with the final adjustment of the account, for the purpose of giving to such copies the same effect as would be accorded to the originals if produced and authenticated in court. If the papers offered, and excluded by the court below, constitute, in fact, the final adjustment of Morris' accounts, the certificates should not have described them as copies of originals on file, but as transcripts of the books and proceedings of the department. The statute, for the convenience of the Government in a certain class of suits against delinquent public officers, makes an alteration of the established laws of evidence. The Government, by a statutory rule which the courts must enforce, denies to defendants in such suits the benefit of the recognized principles which, at common law, govern the proof of essential facts in issue, and it should not be permitted to claim an exemption from the fair and legitimate operation of that rule. It may be true, as the certificate of the Deputy Fourth Auditor states, that the papers offered are true copies of some originals on the files of his office; for instance, of the original drafts of settlement. But it does not necessarily follow that they present an accurate or correct statement of the final settlement or adjustment of the accounts as shown on the books and in the record of the proceedings of the department. Such originals may never have become a part of the books and proceedings of the department, in the sense of the law, or within the meaning of our former decisions. *U. S.* v. *Bujord*, 3 Pet., 12; *Smith* v. *U. S.*, 5 Pet., 292: *Cox* v. *U. S.*, 6 Pet., 172; *U. S.* v. *Jones*, 8 Pet., 375; *Gratiot* v. *U. S.*, 15 Pet., 336; *Hoyt* v. *U.S.*, 10 How., 109; *Bruce* v. *U.S.* [*supra*]. That the abstracts or statements offered and excluded may, upon their examination, seem to the court to be the final adjustment of Morris' accounts is not sufficient. Upon that question the court might be mistaken in any conclusion it should reach, or it may err in the inferences drawn from the items of the accounts. What the statute meant was, that the official certificate of the officer, charged with the examination of the accounts, should be of such character as to give the court, as well as the parties, an assurance that the transcript, offered as evidence to support the claim of the Government, exhibits, in fact, the *final adjustment* of the accounts of the delinquent offi- [554]

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cer, as shown, not by mere copies of original papers on the files, but upon the books and records of the department.

[555] This question, in a somewhat different form, arose in *Smith* v. *U. S.*, *supra*. There, as here, the auditor certified that the transcripts offered in evidence were "true copies of the originals on file" in his office and, in that form, the certificate narrowly escaped condemnation. The majority of the court, evidently with some hesitation, held the transcripts admissible in evidence upon the ground that the bill of exceptions stated that the documents, offered as evidence and excluded, purported to be transcripts "from the books and proceedings of the Treasury Department." Upon that point three of the Judges dissented. The grounds of the dissent are stated in the opinion of the court. The minority held that the certificate could be regarded as referring only to papers the originals of which were on file; that the *books* of the department could not be said to be *on file*, nor were copies from them copies from originals within the meaning of the statute; that it was a copy from the books and proceedings in the Treasury Department which was made evidence, and not mere copies of papers, though on the files, on which the rough draft of settlement may have been entered.

The present bill of exceptions does not bring the present case, upon this particular point, within the ruling in *Smith* v. *U. S.* There is no statement in the bill here that the papers offered and excluded were transcripts from the books and proceedings in the Treasury, but only that they constituted the "account of Miles H. Morris, as purser of the U. S. Navy, as certified by the Treasury Department." This language is not equivalent to that which the statute requires in order to make the transcript evidence, and we are not disposed to extend the rule announced in *Smith* v. *U. S.* The statute is founded in justice as well as in the necessities of the Government when compelled to institute suits against delinquent public officers. Its provisions are easily understood, and it is not at all difficult to meet the manifest object Congress had in enacting them. When the Government desires, in suits against a delinquent officer accountable for public money, to use the final adjustment of his accounts as evidence, the certificate of the officer should show, not, necessarily, in the very words of the statute, but plainly and not by mere inference, that the transcript offered is from the books and proceedings of the department; in other words, that [556] such transcript presents the account of the delinquent as finally adjusted by the proper officers of the Government, and spread upon the records of the department.

Without stopping to consider other points raised by counsel in support of the ruling below, it is sufficient to say, that, for the reasons given, the court below did not err in excluding from the jury the transcripts offered by the Government.

The judgment is affirmed.

Dissenting, *Mr. Justice* **Swayne** and *Mr. Justice* **Bradley.**

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES GOODMAN, *Appt.*, [556]
v.
WILLIAM E. NIBLACK.

(See S. C., 12 Otto, 556-563.)

Assignment of claim against the government—when valid—parties to suit—publication.

1. Section 3477 of the Revised Statutes, forbidding transfers of claims against the government, does not include a voluntary assignment of a claim against the United States, which is included in an assignment made by an insolvent debtor, of all his effects for the benefit of his creditors.
2. Where the government has recognized an assignment, the parties to it cannot claim that it is invalid.
3. The assignees are necessary parties to a bill by a creditor to reach the fund arising from the assigned claims.
4. If defendants are out of the jurisdiction of the circuit court, so they cannot be served with process, they may be proceeded against by an order of publication, in which case the decree so far as it affects a fund within the reach of the court, will bind them.

[No. 1000.]

Submitted Dec. 21, 1880. Decided Jan. 10, 1881.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The case is fully stated by the court.

Messrs. **J. C. Denny** and **D. V. Burns,** for appellant:

The suggestion that if such assignments be recognized, there is danger of some claim being twice paid, will not bear the light of examination. However this may be as to ordinary claims, in this case the contract out of which the claim grew was assigned to trustees, by and with the consent of the government, acting through the Secretary of the Navy. This assignment, as we have seen, was recognized by Congress and by this honorable court. No one then, but those trustees, could receipt for the money, so that there was no possible danger of the claim being twice paid.

To hold that Congress intended thereby to prevent a man who holds a claim against the United States, from making a general assignment of all his property to trustees for the benefit of his creditors, is to attribute to it an arbitrary interference with the rights of the citizen, and the laws of the several States, which it would not be justified in making. Such an intention ought not to be attributed when there is a reasonable way of escaping such a conclusion.

Mr. **F. W. Viehe,** for appellee:

1. This court, in speaking of this Act, in *Spofford* v. *Kirk*, 97 U. S., 484 (XXIV., 1032), after alluding to the danger of the same claim being paid twice, if assignments were allowed, said: "Another and greater danger was the possible combination of interests and influences in the prosecution of claims which might have no real foundation, of which the present case affords an illustration."

When, by operation of law for the benefit of others, the title of others devolves on a person such as an executor, administrator, assignee in bankruptcy or insolvency, the law defines the rights of the beneficiaries; but, in the assignment to Cheever and Wiles, Sloo was not controlled by any statute; he created a trust according to his own views; he made provision for whom he pleased. The assignment is within the mischief intended to be prohibited.

II. Were the necessary parties before the

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court to enable it properly to make a decree in favor of the plaintiff? A court of equity will not make a decree which a party, against whom it operates, cannot safely obey. A provision of an Act of Congress as well as a rule of practice prescribed by this court, authorizes the courts of the United States to entertain jurisdiction in cases where there are several defendants, any one or more of whom shall not be inhabitants of nor found within the district; but that "The judgment or decree shall not conclude or preclude other parties." We take it to be settled that this provision applies only to cases in which the court can proceed to a decree that will be just between the parties before it.

Hagan v. *Walker*, 14 How., 29; *Northern Ind. R. R. Co.* v. *Mich. Cent. R. R. Co.*, 15 How., 233; *Shields* v. *Barrow*, 17 How., 130 (58 U. S., XV., 158); *Coiron* v. *Millaudon*, 19 How., 113 (60 U. S., XV., 575); *Barney* v. *Baltimore*, 6 Wall., 281 (73 U. S., XVIII., 825).

In this case the trustees, for the benefit of the creditors, have the right to all the assets which passed by the assignment made by Sloo; they are not parties, and a decree in this case cannot affect them. No facts are charged that tend to show that Cheever and Wiles are not proceeding with the execution of the trust reposed in them. The money permitted to pass into the hands of the defendant, who is administrator of Sloo's estate and, as such, is entitled to all that remains after the trust is satisfied, may have been no more than he was entitled to. If they retained means sufficient to satisfy all demands against them, it would not be equitable to hold the defendant liable to the trust; the funds in their hands should be exhausted before the defendant who, as representative of Sloo, is entitled to the surplus, is required to account to the plaintiff. It is not alleged that they have not means to pay the complainant's demand, not even that they have demanded payment of them.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Indiana, dismissing the complainant's bill on demurrer.

[557] There came into the hands of defendant, as administrator *de bonis non* of the estate of Albert G. Sloo, the sum of $150,000, and the plaintiff is the owner of a judgment against said Sloo for $31,344.44, recovered in the Supreme Court for the State of New York, on the 20th day of January, 1855.

The purpose of the present bill is to follow this money in Niblack's hands, as a trust fund devoted by Sloo in his lifetime to the payment of the plaintiff's judgment. This trust arises, if it exist at all, out of a deed of assignment made by Sloo of all his property, rights and credits to Benjamin H. Cheever and James Wiles, of the date of February 3, 1860, for the benefit of all his creditors, but with some preferences, among which is the judgment of complainant. The sum above mentioned was received by Niblack as the share of Sloo's estate in a claim of over a million dollars recovered in the Court of Claims against the United States and paid by the government to Marshall O. Roberts and Edward Dickerson, in whose names the judgment was recovered. The history of this claim, which is necessary to an understanding of the case in hand, is this:

The 4th section of the Act of Congress of March 3, 1847, ch. 62, 9 Stat. at L., 187, directed the Secretary of the Navy to contract with Sloo for the transportation of the mails of the United States from New York to New Orleans, Charleston, Savannah, Havana and Chagres and back twice a month, at a compensation not to exceed the sum of $290,000. The mail was to be carried in steam vessels of a character described in the Act, not less than five in number, to be constructed under the supervision of officers of the navy, in such manner as to be [558] easily converted into war steamers of the first class. Under this authority the Secretary and Sloo executed a written contract on the 20th day of April of that year, for the construction of the ships and transportation of the mails at the sum of $290,000 per annum. On the 17th day of August thereafter Sloo entered into an agreement with Marshall O. Roberts, George Law, Prosper M. Wetmore, and Edwin Croswell, by which they were taken into this contract with him, and agreed to build the vessels, and run them, and perform the obligations of Sloo to the government. And Sloo was to receive one half of the net profits of the venture and the four persons named the other half. In order to the perfect working of this agreement, a tripartite instrument in writing was made, in which Sloo is called the party of the first part, and Roberts, Law, Wetmore and Croswell the party of the second part, and George Law, Marshall O. Roberts, and Berres R. McIlvaine party of the third part, whereby, after reciting the agreement between the party of the first part and the party of the second part, the contract of Sloo is assigned to the party of the third part as trustees for the due execution of the agreement. This was signed by all the persons named.

The ships were built, and the mails carried for many years, and by death and substitution, Marshall O. Roberts and Edward Dickerson became the surviving trustees under the agreement, and in a controversy with the United States, recovered as such trustees in the Court of Claims the sum of $1,081,000 as money due under the original contract with Sloo, which judgment was affirmed in this court and the money paid to Roberts and Dickerson.

In the meantime, Sloo had become insolvent and executed the general assignment to Cheever and Wiles, already mentioned, in 1860, and had died before the final payment of the money by the government to Roberts and Dickerson, and Niblack had been appointed his administrator.

These facts are all set out in the bill, and copies of the several contracts and assignments are filed as exhibits. Another averment of the bill is that the sum really due to Cheever and Wiles, as assignees of Sloo, out of the sum paid by the [559] government, was $182,000; that Cheever and Wiles received $37,000 of this money, and consented to the payment of the remaining $150,000 to Niblack under some arrangement not understood by complainant. It is also alleged that all the other indebtedness of Sloo which might have been a claim on this fund under his assignment to Cheever and Wiles has been paid, and there remains no other claim on it than complainant's. It is also averred that Wiles and Cheever are not citizens of Indiana and cannot be served with

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process and are not made parties to the bill, and for the reasons above stated are not necessary parties.

The demurrer is, first, general; and, second, special as regards the failure to make Cheever and Wiles parties.

The general demurrer is maintained on the ground that the assignments made by Sloo are void by reason of the provisions of section 3477 of the Revised Statutes. These provisions were enacted by Congress in 1853, 10 Stat. at L., 170, and were, therefore, not in force when Sloo made his contract with the government, or when he made his agreement with Roberts, Law and others, and that agreement remains unaffected by the statute. It was in force, however, when he made the general assignment of all his effects to Cheever and Wiles, and as complainant claims through that assignment, and can probably succeed only in that way, because, as we are informed, the State Court of Indiana has decided that the Statute of Limitations bars the complainant's claim as an ordinary debt, we must inquire whether that assignment is void under the Act of Congress.

The statute has several times within the last few years received the consideration of this court. See, *U. S.* v. *Gillis*, 95 U. S., 407 [XXIV., 503]; *Spofford* v. *Kirk*, 97 U. S., 484 [XXIV., 1032]; *Erwin* v. *U. S.*, 97 U. S., 392 [XXIV., 1065].

And it is understood that the Circuit Court sustained the demurrer in this case under pressure of the strong language of the court in *Spofford* v. *Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as [560] laid down in that opinion, and in the others referred to, were mainly two:

First. The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

Second. That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress as desperate cases when the reward is contingent on success, so often suggest.

Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was the protection of the government, and not that of the parties to the assignment. The case of *Erwin* v. *U. S.* [*supra*], decided at the same Term as *Spofford* v. *Kirk*, is suggestive on this point. It was there held that the claim of a person declared bankrupt against the United States passed by the assignment in the bankruptcy proceeding to the assignee, and that the assignee, and not the original claimant, was the proper person to sue in the Court of Claims. "The passing of claims to heirs, devisees or assignees in bankruptcy is not within the evil at which the Statute of 1853 was aimed," said the court. The language of that statute includes "All transfers and assignments of any claim upon the United States or of any part thereof or any interest therein." These words are broad enough, if such were the purpose of Congress, to include transfers by operation of law or by will. Yet in that case we held it did not include transfers by operation of law or in bankruptcy, and we said it did not include a transfer by will. The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim. That in such cases the exigencies of the party who held the claim justified and required the transfer that was made. In what respect does the voluntary assignment by an insolvent debtor *of all his effects* for the benefit of all his creditors, which effects must, if the assignment is honest, include a claim against the government, differ from the assignment which is made in bankruptcy? There can here be no purpose to bring improper means to bear in establishing the [561] claim, nor can it be readily seen how the government can be embarrassed by such an assignment. The claim against the government is not specifically mentioned, and is obviously only included by the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil at which Congress aimed in the Act of 1853.

It is also to be remarked that the government had recognized Sloo's original assignment of his contract to Roberts, Law and McIlvaine, as trustees, by permitting them to perform the contract and receive the pay under it for years; and when a dispute arose as to the sum due under that contract, Congress, by the Act of July 14, 1870, 16 Stat. at L., 655 very fully recognized the validity of that transfer.

That Act is in these words:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the claim of the trustees of Albert G. Sloo, for compensation for services in conveying the United States mails by steamers, direct between New York and Chagres, in addition to the regular service required under the contract made between the said Albert G. Sloo and the United States be, and the same is hereby, referred to the Court of Claims; and the said court is hereby directed to examine the same and determine and adjudge whether any, and if any what, amount is due said trustees for said extra service, provided that the amount to be awarded by said court shall be upon the basis of the value of conveying other first-class freight of like quantity with the mails actually carried between the same points at the same time."

This is still further recognized by the appropriation to pay this judgment to Marshall O. Roberts and Edward Dickerson, surviving trustees of A. G. Sloo, found in chapter 3 of the Second Session of the Forty-Fifth Congress. 20 Stat at L., 7.

The first agreement of Sloo, therefore, is unassailable.

His assignment to Cheever and Wiles, in 1860, conveyed only his interest in the profits of the

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contract which the parties in the first assignment were performing or had performed for the goverment.

[562] The general assignment of Sloo, in 1860, gave Cheever and Wiles no right to assert a claim against the government. They could only deal with the trustees under the first assignment, and on them they had only the claim for net profits which came into their hands. Cheever and Wiles and the present complainant were neither of them capable of suing the United States in the Court of Claims, or of presenting the matter before the accounting officers of the government, and could give no valid or just acquittance to the government for any part of the claim.

We do not think the transfer to Cheever and Wiles, as trustees for Sloo's creditors, is forbidden by the Act of 1853, or by any other principle of law or of public policy.

But we are of opinion that Cheever and Wiles are not only proper but necessary parties to this suit. The entire sum to which the estate of Sloo could possibly be entitled was assigned to them. The trust on which it was assigned remains unexecuted. They are charged with having received $37,000 of that fund. What have they done with it?

If, as alleged in the bill, there are no other debts of Sloo secured by the assignment, this sum in their hands should be accounted for before a decree against Sloo's administrator. They are charged with consenting to the payment to the administrator of the fund now sought in this suit. There may have been good reasons for it, and if not, they may be personally liable for it. The fund can only be subjected to the complainant's debt through these trustees. It is only in right of the assignment to them that plaintiff proceeds. They are living, and cannot be devested of this trust by any decree to which they are not parties. The administrator has a right, if decree is rendered against him, to have it made effectual against them.

Notwithstanding the allegation of the bill, that all the liabilities of the trust fund except plaintiff's debt have been discharged, this may not be so; and it may be in the power of these trustees, and it may be their duty, if made parties to this suit, to show that there are others entitled to share in it. No decree against that fund can rightfully be made while they are not before the court.

[563] This, however, need not defeat the jurisdiction of the court if the bill is amended by making them defendants.

This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant.

If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed, and remanded to that court. If the complainant shall ask leave to amend his bill by making Cheever and Wiles defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits. *Shields* v. *Barrow*, 17 How., 130 [58 U. S., XV., 158]; *Barney* v. *Baltimore*, 6 Wall., 280 [73 U. S., XVIII., 825]; *House* v. *Mullen*, 22 Wall., 42 [89 U. S., XXII., 838]; *Kendig* v. *Dean*, 97 U. S., 423 [XXIV., 1061].

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings in that court in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 437, 438, 439; 112 U. S., 736.

MOSES B. GEORGE ET AL., Copartners, under the Firm Name of M. B. GEORGE & BROTHERS, and JAMES W. L. SLAVENS, *Plfs. in Err.*, [564]

v.

SAMUEL W. TATE.

(See S. C., 12 Otto, 564–571.)

Assignment by firm—fraudulent representations—estoppel—effect of assignment.

1. Where a firm name is signed to an assignment of a firm demand, the firm will be bound, although but one member of it is named in the body of the instrument.
2. To sustain a defense at law that defendant was induced to sign a bond by fraudulent representations, the only fraud permissible to be proved is that touching the execution of the instrument.
3. Where a party reaps the benefit which the bond gives in such cases, and is called upon to respond, he is not permitted to repudiate the obligation he has assumed.
4. An assignment of a judgment and all bonds taken in a suit by plaintiff, transfers a bond given by defendant to release property from an attachment therein.

[No. 160.]

Submitted Dec. 17, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Messrs. L. C. Slavens and **Nelson Cobb**, for plaintiffs in error.

Messrs. A. H. Case and **John K. Cravens**, for defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court: [568

The errors assigned in this case relate to three subjects:

The admission in evidence by the court, upon the trial below, of the instrument dated November 1, 1872;

The refusal by the court to permit evidence to be given, of fraud by the defendant in error, in procuring from the plaintiffs in error the bond upon which the judgment below was recovered;

And the instructions given by the court to the jury touching the set-off claimed by the plaintiffs in error.

These several topics will be separately considered.

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1. The instrument referred to purports to be an assignment to Tate of the bond of the plaintiffs in error. It begins and proceeds:

"I, William Greene, in consideration of the sum of $8,509, to me, in hand paid by Samuel W. Tate,.... do hereby assign to said Tate *the within instrument*, and all my interest in the covenants and agreements therein contained,..... and I hereby assign and convey to and for the benefit of said Tate all my right and interest in a certain suit now pending, * * * wherein I, William Greene and J. J. Meyers are plaintiffs, and M. B. George & Bros. are defendants, etc."

The *testatum* clause is

"Witness my hand and seal this 1st day of November, A. D. 1872.

MYERS & GREENE,
By WM. GREENE."

It was in proof that the firm of Myers & Greene were largely indebted to Tate. He applied to Myers for payment. Myers said they had a claim against George & Brothers then in suit. He requested Tate to "go up and see Billy Greene," and added, "he will let you have the claim against George & Bros." Tate went to Greene, and Greene had the instrument in question drawn, and after its execution delivered it [569] to Tate. Greene further agreed that the judgment in the pending suit should be assigned to Tate as soon as it was recovered.

Tate subsequently saw Myers and showed him the assignment. He said it was "all right," and Tate thereupon gave up to him the notes of Myers & Greene to the amount of the claim against George & Bros.

The bond was given to prevent the execution of a writ of attachment issued for the seizure of the property of George & Bros., to secure the payment of any judgment Myers & Greene might recover against them. It was conditioned for the payment of such judgment.

Viewing the transaction in the light of this evidence, it cannot be doubted that it was the intention of both parties that the bond should be transferred to Tate, and we think that intent was made effectual. The difficulty, so far as there is any, has arisen from the unskillfulness of the draftsman of the instrument. The assignment could have been made by one of the partners, and he could have made it by parol. *Jones* v. *Guaranty & Indem. Co.*, 101 U. S., 622 [XXV., 1030]; Story, Part., sec. 101. The signature of the firm name shows that the instrument was intended to be the act of both partners, and effect must be given to it accordingly. This can be done upon settled legal principles and analogies.

If a promissory note be drawn, "I promise to pay," etc., and is signed by more than one person, it is the joint and several note of all who sign it. *Clerk* v. *Blackstock*, 1 Holt, 474; *Hunt* v. *Adams*, 5 Mass., 358; *S. C.*, 6 Mass., 519.

If one party only be named as obligor in the body of a bond, and others sign it also, all are bound. In no other way can any effect be given to the signatures of those not so named. The intent is clear, and that is sufficient. *Parks* v. *Brinkerhoff*, 2 Hill, 663; *Perkins* v. *Goodman*, 21 Barb., 218.

A bond to B's executors, B being alive, is a bond to B. *Langdon* v. *Goole*, 3 Lev., 21.

In *Simpson* v. *Henderson*, 1 Moo. & M., 300, a written contract stipulated that a ship should be ready to take freight on board "*forthwith*." Parol evidence was admitted to show the surrounding circumstances when the contract was made. Lord Tenterden said: "The word *forthwith*, [570] in strictness, means immediately; but it is plain this cannot be the construction to be affixed here. It was known that she required some repairs; at least, to be coppered, and some time must be allowed for that." He left it to the jury to say whether, under the circumstances, the vessel had been made ready within a *reasonable time*.

"Debt on an obligation to pay £7, by 2s. a week until the £7 were paid, and if he failed of the payment of the 2s. at any of the days whereon it ought to be paid, the obligation to be void, or else to remain in full force. The defendant pleaded that he did not pay the 2s. on one of the days whereon it ought to be paid. The plaintiff demurred.

* * * The court held that the condition should be taken distributively, by referring particulars to particulars, viz.: that if he paid the £7 the obligation should be void; but if he failed of paying the 2s. at any of the days, it should be in full force—to which the rest agreed—for the obligation shall not be of no effect if by any means it may be made good." *Vernon* v. *Alsop*, 1 Lev., 77. It has been said by an eminent writer that "words are the counters of the wise and the money of the unwise." Their office is to symbolize ideas. The intent of the parties is the contract, and whenever that is ascertained, however inartificially expressed, it is the duty of courts to give it effect.

As between Myers & Greene and Tate, the title of Tate was good by estoppel. The consideration which passed from him to them made it so.

A title to real estate thus acquired is effectual either for attack or defense in an action of ejectment. *Dickerson* v. *Colgrove*, 100 U. S., 578 [XXV., 618].

The court below committed no error in this connection.

2. Proof of fraudulent representations by Myers & Greene, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. *Hartshorn* v. *Day*, 19 How., 211 [60 U. S., XV., 605]; *Osterhout* [571] v. *Shoemaker*, 3 Hill, 513; *Belden* v. *Davies*, 2 Hall, 433; *Franchot* v. *Leach*, 5 Cow., 506. The remedy is by a direct proceeding to avoid the instrument. *Irving* v. *Humphrey*, 1 Hopk., 284.

The evidence was properly rejected for another reason.

Where a party reaps the benefit which the bond gives in such cases, and is called upon to respond, he is not permitted to repudiate the obligation he has assumed.

In a case not unlike this *Judge* Story said: "The question is not new, and I am entirely satisfied that where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the security. He accepts or not at his pleasure, and it would be grossly inequitable if he might lie by until the

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close of the cause, receive and use the property, and then, by detecting an error in the bond, set the whole judgment of the court at defiance." *The Brig Struggle*, 1 Gall., 476. See also, Bigelow, Estop., p 206, and *post*, and 2 Whart. Ev., sec. 1039, and the authorities cited by each author.

3. The instructions as to the set-off or counter-claim were as favorable to the plaintiffs in error as they had a right to ask. The jury, upon the evidence, found against them. With this result, there being no error of law involved, this court has nothing to do.

4. It is insisted that the court erred in instructing the jury that "An assignment of the claim in suit against George & Brothers, or an assignment of the judgment rendered thereon, would also transfer the bond sued upon in this action."

In this there was no error. The instruction was in exact conformity to the law upon the subject. *Bowdoin* v. *Colman*, 6 Duer., 182; *Craig* v. *Parkis*, 40 N. Y., 181; *Claflin* v. *Ostrom*, 54 N. Y., 581; *Pattison* v. *Hull*, 9 Cow., 747; *Dentruff* v. *Crittenden*, 1 Thomp., & C., 143; *Hosmer* v. *True*, 19 Barb., 106.

All the assignments of error are without merit, and the judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.,

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[572] ALLSTON WILSON, *Plff. in Err.*,

v.

SARAH A. McNAMEE, EXTX. of CHARLES McNAMEE, Deceased.

(See S. C., 12 Otto, 572-575.)

Insufficient objection—pilot laws—pilotage.

1. An objection, which does not appear to have been taken in the circuit court, cannot be considered here.
2. The pilot laws of New York are valid under the Constitution of the United States.
3. A pilot may recover pilotage for refusing to accept his services, although the tender of them was made outside of the jurisdiction of the State of New York.

[No. 163.]

Argued Dec. 20, 1880. Decided Jan. 10, 1881.

IN ERROR to the Court of Appeals of the State of New York.

The case is fully stated by the court.

Mr. **James S. Stearns**, for plaintiff in error.

Messrs. George W. Blunt and *John K. Porter*, for defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court:

The defendant in error tendered his services as a licensed Sandy Hook pilot to conduct the schooner E. E. Racket by way of Sandy Hook to the Port of New York. The tender was made at sea, about fifty miles from that port. The vessel was from a foreign port, sailing under register, and drew nine feet of water. The master refused to accept the services of the pilot and came into port without one. The pilot demanded the compensation allowed by the local state law, upon the tender being made, payment was refused and this suit was thereupon instituted by the defendant in error in the District Court of the City of New York for the First Judicial Circuit. That court gave judgment in his favor. The case was thereupon removed by appeal to the proper Court of Common Pleas, and subsequently to the Court of Appeals of the State. Those courts successively affirmed the judgment.

The plaintiff in error thereupon brought the case before us by this writ of error for review.

The only point argued here was the validity [573] of the pilot law of New York with reference to the Constitution of the United States.

At the close of the opening argument of the learned counsel for the plaintiff in error, we announced that the affirmative of the question thus presented was so well settled by the repeated adjudications of this court, that we had no desire to hear the counsel for the defendant in error upon the subject.

Thereafter, the counsel who had been heard submitted a memorandum, in which he called our attention particularly "to the tenth point of the brief of the plaintiff in error, namely: that the tender took place outside of the jurisdiction of the State of New York." He added: "This question has never yet been passed upon by this court in either of the other pilot cases."

Our opinion will be confined to that subject.

There are several answers to the suggestion. [574]

1. The objection does not appear to have been taken in the Circuit Court, and cannot, therefore, be considered here. *Edwards* v. *Elliott*, 21 Wall., 532 [88 U. S., XXII., 487].

2. A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly. The pilot, upon his boat, had the same authority from the laws of New York to tender and demand employment, and the same legal consequences, under the circumstances, followed the refusal of the master as if both vessels had then been *infra fauces terræ*, where the municipal jurisdiction of the State was complete and exclusive. The jurisdiction of the local sovereign over a vessel, and over those belonging to her, in the home port and abroad on the sea, is, according to the law of nations, the same. Dana's Wheat., p. 169, sec. 106; 1 Kent, Com. 27; Vattel, bk. 1, c. 19 sec. 216; 2 Rutherford's Inst., bk. 2, c. 9, secs. 8, 19.

The principle here recognized is, of course, subject to the paramount authority of the Constitution and laws of the United States over the foreign and interstate commerce of the country, and the commercial marine of the country engaged in such commerce, and subject also to the like power of Congress "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations." See *Ex parte McNiel*, 13 Wall., 236 [80 U. S., XX., 624].

Speaking of the universal law of reason, justice, and conscience, of which the law of Nations is necessarily a part, Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all

NOTE.—*Pilots; their authority, duties, responsibility; responsibility of owner for their acts; right to salvage.* See *note* to Thompson v. The Great Republic, 90 U. S., XXIII., 55.

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Nations it is, and in all time will be, eternally and immutably the same." Lactantius, Inst. Div., bk. 7, c. 8.

3. Conceding that the pilot laws of the several States are regulations of commerce, Mr. Justice Story said, "They have been *adopted* by Congress, and without question are controllable by it." 2 Story, Const., sec. 1071.

Chief Justice Marshall, in *Gibbons* v. *Ogden*, said: "When the government of the Union was brought into existence it found a system for the regulation of pilots in force in every State. [575] The Act which has been mentioned *adopts this system*, and gives it the same validity as if its provisions had been specially made by Congress." 9 Wheat., 207. The long continued silence of Congress, with its plenary power, in the presence of such legislation by the States concerned, is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect. *Atkins* v. *Disintegrating Co.*, 18 Wall., 272 [85 U. S., XXI., 841].

The several Acts of Congress bearing on the subject are fully referred to in *Ex parte McNiel*, *supra*. In that case, and in the earlier and more elaborate case of *Cooley* v. *Port Wardens*, 12 How., 299, this subject, in all its aspects, was so fully considered that further remarks on the present occasion are deemed unnecessary.

The judgment of the Court of Appeals of the State of New York is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[577] MARTHA J. BENNETT, Admrx. of JOHN BENNETT, Deceased, *Plff. in Err.*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(See S. C., 12 Otto, 577-586.)

Negligence, liability for, for unsafe condition of land.

* The owner or occupant of land who, by *invitation* express or implied, induces or leads others to come upon his premises for any lawful purpose is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was suffered to exist, without timely notice to negligently the public or to those who were likely to act upon such invitation.

[No. 149.]

Submitted Dec. 15, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is fully stated by the court.

Mr. **Walter Evans**, for plaintiff in error:

When a person invites or induces, expressly or by implication, another to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting him into danger, and he must use ordinary care and prudence to render the premises reasonably safe.

Cooley, Torts, 605; *Sweeny* v. *R. R. Co.*, 10 Allen, 373; *Elliott* v. *Pray*, 10 Allen, 378; *Carleton* v. *Iron and Steel Co.*, 99 Mass., 217; *Gilbert* v. *Nagle*, 118 Mass., 278.

The defendant's ownership of the wharf-boat, the invitation extended to steamboats to land thereat, its ownership of the landing and all the land in its front, its ownership of the depot, its plank walk across th intervening marsh that led up to it, the manner of locating the depot which monopolized all the available way to the wharf-boat, except by passing through the depot its whole length, precisely as Bennett attempted to do, and the other facts admitted by the demurrer, aside from the statements of the invitation as a substantive fact, clearly, as a matter of legal implication, show an invitation and special inducement by the defendant to all travelers to pass through the depot at any time, night or day, whenever they had occasion to embark on a steamboat at said wharf-boat.

Ad., Torts, sec. 229; Wood, Nuisances, sec. 137; *Sweeny* v. *R. R. Co.* (*supra*); *Smith* v. *Dock Co.*, L. R. 3 C. P., 326; *R. R. Co.* v. *Hanning*, 15 Wall., 655 (82 U. S., XXI., 222); *Tobin* v. *R. Co.*, 59 Me., 183; *Knight* v. *R. Co.*, 56 Me., 234; *Carleton* v. *Iron and Steel Co.* (*supra*); *Swords* v. *Edgar*, 59 N. Y., 29; *Barret* v. *Black*, 56 Me., 505; *Indemaur* v. *Dames*, L. R. 1 C. P., 274. affirmed, L. R., 2 C. P., 318.

Especially, as to the implication of invitation, see, also, *Chapman* v. *Rothwell*, El. Bl. & El. (96 E. C. L.), 168; *Paddock* v. *N. E. R. Co.*, 18 L. T. N. S., 60; *Axford* v. *Prior*, *C. P.*, 14 W. R., 611; *Freer* v. *Cameron*, 4 Rich (S. C.), 228; *Indemaur* v. *Dames*, L. R. 1 C. P., 274.

When the invitation was withdrawn, the public should have been notified and the route closed.

Carleton v. *Franconia Co.* (*supra*); 3 Hurl. & N., 176.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Kentucky.

The action was commenced by a petition framed in accordance with the Kentucky Code of Practice in civil cases. Its object is to recover damages for personal injuries alleged to have resulted from negligence or want of proper care on the part of the agents, servants and *employés* of a Railroad Corporation engaged in the business of transporting freight and passengers for hire. The petition was twice amended and to it as amended a demurrer was interposed and being sustained, judgment was given for the defendant. After judgment the plaintiff died, and the action was revived in this court in the name of his personal representative.

The controlling question before us is whether the petition and amended petitions make out a cause of action against the Company. Under [578] the averments in the pleadings, and for the purposes of this case, as presented, we must assume the existence of the following facts:

In the year 1876, the deceased was a passenger on the cars of the defendant Company from Vernon to Danville, in the State of Tennessee. At the last named place he left the train for the purpose of taking the steamer Rapidan, which belonged to the Evansville and Tennessee River Packet Company, and was engaged in the navigation of that river. Its customary place of landing for Danville and immediate vicinity, on that

*Head note by *Mr. Justice* HARLAN.

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side of the river, was at a wharf-boat, moored at or against a lot within a few hundred yards of the railroad station. Between the railroad company and the packet company there was, at the time, an arrangement or contract, by the terms of which each party enjoyed a community of interest, in what proportion it is not stated, in the freight and passenger traffic at that point. They were mutually at liberty to sell through tickets and give through bills of lading over their respective lines. Both the wharf and the lot were owned by and were under the exclusive control of the railroad company. The former was used by the company and the public for storing freight, and as a convenient place for the landing of steamboats navigating the river. The lot had been purchased and used by the company in connection with the wharf-boat, for the purpose of facilitating its passenger business, as well as for the receipt and discharge of freight coming from the river to the railroad, or going from the railroad to the river. For such use of its wharf-boat and landing the railroad company received benefit and compensation. To further facilitate their freight and passenger business, the railroad company had erected and maintained upon such lot in front of the wharf-boat, a large open shed-depot, about 240 feet in length and 20 feet in width, in the center of which was a room or apartment containing an engine, which was used for the purpose of hauling freight to and from the river by means of flats or cars drawn by ropes on railroad tracks. These cars were pulled up the bank into spaces (of which there were four, two on each side of the engine-room) left in the floor of the depot. These spaces or hatch-holes, as they are called, were about 11 feet in extent, and reached from the river side of the depot nearly to its centre.

The customary, and indeed the only safe, [579] available and convenient route for persons passing from Danville to the steamboat landing was along a plank way on each side of which the ground was low and marshy, put down by the railroad company, about 600 yards in length, extending from Danville along a side track of the railroad, and terminating at or near the northern end of the depot; thence up a flight of steps to the depot floor, and across the floor of the depot towards its southern end; thence down a flight of steps, located between two of the hatch-holes, to the wharf-boat, over a macadamized or gravel way which the railroad company had constructed for the convenience of those going upon business to or from the steamboat landing. The custom of travelers passing between the railroad station at Danville and the steamboat landing to use as a footway the plank-road, the depot floor, and the macadamized way leading to the wharf-boat, was not only a necessary one, but was known to and permitted by the company. There was no path or safe or convenient way around the shed depot to the wharf.

Such was the situation when the deceased reached Danville by the cars of the company. He stopped at a hotel to await the coming, that night, of the steamer Rapidan, whose usual hours of arrival at the landing were known to the railroad company. Some time after midnight the steamer reached the vicinity of the landing and, by whistle, signaled for landing at the wharf-boat. Deceased started from the hotel for the steamboat, for the purpose of prosecuting his journey, taking with him a lighted lantern. He went upon the plank-way leading to the shed depot, having been informed by the landlord that that was the proper route to take. He had proceeded but a short distance when the wind extinguished the light and, fearing the boat would immediately depart, and being able to see the plank-way, he proceeded to the depot, which was unlighted, and, passing up the steps at its northern end, he attempted to cross the floor in the direction of the steps, at the southern end, leading down to the macadamized or gravel way which we have described. He was unaware of the existence of the openings or hatch-holes in the depot floor, or of any other obstruction or danger in his path and, although using due care, he fell through one of the hatch-holes (which had been left uncovered and unguarded for some time before), down, a distance of at least five feet, upon the cross-ties and rails beneath. By the fall, his left ankle and foot were broken and crushed, causing severe and permanent injury, attended by sickness and long confinement to his bed. The demurrer concedes that the company was aware as well of the condition of the hatch-holes in the depot floor, as that such condition was unsafe and dangerous to the traveling public. [580]

1. The right to revive this action in the name of the personal representative of Bennett seems to be clear under the laws both of Kentucky and Tennessee, by each of which States the defendant Company was incorporated, and in the latter of which occurred the injuries for which damages are claimed. Kentucky Gen. Stat., 179; Tennessee Code, sec. 2846.

2. The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule, founded in justice and necessity and illustrated in many adjudged cases in the American courts, that the owner or occupant of land who, by *invitation*, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation. *R. R. Co.* v. *Hanning*, 15 Wall., 649 [82 U. S., XXI., 220]; *Carleton* v. *Iron & Steel Co.*, 99 Mass., 216; *Sweeny* v. *R. R. Co.*, 10 Allen, 368; Whart., Negl., secs. 349-352; Cooley, Torts, 604-607, *and authorities cited by those authors.* The last named author says that when one "Expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." [581]

The rule is also illustrated in many cases in the English courts, some of which it may be well to examine. One, referred to by this court in *R.R. Co.* v. *Hanning*, is *Corby* v. *Hill*, 4 C.B. (N. S.), 562. That was an action for an injury sustained by the plaintiff while traveling upon

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a private way leading from a turnpike road to a certain building, and over which parties having occasion to visit such building were likely to pass, and were accustomed to pass, by leave of the owners of the soil. The defendant negligently obstructed the way by placing thereon certain materials without giving notice or warning of the obstruction by light or other signal, and by reason thereof the plaintiff's horse was driven against the obstruction and injured. One of the pleas was that the defendant had placed the materials on the road by the license or consent of the owners of the soil. Upon the argument of the case, counsel for the defendant contended that the owners of the soil, and consequently, also, any person having leave or license from them, might, as against any other person using the way by the like leave and license, place an obstruction thereon without incurring responsibility for injury resulting therefrom, unless in the case where an allurement or inducement was held out to such other person to make use of the way. Upon the general question, as well as in response to this argument, Cockburn, *C. J.*, said: "It seems to me that the very case from which the learned counsel seeks to distinguish this is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permis-
[582] sion." In the same case, Williams, *J.*, said: "I see no reason why the plaintiff should not have a remedy against such a wrong-doer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it." Willes, *J.*, remarked: "The defendant has no right to set a trap for the plaintiff. One who comes upon another's land, by the owner's permission or invitation, has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury."

Another case, often cited, is *Chapman* v. *Rothwell*, 1 El., B. & E., 168. The declaration there charged that the defendant was in possession and occupation of a brewery, office and passage leading thereto from the public street, used by him for the reception of customers and others in his trade and business as a brewer. The passage was the usual and ordinary means of ingress and egress to and from the office, from and to the public street. The defendant negligently permitted a trap-door in the floor of that passage to be and remain open, without being properly guarded and lighted. The plaintiff's wife had been to the brewery office as a customer in the defendant's business, and was walking along the passage on her return to the public street, when she fell through the trap-door and was injured and killed. Upon the argument, counsel for defendant insisted that no facts appeared showing it to be the duty of the defendant to keep the trap-door closed. To this Erle, *J.*, replied, with the sanction of Lord Campbell, *C. J.*, "If you invite a customer to come to your shop, and leave a pitfall open, or a large iron peg in the part of the floor over which the customer is likely to tread, is not that a duty and a breach, if accident ensues?" The court there drew a distinction between the case of a mere visitor, as in *Southcote* v. *Stanley*, 1 H. & N., 247, and a customer, who, as one of the public, is invited for the purposes of business carried on by the owner or occupier of the premises.

In *Indermaur* v. *Dames*, L. R., 1 C. P., 274, and L. R., 2 C. P., 313, the court, referring to the class of persons who visit premises upon business which concerns the occupier, and upon his invitation, express or implied, said that it [583]
was settled law that a visitor of that class, "Using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

In *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & El., 230, which was the case of a company making a canal for their profit, and opening it to the public use on payment of tolls, it was held by the Exchequer Chamber that the common law, in such a case, imposed a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the public use of all choosing to navigate it, that they may navigate it without danger to themselves or property.

The same principle was applied by the Exchequer Chamber in *Gibbs* v. *Tr. of Liverpool Docks*, 3 H. & N., 164. That was an action by the owners of a ship to recover for an injury done to the cargo by reason of the ship, when entering, having struck a bank of mud carelessly and negligently left in and about the entrance to the dock. The defendants were not individually profited by the operations of the company of which they were trustees, but, by statute, were bound, as such trustees, to apply the tolls received in maintaining the docks, and in paying the debt contracted in making them. The court, speaking by Coleridge, *J.*, held that whether the defendants received the tolls for a beneficial or a fiduciary purpose, the knowledge, upon their part, that the entrance to the dock was dangerous, imposed upon them the duty of closing the dock against the public, as soon as they became aware of its unsafe condition; that they had no right, with a knowledge of its condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on the payment of the tolls to them, might enter and navigate the dock.

The judgment was affirmed upon full consid- [584]
eration in the House of Lords. *Mersey Docks* v.

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Gibbs, 11 H. L. Cas., 686. In the opinion, there delivered by *Mr. Justice* Blackburn, on behalf of all the Judges who heard the argument, among whom were Lords Cranworth, Wensleydale, and Westbury, it was said, "For a body corporate never can either take care or neglect to take care, except through its servants; and, assuming that it was the duty of the trustees to take reasonable care that the dock was in a fit state, it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty and did not take reasonable care that it was fit."

We forbear further citation of authorities. It is clear that the rule which obtains in the English courts is in harmony with that generally recognized in the courts of this country.

That upon the case, as made by the pleadings, the Railroad Company is liable in damages, none of us entertain any doubt. As the deceased did not purchase from the Railroad Company a through ticket, but only a ticket, over its line, from Vernon to Danville station, it may be argued that the relation of carrier and passenger, which existed between him and the Company, terminated when the latter left the train at Danville station and, consequently, that there was no breach of the Company's contract of transportation. But there was, nevertheless, a breach of legal duty or obligation for which, as property owner, the Railroad Company is responsible.

It cannot be pretended that Bennett, at the time he was injured, was, in any sense, a trespasser upon the premises of the Company. Nor is this case, like many cited in the books, of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere license or permission by the owner, without circumstances showing an invitation extended, or an inducement, or, in the language of some of the cases, an allurement, held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make a case of *invitation*, in the tech-
[585] nical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. "The principle," says Mr. Campbell, in his treatise on Negligence, "appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

As each case must largely depend upon its special circumstances, we shall not attempt to lay down a general rule upon the subject. It is quite sufficient to say that no difficulty of discrimination exists in the case before us. This is the case of a traveler, going upon a way which had been constructed and was maintained by a railroad company, in part for its own benefit and profit, to be used by all, without distinction, who desired, for purposes of business, to pass to and from the Company's wharf-boat, moored at an established landing upon a public navigable river. The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had been, so to speak, dedicated by the owner. They were so situated, with reference to the river, and were so occupied and controlled by the Company as not only to invite their use by the public, but, in a sense, to compel those having business at the river landing to abandon such business, or, in its prosecution, to pass over the route through the shed depot. It was, therefore, the plain duty of the Company to take such precautions, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who had occasion to use the premises for the purposes for which they had been appropriated by the company, and for which, with its knowledge and permission, it was commonly used by the public.

We are all of opinion that the pleadings, though somewhat extended and argumentative, state facts sufficient to require an answer from the defendant. It is a case peculiarly for the consideration of a jury of practical men, who, under proper instructions, can best ascertain to what extent, if at all, under the circumstances actually existing, the Railroad Company was negligent in the discharge of any duty or obligation, imposed by the law, and how far, if at all, the deceased was wanting in due care upon the occasion when he was injured.

To guard against misapprehension, it is proper to remark also that we must not be understood as making the plaintiff's right of recovery de- [586]
pendent upon proof of every single fact averred in the pleadings, or which has been recited in this opinion. We have considered the case in the light of the facts, as averred, and, by the demurrer, conceded to exist. Upon the trial, after issue joined, the court will have no difficulty, in view of what we have said, in determining whether the case, as actually presented to the jury, shows a breach of duty or legal obligation upon the part of the Railroad Company, for which it may be liable in damages.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—16 N. W. Rep., 4; 19 N. W. Rep., 260; 57 Wis., 608, 607, 613.

COUNTY OF MOBILE, STATE OF ALABAMA, *Appt.*, [691]

v.

SETH N. KIMBALL ET AL.

(See S. C., 12 Otto, 691-707.)

Commercial power of Congress—uniformity—improvement of harbors—state law to improve river—bonds issued for that purpose—manner of payment—former suit—Harbor Board—equity enforcement of contract.

1. The commercial power of Congress authorizes it to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety.

2. The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable.

NOTE.—*Power of Congress to regulate commerce; state licenses; power of State to tax commerce.* See *note* to Gibbons v. Ogden, 22 U. S. (9 Wheat.), 1; and *note* to Brown v. Maryland, 25 U. S. (12 Wheat.), 419.

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3. The improvement of harbors, bays and navigable rivers within the States may be regulated by state authority, if it does not impair their free navigation as permitted under the laws of the United States, nor defeat any system for the improvement of their navigation provided by the General Government.

4. The Alabama Act of Feb. 16, 1867, to provide for the improvement of the river, bay and harbor of Mobile, is not invalid, as conflicting with the commercial power of Congress, nor because the expenses of the work are imposed on a single county.

5. The issue, by the President and Commissioners of Revenue, of Mobile County, of bonds for the improvement of the river, bay and harbor of Mobile, was not a taking of private property for public use, within the meaning of the constitutional clause. Taxation for a public purpose, however great, is not such taking in the sense of the Constitution.

6. When any public work is authorized, it rests with the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised.

7. Where two suits, although seeking the same relief, rest upon a different state of facts, the adjudication in the one constitutes no bar to a recovery in the other.

8. The Harbor Board, created by a law of the State, was authorized to make contracts for a public work in which the County was specially interested.

9. If, for any cause, a contract cannot be specifically enforced, a court of equity may order compensation in damages from the party ultimately liable.

[No. 126.]

Argued Dec. 15, 1880. Decided Jan. 10, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

The case is fully stated by the court.

Mr. **John T. Morgan,** for appellant.

Mr. **C. W. Jones,** for appellees.

[695] *Mr. Justice* **Field** delivered the opinion of the court:

The several positions taken by the appellant for the reversal of the decree of the Circuit Court may be resolved into these four: 1, That the Act of the Legislature of Alabama of February 16th, 1867, "To provide for the improvement of the river, bay and harbor of Mobile," is invalid, in that it conflicts with the commercial power vested in Congress; 2, that if the Act be not, for this reason, invalid, the expenses for the work authorized by it could not, under the Constitution of the State then in force, be imposed upon the County of Mobile, the work being for the benefit of the whole State; 3, that the right of the complainants to relief is barred by a previous adjudication in the courts of the State [696] against their claim; and, 4, that the case presented by the bill is not one for the cognizance of a court of equity. Each of these positions merits special consideration.

1. The Act of February 16, 1867, created a Board of Commissioners for the improvement of the River, Harbor and Bay of Mobile, and required the president of the commissioners of revenue of Mobile County to issue bonds to the amount of $1,000,000, and deliver them, when called for, to the board, to meet the expenses of the work directed. The board was authorized to apply the bonds, or their proceeds, to the cleaning out, deepening and widening of the river, harbor and bay of Mobile, or any part thereof, or to the construction of an artificial harbor in addition to such improvement.

In June, 1872, the board of commissioners entered into a contract with the complainants, Kimball and Slaughter, to dredge and cut a channel through a designated bar in the bay, of specified width, depth and distance, at a named price per cubic yard of material excavated and removed, and to receive in payment the bonds of the County, issued under the Act mentioned, at the rate of 82½ cents on the dollar. In pursuance of this contract, the work agreed upon was at once undertaken by the complainants, and was completed by them in March, 1873, and accepted by the board through its authorized engineer. The amount due to them was paid, with the exception of seventeen bonds. The board gave them a certificate that they were entitled to that number of bonds, and, after some delay, delivered eleven to them. It is to obtain a delivery of the remaining six, or payment of their value, that the present suit is brought.

The objection that the law of the State, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of state authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its Judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the [697] citizens of the several States, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign Nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation.

Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys and beacons to guide mariners to the proper channel in which to direct their vessels.

The rules to govern harbor pilotage must de-

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pend in a great degree upon the peculiarities of the ports where they are to be enforced. It has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving this subject principally to the [698] control of the States. Their authority to act upon the matter and regulate the whole subject, in the absence of legislation by Congress, has been recognized by this court in repeated instances. In *Cooley* v. *Port Wardens*, the court refers to the Act of Congress of 1789, 1 Stat. at L., 54, declaring that pilots should continue to be regulated by such laws as the States might respectively thereafter enact for that purpose, and observes that "It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States and of the National Government has been in conformity with this declaration, from the origin of the National Government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience and conformed to local wants." 12 How., 299, 320.

Buoys and beacons are important aids, and sometimes are essential to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by Congress is undoubtedly within its commercial power. But it would be extending that power, to the exclusion of state authority, to an unreasonable degree to hold that whilst it remained unexercised upon this subject, it would be unlawful for the State to provide the buoys and beacons required for the safe navigation of its harbors and rivers, and in case of their destruction by storms or otherwise it could not temporarily supply their places until Congress could act in the matter and provide for their re-establishment. That power which every State possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health and property of its people, would justify measures of this kind.

The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from its nature or the sphere of its operation, the subject is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects [699] can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority.

The improvement of harbors, bays and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign Nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the General Government. Legislation of the States for the purposes and within the limits mentioned do not infringe upon the commercial power of Congress; and so we hold that the Act of the State of Alabama of February 16, 1867, to provide for the "improvement of the River, Bay and Harbor of Mobile," is not invalid.

There have been, it is true, expressions by individual Judges of this court, going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all state authority; but there has been no adjudication of the court to that effect. In the opinion of the court in *Gibbons* v. *Ogden*, the first and leading case upon the construction of the commercial clause of the Constitution, and which opinion is recognized as one of the ablest of the great *Chief Justice* then presiding, there are several expressions which would indicate, and his general reasoning would tend to [700] the same conclusion, that in his judgment the grant of the commercial power was of itself sufficient to exclude all action of the States; and it is upon them that the advocates of the exclusive theory chiefly rely; and yet he takes care to observe that the question was not involved in the decision required by that case. "In discussing the question whether this power is still in the States," he observes that, "in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a State regulate commerce with foreign Nations and among the several States while Congress is regulating it?" And the decision was necessarily restricted by the limitations of the question presented. It determined that the grant of power by the Constitution, accompanied by legislation under it, operated as an inhibition upon the States from interfering with the subject of that legislation. The Acts of New York giving to Livingston and Fulton an exclusive right to navigate all the waters within its jurisdiction, with vessels propelled by steam, for a certain period, being in collision with the laws of Congress regulating the coasting trade, were, therefore, adjudged to be unconstitutional. This judgment was rendered in 1824. 9 Wheat., 1. Some years later (1829) the case of *Willson* v. *Blackbird Creek Marsh Co.*, came before the court. There a law of Delaware authorizing the construction of a bridge over one of its small navigable streams, which obstructed the navigation of the stream,

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was held not to be repugnant to the commercial power of Congress. The court, *Chief Justice* Marshall delivering its opinion, placed its decision entirely upon the absence of any congressional legislation on the subject. Its language was: "If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should not feel much difficulty in saying that a state law coming in conflict with such Act would be [701] void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign Nations and among the several States—a power which has not been so exercised as to affect the question." 2 Pet., 252.

In the *License Cases*, which were before the court in 1847, there was great diversity of views in the opinions of the different Judges upon the operation of the grant of the commercial power of Congress in the absence of congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the Judges, but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subjects there considered.

But in 1851, in the case of *Cooley* v. *Port Wardens*, to which we have already referred, the attention of the court appears to have been for the first time drawn to the varying and different regulations required by the different subjects upon which Congress may legislate under the commercial power; and from this consideration the conclusion was reached, that, as some of these subjects are national in their nature, admitting of one uniform plan or system of regulation, whilst others, being local in their nature or operation, can be best regulated by the States, the exclusiveness of the power in any case is to be determined more by the nature of the subject upon which it is to operate than by the terms of the grant, which, though general, are not accompanied by any express prohibition to the exercise of the power by the States. The decision was confined to the validity of regulations by the States, of harbor pilotage; but the reasoning of the court suggested as satisfactory a solution as perhaps could be obtained of the question which had so long divided the Judges. The views expressed in the opinion delivered are followed in *Gilman* v. *Philadelphia*, 3 Wall., 713 [70 U. S., XVIII., 96] and are mentioned with approval in *Crandall* v *Nevada*, 6 Wall., 35 [73 U. S., XVIII., 745]. In the first of these cases the court, after stating that some subjects of commerce call for uniform rules and national legislation, and that others can "be best regulated by rules and pro- [702] visions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively," says, "Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated." This doctrine was subsequently recognized in the case of *Welton* v. *Missouri*, 91 U. S., 275 [XXIII., 347], in *Henderson* v. *Mayor of N. Y.*, 92 U. S., 259 [XXIII., 543], and in numerous other cases; and it may be considered as expressing the final judgment of the court.

Perhaps some of the divergence of views upon this question among former Judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.

2. The second objection of the appellant to the decree of the Circuit Court is equally as untenable as the first. The question of the validity of the Act of February 16, 1867, under the Constitution of Alabama at the time in force, was before the Supreme Court of the State in 1871. It was contended that the Act contravened the article which forbade the taking of private property for public use without just compensation, or for private use, or the use of corporations other than municipal, without the consent of the owner, and the article which restrained the Legislature from delegating power to levy taxes to individuals or private corporations. The court held that the Act was not open to objection on either of these grounds, except perhaps in the clause which authorized the board of commissioners to assess dues or tolls to be collected on vessels or water-craft; and if [703] that clause could be deemed a delegation of the taxing power under the article mentioned, that portion only of the Act was invalid. The issue by the president and commissioners of revenue of Mobile County of bonds for the improvement of the river, bay, and harbor of Mobile was not a taking of private property for public use, within the meaning of the constitutional clause. It was a loan of the credit of the County for a work public in its character, designed to be of general benefit to the State, but more especially and immediately to the County. The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the County. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensa-

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tion. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different.

The objection to the Act here raised is different from that taken in the state court. Here the objection urged is that it fastens upon one County the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

It may be that the Act in imposing upon the [704] County of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the County if the Legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or County can find a refuge from ill-advised, unequal and oppressive state legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

3. The objection that the right of the complainants to relief is barred by a previous adjudication in the courts of the State against their claim arises in this wise: after the complainants had performed their work on the harbor of Mobile under the contract with the harbor commissioners, of June, 1872, and the work had been approved and accepted, the Legislature passed the Act of April 19, 1873, to regulate the further proceedings of the Board, restricting the issue of bonds to the amount, including those already issued, of $200,000, and declaring that the harbor board should not, under any pretense whatever, be entitled to receive bonds to any greater amount. Bonds to that amount had already been delivered to the board, and for six of them, the number to which they were entitled, the complainants applied. The delivery of the bonds being refused, they brought suit against the County of Mobile to obtain them or their value.

Two grounds were alleged on which the responsibility of the County was asserted: one, that the harbor board had ceased to have anything to do with the improvement of the river, bay, and harbor of Mobile, and had turned over all the money and bonds left in its possession to the officials of the County; the other, that the County through its officials had bought from [705] the harbor board thirty-one of the two hundred bonds issued, at a price less than their market value, and had refused to deliver to the complainants the six due to them which they had demanded.

The District Court gave a decree for the complainants, but the Supreme Court reversed it, holding that upon the first ground the complainants were mistaken as to the situation of the harbor board, and that it continued to exist for the purpose of winding up and settling its business; and upon the second ground, that although thirty-one of the bonds had been purchased as stated, they had been canceled before the complainants made the demand for six of them; and it was shown by the county that there still remained with the harbor board unaccounted for twenty-three of the two hundred bonds, which was more than sufficient to pay the complainants and other debts which the board owed. The court therefore decided that the delinquency complained of was that of the harbor board and not of the County; that the only obligations imposed upon the County were that it should issue its bonds upon the demand of the harbor board, and pay them according to their stipulations; and as it appeared that the county officials had delivered to the board the whole amount of the bonds demanded, and that this amount was ample for the fulfillment of the obligations contracted for, the suit could not be maintained. The decree was, therefore, reversed and the bill dismissed, but *without prejudice*, a condition which prevented the adjudication from operating as a bar to the same claim, if the complainants could in another suit obviate the defects of the existing bill. In the present suit they have obviated these defects. They allege and prove that the harbor board had disposed of all the bonds it had received before the passage of the Act of April 19, 1873, restricting the number to be issued, and that it had turned over to the officials of the County neither bonds nor proceeds to meet the demand of the complainants. The two suits, though seeking the same relief, rest upon a different state of facts, and the adjudication in the one constitutes, therefore, no bar to a recovery in the other.

4. But it is finally objected that the case presented by the bill is not one for the cognizance of a court of equity. This objection is important [706] only from the supposed effect of the decision of the Supreme Court of the State in the first suit against the County brought by the complainants. It appears to have been taken for granted by counsel, and also by the court below, that the Supreme Court of the State had decided that the harbor board was not the agent of the County in making the contract with the complainants. We do not so read its opinion. It only says that the board was created by the General Assembly of the State, and was not an agent *appointed* by the County of Mobile. It does not state that the board was not an agent of the County, but only that its appointment was not from the County, and that it drew its existence and authority from the statute of the State. It is not necessary to constitute an agency of a political subdivision of a State that its offi-

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cials should be elected by its people or be appointed with their assent. It is enough to give them that character that, however appointed, they are authorized by law to act for the county, district, or other political subdivision. Here, the harbor board, created by a law of the State, was authorized to make contracts for a public work in which the County was specially interested, and by which it would be immediately and directly benefited, and to require obligations of the County to meet the expenses incurred. It is a mere battle of words to contend that it was, or was not, an agent of the County because its members were appointed by some exterior authority. It is enough in this case that by force of the law of its creation it could bind the County for work for which it contracted. Having thus bound the County, the contractors are entitled to the bonds stipulated, or their equivalent in money. If for any cause, the repeal of the law creating the harbor board, or the refusal of its members or other officials to act, the contract cannot be specifically enforced, a court of equity will order compensation in damages from the party ultimately liable. That court will free the case from all technical embarrassments, to the end that justice may be done to those who have trusted to the law, and the responsibility of parties receiving benefits under it. The case here is not different in principle from the ordinary case of a party being unable to comply with his contract when specific performance is demanded. If, for example, there be a contract for the purchase of land with which the purchaser has complied, but in which the vendor has failed, a court of [707] equity will take jurisdiction; and if it be seen that the vendor, from subsequent sales or otherwise, cannot comply with a decree for a specific performance, the court will adjudge compensation in damages. So here the court will grant the relief which the complainants, under their contract, are entitled to have, if such relief can be obtained from the county; but if by reason of intervening obstacles since the contract was made whether arising from laches or default of its officials or repealing legislation, this cannot be secured, an alternative and compensatory decree, that is, one for a money equivalent in the form of damages, will be directed. *And as this has been done in the present case the decree is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 351; 105 U. S., 492; 107 U. S., 687, 708; 111 U. S., 705; 96 Ind., 179; 49 Am. Rep., 160; 24 W. Va., 783; 49 Am. Rep., 292, 293.

UNION PACIFIC RAILROAD COMPANY,

Plff. in Err.,

v.

JOHN Y. CLOPPER ET AL.

131 US cxcii Appx.

1. A contract must be construed in the light of surrounding circumstances, as the parties understood it at the time it was made.
2. The opinion of a practical engineer, of experience in bridge building, is entitled to weight with the jury, in deciding whether part of a railroad track protected by stone, was so constructed as a dike against the current of water, or as the approach to a bridge.

[No. 139].

Argued Dec. 14, 1880. Decided Jan. 17, 1881.

IN ERROR to the Circuit Court of the United States, for the District of Nebraska.

The case is fully stated by the court.

Messrs. Shellabarger & Wilson and **A. J. Poppleton,** for plaintiff in error.

Messrs. **John L. Webster** and **W. J. Connell,** for defendants in error.

Mr. Justice **Miller,** delivered the opinion of the court:

The Union Pacific Railroad Company having undertaken to build a railroad bridge across the Missouri River at Omaha, entered into the following written contract, by its chief engineer and superintendent:

"Omaha, June 13th, '71.

We hereby propose to furnish, at Missouri River bridge, stone enough to complete said bridge and approaches, excepting the three thousand yards now under contract to W. B. Clark, ag't, at the following rates, viz:

Column stone containing not less than three cubic feet each, and not less than six inches in thickness, at three dollars and fifty cents per cubic y'd.

Riprap stone, containing not less than six cubic feet each stone, at four dollars per cubic y'd.

Dimension stone, containing not less than nine cubic feet each, and rectangular in shape, at four dollars and fifty cents per cubic y'd.

All stone to be clear, sound and durable, and subject to inspection of the engineer of the bridge, and in quantities as may be required.

It being understood that forty-four hundred and twenty pounds be a cubic yard.

Clopper and Gise.
Chas. Fleury.

Approved.
(Stamp). T. E. Sickles,
Ch. Eng'r and Sup't."

The defendants in error having furnished a large amount of stone for which they received payment under this contract, and being ready and willing to furnish other stone, which they allege was needed by the Company to complete the bridge and its approaches, bring this suit to recover damages for the refusal of the Company to receive it, alleging that it had bought the same from other persons.

The case was submitted to a jury who found a verdict for the plaintiffs in the sum of $22,085,50 on which judgment was rendered, to reverse which this writ of error is brought.

The assignments of error necessary to be considered here arise in the refusal of the court to grant certain prayers for instruction by the defendants, and the exception to the charge which the court did give to the jury.

So far as these are material to be considered they all relate to the mode of ascertaining what work, in which stone was used, was necessary to complete the bridge and its approaches, within the meaning of the contract.

It will be seen at once that the language of the contract on this point is very vague. There is no description of the bridge, no statement of its length, or the number of its piers or their

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height; no indication of the length of the approaches to it, nor any estimate of quantity. Nor does the testimony reveal any statement of this kind referred to by either party at the time the contract was made, or during its negotiation, nor any estimate made by the Company itself.

The principal object of this action being the recovery of profits for stone not actually delivered, but which the plaintiffs would have made if delivered and paid for according to the terms of the contract, it would seem eminently proper that plaintiffs should make out clearly that the stone which was bought by the Company from others, was within the terms of their contract, and used to complete the bridge or its approaches.

The main controversy, before the jury, had relation to what constituted the eastern approach to the bridge. To understand this it is essential to understand the topography of the land adjacent to the eastern end of the bridge. The ground there at the river bank is higher than it is for several thousand feet back toward the eastern bluffs. In fact, from the bank of the river, a low bottom extends for about four miles to the City of Council Bluffs, which in many cases is lower than the level of the immediate bank of the river. The current of the river, at the time the bridge was built and for many years before, ran close to this eastern bank, and in very high water the whole bottom was overflowed, and on occasions when it was not so high, a part of the water would break through the eastern bank at different points and run in currents or channels through this wide bottom. The bottom of the bridge on which the rails were laid was considerably higher than the level of this bank, and of course the eastern approach to it had to be projected a corresponding distance on this bottom to obtain the grade necessary to enable the train to ascend to the level of the rails of the bridge.

After the bridge was completed, it was found necessary to protect this eastern approach against the overflow of the river by a riprap wall of stone. It also became expedient for the Company to prolong or continue its track for more than a thousand feet, at a considerable elevation above the natural surface of the ground, as a means of checking the currents of these overflows, which would otherwise cut through their track and do it immense damage. This also aided in turning the current or channel to the western or Omaha side of the river. It does not seem to be yet decided how far eastwardly this elevation of the railroad may be profitably projected for these purposes, without reference to its use as an approach to the bridge; nor how much of it will require a riprap of stone for its protection; nor how much of this may be profitably done, though not absolutely necessary.

Under these circumstances, it was important that the principles which should guide the jury in deciding what part of this track was the approach to the bridge, within the meaning of the contract; and what was mere elevated track to get above high water, and dike to repel the currents of the overflow, should be stated to them with as much precision as possible. We are of opinion that this was not done, but that prayers of the defendant were refused, which conveyed the true rule on that subject, and others granted, at the request of the plaintiffs, which were erroneous.

The following instructions, each of which was specifically refused by the court, were, in our opinion, entirely correct and should have been applied by the jury to the ascertainment of what was the eastern approach to the bridge, intended by the use of that language in the contract:

7. "In determining what was intended to be embraced in the contract, the jury should consider what was the condition of things at the time it was made, and not the condition as developed by the operations of nature, years afterwards, and which was not and could not have been in the minds of the parties at the time the contract was made."

(Refused by the court).

8. "The contract must be construed and interpreted as it was made and understood at the time of entering into it, unless it has been satisfactorily shown that it was subsequently changed or modified."

(Refused by the court).

9. "The testimony of experts, who are shown to have had experience in the science of bridge building and as civil engineers, has been admitted and is entitled to due weight, as to whether or not the work spoken of as a dike is a part of the bridge or approach."

(Refused by the court.)

That the opinion of a practical civil engineer, of experience in bridge building, is entitled to weight with the jury in deciding whether part of this track through the bottom, which had been protected by stone, was so constructed as a dike, against the current of water, or as the approach to the bridge, is, we think, too clear for argument. Such a witness would know what is usually meant by the term "approach to a bridge", much better than the average juror, and would have, perhaps, little difficulty in forming a just opinion, when the ordinary juror would have been wholly at a loss. So, also, no reason can be seen for rejecting the seventh and eighth instructions, which were only intended to assert the ordinary rule, that a contract must be construed in the light of surrounding circumstances, as the parties understood it at the time it was made.

The reason for rejecting these prayers is found in the following instruction granted at the request of the plaintiffs:

"If the jury are satisfied from the evidence that at the time the contract sued on was executed, no plan or specifications for the building of the bridge or its approaches existed, but that the building and completion of the bridge and its approaches were left entirely by the defendant to Mr. Sickles, the chief engineer, who had not, at the time of executing said contract, any definite or fixed plan as to construction and completion of piers or columns and approaches, other than to put in said piers or columns and approaches and riprap the same with stone to protect the same, as it might subsequently be ascertained to be necessary; and it was subsequently ascertained, while work under said contract was in progress, that it would be necessary for such protection to riprap any or all of said piers or approaches, by putting in stone about said piers or columns or by extending the

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east approach by building a heavy wall, extending back in a northeast direction, as far as circumstances might develop a necessity for, then the plaintiffs would be entitled to recover such damage as the proof under instruction may show them entitled, for all stone necessary to be used for such purposes; and this right of plaintiffs to so recover would exist and apply to stone yet undelivered, if necessary for such purposes, as well as stone already delivered.

Under this last instruction, the jury was left fairly to infer that if, after the bridge itself was completed and in use, the Company should find it expedient with a view to arrest the overflow of the river bottom, to extend its track across the entire four miles to Council Bluffs, and protect it by an exterior covering of stone, this dike or wall might be the approach to the bridge within the meaning of the contract and the stone used in the dike covered by its terms.

Taking the prayers refused and the instructions given, and we are satisfied that the jury was left with a very improper view of what was the approach to the bridge, and with unlimited discretion as to time of completion and extent of track that might be called an approach.

We cannot, of course, lay down any precise description of how much of this track was approach and how much was dike, and how much ordinary railroad track. We think the three prayers asked by defendant, and refused by the court, contain the true elements of the problem, and that much weight ought to be given to the views of scientific and practical engineers and builders of bridges.

The main charge delivered by the court is very full and apparently very fair, but it nowhere removes or cures the errors we have pointed out, and *for these the judgment of the court is reversed and the case remanded, with instructions to set aside the verdict and grant a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[545] CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Appt.*,

v.

CHARLES A. ELDREDGE.

(See S. C., 12 Otto, 545-548.)

Purchaser from trustee, title of.

Where a purchaser, at the time of taking a deed, has information that a prior mortgagee or trustee of a prior deed has released the property from the mortgage or trust, without payment of the notes it was made to secure, or their surrender, or express authority from the holder of them, he will take the property subject to any equitable right of the holder of the notes.

[No. 171.]

Argued Jan. 3, 1881. Decided Jan. 17, 1881.

APPEAL from the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. **W. D. Davidge** and **S. R. Bond**, for appellant.

Mr. **Enoch Totten**, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

In November, 1871, John Van Riswick sold and conveyed certain real property in the City of Washington, of which he then was the owner, to one George B. Coburn, for the sum of $7,784.40, for which the latter gave his three promissory notes, each for $2,578.13, payable respectively in one, two and three years after date, with interest. To secure these notes, Coburn executed to one William H. Ward a deed [546] of trust of the property. This deed authorized Ward, upon default in payment of either of the notes, to sell the property and, upon full payment of the notes and not otherwise, to release and reconvey the property to Coburn. The deed was recorded the same month. In February, 1872, Coburn sold and conveyed the property to one Edwin E. Mayhew, subject to the deed of trust.

In June, 1872, two persons by the names of Aistrop and Dudley jointly borrowed of the complainant, Eldredge, $4,000, for which they gave their note payable in sixty days, and as collateral security delivered to him two of the three notes of Coburn before mentioned, which had been indorsed to them.

In October following, Mayhew, who had subdivided the property into sixteen lots, upon eight of which, fronting on 14th Street, houses were then being constructed, applied to the Connecticut General Life Insurance Company, through its agent at Washington, John G. Bigelow, for a loan of $32,000; and through him the loan was effected, and secured by a deed of trust upon each of the eight lots. To obtain this loan it became necessary to have the existing incumbrances upon the property discharged. The Company would not take the property as security with any prior lien upon it. In addition to the deed of trust to secure Coburn's notes, the property was then subject to a prior deed of trust, executed by a former owner, to secure the sum of $7,000. The Insurance Company left the matter of investigating the title and determining as to the sufficiency of the security to Bigelow, who was specially instructed to see that the Company had the first lien upon the property. He employed Ward, the trustee of the Coburn deed, to examine and report upon the title. In compliance, it would seem, with Bigelow's wishes and in conjunction with Van Riswick, who described himself as the holder of the first note of Coburn, but without the consent or knowledge of the complainant, then holding the other two notes, Ward executed a deed of release of the property. It is to set aside this deed, as a fraud upon the rights of the complainant, that the present suit is brought.

It is very plain, from the evidence contained [547] in the record, that Bigelow, in the course of his inquiries as to the condition of the property, became fully acquainted with the existence of the deeds of trust, and learned that the notes secured were not paid. The deeds were on record, and he was bound to take notice of them. The deed of Coburn designated the notes and limited the power of the trustee to release the property. He was in terms authorized to release and reconvey it only upon the full payment of the notes, and not otherwise. The deed showed the time the notes had to run, and that by their terms they were not then due. Unless paid at the time, or, what would be deemed equivalent, surrendered, the trustee had no

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authority to execute the release. It was not sufficient that the original payees of the notes joined in the instrument or consented to its execution. So far as they had parted with the notes they were denuded of power over the subject.

It is not necessary to express any opinion as to the authority of a trustee to release property conveyed to him at any time, where no such restriction, as in the present case, is in terms placed upon his power. We confine our language to the precise point before us. Here there was no authority on the part of the trustee to execute the deed until payment of the notes was made. The fact of their non-payment being known to Bigelow, the agent of the Insurance Company, knowledge of it must be imputed to the company, his principal; and both must be charged with knowledge of the law and the consequent inability of the trustee, at the time, to release the property.

To prevent misapprehension, it is proper to state that we do not wish to intimate any opinion upon the general question, whether a purchaser of property may not rely upon a release of a previous mortgage or trust-deed found upon the official records of the district where the property is situated, without further inquiry, where he has no knowledge of the non-payment of the indebtedness secured; but what we hold is, that where a purchaser, and a mortgagee or trustee of a trust-deed stands in the same position, at the time of taking a deed, has information that a prior mortgagee or trustee of a prior deed has released the property from the mortgage or trust, without payment of the notes or their surrender, or express authority from the [548] holder of them, he will take the property subject to any equitable right of the holder of the notes, to secure the payment of which the mortgage or trust-deed was executed.

As to the position that the complainant is barred of the relief he asks, by laches in asserting his claim, we do not think there is any force in it. The Company, as already stated, must be deemed to have known of the want of power in the trustee to release the property from the Coburn deed, and it does not lie in its mouth to object that the complainant did not sooner seek to set aside the priority of lien thus gained; nor can it aver that his claim to have the instrument canceled, by which this priority was secured, is a stale one, when asserted within the period allowed by law, and no rights of third parties as *bona fide* purchasers have intervened to render inequitable the assertion of his original lien.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 482.

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[603] UNITED STATES, *Plff. in Err.*,

v.

OSEPH G. CHOUTEAU ET AL.

(See S. C. 12 Otto, 603-612.)

Damages, when not recoverable—distiller's bond —compromise—sureties.

1. A party, seeking damages for a specified breach of duty, is not entitled to judgment in his favor, when admitting on the record that whatever damages he may have sustained resulted from other causes.

2. It is enough for the sureties in a distillers' bond to show that the loss to the Government, for which the action was brought was produced by other means than the particular breach of duty by their principal, of which the Government complains.

3. A compromise with the Government is a complete defense against the recovery of a penalty.

4. Sureties on a distiller's bond cannot be subjected to the penalty attached to the commission of an offense, when the principal has effected a full and complete compromise with the Government, under the sanction of an Act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty.

[No. 151.]

Argued Dec. 16, 1880. Decided Jan. 17, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

Statement of the case by *Mr. Justice* **Field**:

This is an action upon a bond of a distiller, against the principal and sureties, and is founded upon sections 3303 and 3296 of the Revised Statutes. The bond is in the penal sum of $25,000, and, after reciting that the principal, Joseph G. Chouteau, intends, after the first day of May, 1874, to be engaged in the business of a distiller [604] within the First Collection District of Missouri, to wit: at Grand Avenue and Main Street, in the City of St. Louis, in that State, it is conditioned, among other things, that he "Shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, *and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions.*"

Section 3303 is as follows:

"Every person who makes or distills or owns any still, boiler or other vessel used for the purpose of distilling spirits, or who has such still, boiler or other vessel so used under his superintendence, either as agent, owner, or who uses any such still, boiler or other vessel, *shall from day to day make or cause to be made in a book or books, to be kept by him in such form as the Commissioner of Internal Revenue may prescribe, a true and exact entry of the kind of materials, and the quantity* in pounds, bushels or gallons, purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in *another book he shall make like entry of the quantity of grain or other material used for the production of spirits*, the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity and temperature at the hour of twelve meridian; also, of the time when any fermenting tub is emptied of ripe mash or beer, the number

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of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business and residence of the person to whom sold."

Section 3296 is as follows:

[605] "Whenever any person *removes or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse* provided by law, or conceals or aids in the concealment of any spirits so removed, or removes or aids or abets in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits, authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a *penalty of double the tax* imposed on such distilled spirits so removed or concealed, and *shall be fined not less than two hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months, nor more than three years.*"

The complaint in the action, or petition as it is termed, contains eighty-four assignments of breaches of the conditions of the bond, forty-two of which, constituting the *odd* numbers, are founded upon section 3303, and forty-two, constituting the *even* numbers, are founded upon section 3296. The difference in the breaches assigned in each class is in respect to the day on which the act constituting the breach is alleged to have been done, commencing on the 2d day of May, and ending on the 15th day of August, 1874. The same breach of duty is charged to have been committed on forty-two different days.

The breach stated in each of the assignments designated by odd numbers is, that the distiller omitted to make, in a book he was required by law to keep, a true and exact entry of the kind and quantity of materials used by him in the production of distilled spirits; that he produced from the grain used a large quantity of spirits, and "*that by means of the said omission to make said entry in said book as aforesaid*" he "*was enabled to defraud and did defraud the United States out of the internal revenue tax*" *then imposed by law on the spirits*, whereby the United States were damaged in the sum of $2,100.

To this breach in the various assignments the defendants answer, and deny that by reason of the alleged omission of the distiller to make proper entries in the distiller's book mentioned [606] he was enabled to defraud and did defraud the United States of the tax on distilled spirits produced at his distillery, or any part of the tax; and state that, prior to any of the acts complained of, the distiller combined, confederated and conspired with certain designated revenue officers and agents, and other distillers and rectifiers, to defraud the United States of the tax on distilled spirits produced at various distilleries within the First Collection District of Missouri; that, in furtherance of this conspiracy and to accomplish its purpose, the parties concerned in it committed various violations of the revenue laws, and among other things they removed and aided in the removal of distilled spirits from the distilleries without having first paid the tax on them; they re-used upon packages paid and warehouse stamps which had been previously used; they gave and received bribes and made and connived at making false and fraudulent reports to the collector of internal revenue within the district of the quantities of spirits produced upon which taxes had become due; that the distiller, by reason of his participation in this conspiracy, was enabled, if at all, to defraud the United States of the tax on distilled spirits produced at his distillery within the period covered by his bond; that the internal revenue officers charged with the execution and enforcement of the internal revenue laws had no occasion to have recourse to the distiller's book and the storekeeper's record kept at the distillery, and did not have recourse to them, or examine them to obtain information touching the quantities of grain used and the number of gallons produced at the distillery; and that it was by reason of the organization and execution of this conspiracy, irrespective of the omission to make the entries mentioned, that the conspirators were enabled to defraud the United States of the tax on spirits produced at the distillery.

The breach stated in each of the assignments designated by even numbers is, that the distiller removed spirits produced at his distillery to a place other than the distillery warehouse, without the internal revenue tax imposed thereon being first paid, thereby incurring a penalty of $2,800, which sum he has not paid.

To this breach in the various assignments the defendants answer that the United States ought [607] not to maintain their action for the penalty denounced in section 3296, for, at the November Term, 1875, in the District Court of the United States for the Eastern District of Missouri, two bills of indictment were found against said Chouteau, the distiller (the principal upon the bond sued upon) one of which contained counts founded upon that section, alleging the removal by him, and his aiding and conniving at the removal, of distilled spirits from his distillery to a place unknown, upon which spirits the revenue tax was imposed and had not been paid, the other counts being founded upon sections 3281 and 5440 of the Revised Statutes, that afterwards, with the advice and consent of the Secretary of the Treasury and upon the recommendation of the Attorney-General, the Commissioner of Internal Revenue accepted from the distiller $1,000 in full satisfaction, compromise and settlement of the indictment and prosecutions, which were thereupon dismissed and abandoned.

And the defendants further answering, state "That the alleged removals of distilled spirits set forth in the various assignments of breaches now answered are *the same removals recited in the said indictment;* that all of the said removals of spirits complained of in plaintiff's petition might have been established, if said allegations be true, under the said indictments, either upon those counts based upon section 3296, or that count based upon section 3281; that all of the evidence which would be necessary to establish, and competent under the various assignments of breaches in plaintiff's petition, would also be competent under and would tend to establish the allegations of said indictments; that the various assignments of breaches in plaintiff's petition *relate to the same subject-matter and are based upon the same transaction* as the various allegations in said indictments contained, so far as they relate to alleged offenses

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under sections 3296 and 3281 and 5440, and that at the time when the said indictments were presented to said grand jury, and at the time when the said indictments were considered by said grand jury, all of the facts which would be competent to sustain the allegations of plaintiff's [608] petition were known to, and within the possession of, the representative of the United States."

To the answer of the defendants the United States demurred. But the demurrer was overruled, and they declining to plead further, judgment was entered thereon in favor of the defendants, and the case was brought here on writ of error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Mr. C. H. Krum for defendants in error.

Mr. Justice **Field,** delivered the opinion of the court:

As seen by the statement of the case, each breach of the condition of the bond in suit, of the class designated by odd numbers, consists in the omission of the distiller to make the required entries in the book provided in section 3303. The petition alleges that, by "means of said omission," the distiller was enabled to defraud and did defraud the United States of the tax imposed by law upon the spirits produced at his distillery. The answer denies this allegation, and avers that whatever fraud was committed upon the United States was effected through other means. The demurrer admits that averment to be true, and the question is thus presented whether a party seeking damages for a specified breach of duty is entitled to judgment in his favor, when admitting on the record that whatever damages he may have sustained resulted from other causes.

The case is not brought for any tax alleged to be due to the United States, which they would be entitled to recover, whatever the cause of its non-payment. In such a case it would be of no consequence whether the cause assigned for the default of the party was the true one or not; the obligation to the Government would be the same. Here a specific omission of duty on the part of the distiller is alleged, for which it is sought to charge both him and his sureties on their bond. Their liability is only to the extent of the damages sustained. If none resulted to the United States from the omission stated, none can be recovered either against him or his sureties. The law does not affix any specific penalty for the omission. If, therefore, the allegations of the petition were simply traversed, the Government would be compelled to prove, not only the omission complained of, but that by means of it the tax on [609] the spirits produced was lost, which constitutes the damage alleged. It would not be sufficient to show that by other omissions of duty the Government was thus defrauded, for that would be to change the entire ground of the action, the specific *gravamen* of the complaint.

Now, the demurrer admits that the ground of complaint—the specific breach of duty stated—did not cause the damages charged, but that whatever damages were sustained by the United States were effected by other means. Therefore the action, so far as damages are claimed for the particular omission of duty mentioned, must fail.

It is true that the breaches of duty, which are stated by the defendants in their answer as the means by which the United States were defrauded, are a series of stupendous frauds, for which the guilty parties deserve severe punishment; still they were none the less available as a defense to an action charging to other causes the damages which they produced It is certainly one way of defending against the charge of a wrongful act for which damages are sought, to show that, notwithstanding the wrong committed, the damages resulted from other causes, however objectionable a pleading might be with averments to that effect instead of a distinct traverse of the allegations of the complaint. If, for example, a party should charge another with inflicting upon his person a wound by which he lost an arm, it would be a good defense to show that the loss resulted from unskillful medical treatment or neglect and not from the wound inflicted. So here, it is enough for the sureties to show that the loss to the Government was produced by other means than the particular breach of duty by their principal, of which the Government complains. It is of no consequence to them, so far as the present action is concerned, how many other sins of omission or commission he may have committed, if they can show that the particular damage claimed was not the result of the one charged.

As to the breaches of duty in the assignments of the class designated by even numbers, we are of opinion that the compromise with the Government, pleaded, is a complete defense against a recovery of the penalty claimed. Each breach alleged consists in the removal, by the distiller, [610] of spirits produced at his distillery to a place other than the distillery warehouse, without first paying the tax imposed thereon. The penalty prescribed for this offense was intended as part punishment for it, and may be enforced, equally as the additional fine and imprisonment, by criminal prosecution. It was not intended in any sense as a substitute for the tax required, or as any abatement of it when recovered. This is evident from the fact that it may be applied to those who have aided or abetted in the removal, whether the distiller or one having no interest in the spirits. So, too, the payment of the tax may be made after the removal, and yet the penalty not be discharged; it could still be imposed upon the offending party.

It may be questioned whether the only mode for a recovery of the penalty is not by indictment; but assuming that it may be recovered in a civil action, the compromise pleaded covers the penalties here claimed. Two indictments have been found against the distiller, one of which contains counts for the specific offenses, which constitute the whole ground and cause of the present action. Under the authority of an Act of Congress, a compromise with the Government was effected, by which a specific sum was paid by him, and received by the Government, "in full satisfaction, compromise and settlement of said indictments and prosecutions," which were accordingly dismissed and abandoned. That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offenses charged and any further punishment for them. The answer avers that the removals of distilled spirits set forth in the

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assignment of breaches of the condition of the bond are the same removals recited in the indictments, and that all the evidence necessary to establish the breaches assigned would have been necessary and competent under the indictments. The two proceedings, the civil action and the criminal prosecution, so far as they relate to offenses under section 3296, are based upon the same transactions.

The question, therefore, is presented whether sureties on a distiller's bond shall be subjected to the penalty attached to the commission of an offense, when the principal has effected a full [611] and complete compromise with the Government, under the sanction of an Act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty.

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the Government delusive and useless.

Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The Government through its appropriate officers has indicated, under the authority of an Act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the Government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in *Ex parte Lange*, speaking through *Mr. Justice* Miller, "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and com- [612] plete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law." 18 Wall., 168 [85 U. S., XXI., 876].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

U. S. v. Ulrich, No. 152, in error to the Circuit Court of the United States for the Eastern District of Missouri. This case was argued at the same time as the preceding case, *ante*, 246, by *Mr.* **S. F. Phillips**, *Solicitor-Gen.*, for plaintiff in error, and *Mr. Thomas C. Fletcher*, for defendants in error. It was also decided on the same day, and the opinion of the court was delivered by *Mr. Justice* **Field**:

This case involves substantially the same questions considered in *U. S. v. Chouteau*. Here the principal on the bond in suit plead guilty to the indictments found against him, and was fined $1,000 and imprisoned for one day. The punishment inflicted was for offenses which are set forth in the petition in this action as breaches of the condition of the bond. This difference in the two cases does not affect the principle upon which the first was decided. Upon its authority the judgment is *affirmed*.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*, [623]

v.

ABRAHAM GOLDBACK ET AL.

(See S. C., 12 Otto, 623-625.)

Action for pay for stamps—costs.

1. Where a manufacturer bought stamps at a certain discount and agreed to pay for them at a future day, giving the bond sued on as his security, and did not pay as he agreed, and he and his sureties were sued for what he owed; held, that he had no moneys which, in any legal sense, belonged to the United States, and the United States cannot recover for the allowances made him as discount on the face value of the stamps or commissions.

2. Having paid for the stamps after suit was commenced, the United States cannot afterwards recover costs.

[No. 137.]

Submitted Dec. 14, 1880. Decided Jan. 17, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The case is fully stated by the court.

Messrs. Edwin B. Smith, Asst. Atty-Gen., and **S. F. Phillips**, *Solicitor-Gen.*, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The defendant in error, Goldback, was a manufacturer of friction matches, and as such gave bond to the United States, under section 3425 of the Revised Statutes, with the other defendants in error as his sureties, to pay such amounts as might from time to time be due from him for proprietary internal revenue stamps supplied him on a credit, in accordance with the provisions of that section. Under the law he was entitled to an allowance on the aggregate amount supplied him, as discount on the face value, or commission. Stamps were furnished him from time to time on the faith of this security; and when this suit was begun the balance against him, without any allowance for discount or commission, was $3,369, but deducting the commission the amount due was $3,062.72. Pending the suit he paid in full this last named sum, and then, without any formal pleadings, the facts were agreed on and submit- [624] ted to the consideration of the court, with the statement that the only point in issue was "as to the right of the defendant, Goldback, to commissions under the provisions of section 3624 of the Revised Statutes of the United States." Judgment was given in favor of the defendants so far as the commissions were concerned, but in favor of the United States for costs to

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November 20, 1876, the date when the payment of the amount due was made. To reverse this judgment, so far as it is in favor of the defendants, this writ of error has been brought.

By section 3624 of the Revised Statutes, "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest at six per cent per annum from the time of receiving the money until it shall be repaid into the Treasury."

Goldback never received and was not accountable for any public money. He bought stamps at a certain discount and agreed to pay for them at a future day, giving the bond sued on as his security. He did not pay as he agreed, and he and his sureties were sued for what he owed. He had no moneys which, in any legal sense, belonged to the United States. He owed a debt for stamps bought at a certain percentage below their face value. Money in his hands was no more the property of the United States than that of any other debtor is the property of his creditors. The stamps when bought were his own, to do with as he pleased. The United States could not call on him to account for them. He was bound to pay for them at the time agreed on, whether used or not. What the statute denominates commissions were in fact discounts from the face value of the stamps sold, on account of the quantity purchased. We think it clear, therefore, that the court below was right in holding that the United States could not recover for these allowances, though called commissions.

625] Neither do we see any error of which the United States can complain, in respect to the costs. Full costs were recovered up to the time the debt was paid. This implies that after that time each party must pay his own costs. It is clear, a plea of payment *puis darrien* was waived, because the parties, when submitting the case, agreed on the fact of payment after the suit was commenced, and in terms said the issue and the only issue between them was in respect to the commissions. This stipulation as to what the issue was, is equivalent, for the purposes of review here, to an admission of record that proper pleadings had been filed to raise that issue.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

658] STEPHEN V. WHITE, *Plff. in Err.*,

v.

MINERS' NATIONAL BANK OF GEORGETOWN, COLORADO.

(See S. C. 12 Otto, 658-663.)

Restricted indorsement of drafts—effect of.

1. Where one purchased certain drafts, paying for them, but they were indorsed by the seller payable to the purchaser for account of the seller, and were not paid at maturity; held, that, in an action by the purchaser against the seller, on the drafts and indorsements, and on a count for money paid for use of defendant, although he could not recover on the restricted indorsement, yet he could recover on the money count.

2. Further held, that the drafts, the peculiar indorsement, and the payment of the money by the plaintiff, and its receipt and use by defendant, were all parts of a transaction admissible as evidence of money paid by plaintiff for use of defendant, to be repaid on request, and did not contradicor vary a written instrument, and that the court erred in rejecting any part of it.

[Nos. 158, 143.]

Argued Dec. 17, 1880. Decided Jan. 17, 1881

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The case is fully stated by the court.

Messrs. **Stephen V. White,** in person (in No. 158), and **Wm. H. Scott** (in No. 143), for plaintiffs in error:

Plaintiff was entitled to judgment for the amounts of the different sums as discounts of the several drafts set forth in the declaration, with interest from the dates, of such advances respectively, as for so many loans of money by the plaintiff to the defendant.

All corporations may incur debts; especially commercial corporations. Brice, *Ultra Vires*, Green, 207.

A fortiori, have banking corporations power to borrow money.

In the case of *Bradley* v. *Ballard*, 55 Ill., 413, the rule is laid down by the Supreme Court of Illinois in these terms, *viz.*:

"A corporation cannot, under cover of this principle evade the payment of borrowed money on the ground that, although it had the power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute; even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality."

DeGroff v. *Am. Lin. Thread Co.*, 21 N. Y., 124.

In *Hitchcock* v. *Galveston*, 96 U. S., 351 (XXIV., 662), the rule is affirmed by this court, in these terms, to wit:

"Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

See, also, substantially to the same effect, *Allegheny City* v. *McClurkan*, 14 Pa., 81; and more or less in point, *Maher* v. *Chicago*, 38 Ill., 266; *Oneida Bk.* v. *Ontario Bk.*, 21 N.Y., 490; *Argenti* v. *San Francisco*, 16 Cal., 256; *Bk.* v. *North*, 4 Johns. Ch., 370.

Courts have gone to the extent of holding that, even where the transaction was illegal, in the sense of being in contravention of some express statutory prohibition, although not *contra bonos mores*, the corporation was still liable to account for the benefit received.

Safford v. *Wyckoff*, 4 Hill, 442; *Barnes* v. *Bk.*, 19 N. Y., 152, cited with approbation by this court in *Hitchcock* v. *Galveston* (*supra*); *Oneida Bk.* v. *Ontario Bk.* (*supra*) also, cited in *Hitchcock* v. *Galveston* (*supra*).

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This court, in the case of *Merchants' Bk.* v. *State Bk.*, 10 Wall., 604 (77 U. S., XIX., 1008), went much further than it is necessary for the court to go in the present case, in order to sustain the plaintiff's right of action upon the principle of *quantum valebat.*

But the plaintiff is not compelled to go behind the drafts, and sue for the money advanced. On the facts proved, he may sue upon the drafts themselves; and this even conceding, at this stage of the argument, that in indorsing them as he did, the president of the defendant acted without authority.

This case is decided by the cases of the *Merchants' Bk.* v. *State Bk.*, 10 Wall., 644 (77 U.S., XIX., 1018), and of *People's Bk.* v. *Nat. Bk.*, 101 U. S., 181 (XXV., 907).

Mr. **Henry M. Teller,** for defendant in error:

The indorsement is a restrictive one, and defendant is not liable to the indorsee on account of the failure of the parties to such bill to pay, and in support of this proposition cites the following cases:

Byles, Bills, 6th ed., 250; *Leary* v. *Blanchard*, 48 Me., 274; Dan. Neg. Inst., 2d ed., 551; *Wilson* v. *Holmes*, 5 Mass., 543; *Blaine* v. *Bourne*, 11 R. I., 122, 123; *Bk.* v. *Hollister*, 21 Minn., 385, etc.; *Herrick* v. *Carman*, 10 Johns., 224; *Lee* v. *Bk.*, 1 Bond, 387; *Sweeny* v. *Easter*, 1 Wall., 166 (68 U. S., XVII., 681).

The words "for account of the Miners' National Bank of Georgetown," were introduced to restrict the liability of the Bank and could have no other meaning, and were equivalent to the words "pay to my use."

See, Byles, Bills, 6th ed. 250.

The indorsement on the bills did not, as between the indorsee and the defendant, create any title in the indorsee.

See, Byles, Bills, 251; *Treuttel* v. *Barandon*, 8 Taunt., 100; *Sweeny* v. *Easter* (*supra*).

The evidence does not show any loans made to defendant.

If the plaintiff put to the credit of defendant the amount of money mentioned in the bills, or less, and defendant accepted this money, it might be contended that such a course would give to plaintiff title to the bills, but it does not create a loan.

Mr. Justice **Miller** delivered the opinion of the court:

[659] This is an action by White, who was plaintiff below and is plaintiff in error, for the sum of $60,000, against the Bank. The declaration contains twelve special counts, upon as many drafts, drawn by the Stewart Silver Reducing Company on Thomas W. Phelps, payable in the City of New York to the order of Miners' National Bank of Georgetown, and indorsed by J. L. Brownell, as President of that Bank, to S. V. White, and duly protested for non-payment.

To these counts is added another, in this language: "And for that also, heretofore, to wit: on the first day of April, A. D. 1876, at the said County of Clear Creek, the said defendant was indebted to plaintiff in $60,000, for so much money by the plaintiff, before that time, paid to the use of said defendant at its request, which said sum of money was to be paid to the plaintiff on request," with an allegation of request and refusal.

To this declaration the defendant pleaded the general issue and several special pleas, which it is unnecessary to notice.

The case was tried before a jury, and plaintiff recovered $15,000 debt and $2,625 damages for interest, on account of three of the drafts, and was defeated as to his claim on account of the other drafts, and on the count for money paid at defendant's request, and on that ground brings this writ. The errors assigned relate to the rulings of the court in the progress of the trial as they are preserved in a bill of exceptions.

It thus appears that one J. L. Brownell, a partner in the firm of J. L. Brownell & Brother, doing business as bankers and brokers in the City of New York, was also President of the defendant Bank, and interested in the Stewart Silver Reducing Company during the time of the transactions involved in this suit. That, as President of the defendant Bank, he sold or transferred to plaintiff the several drafts on which this suit is founded, and received of White for the use of his Bank the amount of said drafts less the discount. The drafts were not paid at maturity, but due demand, protest and notice were made. The three drafts on which plaintiff recovered need not be further noticed. The others were rejected by the court as evidence against defendant, on account of the form of the indorsement.

As they were in this respect, alike, the form of one will be given here as a specimen of the whole:

$5,000.] OFFICE OF THE STEWART SILVER REDUCING COMPANY, [660]

(L. S.) GEORGETOWN, COL., Oct. 25th, 1875.

Four months after date pay to the order of the Miners' National Bank, Georgetown, Colorado, payable at the Third National Bank, New York City, five thousand dollars.

STEWART SILVER REDUCING COMPANY,
By J. OSCAR STEWART, *President.*

To THOS. W. PHELPS, Esq.,
Georgetown, Colorado.

(Across the face, in red): Accepted.—THOS. W. PHELPS.

(Indorsed:)

No..... Pay S. V. White or order for account Miners' National Bank, Georgetown, Colorado.
J. L. Brownell, p't.

S. V. WHITE.

Because of the words "for account of Miners' National Bank of Georgetown, Colorado," in this indorsement by Brownell, as president of the Bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the Bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the Bank. And this is the principal question which we are to decide.

The plaintiff relies largely on two propositions to establish his right to recover against defendant on this indorsement.

The first of these is that these words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted.

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The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract.

We are not satisfied that either of these propositions is sound.

[661] The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make Mr. White the agent of the Bank for the collection of the money.

If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it.

But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case; for, assuming this to be correct, we think the plaintiff was still entitled to recover more than he did.

The court below seems to have paid but little attention to the issue on the count for money paid to the use of defendant.

It appears distinctly by the evidence, and is uncontradicted, that the money paid by plaintiff on account of these drafts was placed to the credit of the defendant with its corresponding bankers in New York, and paid out on checks of the defendant Bank so that there is no question that the defendant received the money. There is also no question but that plaintiff thought he was buying these drafts and that they became his property by their delivery to him. It is also evident that Brownell, the president of the Bank, thought he was selling him the drafts, and there is evidence that neither White nor Brownell noticed the restrictive words of the indorsement. But if the court below was correct in holding that the indorsement—the evidence in writing of what the parties did—only made White the agent of the Bank, and left the Bank the owner of the drafts, then both White and Brownell were mistaken, and the money was paid and received under a mutual mistake. If White paid [662] his money as purchase money of the drafts, he paid it without any consideration, for he did not purchase the drafts. He only burdened himself with the duty of collecting the money for the Bank, and the Bank received and used his money without giving him any consideration for it. So, also, if White did not become the owner of the drafts, and if, when he should collect the money on them, he would hold it, in the language of the indorsement, "for the account of the Bank," the jury might have been left at liberty to presume that the money which he paid was a loan or advance on the security of the paper delivered to him at the time. Either of these views of the transaction would justify a recovery under the money count, in which the delivery of the money and the delivery of the drafts, with the qualified indorsement, would be evidence of the payment and receipt of the money and the circumstances which attended it.

This indorsement is treated by counsel here as an assignment of the paper without recourse, in which the title to the paper passed, but the right to recourse to the assignor was cut off. But this is evidently an error. If the court below was correct, neither the title to the paper nor the right to the money under it passed. The only effect was to justify the acceptor in paying to the indorsee for the account of the Bank. The legal effect of the transaction, as evidenced by the writing, was merely to enable White to collect the money for the Bank. Though a restricted indorsement, it was no assignment at all. It is not, therefore, a contradiction or a varying of the meaning of the written instrument to prove that, in the delivery of this paper to White, he and the Bank were under a mistake as to the effect of it, or that he paid this money to the Bank without any consideration, or that he advanced money to the Bank in the idea that he was to be re-imbursed out of the draft when collected.

The instructions given by the court, and the refusal of the prayer of plaintiff, fairly raised this question. All the drafts, except the three which had no such indorsement, were excluded from the jury. The jury were told that nothing else was before them.

The 13th instruction asked by plaintiff and refused by the court distinctly affirmed that if Brownell obtained from plaintiff sums of money on account of the drafts, which the court had refused as evidence, which money was placed [663] to the credit of defendant in a New York bank, and afterwards drawn by defendant, the defendant was liable for such money.

The judgment of the Circuit Court is reversed, and the case remanded with directions to set aside the verdict and grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Third National Bank of N. Y. City v. *Miners' National Bank, etc.*, No. 143, was argued and decided at the same time with preceding case of *White* v. *Bk.*, as follows:

Mr. Justice **Miller** delivered the opinion of the court:

The action in the present case is brought against the same defendant on indorsements of drafts precisely similar to the indorsements in the case just decided of *White* v. *Bk.*, [*ante*, 250], though by a different plaintiff. There is in that case the same money count joined with special counts on the drafts, and the same evidence that the money came to the use of the defendant.

In this case, however, the parties waived a jury, and the court found no facts, but rendered a general finding for the defendant. We have had some difficulty, therefore, in disturbing the judgment, as there is no charge to the jury and no instructions asked and refused.

A bill of exceptions, however, embodies the evidence, and shows that the court refused to receive the drafts in evidence, although the accompanying evidence of the receipt of the money by defendant, and its payment by plaintiff, was the same as in the other case. To this ruling there was an exception.

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We are of opinion that the drafts, the peculiar indorsement, and the payment of the money by the plaintiff Bank, and its receipt and use by the defendant Bank, were each and all parts of a transaction admissible as evidence of money paid by plaintiff to the use of defendant, to be repaid on request, and that the court erred in rejecting any part of it.

The judgment of the Circuit Court is, therefore, reversed for that error, and the case remanded with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—79 Mo., 425; 49 Am. Rep., 238.

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[586] WILLIAM M. SPRINGER, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 12 Otto, 586-608.)

Insufficient objection—sale for taxes—due process of law—instructions to jury—direct taxes.

1. A point not brought to the attention of the court below cannot be insisted upon here.
2. On a sale for taxes, it was proper for the collector to sell, in one parcel, a homestead containing two city lots surrounded by a common enclosure.
3. A warrant for the collection of taxes, authorizing the sale of property thereon, is due process of law.
4. If instructions to a jury are asked in a mass, and one of them be wrong, all may be rejected.
5. Direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.

[No. 15.]

Argued Apr. 8, 9, 1880. Decided Jan. 24, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Mr. **William M. Springer,** in person for plaintiff in error:

The tax which was levied upon the plaintiff's income, gains and profits, as set forth in the record, and by the pretended virtue of the Acts of Congress and parts of Acts therein mentioned, is a direct tax.

(*a*) The private revenue of individuals arises from three different sources: rent, profit and wages. Every tax must finally be paid from one or other of those three different sources of revenue, or from all of them indifferently.

3 Smith, Wealth of Nations, 216; John Stuart Mill, Political Economy, Vol. 2, p. 418.

(*b*) The tax imposed by said Acts of Congress is levied upon all the sources of "revenue," or "income," these words being convertible terms, *viz.:*

1. From profits in any trade, business or vocation, from which income is actually derived.
2. From rent of land.
3. From rent of buildings.
4. From farming operations.
5. From profits realized from sale of real estate.

6 to 16. From various sources of interest, dividends on stocks, etc., included.

9. From interest on United States bonds or treasury notes.

13, 14. From salaries of every kind.

(*c*) The tax imposed by said Acts of Congress upon plaintiff's profits in business is a direct tax.

In the case of professional men it is a tax upon the wages of their labor. Such taxes are direct.

3 Smith, Wealth of Nations, 271; John Stuart Mill's Political Econ., Vol. 2, p. 423.

(*d*) A tax upon the rent of land, otherwise called a land tax, is direct.

Say, Polit. Econ., p. 466; 3 Smith, Wealth of Nations, 212; Mill, Political Econ., Vol. 2, p. 419.

(*e*) A tax upon the rent of buildings is necessarily of the same class, and is also a direct tax.

3 Smith, Wealth of Nations, 244, 246; Mill, Political Econ., Vol. 2, p. 418.

(*f*) The income derived from farming operations is from the produce of land, and a tax upon such income is direct, for the same reasons stated above.

(*g*) A tax upon the profits arising from real estate sales, from mortgages, from dividends on stock, etc., comes under the general head of a tax on profits. Such tax falls wholly on the payer and is direct.

Mill, Political Econ., Vol. 2, p. 420; 3 Smith, Wealth of Nations, 247.

(*h*) A tax upon the interest derived from the United States bonds falls wholly upon the payer. A part of the tax assessed upon the plaintiff is upon the interest derived from such bonds. The tax is of the same class as that just referred to. It is a direct tax.

3 Smith, Wealth of Nations, 248; Mill, Political Econ., Vol. 2, p. 427;

(*i*) A tax upon salaries is a direct tax. It falls wholly upon the payer. To call it an indirect tax would do violence to the meaning of words and would simply be ridiculous. It is unnecessary to cite authorities.

(*j*) We now pass from taxes on the separate kinds of income, to the tax imposed by the Act of Congress in question upon all kinds, *viz.:* the income tax.

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of the other—such as excise or customs." "Direct taxes are either upon income or expenditure."

Mill, Political Econ., Vol. 2, p. 418.

"An income tax is direct, while duties laid on imported goods are indirect."

Terry, Elements of Political Econ., 448.

"Taxes are usually divided into direct and indirect; the former include all assessments made upon the real or personal estate of the tax payer, upon his income or upon his head."

New American Cyclopedia, title "Taxes."

"Taxation is either direct or indirect; direct when a specific portion of an individual's revenue, or income, is absolutely demanded; or indirect when the demand is made for a specific sum on each act of consumption of any object to which individual revenue may be applied."

Chamber's Information for the People, Vol. 1, p. 371; Say, Political Econ. 465.

NOTE.—*Direct taxes.* See *note* to Scholey v. Rew, 90 U. S., XXIII., 99.

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"Taxes may be either direct or indirect; that is, they may be either imposed on the income or on the property of individuals, or on the articles on which these incomes or property are expended."

Brande's Dic. of Science, Literature and Arts, p. 1211.

Direct taxes are those laid on property or income; Brande, 1211, *et seq.*, 3 Smith, Wealth of Nations, 248; Say, Political Econ., 465; Mill, Political Econ., Vol. 2, pp. 418-434, chapter on "Direct Taxes," wherein the income tax of Great Britain, from which our income tax is copied, is fully discussed.

Of an indirect tax each man pays no more than he pleases. Of a direct tax each man pays what the imposer of the tax pleases.

Jeremy Bentham's Works, Vol. 3, p. 76.

"A direct tax is a certain amount assessed upon any individual in proportion to the property which he is known to possess. An indirect tax is levied upon articles of production at some period during their passage from one possessor to another."

Wayland, Political Econ., 391.

Dr. Wayland proceeds to state that in reference to indirect taxes, people do not know either how much they pay or when they pay or whether they pay or not. But in reference to direct taxes, men know when they pay them and how much they pay.

"The principle of direct taxation by an income tax has been shown to be consistent with justice; but it has been been well remarked, that, in order to render it practically just, it would require angels for commissioners and other angels for its collectors."

Charles Babbage's Thoughts on the Principles of Taxation, pamphlet, p. 27; *Ib.*, Inquiry into the principles of Political Econ., London, 1770, p. 263.

Sir James Stuart in his work on Political Econ. (London, 1770), divides taxes into three kinds, viz.: Those upon alienation, called proportional; those upon possessions called cumulative or arbitrary, and those exacted upon service, called personal, pp. 263, 264. Excises, customs, etc., are given as examples of proportional taxes. Taxes on the possessions, income and profits of individuals are given as cumulative taxes. Other contemporaneous authors used the terms direct and indirect, instead of proportional and cumulative.

See, Babbage, Bentham, Adam Smith, Say, etc.; Knight's Cyclopedia, London, 1842, title "taxation," puts income taxes under the head of direct taxation.

Also, Encyclopedia Britannica, title "Taxation." The article in this work is from the pen of J. R. McCulloch, author of a work on political economy. The attention of the court is particularly directed to the article in the encyclopedia. Also Encyclopedia Americana, title "taxes."

N. Am. Review, March, 1880, article by David A. Wells, p. 242; see, also, 4 Elliott's Debates on the Fed. Const., p. 433; article by Geo. Ticknor Curtis on the Revenue Powers of the United States, in Harper's Magazine for August, 1866, p. 354-363; see, Session Reports of Parliament of Income and Property Tax, 1852, Vol. IX.; Sir Morton Peto, Taxation, 53; Science of Political Econ., by Lewis Henry von Jacob, in 9 N. Am. Review, 443; Science of Government by C. R. Goodrich, p. 251.

Ricardo, in his work on the principles of Political Economy and Taxation, speaks of taxes on profits and the wages of labor as direct taxes; pp. 214, 221.

See, also, Pamphletier, Vol. 1, p. 557 (1816).

Messrs. **Charles Devens,** *Atty-Gen.*, and **Edwin B. Smith,** *Asst. Atty-Gen.*, for defendant in error:

Some of the men who had aided in framing the Constitution were members of the Congress of 1791, which, by the Act of March 3, of that year, ch. 15, sec. 15, 1 Stat. at L., 203, imposed the tax upon whisky which caused the Whisky Rebellion. Substantially, nobody denied its constitutionality, although it was a tax laid directly upon the product of the citizen's industry; produced, it may be, as in fact, it then very generally was in western Pennsylvania, from grain grown upon his own soil, tilled by his own hands.

The Act of June 5, 1794, laid a tax upon snuff and sugar produced within the United States.

1 Stat. at L., 384, ch. 51.

The Act of July 6, 1797 ch. 2, imposed a duty collectible by stamps which were required to be placed upon notes, etc., in all the commonest business transactions of life.

1 Stat. at L., 527.

Among other things a stamp was to be placed upon every certificate of admission as an attorney; and by section 7 every person admitted to practice in any court of the United States was required to take out such a certificate.

Jan. 18, 1815, two Acts, chaps. XXII., XXIII., 3 Stat. at L., 180, 186, were approved, the first of which imposed a tax upon numerous articles of domestic make, and the second upon household furniture exceeding $200 in value.

It is unnecessary to cite numerous similar laws, enacted at other times. The above are mentioned, as indicating the extent of the limitation which the framers of the Constitution themselves thought its language, as to direct taxes, imposed.

In the first case involving a consideration of those clauses of the Constitution relating to taxes, the Judges of this court, in separate opinions, held a tax upon carriages, imposed by the Act of June 5, 1794, 1 Stat. at L., 373 not to be a direct tax; and were all inclined to think nothing a direct tax except a capitation tax, or one placed upon land.

Hylton v. *U. S.*, 3 Dall., 171.

In differing phraseology, all the Judges also expressed the idea thus tersely stated by Iredell, *J.*, and equally applicable to an income tax, "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution."

If a business or occupation may be taxed, *License Tax Cases*, 5 Wall., 462 (72 U.S., XVIII., 497), no reason is apparent why the income or gains of that business may not be subjected to taxation in the same manner.

If the tax upon the income of an insurance company or a bank is not a direct tax, *Ins. Co.* v. *Soule*, 7 Wall., 433 (74 U. S., XIX., 95); Bk. v. *Fenno*, 8 Wall., 533, *et seq.* (75 U. S., XIX.,

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482), that upon an individual's income cannot be so. Although it has, in each case where the question arose, been held that taxes upon land and capitation taxes are direct taxes, yet an assessment upon "The devolution of an estate or the right to become beneficially entitled to the same, or the income thereof in possession or expectancy," is not a direct tax.

Scholey v. *Rew*, 23 Wall., 331 (90 U.S., XXIII., 99); see brief prepared by Alex. Hamilton, in the case of *Hylton* v. *U. S.*, 7 Hamilton's Works, 485.

The Roman law recognized only a capitation tax and a tax upon land as direct taxes; and communities exempt from these were yet subjected to succession taxes and other such levies, as indirect.

Poste's Gaius, 145; 1 Gibbon's Decline & Fall, ch. VI., on pages 90 *et seq.*, Harper's ed., A. D., 1860; 1 Kent, Com., 254; 1 Story, Const., secs. 954-957.

In accordance with this uniform and undisturbed current of authorities, it was held by *Mr. Justice* Strong upon the circuit, that an income tax is not a direct tax.

Clark v. *Sickel*, 14 Int. Rev. Rec., 6. So also, by Nixon, *J.*, in *Smedberg* v. *Bentley*, 21 Int. Rev. Rec., 38.

It is true that some lexicographers and writers upon political economy treat an income tax as a direct tax. For instance, it is said in Little & Brown's edition, A. D. 1860, of the Encyclopedia Britannica, Volume 21, p. 37, article on Taxation, that "A tax may be direct or indirect. It is said to be direct when it is taken immediately from income or capital," etc.

In the last edition of Appleton's Cyclopedia, the same definition is given in the article upon that subject, contributed by *Judge* Cooley. In his work on Taxation, p, 5, he gives the same general statement in the text, citing authors on political economy, etc., but observes, in a *note* to the passage, that "The term 'direct taxes' is employed in a peculiar sense in the Federal Constitution, in the provision requiring such taxes to be apportioned according to representation, and they are, perhaps, limited to capitation and land taxes," citing cases already herein cited.

Upon this question the late *Chief Justice* Chase observed, in delivering the opinion in *Bk.* v. *Flanno* (*supra*), that "Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was made with very little reference to their speculations."

He proceeds to say, we must resort to historical evidence, etc., and that it thence appears that personal property, contracts and occupations were not included in direct taxes, and that the term is confined to capitation and land taxes.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an action of ejectment brought by the defendant in error. The title relied upon was derived from a sale to satisfy the income tax assessed against the plaintiff in error, which he had failed to pay.

In June, 1866, the proper officer delivered to him a notice in due form requiring him to make out a list of his income, gains and profits during the year 1865. He thereupon made such statement, dated June 21, 1866, and delivered it to the officer with a protest against the right of the officer to make the demand.

The statement was handed over to the collector of the district. The plaintiff in error refused payment. On the 19th of November, 1866, the collector served a notice upon him, that unless he paid the tax within ten days it would be collected, with a penalty of ten per cent, by the distraint and sale of his property.

The plaintiff in error still refusing to pay, the collector caused a warrant to be issued and levied upon the premises in question and the property was thereafter advertised, exposed to sale, and bid in by the United States. A deed was made to the purchaser and duly recorded. Owing to a defect touching that instrument a subsequent deed was executed to the same grantee. The latter bears date April 17, 1874, and is the one here in question.

This action was instituted by the United States to recover possession of the premises. Upon the trial it was agreed by the parties that, at the time the premises in question were seized and distrained, the plaintiff in error had no goods or chattels known to the collector or his deputy out of which the tax and penalty could have been made.

The introduction of the deed in evidence was objected to upon several grounds. The objections were overruled and exceptions were taken. As all the objections appear in the assignments of error, it is deemed unnecessary here to reproduce them.

It was also proved that the premises sued for consisted of two lots or tracts of land in the town of Springfield, Illinois. There was a house upon one of the tracts and a barn on the other. They were enclosed together and the house and both tracts were occupied by the plaintiff in error and his family as a homestead. They were assessed separately for state taxation.

The evidence being closed, the court instructed the jury: "That the deed in question is a valid instrument and transferred the title of the defendant in the premises to the United States," and "that the laws or Acts of Congress mentioned in said deed were valid enactments at the time and authorized the proceedings taken in the premises."

The plaintiff in error excepted to each of these instructions.

He also submitted a series of instructions on his part, all of which were refused, and he excepted as to each one. They also appear in his assignments of error and will be considered in that connection.

The jury found a verdict in favor of the United States and judgment was entered accordingly. This writ of error was thereupon sued out, and the plaintiff in error, who was the defendant below, has thus brought the case into this court for review.

There are ten assignments of error. The first one is thus expressed:

"The tax which was levied on the plaintiff's income, gains and profits, as set forth in the

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record, and by pretended virtue of the Acts of Congress and parts of Acts therein mentioned, is a *direct tax.*"

[592] This presents the central and controlling question in the record. It is fundamental with respect to the rights of the parties and the result of the case. This point will be last considered. Many of the other assignments are reproductions of the same things in different forms of language. They will all be responded to without formally restating any of them. This will conduce to brevity without sacrificing clearness, and will not involve the necessary omission of anything proper to be said.

The plaintiff in error advises us by his elaborate brief "that on the trial of the cause below the proceedings were merely formal," and that "no arguments or briefs were submitted, and only such proceedings were had as were necessary to prepare the case for the Supreme Court."

This accounts for the numerous defects in the record as a whole. It was doubtless intended that only the question presented in the first of the assignments of error should be considered here. In that respect the record is full and sufficient. Other alleged errors, however, have [593] been pressed upon our attention, and we must dispose of them.

There is clearly a misrecital in the deed, of one of the Acts of Congress to which it refers. By the Act of the 30th of March, 1864, was clearly meant the Act of June 30, 13 Stat. at L., 223, in the same year. There is no Act relating to internal revenue of the former date.

But the plaintiff in error cannot avail himself of this fact, for several reasons:

The point was not brought to the attention of the court below, and cannot, therefore, be insisted upon here. It comes within the rule, *Falsa demonstratio non nocet.* It was the Act of June 30, 1864, as amended by the Act of March 3, 1865, that was in force when the tax was assessed. The latter Act took effect April 1, 1865, and declared that "The duty herein provided for shall be assessed, collected and paid upon the gains, profits and income for the year ending the 31st day of December next preceding the time for levying, collecting and paying said duty."

The tax was assessed for the year 1865 in the spring of 1866, under the Act of 1865, according to the requirements of that Act; and we find, upon examination, that the assessment was in all things correct. See, 13 Stat. at L., 469, 479. The criticism of the plaintiff in error in this regard is, therefore, without foundation.

The proceedings of the collector were not in conflict with the Amendment to the Constitution which declares that "No person shall be deprived of life, liberty, *or property* without due process of law." The power to distrain personal property for the payment of taxes is almost as old as the common law. Cooley, Tax., 302. The Constitution gives to Congress the power "To lay and collect taxes, duties, imposts and excises." Except as to exports, no limit to the exercise of the power is prescribed. In *McCulloch* v. *Maryland*, 4 Wheat., 316, *Chief Justice* Marshall said, "The power to tax involves the power to destroy." Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose. In *Murray* v. [594] *Hoboken L. Co.*, 18 How., 274 [59 U. S., XV., 373], this court held that an Act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was "due process of law" in that case. See, also, *De Treville* v. *Smalls*, 98 U. S., 517 [XXV, 174]; *Sherry* v. *McKinley*, 99 U. S., 496 [XXV., 330]; *Miller* v. *U. S.*, 11 Wall., 268 [78 U. S., XX., 135]; *Tyler* v. *Defrees*, 11 Wall., 331 [78 U. S., XX.. 161].

The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress or the people who make congresses to see that the evil was corrected. The remedy does not lie with the judicial branch of the Government.

The Statute of Illinois had no application to the point whether the premises should be sold by the collector *en masse* or in two or more parcels. The fact that the house was on one lot and the barn on the other, that the whole was surrounded by a common enclosure, and that the entire property was occupied as a single homestead, rendered it not improper for the collector to make the sale as it was made. No suspicion of bad faith attaches to him. He was clothed with a discretion, and it is to be presumed that he exercised it both fairly and well. *Olcott* v. *Bynum*, 17 Wall., 44 [84 U. S., XXI., 570].

Certainly the contrary does not appear. If the tax was not *a direct tax*, the instructions given by the court, brief as they were, covered the whole case, and submitted it properly to the jury.

The plaintiff in error was entitled to nothing more. The fourth instruction which he asked was as follows: "That a party claiming title to land under a summary or extraordinary proceeding must show that all the indispensable preliminaries to a valid sale, which the law and the Constitution have prescribed, have been complied with; and if they believe from the evidence that the plaintiff has failed to show that all the requirements of the law have been complied with in the assessment and levy of said tax, the service of said notice, the issuance of said warrant, and the execution thereof, in the advertisement and sale of said property, in the making and execution of said deed, and in all the other requirements of the law, then they will find for the defendant." This instruction was liable to several fatal objections. It was too general and indefinite. It left it for the jury to decide what were the "indispensable preliminaries" required by the law and Constitution in the numerous particulars specified. It referred to matters to which the attention of the court below does not appear to have been called, and [595] in regard to which, if this had been done, the requisite proof would doubtless have been supplied. It falls within the principle of the rule so often applied by this court, that where instructions are asked in a mass, if one of them be wrong the whole may be rejected. The rec-

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ord does not purport to give all the testimony, and its defects are doubtless largely due to the mode in which the case was tried, and the single object already stated which the parties then had in view. The instruction was properly refused.

To grant or refuse a new trial was a matter within the discretion of the court. That it was refused cannot be assigned for error here.

Several other minor points have been earnestly argued by the learned plaintiff in error, but as they are all within the category of not having been taken in the court below, we need not more particularly advert to them.

This brings us to the examination of the main question in the case.

The clauses of the Constitution bearing on the subject are as follows:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number those bound to service for a term of years and, excluding Indians not taxed, three-fifths of all other persons." * * * "No capitation or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken."

Was the tax here in question a *direct* tax? If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution. This [596] clause of the Articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional Convention of 1787 contain anything of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth, involving the topic of slavery. On the day following Gouverneur Morris, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that Mr. Morris having so varied his motion by inserting the word *direct*, it passed *nem. con.*, as follows: "Provided always that direct taxes ought to be proportioned to representation." 2 Mad. Papers, by Gilpin, pp. 1079-1081.

On the 24th of the same month, Mr. Morris said that "he hoped the committee would strike out the whole clause. * * * He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." 2 Mad. Papers, by Gilpin, 1197. The gulf was the share of representation claimed by the Southern States on account of their slave population. But the bridge remained. The builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted.

It does not appear that an attempt was made by anyone to define the exact meaning of the language employed.

In the 21st number of the Federalist, Alexander Hamilton, speaking of taxes generally, said: "Those of the *direct* kind, which principally relate to land and buildings, may admit of a rule of *apportionment*. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to [597] the subject of internal taxes. It is there said: "They may be subdivided into those of the *direct* and those of the *indirect* kind." In this connection land taxes and poll taxes are discussed. The former are commended and the latter are condemned: Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase "*direct tax*."

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the state conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Blackstone, pt. 1, app., 235.

Perhaps the two most authoritative persons in the Convention, touching the Constitution, were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in *Hylton* v. *U. S.*, 3 Dall., 171, said, "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 Mad. Writings, pub. by Congress, p. 14. In another letter, of the 7th of February, 1796, referring to the case of *Hylton* v. *U. S.*, then pending, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." *Id.*, 77. Whence the despondency thus expressed, is unexplained.

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage Tax." See vol. vii. p. 848, of his works. This paper was evidently prepared with a view to the *Hylton* case, in which he ap peared as one of the counsel for the United States. In it he says: "What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent, settled, legal meaning to the respective terms. There is none. We shall be as much at a loss to find any [598] disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on

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the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the *whole property* of individuals or on their *whole* real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole * * * personal estate" of the individual, but only on his income, gains and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several Acts of Congress, to be examined according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The Act of July 14, 1798, ch. 75, 1 Stat. at L., 597. This Act imposed a tax upon real estate and a capitation tax upon slaves.

The Act of August 2, 1813, ch. 37, 3 Stat. at L., 53. By this Act the tax was imposed upon real estate and slaves, according to their respective values in money.

The Act of January 9, 1815, ch. 21, 3 Stat. at L., 164. This Act imposed the tax upon the same descriptions of property, and in like manner as the preceding Act.

The Act of February 27, 1815, ch. 60, 3 Stat. at L., 216, applied to the District of Columbia the provisions of the Act of January 19, 1815.

599] The Act of March 5th, 1816, ch. 24, 3 Stat. at L., 255, repealed the two preceding Acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The Act of August 5, 1861, ch. 45, 12 Stat. at L., 294, required the tax to be levied wholly on real estate.

The Act of June 7, 1862, ch. 98, 12 Stat. at L., 422, and the Act of February 6, 1863, ch. 21, 12 Stat. at L., 640, both relate only to the collection, in insurrectionary districts, of the direct tax imposed by the Act of August 5, 1861, and need not, therefore, be more particularly noticed.

It will thus be seen that whenever the Government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: (1) In some of the States, slaves were regarded as real estate. 1 Hurd, Slavery, 239; *Bk.* v. *Fenno*, 8 Wall., 533 [75 U. S., XIX., 482]; and (2), such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national Treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the Legislative and Executive Departments of the Government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. In *Hylton* v. *U. S.*, *supra*, a tax had been laid upon pleasure carriages. The plaintiff in error insisted that the tax was void, because it was a direct tax, and had not been apportioned among the States as required by the Constitution, where such taxes are imposed. The case was argued on both sides by counsel of eminence and ability. It was heard and determined by four Judges—Wilson, Paterson, Chase and Iredell. The three first named had been distinguished members of the Constitutional Convention. Wilson was on the committee that reported the completed draft of the instrument, and warmly advocated its adoption in the state convention of Pennsylvania. The fourth was a member of the Convention of North Carolina that adopted the Constitution. The case was decided in 1795. The Judges were unanimous. The tax was held not to be a *direct* tax. Each Judge delivered a separate opinion. Their judgment was put on the ground indicated by *Justice* Chase, in the following extract from his opinion: [600]

"It appears to me that a tax on carriages cannot be laid by the rule of *apportionment* without very great inequality and injustice. For example, suppose two States equal in census to pay $80,000 each by a tax on carriages of $8 on every carriage; and in one State there are one hundred carriages, and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage $8; but B, in the other State, would pay for his carriage $80."

It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.

The difference in the ability of communities, without reference to numbers, to pay any taxes is forcibly remarked upon by McCulloh in his article on taxation in the Encyclopedia Britannica, vol. xxi., old ed., p. 75.

Justice Chase said further, "That he would give no judicial opinion upon the subject, but that he was inclined to think that the *direct taxes* contemplated by the Constitution were only two: a capitation tax and a tax on land.'

Iredell, *Justice*, said: "Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. * * * A land or poll tax may

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be considered of this description. The latter is to be so considered, particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five." [601]

Paterson, *Justice*, said, he never entertained a doubt "that the principal, he would not say the *only*, objects contemplated by the Constitution as falling within the rule of apportionment, were a capitation tax and a tax on land." From these views the other Judge expressed no dissent.

"Ellsworth, the *Chief Justice* sworn into office that morning, not having heard the whole argument, declined taking part in the decision." *Bk.* v. *Fenno*, 8 Wall., 545 [75 U. S., XIX., 486]. Cushing, from ill health, did not sit in the case. It has been remarked that if they had been dissatisfied with the result, the question involved being so important, doubtless a reargument would have been had.

In *Ins. Co.* v. *Soule*, 7 Wall., 433 [74 U. S., XIX., 95,], the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not *direct taxes*, and that they were valid.

In *Bk.* v. *Fenno* [*supra*], the tax which came under consideration was one of ten per cent upon the notes of state banks paid out by other banks, state or national. The same conclusions were reached by the court as in the case of the *Ins. Co.* v. *Soule*, *Chief Justice* Chase delivered the opinion of the court. In the course of his elaborate examination of the subject he said: "It may be rightly affirmed that, in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances and taxes on polls, or capitation taxes."

In *Scholey* v. *Rew*, 23 Wall., 331 [90 U. S., XXIII., 99], the tax involved was a succession tax, imposed by the Acts of Congress of June, 30, 1864, 13 Stat. at L., 223, and July 13, 1866, 14 Stat. at L., 98. It was held that the tax was not a *direct* tax, and that it was constitutional and valid. In delivering the opinion of the court, *Mr. Justice* Clifford, after remarking that the tax there in question was not a direct tax, said: "Instead of that, it is plainly an excise tax or duty, authorized by section 1, article 8, of the Constitution, which vests the power in Congress to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and public welfare." [602]

He said further: "Taxes on houses, lands and other permanent real estate have always been deemed to be direct taxes and capitation taxes, by the express words of the Constitution, are within the same category; but it has never been decided that any other legal exactions for the support of the Federal Government fall within the condition that unless laid in proportion to numbers the assessment is invalid."

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text writers of the country are in entire accord upon the subject.

Judge Story says all taxes are usually divided into two classes—those which are *direct* and those which are *indirect*—and that "under the former denomination are included taxes on land or real property; and, under the latter, taxes on consumption." 1 Const., sec. 950.

Chancellor Kent, speaking of the case of *Hylton* v. *U. S.*, says: "The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two; viz.: a capitation or poll tax and a tax on land." 1 Com.. 257. See, also, Cooley, Tax., p.5, *n.* 2; Pomeroy, Const. L., 157; Sharswood's Bl., 308, *n.*; Rawle, Const., 80; and Sergeant, Const., 305.

We are not aware that any writer, since *Hylton* v. *U. S.*, was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. L., 177; *Ins. Co.* v. *Soule*, and *Scholey* v. *Rew supra*.

Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is: certainly nothing of such weight, in our judgment as to require any special reply. [603]

The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to.

The judgment of the Circuit Court must be affirmed, and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 107.

GOTTLIEB CRAMER, *Plf. in Err.*, [612]
v.
CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK.

(See S. C., 12 Otto, 612-620.)

Value of foreign coins—in estimating duties, —evidence as to.

1. In estimating the invoices of goods imported from foreign countries, the annual proclamation of the determinations made by the director of the mint of the value of foreign coins, as required by the Act of March 3, 1873, has taken the place of a permanent statutory valuation of foreign coins.

2. That value is to be taken in all cases in estimating customs duties, unless collectors have been otherwise instructed, or unless a depreciation of the value of the foreign currency, expressed in an invoice, from the standard of that currency, shall be shown by consular certificate thereunto attached.

3. A party cannot go behind this valuation, and show that, at the time of the purchase of goods imported, the value of a foreign coin, as quoted in the papers and as exhibited by the actual rate of exchange, was less than the value as thus ascertained.

[No. 183.]

Argued Jan. 5. 1881. Decided Jan. 24, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

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The case is fully stated by the court.

Messrs. **Lewis Sanders,** *John S. Woodward* and *Geo. N. Sanders*, for plaintiff in error.

Messrs. **Charles Devens,** *Atty-Gen.*, *Edwin B. Smith*, *Asst. Atty-Gen.*, and *Mason W. Tyler*, for defendant in error.

[613] *Mr. Justice* **Bradley** delivered the opinion of the court:

This is a suit against the Collector of Customs for the Port of New York to recover back duties alleged to have been overcharged. In August and September, 1874, the plaintiff imported goods from Vienna, in Austria, chargeable with an *ad valorem* duty. The invoices upon which they were entered at the custom-house were made out in Austrian paper florins, in which currency they were purchased, and amounted to the sum of $10,163\frac{71}{100}$ florins. This was assessed and liquidated by the Collector at the sum of $4,818, gold coin of the United States, by converting the same into Austrian silver florins at $45\frac{77}{100}$ cents for each paper florin, and $47\frac{6}{10}$ cents, gold coin of the United States, for each Austrian silver florin, making the duty equal to $1,980.67. The plaintiff paid the duty under a written protest, addressed to the Collector, in which he assigned the following ground of objection, namely: "In computing the amount in United States money of foreign dutiable value of the merchandise covered by the said entries, you have estimated the value of the paper florin, being the currency in which invoices, upon which entries were made, were made out, to be greater than 40 cents. I claim that, under existing laws and upon the fact that in computations at the custom-house the value of the paper florin therein specified should be estimated as of the value of 40 cents, and shall hold you responsible for the excess of duty thus illegally claimed and exacted." The plaintiff having appealed to the Secretary of the Treasury, without effect, brought the present action to recover the alleged excess of duty exacted.

On the trial, the foregoing facts being proved, the plaintiff took the stand, and testified that he was in Vienna in 1873 and part of 1874, and that in those years and for some time prior thereto the silver florin was not in circulation in Austria, having ceased to be a standard or measure of value early in 1873, owing to the fact that silver had been demonetized by the German Empire, where it had previously been current; its place, as a standard, being taken by the 8-florin Austria-Hungarian gold piece; that by the official paper or gazette of the stock exchange of Vienna the silver florin was worth $45\frac{48}{100}$ cents in American gold coin in September, 1874, and the paper florin, $43\frac{71}{100}$ cents; that [614] the actual value of the invoice in question was $4,442.56; that the amount of duty should have been assessed at $1,780.67; and that the excess paid and claimed is $150.

The plaintiff further exhibited in evidence a letter of the Secretary of the Treasury to the Collector of Customs at New York, dated October 23d, 1874 (a few weeks after the importation of the goods in question), in which he stated, amongst other things, that the department had authentic information that the silver florin had generally been thrown out of use, both as a standard and as currency, its place as a standard being taken by the 8-florin gold piece, which had its exact equivalent in the 20-franc gold piece of France; that under these circumstances it became necessary to review the former action of the department in determining the value of the florin of Austria for assessment of duty on imports, and to apply to the 8-florin gold piece and the paper florin the rules applied to all currencies the values of which are not declared in terms by some specific statute; the Collector was, therefore, directed to accept the certificate of a consul of the United States at any point in Austria-Hungary as to the value of the paper florin relatively to the 8-florin gold piece and its equivalent in American gold dollars, as the true value for duty of any invoice of merchandise properly expressed in that currency.

The defendant gave in evidence the consular certificate of the United States consul at Vienna, attached to the invoice, in which it was stated that the true value of the currency of the Austria-Hungarian monarchy, in which the invoice was made out, was $45\frac{77}{100}$ cents estimated in U. S. gold, silver florin being $47\frac{60}{100}$ cents. He also gave in evidence an extract from the proclamation of the Secretary of the Treasury, made on the first of January, 1874, announcing the determinations of the value of foreign moneys made by the director of the mint under the Act of March 3, 1873, 17 Stat. at L., 602, which extract was as follows, to wit:

"The following list of standard values of foreign currencies in the money of account of the United States shall be used in the computation of customs duties, until otherwise provided [615] by law or regulation:

"Foreign moneys of account and their values in United States money of account. Austria, monetary unit, florin; standard, silver; value in U. S. money of account, 47.60 (cents)."

Upon this evidence the court directed a verdict for the defendant, and the plaintiff excepted.

Since the transactions above mentioned took place, we have decided the case of *Collector* v. *Richards*, 23 Wall., 246 [90 U. S. XXIII., 95], which arose about the same time, and in which some of the questions involved in the present case were determined. We there held that the Act of March 3, 1873, which declared that the value of foreign coin, as expressed in the money of account of the United States, should be that of the pure metal of such coin of standard value; and that the values of the standard coins in circulation, of the various Nations of the world, should be estimated annually by the director of the mint, and be proclaimed on the first day of January by the Secretary of the Treasury, superseded previous Acts passed for fixing the value of foreign money, both in estimating the invoices of goods imported from foreign countries, and for other purposes. Prior to 1873, various Acts had been passed fixing the value of foreign money in invoices, commencing with the Collection Act of 1789, by the 18th section of which the rates for estimating certain foreign coins and currencies were prescribed. 1 Stat. at L., 41. By this Act, amongst other things, the pound sterling was valued at $4.44. Various changes and additions were made in subsequent laws. 1 Stat. at L., 167, 673; 2 Stat. at L., 121; 5 Stat. at L., 426, 625; 9 Stat. at L., 14; 12 Stat. at L., 207. In 1842, the

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value of the pound sterling, in computations for payments to the Treasury and in appraising merchandise, was fixed at $4.84. The last general law relating to the values of other foreign moneys was that of May 22, 1846. 9 Stat. at L., 14. By this Act, amongst other things, the value of the florin of the Southern States of Germany was fixed at 40 cents; the florin of the Austrian Empire and of the City of Augsburg, at 48½ cents; and the franc of France, Belgium, etc., at 18 cents 6 mills. This was apparently the Act upon which the plaintiff in his protest based his claim that the florin in his invoice should be estimated at 40 cents. It was this Act under which the importer in the case of *Collector* v. *Richards* claimed that the franc [616] should be estimated at 18 cents 6 mills. In that case we held that the Act of 1846 was repealed by the Act of 1873, which expressly repealed all Acts and parts of Acts inconsistent therewith; and that, instead of a fixed and permanent valuation of foreign coins, which must often involve a departure from the true values, Congress had adopted the juster plan of having them subjected to annual revision by the director of the mint, and announced to the public by proclamation of the Secretary of the Treasury. And as the franc had been thus proclaimed to be worth 19 cents and 3 mills, we decided that the collector rightly adopted that valuation.

In the present case, the Act of 1846, if it were in force, would not help the plaintiff, inasmuch as it fixes the value of the Austrian florin at 48½ cents, which is a higher rate than that announced in the Secretary's proclamation of 1874. He seems, however, to have based his claim on the valuation, in the law of 1846, of the florin of the Southern States of Germany, which was at 40 cents But, since we have decided that that Act was repealed by the Act of 1873, it is unnecessary to examine it further.

That the florin is the standard money of account of Austria is as evident as that the pound sterling is the standard money of account of Great Britain. The plaintiff's own invoice is a proof of this. Whether represented by a corresponding coin of equal amount is of no consequence. It was only since the beginning of the present century that the pound sterling was thus represented; and yet its value was as fixed and certain before the sovereign was coined as since. Coin is the basis of the currency of both countries. The plaintiff concedes that the eight-florin gold piece is a standard coin of Austria; and he does not pretend that, according to this standard, the florin would be less than it was valued at in the proclamation of the Secretary of the Treasury. The silver florin was also formerly a standard coin in Austria, and the florin as a money of account originally derived its value therefrom. It was from this coin that the valuation of the florin was made by the director of the mint, as set forth in the proclamation of the Secretary. That valuation, so long as it remained unchanged, was binding on the Collector and on importers; just as binding as [617] as if it had been in a permanent statute, like the Statute of 1846, for example. Parties cannot be permitted to go behind the proclamation any more than they would have been permitted to go behind the statute, for the purpose of proving, by parol or by financial quotations in gazettes, that its valuations are inaccurate. The government gets at the truth, as near as it can, and proclaims it. Importers and collectors must abide by the rule as proclaimed. It would be a constant source of confusion and uncertainty if every importer could, on every invoice, raise the question of the value of foreign moneys and coins.

But whilst the annual proclamation of the determinations made by the director of the mint has taken the place of a permanent statutory valuation of foreign coins, it has no greater force than a statute would have. The question still remains, whether the fact that the invoice was made out in a depreciated currency entitled the plaintiff to a reduction, and, if it did, whether such reduction was refused by the Collector.

The laws have always made provision for the case of invoices made out in depreciated currencies. In the collection Act of 1799, the 61st section, which fixed the values of different foreign moneys, concluded with the following proviso: "*Provided*, That it shall be lawful for the President of the United States to cause to be established fit and proper regulations for estimating the duties on goods, etc., imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government." This proviso has always continued in force, and now constitutes section 2903 of the Revised Statutes. Such a law is the more necessary, in view of another provision, enacted in 1801, 2 Stat. at L., 121, and continued in section 2838 of the Revised Statutes, directing that "All merchandise subject to a duty *ad valorem* shall be made out in the currency of the place or country where the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins by law [618] made current within the United States in such foreign place or country." It was the object of this law to compel the parties to show, in the invoices, the actual prices and cost of their goods, in the currency of the country where bought, and not leave it to them to make a pretended estimate of the cost in a coin valuation. It is true, the government is not bound by the invoice, but may have the value of the goods appraised. R. S., secs. 2904, 2907. Nevertheless, such invoices, exhibiting the actual transactions, and capable of being verified by oath, are essential instrumentalities in the prevention of fraud; and, in the absence of suspicious circumstances, usually furnish the basis for estimating the actual values of the goods. But since they are required to be expressed in the actual currency of the country of exportation, and since that currency may be depreciated, it is obvious that the authority given to the President by the Act of 1799, to establish fit and proper regulations for estimating the duties when the goods are invoiced in such money, is very important. It was passed at a time when the Nations of Europe were at war, and the United States was neutral. In England and France and perhaps other countries, specie payments had been suspended, and currencies based on government credit had been adopted. The law seems to have had in view artificial money

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of this kind, a depreciated currency, not based on specie, but still "issued and circulated under authority of the government." But it has been liberally construed by the government; and the President, acting through the Secretary of the Treasury, has established regulations on the subject which are sufficiently broad to meet every proper case.

The regulation in force at the time of the importation in question was as follows, namely:

"Where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, that value is to be taken in all cases in estimating customs duties, unless collectors have been otherwise instructed, or unless a depreciation of the value of the foreign currency, expressed in an invoice from the standard of that currency, shall be shown by consular certificate thereunto attached."

In the present case a consular certificate was, in fact, attached to the invoice in the following words, to wit:

[619] "I, P. S. Post, Consul of the United States of America, do hereby certify that the true value of the currency of the Austria-Hungarian Monarchy, in which currency the annexed invoice of merchandise is made out, is $45\frac{77}{100}$ cents estimated in United States gold, silver florin being $47\frac{60}{100}$ cents.

(Signed) P. S. POST. [SEAL.]"

In this certificate the consul assumes the value of the silver florin to be as it was proclaimed to be at the beginning of the year by the Secretary of the Treasury, namely: $47\frac{60}{100}$ cents; and, on this basis, he certifies that the value of the florin in the currency in which the invoice was made out was $45\frac{77}{100}$ cents; and this, as we understand the statement of the case, is the valuation adopted by the Collector in assessing the duties in question. The plaintiff seeks to go behind this valuation, and to show that, at the time of the purchase of the goods, the value of the silver florin in Vienna, as quoted in the papers, and as exhibited by the actual rate of exchange, was less than $47\frac{60}{100}$ cents, namely: $45\frac{46}{100}$ cents, and that the value of the paper florin was $43\frac{71}{100}$ cents.

This we think the plaintiff cannot be allowed to do. The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations. From the letter of the Secretary exhibited in this case, we infer that this was afterwards done, and that he made the desired change. But this change in the regulations does [620] not affect prior transactions which took place before they went into effect. These transactions must be governed by the regulations in force at the time. It is of the utmost consequence to the government, and it is, on the whole, most beneficial to importers, that the value of foreign moneys should be officially ascertained, and that they should be fixed by a uniform method or rule.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CLEMENT A. AUFFM'ORDT, JR. ET AL., [620]
Survivors of CLEMENT A. AUFFM'ORDT,
Appts.,

v.

WARNER M. RASIN, Assignee of THOMAS MORRELL and C. CUYLER CAMPBELL, Bankrupts.

(See S. C., 12 Otto, 620-623.)

Transfers void under bankrupt act—construction of law.

1. The period of four months before proceedings in bankruptcy are instituted, within which transfers of property to give preference by a bankrupt are void, having been changed by the Act of June 1874, to two months; held, that a preference given by a bankrupt before such change more than two but within four months before proceedings in bankruptcy against him, vested a right to the property transferred in the assignee in bankruptcy, which was not taken away by such change in the law, and the assignee could maintain an action for the property after the Act of June, 1874, took effect.

2. No law will be construed to act retrospectively, unless its language imperatively requires such a construction.

[No. 172.]

Argued Jan. 3, 1881. Decided Jan. 24, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Mr. **Charles M. Da Costa,** for appellants.

Messrs. Davies, Whitehead & Suydam and **H. E. Davies, Jr.,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

On the 5th day of February, 1874, a petition in bankruptcy was filed in the proper court against Thomas Morrell and C. Cuyler Campbell, who were duly adjudicated bankrupts, and Rasin the appellee in this case, was appointed assignee. He brought the present suit [621] in the chancery side of the Circuit Court of the United States for the Southern District of New York to recover certain securities received by Auffm'ordt & Co. of the bankrupts, on the ground that they were received as a preference of creditors who had knowledge of the insolvent condition of the bankrupts. The assignee had a decree for the value of the securities from which this appeal is taken.

The testimony leaves no doubt that the transaction was intended as a security for an existing debt, and that appellees [appellants] had good reason to believe that Morrell and Campbell were insolvents. Indeed, it is quite clear

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that the decree must be affirmed, unless the time which elapsed between the receipt of the securities and the beginning of the bankruptcy proceedings was sufficient to protect the appellees [appellants] under the bankrupt law.

This period was at the time the securities were received, to wit: on the 15th November, 1873, fixed by the statute at four months. As the petition in bankruptcy was filed February 5, 1874, it is clear the lapse of time is no defense under that Act. But Congress, on the 22d day of June, 1874, 18 Stat. at L., 178, amended the bankrupt law in many particulars, and in this amendatory Act is found a clause on this subject. It is this: "That in cases of involuntary or compulsory bankruptcy the period of four months mentioned in section 35 of the Act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this Act."

This suit was commenced May 11, 1875, and in the answer of defendants the lapse of two months from the receipt of the securities to the filing of the petition in bankruptcy is pleaded. But there is no allegation in the answer or in the bill, nor do we find any record evidence that the petition was filed by creditors, or anything to show whether it was a case of voluntary or involuntary bankruptcy.

The case, however, has been argued by counsel on both sides as if it were the latter, and we will so treat it. This raises the question whether the law as it stood before the amendment of 1874, or the time prescribed in that amendment, governs the rights of the parties in this suit.

It is to be observed that the full period of four months from the receipt of the securities had passed, indeed, more than six months had passed, before the enactment of this amendment, and the bankruptcy proceeding had been [622] initiated within that period and the assignee appointed. The rights of the parties were therefore fixed before the new law was passed. The assignee had a vested right to the securities, or to their value. The defendants were under legal obligation to return these securities or to pay their value to the assignee. To hold that Congress intended by this amendatory statute to take away that right of action, is to hold that it intended by a retrospective statute to destroy a vested right of property or an existing right of action. If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction. We think the clause in the Act of 1874 under consideration not only does not require this, but that such an inference is fairly negatived by the provision that the clause shall not take effect until two months after the passage of the Act. The evident purpose of this provision was that in cases where such a transfer has been made as section 35 of the original Act forbids, but had not at the date of the Act been covered by the lapse of four months without the initiation of bankrupt proceedings, that provision should remain the law of such cases for two months after the Act was passed, though it became immediately the rule as to preferences made after its passage. Congress thus showed its intent to provide one rule for cases where the lapse of time had not yet cured the unlawful transfer made before its passage, and the rule for such transfers made after its passage, leaving by a very strong inference cases where the rights of parties had been fixed under the old law to be governed by its provisions.

There is no question but what Congress could, by a statute, have limited the time within which an action should be brought in the future, so as to have barred the present action, which was commenced nearly a year after the new law went into effect. But this statute is not a statute of limitation of actions, but a declaration of a period when an act otherwise voidable shall be held to be valid; and we see no reason to believe that in making a new rule on that subject Congress intended to make it retrospective, for the purpose of destroying rights of property [623] or rights of action which had become vested before the passage of the law.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JAMES U. OGDEN, *Plff. in Err.*, [634]

v.

COUNTY OF DAVIESS.

(See S. C., 12 Otto, 634-641.)

County bond, when unauthorized—notice to holder.

1. Although the charter of a Missouri railroad company authorized the taxable inhabitants of the "strip of country" designated to vote a tax upon themselves to take stock, and required the county court to levy and collect such a tax, if voted, and pay over the money, as fast as collected, to the treasurer of the company, this gave no authority for the county to issue bonds in anticipation of the tax.

2. Nor did the Missouri Act of Mar. 24, 1870, give the power to issue bonds.

3. Every holder of a municipal bond is chargeable with notice of the provisions of the law by which its issuance was authorized. If there was no law for such issuing there can be no valid bond.

[No. 128.]

Argued Dec. 8, 9, 1880. Decided Jan. 24, 1881.

IN ERROR to the Circuit Court of the United States for the Western district of Missouri.

The case is fully stated by the court

Messrs. **Joseph E. Merryman,** *John Donaphan, M. A. Reed, Franklin Porter, B. H. Bristow, Wm. S. Opdyke, S. W. Johnston* and *R. B. Warden,* for plaintiff in error.

Mr. **Willard P. Hall,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opin- [635] ion of the court:

NOTE.—*Municipal bonds; reference to statute in.*

If the bond refers on its face to a statutory power, every holder is made chargeable thereby with notice of such statute and its limitations. City of Aurora v. West, 22 Ind., 89; La. St. Bk. v. Orleans Nav. Co., 3 La. Ann., 295; Fisk v. City of Kenosha, 26 Wis., 29.

Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements. McClure v. Township of Oxford, 94 U. S., XXIV., 129; George v. Township of Oxford, 16 Kan., 72; Mygatt v. City of Green Bay, 1 Biss., 292.

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On the 4th of January, 1860, the General Assembly of Missouri incorporated the Platte City and DesMoines Railroad Company, now, by statutory change of name, the Chicago and Southwestern Railway Company. Section 7 of the charter is as follows:

"SEC. 7. Upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road, that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, it shall be the duty of said county court to order an election therein, and shall prescribe the time, place and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company."

[636] On the 4th of July, 1865, a new Constitution of Missouri went into effect, section 14, article XI., of which is as follows:

"The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

By an Act to facilitate the construction of railroads, passed March 23, 1868, municipal townships in any county of Missouri were authorized to subscribe, through the county court of the county, to the stock of railroad companies, with the assent of two thirds the qualified voters of the township, and to pay their subscriptions with bonds in the name of the county, payable out of a special tax to be levied on the real estate of the township. On the 24th of March, 1870, the General Assembly amended this law by adding the following as section 7:

"In all cases where, by the provisions of the charter of any railroad company organized under the laws of this State, the taxable inhabitants of a portion of a municipal township of any county in this State have voted or may hereafter vote to take stock in such railroad company, they are hereby declared entitled to and shall have all the privileges, rights and benefits in said Act conferred upon counties or townships, and the county court of such county shall exercise the same powers and perform the same duties in issuing bonds, levying, collecting and paying over the taxes which it is required to in the case of a county or township under the provisions of said Act; *Provided, however*, That no part of such township outside the limits of the district voting shall be taxed to pay any of the bonds or coupons so issued by the county court. This Act shall take effect from its passage."

After the passage of this Act, the Daviess County Court, on the petition of the Chicago and Southwestern Railway Company, ordered an election on the 21st day of June, 1870, to obtain the assent of the "taxable inhabitants living within a strip of five miles on each side of the line of said railway to be built through the County of Daviess, * * * to the subscription by the County of Daviess, for and on behalf of the taxable inhabitants of said strip, of [637] the sum of $60,000 of the capital stock of said Railway Company, on such terms and conditions as" the court "should deem proper." Thereupon the court fixed, as one of the conditions of the subscription, that "in payment of said subscription sixty bonds shall be issued by said County to the Chicago and Southwestern Railway Company, * * * of $1,000 each, payable ten years after date, with interest at the rate of eight per cent per annum, evidenced by semi-annual coupons," etc., etc. The election was held, and resulted in five hundred and sixty-eight votes for the subscription and four hundred against it. The county court subscribed the stock, and to pay the subscription issued and delivered to the Company bonds in the following form:

"UNITED STATES OF AMERICA.

$1,000. *State of Missouri, County of Daviess.* $1,000

Daviess County Ten-Year Bond, No. 8.

Know all men by these presents, that the County of Daviess, in the State of Missouri, acknowledges itself to owe and be indebted to, and promises to pay the bearer the sum of one thousand dollars, on the first day of August, in the year of our Lord one thousand eight hundred and eighty, for value received, negotiable and payable without defalcation or discount at the Metropolitan National Bank, in the City and State of New York, with interest thereon from the first day of August, A. D., 1870, at the rate of eight per centum per annum until paid, which interest shall be due and payable semi-annually on the first day of February and August in each year, on the presentation of the proper interest coupon, as annexed hereto, attested by the signature of William M. Bostaph, clerk at the said Metropolitan National Bank. This is one of sixty bonds of like date, amount and effect, numbered from one to sixty, both numbers inclusive, issued in payment of the indebtedness of said County of Daviess to the Chicago & Southwestern Railway Company, incurred on account of an election held in said County on the 21st day of June, A. D., 1870, by certain taxable inhabitants of said County.

In testimony whereof, the said County of Daviess, by order of its county court, has caused these presents to be executed by the signature [638] of the presiding justice of said court, attested by the clerk thereof, with the seal of said County affixed, at office in Gallatin, Daviess County, Missouri, this 27th day of July, A. D. 1870.

PETER BEAR, *Presiding Justice.*

Attest: WILLIAM M. BOSTAPH, *Clerk.*

{ SEAL OF DAVIESS COUNTY COURT, MO." }

Coupon described in amended petition.

The coupon is in words and figures following, to wit:

"$40. GALLATIN, MO., July 27, 1870.

County of Daviess, in the State of Missouri, will pay to the bearer forty dollars on the first day of February, 1873, at the Metropolitan National Bank, in the City and State of New York, for value received, being the semi-annual interest due on bond No. 8 of said County, issued to

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Chicago & Southwestern Railway Company.
WILLIAM M. BOSTAPH, *Clerk.*"

When the delivery of the bonds was made, the interest coupons were canceled to September 1, 1871. The coupons for 1878 were not paid, and this suit was brought to recover what was due on that account. The plaintiff is a *bona fide* holder of the coupons. On the trial the Judges of the Circuit Court were divided in opinion on several questions which have been certified here, the principal of which is whether there was lawful authority for the issue of the bonds. The presiding Judge being of the opinion that there was not, judgment was given in favor of the County, and to reverse that judgment this writ of error was brought.

We think the presiding Judge was right in the view he took of the controlling question in this case. Without doubt, section 7, of the charter of the company authorized the taxable inhabitants of the "strip of country" designated to vote a tax upon themselves to take stock, and required the county court to levy and collect such a tax, if voted, and pay over the money as fast as collected to the treasurer of the company; but in this we find no authority for the County to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond, and all the county court could do was to collect and pay over the tax they voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the [639] tax, if called upon to do so by the county court, but that was all. The effect of their vote was nothing more than to authorize the county court to levy, collect and pay over to the treasurer of the company the special tax they had determined upon. The requirement of the law — that the money, when collected, should be paid over to the treasurer of the company—is entirely inconsistent with any idea that the obligations to be met in this way were to be in the form of negotiable paper afloat on the market as commercial securities. Under the provisions of section 6 of the charter, counties, towns and cities were expressly authorized to issue bonds in payment of their subscriptions. The omission of any such power in section 7 is conclusive evidence that nothing of the kind was intended in case of "strip" subscriptions. In this particular the case is even stronger than that of *Wells* v. *Supervisors* [*ante*, 122], decided at the present Term.

Neither did the Act of March 24, 1870, give the power to issue bonds. That was an Act amending what is commonly known as the "township aid law" of Missouri, which related only to subscriptions by municipal townships. The amendment granted no new power of subscription, but simply provided that where, under the charter of any railroad company, the taxable inhabitants of a portion of a municipal township had voted or might vote to take stock in the company, the county court might issue bonds for the stock so taken, to be paid out of taxes levied on property within the limits of the district voting. In the charter of the Chicago and Southwestern Company, authority was not given the taxable inhabitants of any portion of a township to take stock, but to the taxable inhabitants of any strip of country through which the road might pass, not exceeding ten miles on either side. This strip was not necessarily part of a township. It might include parts of several townships, or the whole of some and parts of others. As the Act amended related entirely to municipal townships as such, and there had before been legislation in relation to strips of country without any reference to townships, it must be presumed that the amendment applied only to parts of townships separately, and not to the aggregation of townships or parts of townships [640] which would almost necessarily be included in a strip of country, twenty miles wide or under, along a railroad as it runs through a county. The bonds which this statute authorizes were to be issued on behalf of a portion of a township, not on behalf of a "strip of country." Under the charter, the taxable inhabitants of the strip were to take the stock, and they were to be taxed. We cannot, without a perversion of language, apply the Act of 1870 to this provision of this charter. It follows that neither in the charter nor in the amending Act relied on can there be found authority to issue the bonds in question.

On the 24th of March, 1868, the General Assembly of Missouri passed an Act "To enable counties, cities, and incorporated towns to fund their respective debts." Sec. 1 of that Act is as follows:

"That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities or towns in this State which have or shall hereafter subscribe to the capital stock of any railroad company, may in payment of such subscription issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this Act shall be payable not more than twenty years from date thereof."

It is claimed that authority for the issue of the bonds can be found in this law. We do not agree to this. Neither the County nor a city nor a town took the stock now in question. The County did not owe any debt. The taxable inhabitants of the "strip of country" had authority to vote to tax themselves for the stock. In this way they could bind themselves; but that did not create a debt of the County, as such, for which funding bonds might be issued. The debt, if any, was of the "strip" only, and not the County. As no bond could be issued under the original vote, the County assumed no obligation whatever. The county court and other officers of the County could be compelled to levy, collect, and pay over the tax, but that was all the County or its officers were required to do. [641]

We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond. On the face of these bonds it appears that they were issued to the Chicago and Southwestern Company on account of an election held by "certain taxable inhabitants of the County." This clearly connects the bonds with the Chicago and Southwestern charter, and indicates unmistakably that they were put out on account of a "strip" subscription. The holder is, therefore,

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chargeable with notice of the want of legal authority for their issue.

The principal question certified is answered in the negative and, without specially replying to the others, further than may be implied from this opinion, *the judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—2 McCrary, 618.

SAMUEL KAHN, *Appt.*,
v.
CENTRAL SMELTING COMPANY, FREDERICK H. MYERS ET AL.

(See S. C., 12 Otto, 641-647.)

Law of Utah as to trial of issues—findings of fact—mining partnership—insufficient finding.

1. In Utah, findings of fact are required in all cases where issues of fact are tried without a jury; they should be filed before the entry of the judgment or decree.
2. Additional findings, made without notice to the adverse party, may be stricken from the transcript.
3. A mining partnership or association is not dissolved by the death or bankruptcy of one of its members, nor by the assignment of his interest.
4. Where one claims that, as co-tenant, he has a right to call for an accounting of the proceeds of a mine, the finding "That there was no such co-tenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account," is not a sufficient finding of fact upon which to base a decree.

[No. 133.]

Submitted Dec. 13, 1880. Decided Jan. 24, 1881.

APPEAL from the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. **John R. McBride, George H. Williams** and *Frank Hoffman*, for appellant.

Messrs. **Shellabarger & Wilson,** for appellees.

[642] *Mr. Justice* **Field** delivered the opinion of the court:

This is a suit to compel the defendants to account for the proceeds of a mining claim in Utah, known as the Montreal claim, and to pay over to the plaintiff the amount to which he may be entitled upon such accounting. The complaint alleges that on the 14th of December, 1874, the plaintiff and two other persons, by the name of Deronso and Berassa, were the owners and tenants in common of the claim, each having an undivided third; that they then entered into an arrangement to work the claim for the ores and metals it contained, and from that time until February, 1876, they were a mining partnership engaged in working the mine, bearing the expenses and sharing the profits equally, Deronso and Berassa having the immediate direction, control and management of its working; that on the first of February, 1876, his associates sold and transferred their interest in the mine, and in the tools, implements and appurtenances connected therewith, to the defendant, Isador Morris, through whom the other defendants immediately acquired all the rights they possess; that, from that time until the 10th of April, 1876, the defendants were in full charge and possession of the property, and extracted from the mine and sold about sixteen hundred tons of ores, worth about $45,000, the expense of extracting and marketing of which did not exceed $10,000; that, since the first of February, the plaintiff has been a partner with the defendants in the mining claim and is entitled to his share of the profits made—being one-third of the whole—and has demanded of the defendants a statement of their work and an accounting, but they have refused to comply with his demand or to give him any information on the subject or any share of the profits, and have denied him access to the books of account of the concern, and that the profits amount, according to his information and belief, to about $35,000. He therefore prays for a decree establishing the partnership between him and the defendants, and directing an accounting from them and the payment of the amount found due to him upon such accounting; and for such other and further relief as to the court may seem meet and equitable.

The answer of the defendants traverses the [643] allegations of the complaint, and avers that on the 31st of January, 1876, the defendant, Isador Morris, found Deronso and Berassa in the actual possession of a portion of the Montreal mine, of which they claimed to own two thirds; that, believing they owned such interest, Morris paid to them $25,000 for it and received a quitclaim deed from them; that, on the following day, for the like sum, he conveyed, by a similar deed, that interest to one Wadsworth in trust for such persons as a majority of the members of the Sandy Smelting Company of Salt Lake City might direct, and that afterwards such majority conveyed the same to the defendant, the Central Smelting Company, remaining, however, in the possession of and working the mine until about March 1, 1876, when the Smelting Company took possession of it and afterwards held it exclusively until the 1st of April following. The answer further avers that a short time prior to this last date the mine was claimed by another company, called the Old Telegraph Company, under an older location; that thereupon the Central Smelting Company and its vendors caused the prior location and the mining claim to be carefully examined by experienced miners, and upon that examination they became satisfied that the older location and the Montreal mine were one and the same vein or lode, and that the Montreal mine was owned by the holders of the earlier location; that having become thus satisfied of this fact, the Central Smelting Company abandoned the Montreal mine, and has not since held, used or occupied the same, or exercised any acts of ownership over it.

The answer further avers that the defendants never worked the Montreal mine or extracted ore from it, under any agreement with the plaintiff, or by his advice or consent, or in conjunction with him or as his mining partners, that they have always refused to recognize him as a party in any work, labor or management, or business of the mine; that the proceeds of the mine received by the Central Smelting Company and its immediate vendors, after deducting the expenditures, show a net profit of about $12,000, which the defendants hold until the determination of suits now pending between the plaintiff and the owners of the alleged earlier location; that those suits are brought to determine whether the Montreal mine and the

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earlier location are one and the same lode, and [644] which of the parties is entitled to its possession, and the proceeds; and the defendants pray for their protection that the prosecution of this suit may be restrained until those suits are determined.

On the trial, evidence was produced by both parties, and from it the court found as facts:

First. That there was no partnership between the plaintiff and the defendants, as charged in the complaint.

Second. That there was no such co-tenancy between them in the mine in controversy as entitled the plaintiff to an accounting; and, as a conclusion of law, that he had no right to recover in the action, and that the suit should be dismissed.

These findings were filed November 21, 1877, and judgment upon them was entered the same day. From this judgment the plaintiff appeals to this court. Fourteen days after its entry the judge who heard the case, at the request of the plaintiff, filed further findings of fact. It does not appear that any notice was given to the defendants of any intended application to the court to make any findings in addition to those originally filed; and to make such findings without such notice was irregular. The practice, if permitted would lead to great abuses. It is not absolutely necessary in any case that the findings should accompany the announcement of the decision of the court; but, when they are required—and by the practice established in Utah they are required in all cases where issues of fact are tried without a jury—they should be filed before the entry of the judgment or decree, as in such cases upon them the judgment or decree rests. If either party is dissatisfied with them and desires more full or additional ones, he should, within a reasonable time during the same term, and before an appeal is taken or a writ of error sued out apply to the court, upon proper notice to the adverse party, to make such fuller or additional findings; and if the application is granted, the additional findings should show on their face why they are made. The additional findings in this case not having been thus made, were properly stricken from the transcript. Taking, then, the original findings, let us examine whether [645] they meet the issues raised by the pleadings and support the decree; for under the practice of Utah, where, in a case seeking equitable relief, the facts are found by the court (and not by a master or a jury where the findings are merely advisory) they will be taken as its conclusions upon the evidence, and their sufficiency for the decree rendered will be considered.

The plaintiff avers that his association with his co-tenants of the mine was a mining partnership, and seeks to enforce his rights as a member of such partnership, and to obtain such other and further relief as he may be equitably entitled to. The opinion of the Judge before whom the case was heard shows that he did not recognize the existence of any partnership in mines differing from ordinary partnerships, and his finding that there was no partnership, as alleged, between the plaintiff and the defendants, necessarily followed. The allegations of the complaint, whilst asserting a mining partnership, show that no other partnership existed after the sale of Deronso's and Berassa's interest. Such sale would have ended any ordinary partnership.

Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them, successful mining would be attended with difficulties and embarrassments, much greater than at present. In *Skillman* v. *Lachman*, the question of the relation existing between parties owning several interests in a mine came before the Supreme Court of California, and that court said that "Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them; and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership." 23 Cal., 203. The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the [646] continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was, therefore, recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea* v. *Burt*, 28 Cal., 569; *Settembre* v. *Putnam*, 30 Cal., 490; *Taylor* v. *Castle*, 42 Cal., 367. There are other consequences resulting from this peculiarity of a mining partnership, particularly as to the power of individual members to bind the association, upon which there is no occasion now to express any opinion. *Skillman* v. *Lachman* [*supra*]; *Dickinson* v. *Valpy*, 10 Barn. & C., 128; *Ricketts* v. *Bennett*, 4 C. B., 686.

But if the relation of the plaintiff to his associates could not be considered as one of a mining partnership, he was still entitled to an accounting from them, if, as alleged by him, he was joint owner with them in the mine. They went into possession of the property under a conveyance from his co-tenants, and admit that whatever proceeds they have received from it were taken under a claim of ownership derived from that source. They have, upon, their own averments, only a claim in any event, to two thirds of the proceeds; and if the plaintiff was a tenant in common with them, they can only refuse his demand to the other third by repudiating their own right to any portion. If a co-tenant, he had a right to call for an accounting, whatever might be the ultimate result of the claim of third parties to the whole proceeds as the owners of the mine under a prior location.

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He was, therefore, entitled to a finding on the question of his co-tenancy. The Judge of the District Court seemed to recognize this position, for, after finding that there was no partnership —following in this respect his peculiar notions as to the non-existence of such an association as a mining partnership—he passed upon the claim to an accounting, as a tenant in common of the mine, with the defendants, and found "that [647] there was no such co-tenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account." This is not a sufficient finding of fact upon which to base a decree; it does not state that there was no co-tenancy between the parties; it implies that there was a co-tenancy; it only states that there was not such an one as entitled the plaintiff to an accounting. This is a mere legal inference, not the finding of a fact. If a co-tenancy of any kind existed, it is a question of law whether or not it entitles one co-tenant to an accounting from the others.

In considering the whole case, we think that justice will be subserved by a new hearing. The defendants recognize the possibility of the plaintiff ultimately establishing his right to a portion of the proceeds of the mine in their hands against the claimants of the alleged earlier location. They aver that they hold the proceeds subject to the determination of pending suits between those parties. The present decree, if affirmed, would cut off any claim of the plaintiff even should he prevail in that litigation.

The decree will be, therefore, reversed and the cause remanded, with direction to the Supreme Court of the Territory to send it to the District Court for a new hearing, the parties to be at liberty to produce new proofs; and *it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[664] JOS. P. PAGE, Admr. of ROBERT C. PAGE, Deceased, *Appt.*,

v.

BERNARD BURNSTINE.

(See S. C., 12 Otto, 664-672.)

Parties as witnesses in District of Columbia—assignment of policy.

1. The provision of the R. S. of U. S., that no party to an action, by or against a personal representative, can testify against his adversary as to any transaction with or statement by the deceased, unless called to testify thereto by the opposite party or by the court, applies to the courts of the District of Columbia, as fully as to the Circuit and District Courts of the United States.

2. An absolute assignment of a policy of insurance, held on the evidence, an assignment only as security for money loaned.

[No. 175.]

Argued Jan. 4, 1881. Decided Jan. 24, 1881.

APPEAL from the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Mr. **W. F. Mattingly,** for appellant.

Mr. **Enoch Totten,** for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an appeal from a decree of the Supreme Court of the District of Columbia, dismissing a bill, filed by the personal representative of Robert C. Page, for the purpose of securing for the estate of the decedent the benefit of a policy upon his life for $3,000, issued November 22, 1866, by the American Life Insurance Company of Philadelphia. The bill conceded that the defendant, Burnstine, had an interest in the policy to the extent of any loans of money by him to the assured, and prayed an account for the ascertainment of such sums. The defendant resisted the relief asked, upon the ground that, at the death of the assured, he was the absolute owner, by assignment, of the policy and, as such, entitled to receive, to his own use, the entire sum which might be realized thereon. The amount due on the policy, [665] was $2,676.33, which was paid by the company into court, to abide the result of this suit.

Among the depositions taken in the case was that of Burnstine. He testified in reference to the alleged loans by him to Page and the several assignments which he claims were executed to him by the assured.

The preliminary question for our consideration is whether Burnstine, upon his own motion, can testify as a witness in the cause. The contention of appellant's counsel is, that no *party* to an action, by or against a personal representative, can testify against his adversary as to any transaction with or statement by the deceased, unless called to testify thereto by the opposite party, or required to testify thereto by the court. Rev. Stat., sec. 558. This rule, it is claimed, applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. The contention on the other hand, of counsel for the appellee, is,

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NOTE.—*Life insurance; assignability of policy.*

Insurance policy for benefit of wife on life of husband may be pledged by her as collateral security for the husband's debt, unless prohibited by statute. Collins v. Dawley, 4 Col., 138; Charter Oak Life Ins. Co. v. Brant, 47 Mo., 419; S. C., 4 Am. Rep., 328.

Where a wife indorses policy in blank and delivers it to her husband he may pledge it. Norwood v. Guerdon, 60 Ill., 253.

Where a man sold and assigned an insurance policy on his life with the consent of the company, to one who had no insurable interest in his life; *held,* that the assignee could not recover on the policy. Franklin, etc., Ins. Co. v. Hazzard, 41 Ind., 116; S. C., 13 Am. Rep., 313; Stevens v. Warren, 101 Mass., 564; Cammack v. Lewis, 82 U. S., XXI., 244; Mo. Val. L. Ins. Co. v. Sturges, 18 Kan., 98; S. C., 26 Am. Rep., 761.

If a policy is valid in its inception, it may be assigned to anyone, whether he has any interest in the life of the secured or not. St. John v. Am. Mut. L. Ins. Co., 13 N. Y., 31; Valton v. Nat. L. F. L. Ass. Co., 20 N. Y., 32; Ashley v. Ashley, 3 Sim., 149; Clark v. Allen, 11 R. I., 439; S. C., 23 Am. Rep., 496.

A policy of insurance procured by one on his own life and payable to his heirs, is not assignable by him. Gosling v. Caldwell, 1 Lea, 454; S.C., 27 Am.Rep.,774.

If the policy is payable to the widow and heirs, the proceeds cannot be diverted from them. Gould v. Emerson, 99 Mass., 154; Eadie v. Slimmon, 26 N. Y., 9; Conn. Mut. L. Ins. Co. v. Burroughs, 34 Conn., 305; Ruppert v. Union Mut. Ins. Co., 7 Robt., 155; Frat. Mut. L. Ins. Co. v. Applegate, 7 Ohio St., 292.

A policy for the benefit of the wife assigned by her husband as security, remained her property, although the assignee paid the premiums on the same. Pence v. Makepeace, 65 Ind., 345; Wilburn v. Wilburn, 83 Ind., 355.

Assignment by a husband, of a policy for the benefit of his wife after her death as security, only carries the interest the husband derived by the death of the wife in the policy as her property. Hailey v. Heist, 86 Ind., 196; S. C., 44 Am. Rep., 285.

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that the question of Burnstine's competency is to be determined by sections 876 and 877 of the Revised Statutes relating to the District of Columbia. These positions require careful consideration; and it is essential to a clear understanding of the question, thus presented, to ascertain the history of the several provisions now incorporated as well in the Revised Statutes of the United States as in the Revised Statutes relating to the District of Columbia, upon the subject of the competency of witnesses in courts of justice.

By the proviso to the 3d section of an Act, approved July 2, 1864, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1865, it is declared, "That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to or interested in the issue tried." 13 Stat., at L., 351.

By an Act, approved on the same day, July 2, 1864, entitled "An Act relating to the law of evidence in the District of Columbia," it is declared "That on the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit, action or other proceeding in any court of justice in the District of Columbia, or before any person having, by law or by consent of parties, authority to hear, receive and [666] examine evidence within said District, the parties thereto, and the persons in whose behalf any such action or other proceeding may be brought or defended, and any and all persons interested in the same, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said action or other proceeding; *Provided*, That nothing herein contained shall render any person who is charged with any offense in any criminal proceeding competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, or in any proceeding instituted in consequence of adultery; nor shall any husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall any wife be compellable to disclose any communication made to her by her husband during the marriage." 13 Stat. at L., 374.

On the 3d of March, 1865, another Act upon the subject of the competency of witnesses, was passed by Congress. Its title was "An Act to Amend the 3d Section of an Act Entitled 'An Act Making Appropriations for Sundry Civil Expenses of the Government for the Year Ending the 30th Day of June, 1865, and for Other Purposes,' so far as the same Relates to Witnesses in the Courts of the United States." By that Act it is declared that said 3d section of the appropriation Act of July 2, 1864, "be, and the same hereby is, amended by adding thereto the following proviso: *Provided, further*, That, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." 13 Stat. at L., 533.

There is still another Act which has an important bearing upon the question before us. We allude to that portion of section 34 of the Act of February 21, 1871, creating a government for the District of Columbia, which declares that "The Constitution, and *all* the laws of the United States which are *not locally inapplicable*, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." 16 Stat. at L., 426. This provision was not affected by the subsequent displacement of the District government organized under that Act. [667]

Thus stood the law up to the date when the two revisions, one the Revised Statutes of the United States, and the other the Revised Statutes relating to the District of Columbia, went into operation.

If it be true, as argued, that the Supreme Court of the District of Columbia, although organized under and by authority of the United States, and possessing the same powers and jurisdiction as the Circuit Courts of the United States (12 Stat. at L., 762; R. S. Dist. Col., sec. 760), was not intended to be embraced by the proviso to the 3d section of the Appropriation Act of July 2, 1864, and if, as may be further argued, the Act of March 3, 1865, being, in terms, amendatory only of that section, was not intended to modify the special Act of the latter date relating to this District, it is, nevertheless, quite clear that, from and after the passage of the Act of February 21, 1871, if not before, the Act of March 3, 1865, became a part of the law of evidence in this District. The legal effect of the declaration that all the laws of the United States, not locally inapplicable, should have the same force and effect within this District as elsewhere within the United States, was to import into, or add to, the special Act of July 2, 1864, relating to the law of evidence in the District, the exception, created by the Act of March 3, 1865, to the general statutory rule, excluding parties as witnesses. This is manifestly so, unless it be that a statute affecting the competency of parties as witnesses in actions by or against personal representatives and guardians, in which judgment may be rendered for or against them, was "locally inapplicable" to this District. But such a position cannot be maintained consistently with sound reason. The same considerations of public policy which would require the enforcement of such a statute, as that of March 3, 1865, in the Circuit and District Courts of the United States, without [668] regard to the laws of the respective States upon the same subject, would suggest its application in the administration of justice in the courts of this District. Congress no doubt felt that the general rule under which parties were permitted to testify upon their own motion put the estates of deceased persons at a great disadvantage, if those proceeding against them by suit could, upon their own motion, testify as to transactions with, or statements by the decedent. To remedy that evil, the Act of March 3, 1865, was passed, and it should not be held locally

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inapplicable to this District, simply because it enlarges the exceptions to the general rule established by the special Act of July 2, 1864.

These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States," were locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the Legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to "courts of the United States." *Clinton* v. *Englebrecht*, 13 Wall., 434 [80 U. S., XX., 659]; *Hornbuckle* v. *Toombs*, 18 Wall., 648 [85 U. S., XXI., 966]; *Good* v. *Martin*, 95 U. S. 90 [XXIV., 341]. No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us.

Such being the law when the Revised Statutes of the United States and the Revised Statutes relating to the District of Columbia went into operation, which was on the same day, we are to inquire whether Congress by those revisions has made or intended to make any change in the particular rule of evidence now under examination. We are of opinion that no alteration of the previous law was made or intended to be made. The special Act of July 2, 1864, 13 Stat. at L., 351, relating to the law of evidence in this District, is reproduced, *ipsissimis verbis*, in two paragraphs, constituting sections 876 and 877 of the District revision; the Act of July 16, 1862, 12 Stat. at L., 588, 589, the 3d [669] section of the appropriation Act of July 2, 1864, 13 Stat. at L., 374, and the Act of March 3, 1865, 13 Stat. at L., 533, are consolidated into one paragraph, and, without the slightest material change of language, constitute section 858 of the Revised Statutes of the United States; and the provision already quoted from the Act of February 21, 1871, 16 Stat. at L., 426, is reproduced in section 93 of the District revision. If we consulted alone sections 876 and 877 of the Revised Statutes relating to the District, we should, perhaps, be constrained to hold that, in the courts of the District, *parties* could, upon their own motion, testify as well in actions by or against personal representatives as in any other action. But we cannot overlook the fact that, in the revisions, the language of the previous statutes have undergone no change whatever. We should not, therefore, permit the mere collocation or re-arrangement of the previous statutes in the new revisions, adopted on the same day, to operate to change the law, and thereby defeat the will of Congress. R. S. Dist. Col., sec. 1296; R. S., sec. 5600.

For these reasons, we are of opinion that Burnstine could not, upon his own motion, testify as to any transaction with or statement by the decedent, Page. His deposition as to such transactions and statements must be excluded from consideration.

Upon the merits of the case, we waive any consideration of the question suggested in oral argument, as to whether Burnstine, consistently with public policy, could acquire by assignment any interest in the insurance upon the life of Page, beyond such amount as the latter actually owed him at the time of his death. No such question is raised in the pleadings, nor was it suggested or considered in the court below. We pass it by for the additional reason that its determination is unnecessary in the view which the court takes of this case.

The transactions between Page and Burnstine had their origin, it is conceded, in a loan of money by the latter to the former. To secure that loan an assignment was made of Page's interest in the policy to the extent of the sum borrowed. Each subsequent assignment shows, upon its face, a similar arrangement, until that of January 7, 1873, was executed. The latter assignment by itself, imports an absolute transfer to Burnstine of all the right, title and interest of the assured in the policy, and to the payments [670] previously made thereon, as well as all benefit and advantage to be derived therefrom. But the circumstances disclosed in the record indicate, with reasonable certainty, that the real and only object of the execution of the assignment of January 7, 1873, was to invest Burnstine with the entire control of the policy, to the end that, thereafter, the company might deal directly with him, and, upon the death of the assured, that he might be invested with full authority to receive the proceeds of the policy, and apply them in the repayment of such sum or sums as he had loaned to Page upon the security of the policy. In other words, the last assignment may be construed as simply appointing Burnstine, upon the death of the assured, to receive from the company such sum as would then be due on the policy, and after re-imbursing himself to the extent of his loans to Page, to pay the balance to the persons entitled thereto. A different construction of that instrument would place Burnstine in the position of being pecuniarily interested in the death of Page. Unless compelled to do so, we should not suppose that he had any desire or purpose to speculate upon the life of Page, or to do more than secure the repayment of the money actually loaned by him to the assured.

This construction of the assignment of January 7, 1873, is fortified by other evidence. Cross, the local agent at Washington of the insurance company, drew the assignment. In his deposition, taken by the defendant, he testifies that Page admitted, about December, 1871, his inability to keep up the premiums. Burnstine was advised of these facts. Cross thereupon recommended to him that, in order to *save himself*, he should secure an absolute assignment of the policy, Nothing was said by the parties, upon the occasion when the assignment was drawn, as to its consideration. If the intention had been, upon the part of Page, to make an unconditional sale, and upon the part of Burnstine, to make an unconditional purchase, of the policy, something would have been then said indicating such an intention. That portion of the evidence, which we are at liberty to consider, tends to show that Burnstine acted upon the advice of Cross, and took an absolute assignment, with the object of *saving himself*—a result

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which can be accomplished by awarding to him, [671] out of the proceeds of the policy, such sum as will re-imburse him for the loans made to Page.

This conclusion is strengthened by the language employed by Burnstine in his receipt of October 2, 1868. In that paper, he acknowledges the receipt from Page of six orders, for $50 each, upon the disbursing clerk in the Post Office Department, and agrees that in the event Page dies before the orders are paid, and he, Burnstine, should receive from the insurance company the whole or a part of the amount due on the policy, he "would make such a settlement with his (Page's) representatives as the case may require."

This obligation of Burnstine was not, in terms, withdrawn or canceled in any of the assignments thereafter executed, and the receipt of October 2, 1868, should not, therefore, be overlooked in ascertaining the real purpose the parties had in the assignment of January 7, 1873. Our conclusion is still further strengthened by the language in one of the conditions inserted in the policy (of which, it must be assumed, the parties were aware), to the effect that, "In case of the assignments of a policy, whether as security *or otherwise*, satisfactory proofs of the *assignee's interest in the insured life* must be furnished with the proofs of death." If the company or Burnstine understood that the latter, by the assignment of January 7, 1873, became entitled to the whole sum due on the policy at the death of the assured, without reference to the amount Burnstine had actually paid out, it would have been an idle ceremony for the latter to have furnished proofs of his interest in the assured life.

The decree must be reversed, and the cause remanded with directions that an account be taken, as well of the sums actually loaned or paid by Burnstine to Page upon the policy as security for its repayment, as of all sums paid by him for the purpose of keeping the policy in force, and for such decree as may be in conformity to this opinion.

Mr. Justice **Bradley**, dissenting:

I dissent from so much of the opinion in [672] this case as holds that the Act of Congress relating to the admission of parties to testify in the courts of the United States applies to the courts of the District of Columbia. The Act relating to that subject, in reference to judicial proceedings in the District, covers the whole subject and excludes the operation of any general law unless the latter is made specially applicable. The practice of admitting colored persons to testify prevailed in the District courts from the organization of the present Supreme Court of the District, and did not need the aid of the general statute. The admission of parties to testify in the courts of the District was provided for in a distinct and separate statute relating to the District alone.

I concur in the judgment of the court notwithstanding the evidence of the defendant.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

H. C. G. HARTMAN, *Plff. in Err.*,
v.
SAMUEL C. GREENHOW, Treasurer of CITY OF RICHMOND.

(See S. C., 12 Otto, 672–686.) [672]

Review of State judgments—judgment denying mandamus—*judgment on equal division—court of appeals—division of a State—void State law.*

1. A final judgment or decree of the highest court of a State in which a decision could be had, may be re-examined by this court, where the decision expressed by that judgment involved a question under the Constitution, laws, or treaties of the United States, and was adverse to some right, privilege, or immunity claimed under them.

2. A judgment denying the writ of *mandamus*, stands, like the judgment in an ordinary action at law, subject to review under similar conditions.

3. That it was rendered upon an equal division of opinion among the judges, does not impair the conclusive force of the judgment. It is as binding in every respect as if rendered upon the concurrence of all the judges.

4. Nor does it matter that the judgment was rendered in an original proceeding in the Supreme Court of Appeals of the State, and not in a case pending before that court on appeal.

5. Where a State is divided into two States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them.

6. The Act of Virginia of 1876, requiring the tax on her bonds, issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds and held by different owners, without impairing the contract with such bondholders contained in the Funding Act, and the contract with the bearer of the coupons.

[No. 154.]

Argued Dec. 16, 1880. Decided Jan. 24, 1881.

IN ERROR to the Supreme Court of the State of Virginia.

The case is fully stated by the court.

Mr. **William L. Royal**, for plaintiff in error:

The Act of Assembly imposes taxes equally upon her bonds, held and owned by persons not citizens or residents of Virginia, as upon those held and owned by her own residents and citizens. Clearly, so far as it does this, the Act is void. *The State Tax on Foreign-held Bonds*, 15 Wall., 300 (82 U. S., XXI., 179), affirmed in *Tappan* v. *Merch. Nat. Bk.*, 19 Wall., 499 (86 U. S., XXII., 193); *Com.* v. *R. R. Co.*, 27 Gratt., 344.

Concede, for the purposes of the argument, that the Legislature may tax the bonds of the State of Virginia; although it may tax the bonds of the State, it cannot, when a coupon cut from a bond is tendered to an officer of the State, for payment of a liability to the State, demand that it shall be received with the tax on the bond deducted from the coupon. Concede that the Commonwealth may tax its bonds; yet, I insist, the tax must be collected as is that on any other property, by seizure and sale of the property itself, if necessary. If the citizen does not pay the tax levied on bonds owned by him, let the bond be seized if no other property can be found, sold in market overt, that part due to the State taken from the proceeds, and the residue turned over to him.

But when Virginia issued bonds under the

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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Act of 1871, it made a contract with the person to whom they were issued that coupons would be received at their face value, from any person in the world who happened to be the holder of them, in payment of any liability to the State which that person might be under, at any time whatever, after the maturity of the coupon. If this was, in fact, the contract, it is of course manifest that the law providing for collections shall not receive them according to face value, but at less than face value, is a law impairing the obligation of the contract and is, therefore, void.

Mr. **James G. Field,** *Atty-Gen., of Virginia,* for defendant in error:

The writ of *mandamus* is a high prerogative writ, and only issues when there is a clear and specific legal right to be enforced or a duty to be performed, and where there is no other legal remedy. The right asserted or the duty to be performed must not be of a doubtful character, nor in any respect illegal. See, High, Legal Remedies, secs., 7, 9, 32; *Tyler* v. *Taylor*, 29 Gratt., 766, 767; *Page* v. *Clopton*, 30 Gratt., 415.

The right of the appellant to use the coupons, for the purpose and in the mode indicated, must be clear and well defined, and the duty of Greenhow to receive them absolute.

The question to be decided is, whether the State of Virginia had and has the right to tax, as other choses in action, its own bonds, in the hands of its own citizens and tax payers; the law under which the bonds were issued, not prohibiting the right of taxation. If the right of taxation exists, then the mode of levying and collecting the tax will be left to the discretion of the Legislature of the State.

See, *Kirtland* v. *Hotchkiss* (100 U. S., 491 XXV., 558); in *State Tax on Foreign-held Bonds*, 15 Wall., 319 (82 U. S., XXI., 186), *Mr. Justice* Field, delivering the opinion of the court, said:

"Unless restrained by the provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

There was no discrimination against the bonds of the State in the levying of taxes. Indeed, it is more favorable, in providing that no tax is to be collected unless full interest be paid on the bond. And even when full interest is paid, the bond is assessed at its market rather than its nominal value.

The State grants lands within its territorial limits, by deed, with covenants of title and quiet possession. Yet no one will deny the right of the State to tax the land so granted and, if the tax is not paid, to have the lands sold therefor, and thus defeat its own deed. But this is not held to impair the contract.

The learned counsel for the appellant relies very much, if not altogether, upon the decision of this court in *Murray* v. *Charleston*, 96 U. S., 432-449 (XXIV., 760-764), to sustain the position assumed for the appellant. The facts in that case are so very different from those in the case at bar, that its decision, even if it had been by a unanimous court, would not be decisive of this case.

Here no effort is made to tax a foreigner or non-resident; no effort to tax property having its *situs* beyond the limits of the State; no unjust discrimination as to rate of taxation. And as to the mode of collecting the tax, it is necessary, in order that the bonds liable to taxation may not elude this reasonable burden.

The power of taxation is a part of the legislative sovereignty of the State and is not the subject of contract or barter or sale by the Legislature; and if the Legislature attempts to make such contract, it is a fraud on the sovereignty of the State and, of necessity, void.

Bk. v. *Billings*, 4 Pet., 561; *Bk.* v. *Skelly*, 1 Black, 436 (66 U. S., XVII., 173); *Ins. Co.* v. *Debolt*, 16 How., 416; *R. R. Co.* v. *Maguire*, 20 Wall., 60, 61 (87 U. S., XXII., 293); Cooley, Const. Lim., 479, 480; *McCulloch* v. *Md.*, 4 Wheat., 428; Cooley, Tax, 3; *Duer* v. *Small*, 4 Blatchf., 263; *Tucker* v. *Ferguson*, 22 Wall. 575 (89 U. S., XXII., 816).

The State has power to tax its own bonds, unless said bonds have been expressly exempted.

Bk. v. *Smith*, 7 Ohio St., 42; *Hall* v. *Co. Comrs.*, 10 Allen (Mass)., 100; *State Tax on Foreign-held Bonds*, 15 Wall., 324, 325 (82 U. S., XXI., 188); *People* v. *Ins Co.*, 29 Cal., 533.

If it is claimed that the right of taxation has been surrendered by the State, it must so appear, by express terms, clear and unmistakable.

R. R. Co. v. *Pa.*, 21 Wall., 492, 498, 499 (88 U. S., XXII., 595, 598); *Miami Co.* v. *Brackenridge*, 12 Kan., 114.

Bonds of the United States, not exempted by Congress from state taxation, may be taxed by the State in which they are owned and held.

People v. *Comrs. of Taxes*, 23 N. Y., 192; *State Tax on Foreign-held Bonds* (*supra*).

The tax, properly assessed upon the state bonds, may be collected out of the interest of said bonds when that interest is paid.

Malthy v. *R. R. Co.*, 52 Pa., 140; *State Tax on Foreign-held Bonds* (*supra*); *R. R. Co.* v. *Pa.*, 15 Wall., 326 (82 U. S., XXI., 189).

Mr. Justice **Field** delivered the opinion of the court: [673]

The plaintiff in error, who is the petitioner in the court below, is a citizen and resident of the City of Richmond, State of Virginia; and on the 5th of April, 1878, was indebted to the State for taxes to the amount of $26.53. On that day he tendered to the Treasurer of Richmond—who is by law charged with the duty of collecting the taxes of the State in that city—certain interest coupons, which were overdue, amounting to $24, cut from bonds of the State, issued under the provisions of an Act of the General Assembly, passed March 30, 1871, commonly known as the Funding Act, and $2.53 in lawful money of the United States, in payment of the taxes; but the Treasurer refused to receive the coupons in discharge of the taxes without first deducting therefrom the taxes upon the bonds to which they were originally attached. The petitioner holding the coupons was not at the time the owner of such bonds. Upon this refusal he applied to the Supreme Court of Appeals of Virginia for a writ of *mandamus* to the Treasurer to compel him to receive the coupons, with the money mentioned, in full discharge of the petitioner's taxes, without any deduction from the coupons for the taxes upon the bonds.

The court issued a rule or an alternative writ upon the Treasurer, to which he answered, that the General Assembly of the State had, for many years, exercised the right to tax all bonds, choses in action, and other evidences of debt,

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including bonds of the State; that the taxes assessed upon the latter bonds were according to their market value, the amount being fixed at fifty cents on the one hundred dollars of such value; that the law required the taxes to be collected when the interest on the bonds was paid, and made it a high penal offense for any officer to receive coupons in payment of taxes without deducting from their face value the tax levied upon the bonds from which they were taken; and he [674] referred to several Acts of the Legislature in support of this statement. He also answered, that at the time the coupons were tendered to him he proposed to deduct from them the amount of the taxes on the bonds to which they were originally attached, and demanded of the petitioner a like amount in money in addition to what was tendered; that he would not otherwise have been justified in giving a receipt in full for the taxes due, and that this additional amount the petitioner refused to pay. The respondent, therefore, denied that the petitioner was entitled to the writ, and prayed that his petition be dismissed.

The application was fully argued before the Supreme Court of Appeals by counsel for the petitioner, and by the Attorney-General of the State for the Treasurer. The Judges of the court were equally divided in opinion upon it, and, as is usual in such cases, the application was denied, and judgment to that effect, with costs, was entered. To review this judgment the case is brought here on writ of error.

The principal question for determination, as thus seen, is the validity of the statute of the State requiring the tax levied upon its bonds to be deducted from the coupons for interest, originally attached to them, when the coupons are presented for payment, so far as it applies to coupons separated from the bonds and held by different owners.

To fully understand this question, it will be necessary to make a brief reference to the legislation of the State upon her indebtedness. But before doing this, there is a question of jurisdiction to be considered. The judgment of the Supreme Court of Appeals being entered upon an equal division of opinion among its Judges, it is argued that there is no such final adjudication of the State Court as can be reviewed by this court.

The Revised Statutes, which express the statute law of the United States in force December 1, 1873, provide, in section 709—embodying substantially the provisions of the 25th section of the Judiciary Act of 1789, 1 Stat. at L., 73—that a final judgment or decree, in any suit, of the highest court of a State in which a decision could be had, may be re-examined by the Supreme Court of the United States in three classes of cases. In all of them there must be a final [675] judgment or decree of the highest court of the State, and the decision expressed by that judgment must have involved a question under the Constitution, laws or treaties of the United States, and have been adverse to some right, privilege or immunity claimed under them. Here the Supreme Court of Appeals certifies that on the hearing of the case there was drawn in question the validity of the statute of the State authorizing the tax upon the bonds and requiring its deduction from the coupons, on the ground of its repugnancy to the provision of the Constitution of the United States prohibiting any legislation by the States impairing the obligation of contracts; and that the decision was in favor of the validity of the state statute and against the right claimed by the petitioner under the provision of the Constitution of the United States. That this certificate correctly states the question involved will more clearly appear from the legislation of the State, which we shall presently consider. The judgment denying the writ of *mandamus* was a final determination against the claim of the petitioner to have the coupons held by him received for taxes without a deduction from their face value of the amount of the tax levied on the bonds. A *mandamus* in cases of this kind is no longer regarded in this country as a mere prerogative writ. It is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the rights of the petitioner are affected, is sought to be enforced. Says *Mr. Chief Justice* Taney: "It undoubtedly came into use by virtue of prerogative power in the English Crown, and was subject to regulations and rules which have long since been disused; but the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall* v. *U. S.*, 12 Pet., 615, and *Kendall* v. *Stokes*, 3 How., 100." *Ky.* v. *Dennison*, 24 How., 97 [65 U. S., XVI., 725]. And such we understand to be the law of Virginia. The judgment, therefore, in the case, stands like the judgment in an ordinary action at law, subject to review under similar conditions. It is not the less expressive of the decision of the court upon the merits of [676] the petitioner's claim in the case because it is rendered upon an equal division of opinion among the Judges. The fact of division does not impair the conclusive force of the judgment, though it may prevent the decision from being authority in other cases upon the question involved. The judgment is that of the entire court, and is as binding in every respect as if rendered upon the concurrence of all the Judges. *Lessieur* v. *Price*, 12 How., 59; *Durant* v. *Essex Co.*, 7 Wall., 107 [74 U. S., XIX., 154]; *S. C.* 101 U. S., 555 [XXV., 961].

Nor does it matter that the judgment was rendered in an original proceeding in the Supreme Court of Appeals of Virginia, and not in a case pending before that court on appeal. It is enough for our jurisdiction that the judgment is by the highest tribunal of the State in which a decision could be had in the suit. When such a judgment is brought before us for review, involving in its rendition a decision upon a federal question, we do not look beyond the action of that court. It is enough that we have its final judgment in the case; whether it be one of original jurisdiction or heard by it in the exercise of its own appellate power over the inferior courts of the State.

We proceed, therefore, to consider the legislation of the State upon her indebtedness. A brief sketch of it will perhaps enable us better than in any other way to exhibit the question for our determination, and indicate the solution it should receive.

It appears from the statutes to which we are referred—and we know the fact as a matter of

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public history—that prior to the late civil war Virginia had become largely indebted for moneys borrowed to construct public works in the State. The moneys were obtained upon her bonds, which were issued to an amount exceeding $30,000,000. Being the obligations of a State of large wealth, which never allowed its fidelity to its promises to be questioned anywhere, the bonds found a ready sale in the markets of the country. Until the civil war, the interest on them was regularly and promptly paid. Afterwards the payments ceased, and until 1871, with the exception of a few small sums remitted in coin during the war to London for foreign bondholders, or paid in Virginia in Confederate money, and a small amount [677] paid in 1866 and 1867, no part of the interest or principal was paid. During the war a portion of her territory was separated from her, and by its people a new State, named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole State had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new State. Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says: "If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common." 1 Com., 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: "In that case, the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations." Internat. L., ch. 3, sec. 27.

In conformity with the doctrine thus stated by Halleck, both States—Virginia and West Virginia—have recognized in their Constitutions their respective liability for an equitable proportion of the old debt of the State, and have provided that measures should be taken for its settlement. The Constitution of Virginia of 1870 declared that the General Assembly should "Provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia," and should "provide that such sums as shall be received from West Virginia shall be applied to the payment of the public debt of the State." Art. 10, sec. 19.

[678] The Constitution of West Virginia, which went into effect in 1863, declared that "An, equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," should "be assumed" by the State, and that the Legislature should 'ascertain the same as soon as practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." Art. 8, sec. 8.

But notwithstanding these constitutional requirements and various efforts made to adjust the liabilities of West Virginia, nothing was accomplished up to March 30, 1871, and it is stated by counsel that nothing has been accomplished since. As might have been expected, the position of Virginia was not a pleasant one, being charged with the whole indebtedness which accrued before the formation out of her territory of a new State, and entitled to, without being able to obtain, a contribution from the new State of a part of it, corresponding proportionately to her extent and population. She, therefore, undertook to effect a separate adjustment with her creditors, and for that purpose, on the 30th of March 1871, passed an Act known as the "Funding Act" of the State. It is entitled "An Act to Provide for the Funding and Payment of the Public Debt." Its preamble recited that in the Ordinance authorizing the organization of the State of West Virginia it was provided that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia, prior to January 1, 1861, and that this provision had not been fulfilled, although repeated and earnest efforts in that behalf had been made by Virginia; and then declared that, "To enable the State of West Virginia to settle her proportion of said debt with the holders thereof," and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and "for the purpose of promptly restoring the credit of Virginia, by providing for the certain and prompt payment of the interest on her proportion of said debt, as the same shall become due," the Legislature enacted that the owners of the bonds, stocks, or interest certificates of the State (with a few exceptions) might fund two thirds of the same and two thirds of the interest due or to become due thereon up to July 1, 1871, in six per cent coupon or registered bonds of the State, to run thirty-four years, the bonds [679] to be made payable to order or bearer, and the coupons to bearer. The Act declared that the coupons should be payable semi-annually, and "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and that this should be so expressed on their face. For the remaining one third of the amount of the bonds thus funded the Act provided that certificates should be issued to the creditors, setting forth the amount of the bonds not funded, with the interest thereon, and that their payment would be provided for in accordance with such settlement as might be subsequently had between the two States; and that Virginia would hold the bonds surrendered, so far as they were not funded, in trust for the holder or his assignees. The bonds of the State, with the accumulated interest, then amounted to over forty millions of dollars.

Under this Act a large number of the creditors of the State, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two-thirds of their amount and certificates for the balance. A contract was thus consummated between the

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State and the holders of the new bonds, and the holders of the coupons, from the obligation of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two-thirds of their amount.

In *Woodruff* v. *Trapnall*, reported in 10th Howard, 190, a provision in an Act of Arkansas, similar to this one, that the bills and notes of the Bank of the State of Arkansas, the capital of which belonged to the State, should "be received in all payments of debts due to the State of Arkansas," was held to be a contract with the holders of such notes which was binding on the State, and that the subsequent repeal [680] of the provision did not affect the notes previously issued. "The notes," said the court, "are made payable to bearer; consequently every *bona fide* holder has a right, under the 28th section" (the one making the notes receivable for dues to the State), "to pay the State any debt he may owe it in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and is not the less so on the State." "And that the Legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument." In *Furman* v. *Nichol*, reported in the 8th Wallace, 44 [75 U. S., XIX., 370], a similar provision in an Act of Tennessee, declaring that certain notes of the bank of that State should be "receivable" at the Treasury of the State and by tax collectors and other public officers, "in all payments for taxes and other moneys due the State," was held by this court unanimously to constitute a valid contract between the State and every person receiving a note of the bank. An attempt was made in the case to restrain the operation of the guaranty contained in the provision to the person who received the note in the course of his dealing with the bank, but the court said: "The guaranty is in no sense a personal one. It attaches to the note; is part of it, as much so as if written on the back of it; goes with the note, everywhere, and invites everyone who has taxes to pay to take it."

Yet, notwithstanding the language of the Act of March 30, 1871, providing that the interest coupons of the new bonds should "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and this was so expressed upon their face, the Legislature of Virginia, less than one year afterwards, on the 7th of March, 1872, passed an Act declaring that thereafter it should "not be lawful for the officers charged with the collection of taxes or other demands of the State," then due or which should thereafter become due "to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." This Act, as seen on its face, is in direct conflict with the [681] pledge of the State of the previous year, and with the decisions of this court to which we have referred. Its validity, as might have been expected, was soon attacked in the courts, as impairing the obligation of the contract contained in the Funding Act, and came before the Supreme Court of Appeals of the State for consideration in *Antoni* v. *Wright*, at its November Term of 1872 [22 Gratt., 833]. The subject was there most elaborately and learnedly treated. The cases above were cited by the court; and the provision of the Funding Act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State. It was earnestly pressed upon the court that it was not within the legitimate power of the Legislature to make such a contract; that it would tend to embarrass the action of subsequent Legislatures by depriving them of the proper control of the annual revenue, and might, by absorbing the revenue, substantially annul the taxing power and put a stop to the wheels of government. But the court said, among other answers to this, that no rightful power of the State was surrendered by the legislation, but simply a provision made for the payment of the debts of the State; that the annual accruing interest on the debt of the State was in all well regulated governments deemed an essential part of their annual expenses, and was always annually provided for. The Act only made provision for an annual appropriation of a portion of the revenue, derived from taxation, to the payment of existing debts; and such legislation could not be deemed a great stretch of power, when the organic law of the State not only contemplated the punctual annual payment of the interest of her entire debt, but imperatively required, on the creation of a debt, that a sinking fund should be at once established, to be applied solely to its extinction. The organic law thus not merely authorized, but required the Legislature which created the debt to bind all future Legislatures, by the establishment of a fund to be applied solely to the extinction of the debt. And as to the objection that such legislation might and probably would result in crippling the power and resources of the State in time of war or other great calamity, the court said, that legislation cannot well be adapted in advance to extraordinary and exceptional cases; that such cases will occur at all [682] times with all Nations, and must be provided for by the wisdom and prudence of the government for the time being. "At such a time, however," said the court, in words full of wisdom, "the honored name and high credit secured to a State by unbroken faith, even in adversity, will, apart from all other considerations, be worth more to her in dollars—incalculably more—than the comparatively insignificant amount of the interest on a portion of the public debt enjoyed by breach of contract." The court thus expressed a great truth, which all just men appreciate, that there is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken.

These decisions of the Federal and State Courts dispose substantially of the question presented in the case at bar. The Act of March, 1872, being held to be invalid, the coupons were

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subsequently, and until March 1873, received for all taxes due the State to their full amount. On the 25th of that month, the Legislature passed an Act providing that from the interest payable out of the Treasury on bonds of the State, whether funded or unfunded, there should be retained a tax equal in amount to fifty cents on the one hundred dollars of their market value, on the first day in April of each year, and made it the duty of every officer of the Commonwealth, charged with the collection of taxes, to deduct from the matured coupons which might be tendered to him in payment of taxes, or other dues to the State, such tax as was then or might thereafter be imposed on the bonds. The Act, in terms, applied to all bonds of the State, whether held by her own citizens or non-residents and citizens of other States or countries. In 1874, the Legislature modified this provision so that the tax on the bonds should not be retained from the interest paid on them, when they were the property of non-residents of the Commonwealth. But this exemption was omitted in the Act of 1876, providing for the assessment of taxes in the State, in which the provision of the Act of 1873 was inserted. It is the validity of this provision requiring the tax levied on the bonds to be deducted from the coupons held by other parties, when tendered in payment of their taxes or other dues to the State, [683] which is presented for our determination.

The power of the State to impose a tax upon her own obligations is a subject upon which there has been a difference of opinion among jurists and statesmen. On the one hand, it has been contended that such a tax is in conflict with and contrary to the obligation assumed; that the obligation to pay a certain sum is inconsistent with a right, at the same time, to retain a portion of it in the shape of a tax, and that to impose such a tax is, therefore, to violate the promise of the government. See, Hamilton on the Public Credit, in his works, 3d Vol., pp. 514-518.

On the other hand, it is urged that the bonds of every State are property in the hands of its creditors and, as such, that they should bear a due proportion of the public burdens. In the case of *Murray* v. *Charleston*, 96 U. S., 432 [XXIV., 760] there are many pertinent and just observations on this subject which it is not material to repeat, for the question is not necessarily involved in the disposition of the case before us. Whatever may be the wise rule—looking at the necessity in a commercial country for its prosperity that its public credit should never be impaired—as to the taxability of the public securities, it is settled that any tax levied upon them cannot be withheld from the interest payable thereon. Such was the decision of this court in *Murray* v. *Charleston*. There the city had issued certificates of stock, whereby it promised to pay to the owners thereof certain sums of money, with six per cent interest, payable quarterly. Subsequently it imposed a tax of two per cent on the value of all property within its limits for the purpose of meeting the expenses of its government; and, treating its stock as part of such property, directed that the tax assessed upon it should be retained by the Treasurer of the city from the interest due thereon. To recover the amount thus retained, which was one-third of the interest stipulated, suit was brought. The city defended its action on the ground that the tax on the stock was not higher than the tax on all other property of its citizens, and that all property in the city was subject to taxation; but the court answered that, by the legislation of the city, its obligation to its creditors was impaired, and, however great its power of taxation, it must be exercised, being a political agency of the State, in subordination to the inhibition of the Federal Constitution against [684] legislation impairing the obligation of contracts. Until the interest was paid, no Act of the State or of its political subdivisions, exercising legislative power by its authority, could work an exoneration from what was promised to the creditor. This decision would be decisive here, but the present case is still stronger for the creditor. The Funding Act made the bonds issued under it payable to order or bearer, and made the coupons payable to bearer. They were, so far, distinct and independent contracts, that they could be separated from each other and transferred to different hands.

In *Clark* v. *Iowa City* we had occasion to speak of bonds of municipal bodies and private corporations having similar coupons, and the language there used is applicable here. We said that most of such bonds "Are issued in order to raise funds for works of large extent and cost, and their payment is, therefore, made at distant periods, not unfrequently beyond a quarter of a century. Coupons for different installments of interest are usually attached to such bonds in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity if for any cause the bonds are canceled or paid before maturity, nor their negotiable character, nor their ability to support separate actions. They then possess the essential attributes of commercial paper, as has been held by this court in repeated instances." 20 Wall., 589 [87 U. S., XXII., 429].

Here, also, the coupons held by the petitioner were distinct contracts imposing separate obligations upon the State. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an Act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an Act is not a legitimate exercise of the taxing power: it undertakes to impose upon one the burden which should fall, if at all, upon another.

The Funding Act stipulated that the coupons [685] should be receivable for all taxes and dues to the State, that is, for taxes and dues owing by the holders of the coupons, and for their full amount; and upon this pledge the holders of the bonds of the State surrendered them, and took new bonds for two thirds of their amount. The Act of 1876 declares that the coupons shall not be thus received for taxes and dues owing by the holders of them for their full amount, but only for such portion as may remain after

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a tax subsequently levied upon the bonds, to which they were originally attached, is deducted, though the bonds be held by other parties. If this Act does not impair the contract with the bondholder, who was authorized to transfer to others the coupons with this quality of receivability for taxes annexed, and also the contract with the bearer of the coupon written on its face that it should be received for all taxes to the State, it is difficult to see in what way the contract with either would be impaired, even though the tax on the bond should equal the whole face of its coupons. If, against the express terms of the contract, the State can take a portion of the interest in the shape of a tax on the bond, it may at its pleasure take the whole.

We are clear that this Act of Virginia of 1876 (sec. 117), requiring the tax on her bonds, issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bondholders contained in the Funding Act, and the contract with the bearer of the coupons. It follows that the petitioner was entitled to a writ of *mandamus* to compel the Treasurer of the City of Richmond to receive the coupons, tendered to him in payment of taxes due the State, for their full amount.

The judgment of the Supreme Court of Appeals denying the writ must, therefore, be reversed, and the case remanded for further proceedings in accordance with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[686] *Mr. Justice* **Miller** dissenting.

I dissent from the judgment of the court. In addition to the general proposition which I have always maintained, that no Legislature of a State has authority to bargain away the State's right of taxation, I am of opinion that in issuing the bonds and coupons which are the subject of this controversy, the Legislature of Virginia, neither in terms nor by any just inference, made any contract that the bonds and coupons should not be subject to the same taxes as other property taxed by the State.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 288; 107 U. S., 745, 771, 788, 812.

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[686] GEORGE H. SHARPE. *Plff. in Err.*,

v.

MICHAEL L. DOYLE ET AL.

(See S. C., 12 Otto, 686-691.)

Review of state judgment—jurisdiction.

1. Where a warrant is issued to a U. S. Marshal, to take possession of a bankrupt's estate, and a purchaser from the bankrupt sues him in a state court for so doing, and the Marshal sets up as a defense that such purchase was a fraud on the bankrupt law and passed no title, and asserts a right to it under such law, which right is decided adversely to him, the case is proper to be reviewed in this court.

2. In such case, the title to the property and the rightfulness of the seizure under the writ were open to inquiry.

[No. 179.]

Argued Jan. 5, 1881. *Decided Jan. 24, 1881.*

IN ERROR to the Superior Court of the City of New York.

The case is fully stated by the court.

Messrs. **Chas. E. Whitehead** and *D. M. Porter*, for plaintiff in error:

The United States Marshal, under a provisional warrant, has the right to seize goods of a bankrupt wheresoever they may be found, and if he seizes them in good faith, in the possession of some person claiming to have a title to them by transfer from the bankrupt, in a suit brought by the claimant against the Marshal for the value of such goods, the *bona fide* character of the plaintiff's title is to be proven and tried in the ordinary way.

This ruling of the court was error, as it took from the jury all question of defendants in error's knowledge of the purpose of Landers, which was a purpose of diverting the goods of a bankrupt to a single creditor, and if the defendant in error was cognizant of that intent and that diversion, he was a party to it.

O'Brien v. *Weld*, 92 U. S., 81 (XXIII., 675); *Case of Briggs*, 3 Bk. Reg., 638; *Stevenson* v. *McLaren*, 14 Bk. Reg., 403; *Hanson* v. *Herrick*, 100 Mass., 323.

Mr. **Wm. Henry Arnoux**, for defendant in error:

The Bankrupt Act, section 40, authorized the issuing of a warrant "To take possession provisionally of all the property and effects of the debtor."

This gives no authority to take possession of the property of any other person. It applies only to property belonging to the debtor, and over which he exercises acts of ownership at the time. So it has been decided under this section that where an assignee claims property or a fund which has been transferred by the bankrupt before the proceedings in bankruptcy were commenced, he must bring an action at law or a suit in equity, to determine the title.

Smith v. *Mason*, 14 Wall., 419 (81 U. S., XX., 748); *Marshall* v. *Knox*, 16 Wall., 551 (83 U. S., XXI., 481); *In re Marter*, 12 Bk. Reg., 188; *Leighton* v. *Harwood*, 12 Bk. Reg., 360; *Barker* v. *Smith*, 12 Bk. Reg., 479; *Hathaway* v. *Brown*, 18 Minn., 414.

The principle, that where a third party has possession of property under a claim of title he cannot be summarily dispossessed, but that the legal and orderly method is to bring an action to determine the respective rights of the parties, decided in relation to assignees in bankruptcy, must apply with still greater force to a United States Marshal acting under a provisional warrant; for he is at the utmost only an assignee *ad litem*, and has more limited power over the bankrupt's estate than the assignee.

Consequently, similar decisions have been made in relation to United States Marshals.

In re Harthill, 4 Ben., 448; *In re Holland*, 12 Bk. Reg., 403; *Marsh* v. *Armstrong*, 11 Bk. Reg., 125.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Superior Court of the City of New York.

Alfred E. Lagrave and James D. Otis, partners in trade, were adjudicated bankrupts on the

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8th day of June, 1872, on a petition filed May 30th. On the first day of June a warrant was issued under the seal of the District Court, in which the bankruptcy proceedings were pending, directed to the Marshal of the district, which, after reciting that a previous order had [687] been obtained for the possession of the bankrupt's goods, proceeded as follows:

"You are, therefore, required and authorized, immediately upon receipt hereof, to take possession provisionally of all the property and effects of said Alfred E. Lagrave, and James D. Otis, and safely keep the same until the further order of the court."

Under this warrant the plaintiff in error, who was the Marshal to whom the writ was directed, seized eight packages of goods. For this act he was sued in the State Court by the defendants in error, who recovered judgment against him for their value, which judgment was finally affirmed by the Court of Appeals of the State of New York.

The case was tried by a jury, the defendant's plea being that the goods were the property of the bankrupts, and were lawfully seized under the warrant for provisional possession.

While it is uncontradicted that the goods had been the property of the bankrupts, evidence was given tending to show that they had been purchased a few days before by the plaintiffs in this action, and other evidence to show that this was done in fraud of the bankrupt law. There was also evidence tending to show that the goods when seized by the Marshal, were not in the possession of the bankrupts but were in the possession of plaintiffs or of some one for them. In this state of the evidence the court gave the jury the following instruction, which was excepted to:

"Gentlemen, as you know, the defendant is a United States Marshal. He has certain powers given to him by statute. Under a warrant of the kind in evidence, the form of which it is unnecessary to read to you, he has authority to take goods belonging to a bankrupt and which are in his possession. He has no authority under such a warrant to take goods from a third person, having possession for himself of the goods, and claiming, as a matter of right, to be entitled to their possession. If that be the case here, the defendant had no right to take these goods from Mr. Ketchum's warehouse. If Mr. Doyle was, as a matter of fact, in possession of these goods, claiming them, as owner, for himself, then the plaintiffs, Doyle and Adolphi, are entitled to recover for the value of the goods what you shall find it to be. Otherwise, the defendant is entitled to a verdict. It will be unnecessary for you to inquire as to the reasons of this; but I say to you briefly, that such [688] a rule of law as that does not finally determine the rights of the parties, because the defendant may only have limited rights to take possession under certain circumstances, while the assignee in bankruptcy for the creditors of Lagrave & Co. might try the question on different principles of law. This defendant is an officer of the law, with certain limited powers."

This charge was decisive of the case, because there was no doubt that the goods when received were in the actual custody of persons other than the bankrupts, under claim of title to them. It also presents a case in which the defendant asserted a right under the laws of the United States, which was refused to him, namely: that the pretended purchase of the plaintiffs was a fraud upon the bankrupt law, and gave them no title to the goods, but that the ownership was, by virtue of the bankruptcy proceedings, in the assignee; and that plaintiffs were not entitled to recover. The soundness of the court's instruction, which was affirmed in the Court of Appeals, depended upon the authority conferred on the Marshal by the provisional warrant of seizure. The case is, therefore, a proper one for a writ of error from this court.

The language of the writ in the Marshal's hand is identical, in its mandatory part, with that of section 5024 of the Revised Statutes, and, if he did no more than the writ commanded him to do, it was a sufficient justification for his act, unless the Act of Congress was unconstitutional. This is not pretended, either here or in the State Courts.

It is a little difficult to see upon what principle the plaintiffs can recover the value of these goods, if they were not the rightful owners of them. It is true, that, in a case of naked trespass, without claim of right in the trespasser, the possessor of the goods may recover, without regard to the state of the title. But such is not the case here. The defendant was acting under a lawful writ from a court which had jurisdiction to issue it. By his plea he took upon himself the burden of proving that the goods were subject to seizure under the writ; and in doing so, he must of course prove that the plaintiffs were not the lawful owners of them. In other words that the right of the assignee in bankruptcy, whose right he represented in that suit, was superior to that of plaintiffs.

But the court said: "You shall not be per- [689] mitted to prove that. If plaintiffs show that they were in possession, asserting ownership, you will not be allowed to contradict that assertion."

Such a proposition is opposed to all the analogies of the law.

If a writ issue from a court of competent jurisdiction, and directing an officer to seize property which is described in the writ, as in case of admiralty or replevin, or in the writ of ejectment, the writ itself is a protection, when the officer is sued in trespass. If, however, the writ in general terms directs or authorizes him to seize the property of an individual without a special description of the property to be seized, he exercises the authority conferred at his own risk as regards the ownership of the property, and whether it is liable to seizure under that process. Such is the rule of law in ordinary writs of attachment, and in the writ of *fieri facias* at common law.

When, however, the officer is sued by some one other than the defendant, in trespass for a wrongful levy of the writ, it has never been doubted that the title to the property and the rightfulness of the seizure under the writ was open to inquiry in such a suit, and that unless plaintiff made out his case before the jury, he must fail. This subject is fully considered by the court in the case of *Buck* v. *Colbath*, 3 Wall., 334 [70 U. S., XVIII., 257].

No just distinction can be seen between this latter class of cases and the one now under consideration. The Act of Congress was designed to secure the possession of the property of the

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bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in that court and the appointment of the assignee, a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceeding, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of the assignee or the process of the court, and thus defy the law. The evidence in this case shows the manner in which this can be done.

It was the purpose of the Act of Congress to [690] remedy this evil. It, therefore, provides that as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of all the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purpose of the writ. There is, therefore, no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found; so here it is made his duty to take into his possession the bankrupt's property wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found property which he believed would belong to the assignee when appointed, as a sufficient reason for failing to take possession of it.

But he does this on his own responsibility for not only a faithful, but a correct, judgment in deciding what property to seize. He is liable to suit if by mistake he takes possession of property not liable to seizure under his warrant.

Such a suit was brought in this case; and we can see no reason why the issue made by the pleadings, namely: the true ownership of the property, should not have been fully submitted to the jury. It was the shortest way to determine the rights of the parties. It was the first time the issue was presented. It was before a court of competent jurisdiction.

To hold that the plaintiffs, by reason of their bare assertion of ownership connected with possession, must recover of the marshal the value of the property, and that the assignee could then have sued plaintiffs and recovered it from them, is a mode of doing justice that does not commend itself to our judgment, even if the assignee could be sure to find a responsible defendant when he came to sue.

We are of opinion that the Court of Appeals [691] of New York was in error in its construction of the bankrupt law and in affirming the instruction of the inferior court.

The judgment of the Superior Court is, therefore, reversed and the case remanded for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 426, 477.

RICHARD A. TILGHMAN, *Appt.*, [707]
v.
WILLIAM PROCTOR ET AL.

(See S. C., 12 Otto, 707-735.)

Patent-right—for a process—subsequent inventor—Tilghman's patent—decisions explained.

*1. A patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, is admissible under the patent laws of the United States.

2. To sustain a patent for a process, the patentee should be the first and original inventor of the process; should claim it in his patent and, if the means of carrying it out are not obvious to an ordinary mechanic skilled in the art, his specification should describe some mode of carrying it out which will produce a useful result.

3. If a subsequent inventor discover a new mode of carrying out a patented process, though he may have a patent for such new mode, he will not be entitled to use the process without the consent of the patentee thereof.

4. The decision in *Mitchell* v. *Tilghman* [XXII., 125], reviewed and overruled; and Tilgman's patent relating to the manufacture of fat acids, sustained as a patent for a process.

5. The decisions in *O'Reilly* v. *Morse*, 15 How., 62, and in the case of Neilson's patent for the hot blast, (Web. Pat. Cas.) commented upon and explained.

[No. 25.]

Argued, Nov. 11, 12, 1880. Decided, Jan. 24, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below by the appellant, to obtain an injunction and other relief against the alleged infringement of a certain patent. A decree was entered against the complainant; whereupon he appealed to this court.

The case is fully stated in the opinion of the court.

***Mr.* Geo. Harding**, for appellant:

Appellant was the discoverer of the chemical fact that fatty or oily substances would be decomposed, and the fat acids and glycerine separated by the action of water at a high temperature and under pressure; and he was the first to describe a process by which his said discovery could be utilized in the arts, *viz.*:

The heating of fatty matter and water in proper proportions, in a closed vessel, of sufficient strength to prevent the evaporation of the superheated water.

Having thus described the mechanical means of carrying into effect his discovery, he is entitled to protection, whatever be the form of the closed receptacle or the means of heating it.

O'Reilly v. *Morse*, 15 How., 62; *Neilson* v. *Harford*, 1 Web. Pat. Cas., 295; *Corning* v. *Burden*, 15 How., 267.

Appellant's patent is for a process, and is patentable; it is not for a mere philosophical principle, unapplied to practical use.

Same cases.

*Head notes by *Mr. Justice* BRADLEY.

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The mention of the use of a "convenient vessel," in appellant's patent, is sufficient without a further description or reference to known existing apparatus.

Household Co. v. *Neilson*, 1 Web. Pat. Cas., 687; *Emerson* v. *Hogg*, 2 Blatchf., 9; *Brooks* v. *Jenkins*, 3 McLean, 447; *Kneass* v. *Schuylkill Bk.*, 4 Wash.(C. C.), 13; see, Patent Rec. p. 8.

Appellees infringe by the use of highly heated water under pressure, to decompose fat into fat acids and glycerine. Appellant's patent is not limited to specific degrees of temperature.

Mowry v. *Whitney*, 14 Wall, 636 (81 U. S., XX., 860, 861); *Goodyear* v. *Wait*, 3 Fish., 248; *Wood Paper Co.* v. *Glens Falls Co.*, 4 Fish., 324.

Appellees infringe none the less because they insert a small per cent of lime in their digesters. Two processes then go on independently of each other, *i. e.*, the old lime saponification process producing lime and soap, and the infringing process, producing free fat acids and glycerine by the use of superheated water alone.

The mere suggestions of actual and possible modes of operation in prior books or patents, is not sufficient to invalidate a patent for a process reduced to practice and adequately described.

Curt. Pat., sec. 378; *Betts* v. *Menzies*, 7 Law Times (N. S.), 110; *Household Co.* v. *Neilson*, 1 Web. Pat. Cas., 690.

Appellant's patent is not void for want of practical utility, nor because lower temperatures than those pointed out in the appellant's patent are generally used, nor because there may be inconvenience in working his process at the *maximum* temperature mentioned by him. *Mowry* v. *Whitney*, 14 Wall., 646 (81 U. S.,XX., 864).

The extension is valid on its face. Its validity cannot be impeached in this suit.

Messrs. **Chas. B. Collyer** and **Matt. H. Carpenter,** for appellees:

The defendants do not infringe the patent of the complainant:

First. Because the high temperature and pressure described and employed in the patent is not employed by the defendants, and could not possibly be realized in the form and character of apparatus used by them.

Second. The complainant to prove infringement, must show, not only that the temperature and apparatus, as employed by defendants, are within the compass of his patent; but, that the defendants do in fact decompose fats into fat acids and glycerine, by the sole agency of water in its liquid form.

Tilghman's alleged invention was not new and his patent is, consequently, void.

Tilghman claims a process whereby fat is decomposed by water; he says the vessel must be so closed, etc., as to "prevent the conversion of the water into steam."

His process may, therefore, be briefly termed a "water process."

Whenever the water becomes a mere auxiliary to other forces, as in defendants' process,although it may be essential to their action, the process is not Tilghman's.

In Gay Lussac and Chevreul's patent, water, in a liquid state, at a pressure of several atmospheres, is an essential agent of the decomposition and solution of glycerine, one of the products. Why is not this patent then a distinct anticipation of Tilghman's? Because the water, although essential, is nevertheless merely auxiliary to the other forces, and acts a subordinate part.

And for the same reason the defendants' process does not infringe complainant's process, although water is present as an essential agent.

The defendants having acquired from the patentee the right to use his patented invention during the original term of the patent, are not liable to him under the extension.

The Act of 1836, section 18, providing for renewals of patents, also provides:

"And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein."

This saving clause of the statute has been considered repeatedly by the Supreme Court, and its meaning definitely determined. The case of most recent date, in which it has been passed upon in that court, is that of *Bloomer* v *Millinger*, 1 Wall., 340 (68 U. S., XVII., 581), and in this case the prior decisions are referred to.

In the case of *Day* v. *Rubber Co.*, 3 Blatchf., 488, the rights of those who have acquired licenses under the original term of the patent to continue under the extended term, without liability to the patentee, when a process is the subject-matter of the patent, is fully established. Referring to all the reported decisions on the question, *Wilson* v. *Turner*, 7 Law Rep., 527; *Wilson* v. *Rousseau*, 4 How.,646, *Wilson* v. *Simpson*, 9 How., 109, and *Bloomer* v. *McQuewan*,14 How., 539.

Mr. Justice **Bradley** delivered the opinion of the court: [708]

This case involves a consideration of the same patent which was the subject of litigation in the case of *Mitchell* v. *Tilghman*, reported in 19th Wallace, 287 [86 U. S., XXII., 125]. The evidence in the present case, which is quite an unwieldy mass, is much the same as in that, being supplemented, however,by the testimony of the patentee respecting the nature of his original experiments and the practicability of using profitably the coil apparatus described in the patent, together with certain exhibits relating to the novelty of the alleged invention. Upon the renewed consideration which has been given to the subject, the court is unanimously of opinion, contrary to the decision in the *Mitchell* case, that the patent of Tilghman must be sustained as a patent for a process, and not merely for the particular mode of applying and using the process pointed out in the specification, and that the defendants have infringed it by the processes used by them.

The patent in question relates to the treatment of fats and oils, and is for a process of separating their component parts so as to render them better adapted to the uses of the arts. It was discovered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow and oil are regular chemical compounds, consisting of a base which has been termed glycerine, and of different acids, termed generally fat acids, but specifically, stearic, margaric and oleic acids. These acids, in combination severally with glycerine, form stearine, margarine,

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and oleine. They are found in different proportions in the various neutral fats and oils; stearine predominating in some, margarine in others, and oleine in others. When separated from their base (glycerine), they take up an equivalent of water, and are called free fat acids. In this state they are in a condition for being utilized in the arts The stearic and margaric acids form a whitish, semi-transparent, hard substance, resembling spermaceti, which is manufactured into candles. They are separated from the oleic acid, which is a thin oily fluid, by hydrostatic or other powerful pressure; the oleine being used for manufacturing soap, and other purposes. The base, glycerine, when purified, has come to be quite a desirable article for many uses.

[709]

The complainant's patent is dated the third day of October, 1854, and relates back to the 9th day of January of that year, being the date of an English patent granted to the patentee for the same invention. It has but a single claim, the words of which are as follows "Having now described the nature of my said invention, and the manner of performing the same, I hereby declare that I claim as of my invention, the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure"

In the case of *Mitchell*, the majority of the court was of opinion that in the application of the process thus claimed the patentee was confined to the method of using the process particularly pointed out in the specification; and as, by that, it was proposed to produce a very rapid separation of the fatty elements by the use of a high degree of heat, the operation being effected in the space of ten minutes by forcing the fat, mixed with water, through a long coil of strong iron tube passing through an oven or furnace where it was subjected to a temperature equal to that of melting lead, or 612° Fahrenheit, it was concluded by the court that the producing of the same result in a boiler subjected to only 400° Fahrenheit, and requiring a period of several hours to effect the desired separation, was not an infringement of the patent, although the process by which the effect was produced, namely: the action of water, in intimate mixture with the fat, at a high temperature and under a sufficient pressure to prevent the formation of steam, was undoubtedly the same. On further reflection, we are of opinion that, in the case referred to, sufficient consideration was not given to the fact that the patent is for a process, and not for any specific mechanism for carrying such process into effect.

[710]

In order to have a clearer understanding of the question, it is necessary to advert briefly to the history of the art, and then to examine the terms of the patent in greater detail.

It is conceded by the complainant that two different processes for effecting a decomposition of fats into their component elements had been in practical operation prior to his invention. These processes were called respectively the alkaline saponification process, and the sulphuric acid distillation process. The first consisted of the manufacture of the fat into soap by the use of lime or other alkali; and then, of the decomposition of the soap, so produced, into the fat acids by the aid of hydrochloric or dilute sulphuric acid. The decomposition of the soap was, by a subsequent improvement, effected by distillation in an atmosphere of steam. The other process, called the sulphuric acid distillation process, consisted of the direct saponification of fat by means of concentrated sulphuric acid, and the subsequent distillation over of the resulting fatty acids. By this process, however, the glycerine was destroyed.

The first of these processes was patented by Gay Lussac & Chevreul in 1825, but was not brought into successful operation in the manufacture of stearic candles until improved by De Milly in 1831. The second process was proposed and developed between 1840 and 1850. It was extensively used during and after that period by the large manufacturing firm of E. Price & Co., of London, and their successors, Price's Patent Candle Company. Mr. G. F. Wilson, one of the shareholders in that establishment, and apparently a man of accurate knowledge on this subject, read various papers illustrative of the history of the manufacture before learned societies in England, extracts from which are contained in the record, and throw considerable light on the matter. It appears from his statements that the distillation of the saponified fat, whether saponified by an alkali or by sulphuric acid, was often accompanied by prejudicial effects from the access of atmospheric air to the contents of the still. To remedy this, he and his associates adopted and patented the introduction of superheated steam into the still or vat containing the fat acids, which excluded atmospheric air, and carried over the fatty vapors into the receiver in a more perfect condition than they had before been able to obtain them. These patents were taken out in 1848. In the following year, the same parties, Gwynne and Wilson, found, what Dubrunfaut had found two or three years before, that palm-oil, which is very fusible and manageable, can be distilled in its crude state, in the manner last described, that is, by the introduction of steam into the still, without the intervention of saponification; and the distilled product being then steam boiled in water, acidulated with sulphuric acid, and the water allowed to settle and separate, the resulting substance would be a fat acid. It is not shown that this process was ever carried into successful operation prior to Tilghman's patent; and judging from what was done by the Price Patent Candle Company in the way of improvement immediately after becoming acquainted with Tilghman's process, it is to be inferred that the steam distillation process, without saponification, was still an unsuccessful experiment when his patent was issued. This experiment, however, must be regarded as the nearest approach to the process of Tilghman of anything done in the art prior to it.

[711]

We do not regard the accidental formation of fat acid in Perkin's steam cylinder from the tallow introduced to lubricate the piston, if the scum which rose on the water issuing from the ejection pipe was fat acid, as of any consequence in this inquiry. What the process was by which it was generated or formed was never fully understood. Those engaged in the art of making candles, or in any other art in which fat acids are desirable, certainly never derived the least hint from this accidental phenomenon in regard to any practicable process for manufacturing such acids.

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The accidental effects produced in Daniell's water barometer and in Walther's process for purifying fats and oils preparatory to soap making, are of the same character. They revealed no process for the manufacture of fat acids. If the acids were accidentally and unwittingly produced, whilst the operators were in pursuit of other and different results, without exciting attention and without its even being known what [712] was done or how it had been done, it would be absurd to say that this was an anticipation of Tilghman's discovery

Nor do we regard the patent of Manicler, which was taken out in 1826, as anticipating the process of Tilghman. It is true that he directs a mixture of fat with about one quarter of its weight of water to be placed in a boiler and subjected to a heat sufficient to create a pressure equal to one atmosphere above the natural atmospheric pressure (or about 250° Fahrenheit); the boiler being provided with a safety-valve which would secure that degree of pressure. But, subject to this pressure, the patent directed that the mixture should be made to boil, and of course that the water should be converted into steam; the words are, "Apply fire to this digester to melt and digest the contained tallow or fat and water and keep up a rapid ebullition during about six hours." It is probable, therefore, that any decomposition of the fat which may have been produced by this process was due to the steam formed and passing through the fat, as no means appears to have been adopted for keeping up the mixture of the fat and water. But we have no evidence that the process was ever successful in practice. One of the defendants' witnesses testifies that he tried it, and though he got some results, he adds this pregnant observation: "To transform all the fat in this way at so low a temperature would have required many days." He only pretends that the sample which he obtained showed by its appearance, as well as by its acid action, that the separation had commenced. Evidently, therefore, this was but an abandoned experiment, since we never hear any more of it from 1826 down to the trial of this cause.

It is unnecessary to examine in detail other alleged anticipations of Tilghman's process. We believe that we have specified the most prominent and reliable instances.

Tilghman's discovery was made in 1853, and was, in brief, this: That the fat acids can be separated from glycerine, without injury to the latter, by the single and simple process of subjecting the neutral fat, whilst in intimate mixture with water, to a high degree of heat under [713] sufficient pressure to prevent the water from being converted into steam, without the employment of any alkali or sulphuric acid, or other saponifying agent; the operation, even with the most solid fats, being capable of completion in a very few minutes when the heat applied is equal to that of melting lead, or 612° Fahrenheit; but requiring several hours when it is as low as 350° or 400° Fahrenheit. The only conditions are, a constant and intimate commixture of the fat with the water, a high degree of heat, and a pressure sufficiently powerful to resist the conversion of the water into steam. The result is, a decomposition of the fatty body into its elements of glycerine and fat acids, each element taking up the requisite equivalent of water essential to its separate existence, and the glycerine in solution separating itself from the fat acids by settling to the bottom when the mixed products are allowed to stand and cool. In this process a chemical change takes place in the fat in consequence of the presence of the water and the active influence of the heat and pressure upon the mixture.

We are satisfied that Tilghman was the original discoverer of this process. His priority was acknowledged at the time by those most interested to question it. Mr. Wilson, to whose statements reference has been made, and who is perhaps more justly entitled than anyone else to claim an anticipation of Tilghman's discovery, makes no such pretension, but, on the contrary, concedes Tilghman's right to priority; and, indeed, Price's Patent Candle Company, of which Mr. Wilson was a member and director, took a license under Tilghman's English patent.

As having some bearing upon the proper construction of the patent in suit, which will presently be more particularly examined, it is proper to observe that Tilghman's actual invention, as demonstrated in his experiments made in 1853, before making any application for a patent, was not confined to the use of a coil of pipe in a heated chamber or furnace for effecting the process which he claims, but was frequently exhibited by using a simple digester, filled nearly full with a mixture of fat and water, and heated in a gas stove, or in a vertical position over a gas lamp; the mixture of fat with the water being kept up by a loose metallic rod or jumper, which thoroughly mixed the contents when the digester was shaken. Sometimes the digester was heated in a horizontal position and, being pro- [714] vided with thin copper partitions fixed inside, was made to revolve in order to cause a more perfect mixture of the materials. In using the digester, it not being provided with a safety-valve, a small space was left at the top for the formation of sufficient steam to prevent, by its elasticity, the vessel from exploding.

In making these experiments Tilghman not only varied the apparatus, but applied different degrees of heat in the operation. The following is his account of some of these proceedings. He says: "Before applying for my patent I had made many experiments in decomposing by water at temperatures below melting bismuth, sometimes in the coil form of apparatus, but most frequently in digesters. The lowest temperature tried by me was three hundred and fifty degrees Fah. (350° F.), or 120 pounds pressure continued for four hours. The digester was as usual in a vertical position, but the heat was in this case given by an oil bath. I obtained both fat acids and glycerine in this experiment, but in such small quantities as to prove that though the decomposition did go on at that heat, yet it was very slow compared with the higher heats. I find notes of another experiment, July 15th, 1854, in the coil apparatus, with palm-oil, made at the melting point of tin, 440° Fah., 360 pounds pressure. It was pumped through the coil very slowly, so as to give about thirty minutes' heat, and found to be partly decomposed, so that it was returned to the inlet end of the apparatus and pumped through a second time at the same rate and heat, which produced perfect decomposition of the palm-oil into fat acids and solution of glyc-

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erine. Ten minutes' exposure would have perfectly decomposed palm-oil at the heat of melting bismuth, 510° F. Yet I found 70° lower heat required six times as long to produce the same effect. I had often decomposed tallow at 510° F. before taking out my patent, not in the coil apparatus, but in the simple vertical digester. In this case I had to allow increased time on account of the imperfect contact of the fat and water in addition to that required by the diminished temperature."

In the course of his testimony, Tilghman explains why, in his patent, he specially recommended the use of the high temperature of melting lead in applying his process to practical use. He says: "Many experiments had shown me that at these higher temperatures the decomposition was carried on with the greatest economy of fuel and cost of apparatus. When in London in 1847, I had found Perkins' house-warming apparatus, consisting of coils of hundreds of feet of pipe, containing water at the temperature of melting lead, had long been in extensive domestic use there. On returning to London in 1853, I found the same apparatus largely used for heating bakers' ovens. As I thus found such heats and pressures were perfectly practical and safe, as well as economical, I thought I was bound to describe my invention in what I then believed to be the best mode of carrying it out, and that, as I was the discoverer of the chemical fats, I could then claim broadly as my process the use of water highly heated and under pressure to decompose fats, no matter what temperature or apparatus was used."

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And being asked for his present view as to the practicability, economy and safety of the higher temperatures as compared with lower temperatures, he said: "I think the high-pressure apparatus is much more economical, both in the first cost and in the expense of working. Its principal disadvantage is that ordinary engineers are not familiar with its management, and consequently dislike it."

In December, 1853, Tilghman, having completed his experiments to his own satisfaction, filed a *caveat* in the Patent-Office preparatory to taking out a patent for his invention. In this *caveat* he says: "The invention consists in subjecting animal and vegetable fatty and oily substances containing glycerine to a high temperature and pressure in close vessels, mixed with different agents, according to the effect desired to be produced upon the fatty matter. Thus, when I wish to convert the neutral fatty substances into fatty acids and glycerine, I pump a mixture of the fat and water, under great pressure, through a series of strong metal tubes, kept at about the heat of melting lead, and provided with a cooling-worm and safety-valve at its outlet. The neutral fatty substance is decomposed by the process, and the fat acid and solution of glycerine which issue through the safety-valve separate by settling."

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Tilghman soon after repaired to England and took out a patent there, dated the 9th day of January, 1854, and sealed the 25th of March. He immediately put in operation an apparatus for exhibiting his process on a small scale. Mr. Wilson, before mentioned, witnessed his experiments, and thus speaks of them in a paper communicated to the Journal of the Society of Arts, January 25, 1856:

"In January, 1854, Mr. Tilghman, an American chemist, who has studied all that has been published here and in France on the subject of acidification and distillation of fatty bodies, obtained a patent for exposing fats and oils to the action of water at a high temperature and under great pressure, in order to cause the combination of the water with the elements of the neutral fats, so as to produce at the same time free fat acids and solution of glycerine. He proposed to effect this by pumping a mixture of fat and water, by means of a force-pump, through a coil of pipe heated to about 612° Fahrenheit, kept under a pressure of about 2,000 pounds to the square inch; and he states that the vessel must be closed, so that the requisite amount of pressure may be applied to prevent the conversion of water into steam. This is, all must admit, a beautiful, original, chemical idea, well carried out; it has yet to prove how far it can compete successfully with distillation. We have made an arrangement with Mr. Tilghman which will give us the means of testing its commercial merits."

Mr. Wilson goes on to state that this process of Tilghman suggested to them the idea of distilling fats by passing steam into them at a high temperature whereby to resolve them into glycerine and fat acids. They found the plan successful, and that the glycerine distilled over with the fat acids, but no longer combined with them; and, in July, 1854, they took out a patent for that process. In a paper read before the Glasgow meeting of the British Association for the Advancement of Science, in September, 1855, Mr. Wilson thus refers to the course of discovery which took place in this branch of manufacture:

"By our first improvement in separating the fat acids from neutral fats, the glycerine was decomposed by the direct action of concentrated sulphuric acid at a high temperature, and all that remained of it was a charred precipitate. A new process for decomposing neutral fats by water under great pressure coming under our notice" (referring to Tilghman's process) "led us to look again more closely into our old distilling processes, and the doing this showed, what we had often been on the brink of discovering, that glycerine might be distilled.

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In our new process the only chemical agents employed for decomposing the neutral fat, and separating its glycerine, are steam and heat; and the only agents used in purifying the glycerine thus obtained are heat and steam; thus all trouble from earthy salts or lead is escaped.

Distillation, however, purifies the impure glycerine of the old sources.

On the table is a series of products of palm-oil, which will serve to illustrate the process. Steam, at a temperature of from 550° to 600° Fah., is introduced into a distillery apparatus containing a quantity of palm-oil. The fatty acids take up their equivalents of water, and the glycerine takes up its equivalent; they then distill over together. In the receiver the condensed glycerine, from its higher specific gravity, sinks below the fat acids."

We quote more fully from this paper, be-

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cause it is a contemporary acknowledgment, made by a man who stood in the front rank of those who understood and whose interest it was to understand the most advanced process of resolving fats and oils into their component parts, that Tilghman's "process for decomposing neutral fats by water under great pressure" was "a new process;" and who, with his associates, took hints from it for making new departures and improvements in the art. The statements of Mr. Wilson on this subject are corroborated by other witnesses. Indeed, nearly all those competent to speak on the subject state or admit that the process of decomposing fats into glycerine and fat acids by mixing them with water and subjecting the mixture to a high degree of heat under a pressure sufficient to prevent the conversion of the water into steam, was not known in the arts prior to Tilghman's discovery. The testimony of some experts to the contrary is based upon their construction of certain patents and publications produced in evidence, the most important of which have already been adverted to.

The question then arises: has Tilghman secured the exclusive right to the process of which he was thus the inventor?

An examination of the patent itself, which [718] the preceding remarks will enable us better to understand, will show, we think, that it was intended to and does cover and secure to the patentee the general process which has been described, although only one particular method of applying and using it is pointed out.

The specification describes the invention as follows:

"My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine as their base. For this purpose, I subject these fatty or oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water, and thereby obtain at the same time free fat acids and solution of glycerine. I mix the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam.

The process may be performed more rapidly and also continuously by causing the mixture of fatty matter and water to pass through a tube or continuous channel, heated to the temperature already mentioned; the requisite pressure for preventing the conversion of water into steam being applied during the process; and this I believe is the best mode of carrying my invention into effect. In the drawing hereunto annexed are shown figures of an apparatus for performing this process speedily and continuously, but which apparatus I do not intend to claim as any part of my invention."

The specification then goes on to describe, by the aid of the drawing referred to, the particular device mentioned. But it is evident, and indeed is expressly announced, that the process claimed does not have reference to this particular device, for the apparatus described was well known, being similar to that used for producing the hot-blast and for heating water for the purpose of warming houses. It consists of a coil of iron pipe or other metallic tubing erected in an oven or furnace, where it can be subjected to a high degree of heat; and through this pipe the mixture, of nearly equal parts of fat and water, made into an emulsion in a separate vessel by means of a rapidly vibrating pis- [719] ton or dasher is impelled by a force-pump in a nearly continuous current, with such regulated velocity as to subject it to the heat of the furnace for a proper length of time to produce the desired result; which time, when the furnace is heated to the temperature of 612° Fah., is only about ten minutes. The fat and water are kept from separating by the vertical position of the tubes, as well as by the constant movement of the current; and are prevented from being converted into steam by weighting the exit valve by which the product is discharged into the receiving vessel, so that none of it can escape except as it is expelled by the pulsations produced by the working of the force-pump. Before arriving at the exit valve, the pipe is passed, in a second coil, through an exterior vessel filled with water, by which the temperature of the product is reduced. After the product is discharged into the receiving vessel, it is allowed to stand and cool until the glycerine settles to the bottom and separates itself from the fat acids. The latter are then subjected to washing and hydraulic pressure in the usual way.

After describing this apparatus it is added

"Although the decomposition of the neutral fats by water takes place with great quickness at the proper heat, yet I prefer that the pump should be worked at such a rate, in proportion to the length or capacity of the heating tubes, that the mixture, while flowing through them, should be maintained at the desired temperature for ten minutes before it passes into the refrigerator or cooling part of the apparatus."

It is evident that the passing of the mixture of fat and water through a heated coil of pipe standing in a furnace is only one of several ways in which the process may be applied. The patentee suggests it as what he conceived to be the best way, apparently because the result is produced with great rapidity and completeness. But other forms of apparatus, known and in public use at the time, can as well be employed without changing the process. A common digester or boiler can evidently be so used, provided proper means are employed to keep up the constant admixture of the water and fat, which is a *sine qua non* in the operation. Tilgh- [720] man himself, as we have seen, often used such digesters in making his experiments before applying for his patent; and, in putting up machinery for his licensees after his patent was obtained, he did the same thing when the parties desired it. Yet surely the identity of the process was not changed by thus changing the form of apparatus. No great amount of invention was required to adapt different forms of well-known apparatus to the application of the process. The principal difficulty would be in providing an internal arrangement in the boiler, or digester, for successfully keeping up the intimate commixture of the fat and water. It is

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evident that this could be accomplished by means of revolving reels armed with buckets, or of a force-pump constantly transferring the heavy stratum of water from the bottom of the mass to the top, aided by horizontal diaphragms partially sectionizing the digester. These devices were resorted to by Tilghman and others when they used a boiler instead of a coil of pipe.

Whilst Tilghman in his patent recommends the high degree of heat named, he does not confine himself to that. It had been fully developed in his experiments, and was well known to him, that a lower degree of heat could be employed by taking longer time to perform the operation; and this would be necessary when boilers or digesters of considerable size were used instead of the coil of pipe, on account of the decreasing power of large vessels to resist the internal pressure. The specification, after describing the use of a metallic coil of pipe, proceeds to add:

"The melting point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matters into fat acid and glycerine takes place with some materials, such as palm-oil, at or below the melting point of bismuth (510° Fah.); yet the heat has been carried considerably above the melting-point of lead without any apparent injury, and the decomposing action of the water becomes more powerful as the heat is increased. By starting the apparatus at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined."

[721] Now when we find it stated, as we do in this specification, that the patentee subjects "fatty or oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water;" that "the mixture may be placed in any convenient vessel in which it can be heated to the melting point of lead, until the operation is complete;" that "the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam;" that "the decomposition of the neutral fats by water takes place with great quickness at the proper heat;" that 'the melting point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results;" that "the change of fatty matters into fat acid and glycerine takes place with some materials at or below the melting point of bismuth;" that "the decomposing action of water becomes more powerful as the heat is increased;" that, "by starting the apparatus at a low heat and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined;" and when we then find that the patentee categorically claims, in general terms, as his invention "*The manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure*;" and being satisfied that he was, in fact, the inventor of the general process described and bodied forth in the specification, how can we, by any fair rule of construction, circumscribe this claim in such a manner as that it shall only cover the process when applied in the use of a coil of pipe heated to 612° Fahrenheit? Or, if we allow it to embrace any "convenient vessel," and do not confine it to a coil of pipe, how can we confine it to a particular degree of heat? What did Tilghman discover? And what did he, in terms, claim by his patent? He discovered that fat can be dissolved into its constituent elements by the use of water alone under a high degree of heat and pressure; and he patented *the process* of "manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." Had the process been known and used before, and not been [722] Tilghman's invention, he could not then have claimed anything more than the particular apparatus described in his patent; but being the inventor of the process, as we are satisfied was the fact, he was entitled to claim it in the manner he did.

That a patent can be granted for a process, there can be no doubt. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art, within the meaning of the law. Goodyear's patent was for a process, namely. the process of vulcanizing India rubber by subjecting it to a high degree of heat when mixed with sulphur and a mineral salt. The apparatus for performing the process was not patented, and was not material. The patent pointed out how the process could be effected, and that was deemed sufficient. Neilson's patent was for the process of applying the hot-blast to furnaces by forcing the blast through a vessel or receptacle situated between the blowing apparatus and the furnace, and heated to a red heat; the form of the heated vessel being stated by the patent to be immaterial. These patents were sustained after the strictest scrutiny and against the strongest opposition.

On the subject of patents for processes, *Mr. Justice* Grier, in delivering the opinion of this court in *Corning* v. *Burden*, 15 How., 267, said: "A process *eo nomine* is not made the subject of a patent in our Act of Congress. It is included under the general term, 'useful art.' An art may require one or more processes in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function or to produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods or operations are called processes. A new process is usually the result of a discovery, a machine of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores, and numerous others, are usually carried on by processes as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, etc., irrespective of any particular form of machinery or mechanical device. And another may invent a labor- [723] saving machine, by which the operation or process may be performed, and each may be entitled to his patent. As, for instance, A has discovered that by exposing India rubber to a certain degree of heat, in mixture or connection with cer-

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tain metallic salts, he can produce a valuable product or manufacture; he is entitled to a patent for his discovery, as a process or improvement in the art irrespective of any machine or mechanical device. B, on the contrary, may invent a new furnacce or stove or steam apparatus, by which this process may be carried on with much saving of labor and expense of fuel, and he will be entitled to a patent for his machine as an improvement in the art."

Neilson's patent above refered to had some features very similar to those of Tilghman's. The strong objection urged against the latter is, that the particular apparatus described in the specification is not that which is generally used, and that it cannot be used with much profit or success in large manufacturing operations; whereas, the slower method of dissolving fats in a common boiler or digester at a lower temperature even than that of melting bismuth, which is not described in the specification, is the one which is generally adopted. Precisely this circumstance existed in reference to the patent of Neilson. The specification directed that the blast or current of air produced by the blowing apparatus should be passed into an air vessel or receptacle heated to a red heat, and from thence into the furnace. Then, after stating that the air vessel or receptacle should be increased in size according to the size of the forge or furnace to be supplied, the specification adds: "The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation." Now, the most simple and natural form of an air vessel, for heating the blast, as here directed, would be a box or chamber, or a cylindrical vessel; but it turned out in practice that a receptacle of this kind would answer the purpose but very imperfectly; and that the best and most useful method was to heat the blast in a series of tubes placed in a heated oven. This was held to be no ground for invalidating the patent, or for preventing it from covering intermediate tubes, as well as an intermediate box or chamber, the jury being of opinion that a man of ordinary skill and knowledge in the construction of blowing and air-heating apparatus would be able, from the information contained in the specification, to erect a machine which would answer some beneficial purpose in the application of the process, and would not be misled and prevented from so doing by the declaration that the form or shape of the vessel or receptacle was immaterial to the effect. In this view of the subject, the patent was sustained after very great consideration.

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Some question has, indeed, been made whether Neilson's patent was sustained as a patent for a process. The Court of Exchequer, in reviewing the proceedings at the trial, and answering the objection that it was a patent for a principle, said: "It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of some of the court much difficulty; but, after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented *a mode of applying it* by a mechanical apparatus to furnaces; and his invention consists in this—*by interposing a receptacle for heated air between the blowing apparatus and the furnace.* In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast which was before of cold air, in a heated state to the furnace." *Neilson* v. *Thompson*, Web. Pat. Cas., 275, 371.

In this passage, we think that the Court of Exchequer (who spoke through Baron Parke) drew the true distinction between a mere principle, as the subject of a patent, and a process by which a principle is applied to effect a useful result. That a hot-blast is better than a cold-blast for smelting iron in a furnace was the principle or scientific fact discovered by Neilson; and yet, being nothing but a principle, he could not have a patent for that. But having invented and practically exemplified a process for utilizing this principle, namely: that of heating the blast, in a receptacle, between the blowing apparatus and the furnace, he was entitled to a patent for that process, although he did not distinctly point out all the forms of apparatus by which the process might be applied; having, nevertheless, pointed out a particular apparatus for that purpose, and having thus shown that the process could be practically and usefully applied. Another person might invent a better apparatus for applying the process than that pointed out by Neilson, and might obtain a patent for such improved apparatus; but he could not use the process without a license from Neilson. His improved apparatus would, in this respect, stand in a relation to the process analogous to that which an improvement on a patented machine bears to the machine itself.

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That Neilson's patent was regarded as for a process is apparent from what is said by the Judges who had it under consideration. Thus Baron Parke at the trial had said: "The specification and patent together make it clear what the discovery was; it was the introduction of hot air by means of heating it before it was introduced into the furnace, between the blowing apparatus and the furnace." Web. P. C., 312. And when the matter came before the House of Lords, after a trial in Scotland, Lord Campbell said: "After the construction first put upon it (the patent) by the learned Judges of the Court of Exchequer, sanctioned by the high authority of my noble and learned friend now upon the woolsack, when presiding in the Court of Chancery, I think the patent must be taken to extend to all machines, of whatever construction, whereby the air is heated intermediately between the blowing apparatus and the blast furnace. That being so, the learned Judge was perfectly justified in telling the jury that it was unnecessary for them to compare one apparatus with another, because, confessedly, that system of conduit pipes was a mode of heating air by an intermediate vessel between the blowing apparatus and the blast furnace, and, therefore, it was an infraction of the patent." *Househill* v. *Neilson*, Web. Pat. Cas., 715.

This case of the hot-blast was commented upon in the great case of *O'Reilly* v. *Morse*, reported in 15th How., 62-116, and is there recognized and approved in the opinion of this court delivered by *Chief Justice* Taney. After quoting the remarks of Baron Parke in the Court of Exchequer, cited above, the *Chief Justice* says: "We see nothing in this opinion differing

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in any degree from the familiar principles of law [726] applicable to patent cases. Neilson claimed *no particular mode* of constructing the receptacle, or of heating it. He pointed out the manner in which it *might* be done; but admitted that it might also be done in a variety of ways, and at a higher or lower temperature; and that all of them would produce the effect in a greater or less degree, provided the air was heated by passing through a heated receptacle. * * * Whoever, therefore, used this method of throwing hot air into the furnace, used *the process* he had invented, and thereby infringed his patent, although the form of the receptacle or the mechanical arrangements for heating it might be different from those described by the patentee. For whatever form was adopted for the receptacle, or whatever mechanical arrangements were made for heating it, the effect would be produced in a greater or less degree, if the heated receptacle was placed between the blower and the furnace, and the current of air passed through it. * * * The patent was supported because he (Neilson) had invented a mechanical apparatus by which a current of hot air, instead of cold, could be thrown in. And this new method was protected by the patent. The interposition of a heated receptacle *in any form* was the novelty he invented." *O'Reilly* v. *Morse*, 15 How., 115, 116.

We have quoted these remarks of the *Chief Justice* more fully because they show most clearly that he put the same construction upon Neilson's patent that was put upon it by Lord Campbell, and that he fully acquiesced in the legality and validity of a patent for a process. Yet it has been supposed that the decision in *O'Reilly* v. *Morse* was adverse to patents for mere processes. The mistake has undoubtedly arisen from confounding a patent for a process with a patent for a mere principle. We think that a careful examination of the judgment in that case will show that nothing adverse to patents for processes is contained in it. The eighth claim of Morse's patent was held to be invalid, because it was regarded by the court as being not for a process, but for a mere principle. It amounted to this, namely: a claim of the exclusive right to the use of electro-magnetism as a motive power for making intelligible marks at a distance; that is, a claim to the exclusive use of one of the powers of nature for a particular purpose. It was not a claim of any particular machinery, nor a [727] claim of any particular process for utilizing the power but a claim of the power itself; a claim put forward on the ground that the patentee was the first to discover that it *could* be thus employed. This claim the court held could not be sustained.

That this was the true ground of the decision will be manifest from the following observations of the *Chief Justice* in the opinion already quoted from. He says: "He (Morse) claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs or letters at a distance. If this claim can be maintained, it matters not by what *process* or *machinery* the result is accomplished. For aught that we now know, some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. * * * In fine, he claims an exclusive right to use a *manner and process* which he has not described, and indeed had not invented, and therefore could not describe when he obtained his patent. The court is of opinion that the claim is too broad and not warranted by law. * * * It is the high praise of Professor Morse that he has been able by a new combination of known powers, of which electro-magnetism is one, to discover a method by which intelligible marks or signs may be printed at a distance. And for the method or process thus discovered he is entitled to a patent. But he has not discovered that the electro-magnetic current, used as a motive power, in any other method and with any other combinations, will do as well." After reviewing the statutes and decisions bearing upon the subject, the *Chief Justice* makes a summary conclusion of the whole matter, as follows: "whoever discovers that a certain useful result will be produced, in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact that anyone skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if [728] this cannot be done by the means he describes, the patent is void. And if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination; or by the application of discoveries or principles in natural philosophy, known or unknown before his invention; or by machinery acting altogether upon mechanical principles. In either case, he must describe *the manner or process* as above mentioned, and the end it accomplishes. And anyone may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described." *O'Reilly* v. *Morse*, 15 How., 119.

It seems to us that this clear and exact summary of the law affords the key to almost every case that can arise. "Whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means." But everything turns on the force and meaning of the word "means." It is very certain that the means need not be a machine, or an apparatus; it may, as the court says, be a *process*. A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye, an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result. The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process. If the mode of doing it or the apparatus in or by which it may be done is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving supererogatory

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directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discover. But [729] he must describe some particular mode, or some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience.

Let us apply these principles to the present case. In the first place the claim of the patent is not for a mere principle. The chemical principle or scientific fact upon which it is founded is, that the elements of neutral fat require to be severally united with an atomic equivalent of water in order to separate from each other and become free. This chemical fact was not discovered by Tilghman. He only claims to have invented a particular mode of bringing about the desired chemical union between the fatty elements and water. He does not claim every mode of accomplishing this result. He does not claim the lime saponification process, nor the sulphuric acid distillation process, and if, as contended, the result was accomplished by Dubrunfaut, Wilson and Scharling, by means of steam distillation, he does not claim that process. He only claims the process of subjecting to a high degree of heat a mixture continually kept up, of nearly equal quantities of fat and water in a convenient vessel strong enough to resist the effort of the mixture to convert itself into steam. This is most certainly a process. It is clearly pointed out in the specification, and one particular mode of applying it and carrying it into effect is described in detail. But it is not the particular apparatus described which Tilghman desires to secure by his patent. Having pointed out the process and suggested a particular mode of applying it, he claims as his invention "*the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure.*" The true construction of this claim is to be sought by comparing it, as we have already done, with the context of the specification; with the statement of the patentee that his "invention consists of a *process* for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin, which contain glycerine as a base;" that "for this purpose he subjects these fatty and oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water and thereby obtain at the same time free fat acids and solution of glycerine;" [730] that he "mixes the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel in which it can be heated to the melting point of lead" (which is afterwards explained to be only desirable for a quick result, not essential); that "the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam." This is the process which the patentee claims to have invented; and this description of it gives the proper construction and qualification to the claim.

It is objected that the particular apparatus described in the patent for carrying the process into effect cannot be operated to produce any useful result. We have examined the evidence on this point, and are satisfied that it shows the objection to be unfounded. A recapitulation of this evidence is not necessary. The testimony of Tilghman himself, of Professor Booth and of Mr. Wilson is directly to the point.

It only remains that we should express our views on the question of infringement. The defendants advance several reasons for the purpose of showing that their process does not conflict with that of Tilghman. First, because they do not use the apparatus described in the complainant's patent; but use a boiler in which the charge of fat and other materials is placed and heated; and do not mix the fat and water in the manner pointed out in the specification of the patent but, on the contrary, have inserted in the boiler a pump which forces the water as it settles to the bottom upwards to the top of the mass and pours it upon the upper surface, whence it again finds its way down through the fat, thus keeping up a constant mixture. It is unnecessary to add anything further on the subject of the form of the apparatus used. The patentee is not confined to a metallic coil of pipe heated in a furnace; but his patent extends to and embraces any convenient vessel for holding the mixture, which is strong enough to sustain the pressure necessary to prevent the water from being converted into steam. The defendants use such a vessel, and use it for the purpose indicated and pointed out in the patent. The vessel which they use has the requisite strength to prevent the water from being converted into [731] steam, and does effect that object. And as to the defendants' using a different method from that suggested in the patent for keeping up the mixture of fat and water, that is of no consequence. The keeping up of the mixture is the important thing. That is a necessary part of the process. They employ such a device for effecting this as is adapted to the form of vessel in which they heat the material. Using a boiler instead of a coil of pipe for this purpose, they are obliged to employ an additional or modified means for keeping up the mixture. They only employ such means as, in view of the change adopted in the form of the heating apparatus, and of the known appliances in use in analogous processes, would naturally suggest themselves to a mechanic skilled in the art. Or, if the mode of effecting the continued mixture adopted by the defendants should be deemed a new and useful improvement, they might perhaps have a patent for that peculiar device without being entitled to use Tilghman's process, on which it is but an improvement.

Another ground on which the defendants argue that they do not infringe the patent is, that they do not, in their process, use water alone in admixture with fat, but use also some portion of lime: that they formerly used seven per cent of lime, and now use four per cent. But they do not use lime in the manner and to the extent in which it is used for dissolving fats by the

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saponifying process. That requires twelve or fourteen per cent. Even if the saponifying process partly takes place, they use Tilghman's process for effecting the balance of the operation. They use water in admixture with fat, heated to a high degree, far above the boiling point, and yet subjected to such pressure as to prevent the water from being converted into steam; and though they may also use other things at the same time, which other things may facilitate the operation, or render a less degree of heat necessary than would be required when water alone is used, and thus actually improve the process of Tilghman, yet this process is included in their operation and forms the basis of it. It is idle, therefore, to say that they do not infringe Tilghman's patent. It is unnecessary to determine what precise part the lime used by the defendants plays in their process; whether, as the complainant contends, it saponifies the fat to a certain extent, leaving the remainder to be acted upon by the water alone purely after the process of Tilghman; or whether, as the defendants contend, the lime produces a more perfect and active commixture of the fat and water, or predisposes the fat to unite with the requisite elements of water necessary for producing glycerine and the fat acids, in either case the process of Tilghman, modified or unmodified by the supposed improvement, underlies the operation performed in the defendants' boilers. [732]

Another ground assumed by the defendants to avoid the charge of infringement is, that they do not heat the mixed mass in the manner pointed out in Tilghman's specification; but, instead of heating the containing vessel by an outside application of heat, they heat the contents by the introduction of super-heated steam. But we think that this does not alter the essential character of the process. The heating by steam is clearly an equivalent method to that of heating by an external fire. The patent does not prescribe any particular method of applying the heat, except when using the pipe and coil apparatus described in the specification; and, even in the use of this apparatus, the outward application of the heat to the pipe is suggested incidentally and as a matter of convenience rather than as an essential requisite. The patentee showed one method in which the heat could be applied. That was all that was necessary for him to do. If it could be applied in any number of different methods, it would not affect the validity of the patent as a patent for a process. The method of heating the mixture by the introduction of steam may be attended with some beneficial results, in producing an agitation, or automatic circulation helpful to the perfection of the admixture of the water and fat; and so far it may be an improvement on heating from without. Suppose this to be so, as before said, the introduction of an improvement gives no title to use the primary invention upon which the improvement is based.

Finally, the defendants argue that they only use a low degree of heat and pressure compared with that pointed out by the patent, namely: only about 310° Fahrenheit instead of 612.° The precise degree of heat, as we have seen, is not of the essence of the patent. The specification only claims that a high degree of heat, such as would be sufficient to melt lead, is most effective and rapid in producing the desired result; but suggests a trial of the apparatus employed with different degrees of heat so as to ascertain that which is best for each particular kind of fat. "By starting the apparatus," the language is, "at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined." It is probably true, as contended for by the defendants, that by the use of a small portion of lime, the process can be performed with less heat than if none is used. It may be an improvement to use the lime for that purpose; but the process remains substantially the same. The patent cannot be evaded in that way. The matter may be stated thus: Tilghman discovers a process of decomposing fats by mixing them with water, and heating the mixture to a high temperature under a pressure that prevents the formation of steam. It is a new process, never known before. The defendants seeing the utility of the process, and believing that they can use a method somewhat similar without infringing Tilghman's patent, put a little lime into the mixture, and find that it helps the operation, and that they do not have to use so high a degree of heat as would otherwise be necessary. Still, the degree of heat required is very high, at least a hundred degrees above the boiling point; and a strong boiler or vessel is used in order to restrain the water from rising into steam. Can a balder case be conceived of an attempted evasion and a real infringement of a patent? [733]

And as to the low degree of heat used in the operations of the defendants, this must also be said: that, with the reduction of the temperature, the time of perfecting the operation is more than proportionally increased. Tilghman was aware of this result, and pointed it out in his patent. He expressly says: "The decomposing action of the water becomes more powerful as the heat is increased." What can be done in minutes by the application of a very high degree of heat, requires hours to do at the temperature used by the defendant. But the process is still the same, and the defendants fail to evade the patent.

We pass by the fact that the defendants first took a license from the patentee, and under it and under his directions erected substantially the same apparatus which they are yet using. Receiving what they regarded as additional light, they refused to continue the payment of a royalty, and put the complainant to his legal remedy. [734]

It is our opinion that the patent is for a process, that it is a valid patent, and that the defendants infringe it.

We have considered the case entirely upon its merits. It is unnecessary to bestow much discussion upon the technical objections that have been raised. They have not been pressed in the argument, and are probably not seriously relied on. One of them is, that no replication was filed in the case. To this it may be answered, that the parties have throughout treated the case as though it were regularly at issue. The various stipulations into which they have entered, with regard to the admission of evidence to be heard on the trial of the cause, are totally inconsistent with the idea that the case was to be heard merely on bill and answer. Another

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objection is, that the patent was dated more than six months prior to the filing of the application for it. But under the law then in force, 1854, with regard to the antedating of patents where a foreign patent had been obtained, this was admissible. The 6th section of the Act of March 3d, 1839, entitled "An Act in Addition to an Act to Promote the Progress of the Useful Arts," expressly declared "that no person shall be debarred from receiving a patent for any invention or discovery * * * by reason of the same having been patented in a foreign country more than six months prior to his application; *Provided*, That the same shall not have been introduced into public and common use in the United States prior to the application for such patent; *And provided also*, That in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters-patent." Now, we know by the proceedings on the application in this case that the attention of the Commissioner of Patents was expressly called to the fact of the issuing of the English patent, and that the question of the [735] date of the patent in suit was submitted to and considered by him. Under the laws then in force, he determined that the patent ought to be antedated as of the date of the English patent. It must be presumed that his decision was right according to the facts of the case, at least until the contrary is shown; and nothing has been shown to the contrary by any evidence in the cause to which our attention has been called.

The decree of the Circuit Court is reversed, and the cause remanded with directions to enter a decree in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—7 Sawy., 359.

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[647] JAMES S. TRIMBLE *Appt.*,
v.
JOSHUA WOODHEAD ET AL.

(See S. C., 12 Otto, 647-650.)

Bankrupt law—rights of assignee.

1. Rights to property fraudulently transferred by a bankrupt, pass to his assignee in bankruptcy, and a creditor of the bankrupt cannot assert them in his own name.
2. The failure of the assignee to sue within two years does not transfer his right of action to a creditor.

[No. 127.]
Submitted Dec. 8, 1880. Decided Jan. 31, 1881.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The case is fully stated by the court.

Messrs. J. G. Carlisle and *James O'Hara, Jr.*, for appellant.

Messrs. Stanley Matthews and *Wm. M. Ramsey*, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

The appellant, who was plaintiff below, brought his bill in chancery in the Circuit Court for the District of Kentucky and, after hearing on bill, answer, replication and evidence, it was dismissed.

The substance of the bill is that Joshua Wood- [648] head was largely indebted to him for government bonds and money loaned for which he had recovered judgments that had proved unavailing; that Ann Woodhead, the wife of Joshua, held the legal title to certain valuable real estate, on which was a flouring mill and other improvements. That the land was purchased by Joshua's money, and the title made to Ann with intent to defraud the creditors of Joshua: and that valuable improvements had been placed on the land, the payment for which was made by Joshua's money. The prayer of the bill was to subject this land to sale for the payment of plaintiff's judgment.

The answer of Ann denied all this, and also set up as a bar to the relief prayed a former suit in one of the state courts concerning the same subject between the same parties. The record of the proceedings in the state court is set out in full, and much evidence on both sides as to the main allegation of fraud alleged in the bill in the present suit is found in the record, all of which, in the view we take of the case, is immaterial.

The defendant, Joshua, answered "that long before the bringing of this suit this defendant had filed his petition in this honorable court under the bankrupt law of the United States, and the said orator, the said James S. Trimble, was duly notified of the same, and the claim of the said orator was therein set forth, and after the proper proceedings as prescribed in said law, this defendant was on his petition adjudged a bankrupt, and by a judgment of this court he was finally discharged from all of his indebtedness, and the claim of the orator was one of the debts from which he was thus discharged; he files herewith a copy of his judgment of discharge as part hereof."

The proceedings in bankruptcy are not found in this record, nor have we been able to find in it a copy of Woodhead's discharge; but the answer of Woodhead is sworn to. The plaintiff also filed an amended bill, in which he makes John T. Levis, a defendant, whom he alleges to be assignee in bankruptcy of the defendant, Joshua. He says in this amended bill that the judgment recovered by him in the state court was obtained after the discharge of said Woodhead as a bankrupt.

It may, therefore, be accepted as established by the pleading that Woodhead was regularly discharged of all his debts by proceedings in bankruptcy, and that in those proceedings John T. Levis was made the assignee with the usual [649] effect of such an appointment.

It is as well to observe here that while the amended bill of plaintiff made Levis a defendant in his character of assignee, and the record shows an order of court for process to issue against him no such process, nor any other notice to him, nor any appearance by him or for him is found in the record. As to him, therefore, and the rights represented by him, the bill is of no effect.

The case of *Glenny* v. *Langdon*, 98 U. S., 20 [XXV., 43], conclusively establishes the proposition that the rights asserted in this bill passed to the assignee in bankruptcy of Woodhead, and that a creditor of Woodhead cannot assert them in his own name.

In that case the plaintiff ought to avoid

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this difficulty by alleging that he had requested the assignee to bring suit or assert the right in some other way, who had refused to do so. That made a stronger case than the present one, where no such application was made. The abortive effort to make the assignee a party without service of process or appearance for him does not help the case.

Nor can we attach much importance to the allegation in the amended bill, that two years had elapsed without suit by the assignee, for the assignee might not have discovered the fraud, or if brought judicially into court might have asserted his right not only against the plaintiff but against Mrs. Woodhead, for the benefit of all the creditors.

We do not see on what principle the failure of the assignee to sue within two years transfers his right of action to plaintiff.

The right was certainly in the assignee. That right, if barred by the Statute of Limitations, would, if it had any effect on the title, make good the title of defendant. See *Meeks* v. *Olpherts*, 100 U. S. 564 [XXV., 785]. It seems to be well settled that, in regard to real estate, the undisturbed possession of the wrong-doer for the time necessary to bar the action makes of itself a good title in the party holding such possession.

It would be a curious application of this principle in the present case, which concerns real estate, to hold that this same lapse of time, instead of making good defendant's title, or acting as a bar to the right to bring suit, transfers [650] that right to another unimpaired by the lapse of time.

Nor is the creditor of a bankrupt without remedy in such case as the present. If he is aware of the existence of property or credits, which should rightfully go to the assignee for the benefit of the creditors, he should inform the assignee of all he knows on the subject, and request him to proceed, by suit, if necessary, to recover it. If he declines, a petition to the court of original jurisdiction would, if a proper case was made, compel the assignee to proceed. See *Glenny* v. *Langdon*, already cited. Indeed the whole question is so fully considered in that case that little more need be said.

We may, however, suggest consequences readily to be seen if any other doctrine were held.

The primary object of the bankrupt law is to secure the equal distribution of the property of the bankrupt of every kind among his creditors. This can only be done through the rights vested in the assignee and the faithful discharge of his duties. Let us suppose, however, that a creditor of the bankrupt is aware of the existence of property of the bankrupt sufficient to satisfy his own debt, which has not come to the possession or knowledge of the assignee. He has but to keep silence for two years, and then bring suit in his own name against the fraudulent holder of this property, and make his debt really at the expense of the other creditors; or he may have an understanding with the bankrupt, who, after two years, and after his own discharge from all his debts may confess judgment to this creditor and furnish him the evidence to prove the fraud, and thus secure him a preference forbidden by the Act itself.

In the present case, if any right exists to subject this property in the hands of Ann Woodhead to the payment of the debts of her husband, which existed prior to the bankruptcy proceedings, that right is in the assignee, and such right is not divested by anything shown in this case.

The bill of the appellant was, therefore, properly dismissed, and the decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 303.

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[651]

JOHN BARRETT, *Plff. in Err.*,
v.
E. J. HOLMES, as Guardian *ad litem* of CHARLES LOVE, ET AL.

(See S. C., 12 Otto, 651-658.)

Iowa Statute of Limitations—tax deed—valid law.

1. The Iowa Statute of Limitations, applies to an action brought by one claiming under a tax deed, as well as to one brought by the original owner of the land.
2. The party holding under the tax deed must, within five years, either himself take actual possession of the property, or bring a suit to recover possession, or his action upon his deed will be barred.
3. Such law violates no contract, and deprives the purchaser at the tax sale of no estate or property to which he had a right.

[No. 204.]

Argued Jan. 17, 1881. Decided Jan. 31, 1881.

IN ERROR to the Supreme Court of the State of Iowa.

The case is fully stated by the court.

Mr. **George G. Wright**, for plaintiff in error.

No counsel appeared for the defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

This was an action for the recovery of real property, brought by the plaintiff in error on August 28, 1874, in the Circuit Court of Mills County, in the State of Iowa. He relied on a tax title based on the deed of the county treasurer to one Meads, dated January 6, 1868, and recorded on the 28th of the same month; a deed from Meads to one Callanan, dated February 1, and recorded March 12, 1873; and a deed from Callanan to himself, dated July 25, and recorded August 3, 1874.

The defendant claimed under a bond for a deed, given by those who held the patent to the land. The bond was dated February 12, 1872.

The law of Iowa prescribes how the deed of the treasurer or tax collector for lands sold for taxes shall be executed, and its effect, as follows:

"The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles for real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and all the right, title, interest and claim of the

NOTE.—*Sale of land for taxes—strict compliance with the statute, necessary.* See *note* to Williams v. Peyton, 17 U. S. (4 Wheat.), 77.

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State and county thereto, and shall be presumptive evidence in all the courts of this State, in all controversies and suits in relation to the rights of the purchaser, his heirs and assigns, to the land thereby conveyed, of the following facts: that the real property conveyed was subject to taxation for the years stated in the deed, etc., and shall be conclusive evidence of the following facts: that all things whatever required by law to make a good and valid sale, and to vest the title in the purchaser, were done," etc. Iowa Rev., 784; Code, 807.

652] The following Statute of Limitations was in force in Iowa when the tax deed under which the plaintiff in error claimed bore date, and when the suit was brought:

"No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded as above provided (Rev. 784; Code, 807): *Provided*, That where the owner of such real estate sold as aforesaid shall, at the time of such sale, be a minor, or insane, or convict in the penitentiary five years after such disability shall be removed shall be allowed such person, his heirs or legal representatives to bring such action." Iowa Rev. 700; Code, 902.

The defense was the limitation of five years prescribed by the statute above quoted.

Upon the trial of the cause in the State Circuit Court, the jury returned special findings, from which it appeared that Love, the ancestor, who was the only defendant when the suit was brought, and who had died after its commencement, took possession of the land in controversy in March, 1872, and continued in possession until the trial, in November, 1875, and that the parties who during that period held the tax title to the land had no knowledge of such possession until June, 1874. The land was unoccupied and unimproved until the possession taken by Love.

There was a general verdict for the defendant, upon which judgment was entered.

The plaintiff appealed to the Supreme Court of the State, where he claimed that upon the conceded facts of the case, as above recited, and the findings of the jury, the five years' Statute of Limitations above quoted did not begin to run until there was an adverse possession of the land by the former owner or one claiming under him, and that if not thus construed the statute was in conflict with the Constitution of the United States.

The Supreme Court of Iowa found that the constitutional question was involved, but upheld the statute, and affirmed the judgment of the State Circuit Court. This writ of error is prosecuted to reverse that judgment.

655] The Supreme Court of Iowa has by several decisions, construed the five years' Statute of Limitations, which is set up as a defense in this case, to apply to an action brought by one claiming under a tax deed, as well as to one brought by the original owner of the land. *Brown* v. *Painter*, 38 Iowa, 456; *Laverty* v. *Sexton*, 41 Iowa, 435. And the court so ruled in this case. See *Barrett* v. *Love*, 48 Iowa, 103.

By these decisions the Supreme Court of the State has established a rule of property in the State of Iowa, which is binding on this and other courts of the United States. *Jackson* v. *Chew*, 12 Wheat., 153; *Beauregard* v. *New Orleans*, 18 How., 497 [59 U.S., XV., 469]; *Suydam* v. *Williamson*, 24 How., 427 [65 U. S., XVI., 742]; *Nichols* v. *Levy*, 5 Wall., 433 [72 U. S., XIX., 596]; *Williams* v. *Kirtland*, 13 Wall., 306 [80 U. S., XX., 683].

So far, therefore, as this point is concerned, it must be considered as settled.

But the court further held that the limitation began to run at the time of the execution and recording of the tax deed, irrespective of the question of adverse possession, so that, if at any time during the period of five years, no matter how near its close, the former owner takes actual possession, and holds until the expiration of the five years from the date of the execution and recording of the tax deed, the right of the purchaser at the tax sale is completely barred.

The plaintiff in error claims that when thus construed the statute is in conflict with the Constitution of the United States: first, because it deprives the purchaser at a tax sale of his property without due process of law; and, second, because it impairs the obligation of the contract of purchase, of which the statute in force when it was made forms a part. Art. V., Amendments to the Constitution, and sec. 10, art. 1.

The argument of the plaintiff in error is that the purchaser at a tax sale cannot bring suit to recover the land purchased by him until the former owner or some one else takes adverse possession; and as no such possession may be taken until just before or even after the expiration of the five years, his right to the land is cut off without giving him his day in court, and the obligation of the contract contained in his deed, and the law under which it was executed, is impaired. [656]

We do not think that the premise from which this conclusion is drawn is true in point of fact, nor, if it were, that the conclusion would follow.

The Iowa Statute (Rev. 3601; Code, 3273) declares that "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto though not in possession."

The Supreme Court of Iowa, in this case, held that the bringing of an action under the section first quoted would be an action for the recovery of the property, and would interrupt the running of the five years' Statute of Limitation. *Barrett* v. *Love*, 48 Iowa, 103.

The fact, therefore, that the lands are unoccupied during the five years succeeding the execution and recording of the tax deed is no obstacle to the bringing of a suit which would interrupt the running of the limitation.

But even if no such action could be brought, we think that the purchaser at a tax sale is not deprived of any of the rights conferred on him by his purchase and deed, by reason of the construction put upon the five years' Statute of Limitation.

The right of the Legislature to prescribe what shall be the effect of a tax sale and deed cannot be questioned. The Legislature of Iowa, in the enactments brought to our notice in this case, has exercised that right with great liberality to the purchaser at the tax sale. It has made his deed presumptive evidence of certain facts

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and conclusive evidence of others; it has declared that it shall vest in him all the estate of the former owner and of the county and State in the premises. But it has also declared, in effect, that the deed shall not support an action for the recovery of the land unless the suit therefor is brought within five years after the treasurer's deed is executed and recorded. When, therefore, the purchaser at a tax sale receives the treasurer's deed, he takes it with all the advantages and disadvantages incident thereto. He knows precisely its effect, and what he must do to protect his title under it, for all this is plainly written in the law. If there should turn out to be an insuperable obstacle to his establishing his title to unoccupied lands, he cannot complain, for the whole subject was under the legislative control, the rules affecting his title were proclaimed in advance, and he bought with his eyes open. He took the risk of being able to make his deed effectual under the rules prescribed by the Legislature. He gets all he bargained for. So that when the Statute of Limitation cuts him off, he having, as he imagined, been unable to bring his suit for want of a party in adverse possession, he has been deprived of no right which he ever possessed.

[657]

The Legislature might have declared that the title of the purchaser at the tax sale should be devested without his consent by the repayment to him within a prescribed period, by the former owner, of the amount of his bid, or the tax and the interest and penalty thereon. The right to redeem the title of lands sold for taxes is one commonly reserved, and the right is favored by the policy of the law. *Dubois* v. *Hepburn*, 10 Pet., 1; *Corbett* v. *Nutt*, 10 Wall., 464 [77 U. S., XIX., 976]; *Gault's Appeal*, 33 Pa., 94; *Rice* v. *Nelson*, 27 Iowa, 148; *Schenk* v. *Peay*, 1 Dill., 267; *Masterson* v. *Beasley*, 3 Ohio, 301; *Jones* v. *Collins*, 16 Wis., 594; *Curtis* v. *Whitney*, 13 Wall., 68 [80 U.S., XX., 513]. But it would scarcely be contended that such statute deprived the purchaser of his property without due process of law, or impaired the obligation of his contract of purchase.

But under the Iowa law the purchaser at a tax sale, who can find no one in possession against whom to bring his suit, has a plain way to make his title indefeasible, and that is by taking possession himself.

When the section prescribing the effect of the treasurer's deed and the section prescribing the five years' limitation are considered together, the policy of the law is plain, and no cause of complaint is left the purchaser at tax sale. The effect of the two sections is this: that the party holding under the tax deed must within five years either himself take actual possession of the property, or within the same period bring a suit to recover possession; and, upon his failure to do either, his action upon his deed shall be barred.

[658]

When thus considered, the law violates no contract and deprives the purchaser at the tax sale of no estate or property to which he had a right. He bought subject to a condition, with explicit warning that if he did not comply with it, his deed should become ineffectual to support an action. Failing to perform the condition, he is left without remedy, but also without just ground for complaint.

We see no error in the record.

The judgment of the Supreme Court of Iowa is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 35.

EDWARD M. EDWARDS, *Plff. in Err.*, [575]
v.
UNITED STATES, *ex rel.* WILLIAM F. THOMPSON.

(See S. C., 12 Otto, 575-577.)

Docketing cause.

Leave will be given to docket the cause after the term, when the transcript has been filed in time, although, through inadvertence, a fee bond has not been given, and in the meantime there has not been a motion to docket and dismiss.

[No. 187.]

Argued Jan. 6, 7, 1881. Decided Apr. 18, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

On motion to dismiss.

The case is fully stated by the court.

Mr. **Henry F. Severens,** for plaintiff in error:

The theory of the relator on which his demurrer rests, that the resignation must be accepted by the Township Board to make it effectual, is not supported by the statutes. In addition to the statutes in question, see *U. S.* v. *Wright*, 1 McLean, 509; *Gates* v. *Delaware Co.*, 12 Ia., 405; *State* v. *Hause*, 43 Ind., 105; *State* v. *Fitts*, 49 Ala., 402; *People* v. *Porter*, 6 Cal., 26; *State* v. *Clarke*, 3 Nev., 566.

Messrs. **M. J. Smiley,** *D. Darwin Hughes, O'Brien,* and **John W. Stone,** for defendant in error:

A supervisor who has tendered his resignation and filed the same with the proper officer, still continues in office and is not relieved from its duties and responsibilities, until his resignation is accepted and his successor is appointed and qualified.

Badger v. *U. S.*, 93 U. S., 599 (XXIII., 991); *U. S.* v. *Badger*, *S. C.* 6 Biss., 308; *State* v. *Ferguson*, 31 N. J. L., 107; Dill. Corp., sec. 163, *n.* 4.

Mr. Chief Justice **Waite** delivered the opinion of the court.

The writ of error in this case was returnable to the October Term, 1877. The return was duly made, and a transcript of the record lodged in the office of the clerk of this court on the 27th of September, 1877. A citation in due form was issued and served in time. By an oversight of the counsel for the plaintiff in error no fee bond was given, and the cause was not docketed during the term of 1877. No motion to docket and dismiss was ever made, and on the 3d of September, 1878, the attention of counsel having been called to the omission of the security for costs, an acceptable bond was given and the cause docketed in form. Under these circumstances we are not inclined to dismiss the suit. We are aware that in some of the cases it has been said that a writ of error or an appeal becomes inoperative if a transcript is not filed *and the cause docketed* during the

[576]

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term to which it is made returnable, but this has always been in cases where a return had not been made and a transcript had not been filed within the time. The language should, therefore, be construed in connection with those facts. In *Owings* v. *Tiernan*, 10 Pet., 447, and *Van Rensselaer* v. *Watts*, 7 How., 784, leave was given to docket the cause after the term, when the transcript had been filed in time, but through inadvertence a fee bond had not been given and there had not been, in the meantime, a motion to docket and dismiss. That is this case. In *R. R. Co.* v. *Bk.*, 94 U. S., 253 [XXIV., 32], the transcript was filed in time, but the cause not docketed because of a failure to furnish a fee bond. In this state of things, and while the default continued, a motion to docket and dismiss was made under Rule 9, and granted. At the next Term the appellant appeared, and moved to set aside the order of dismissal and docket his appeal. This we refused, under the circumstances of that case. After a cause has been docketed and dismissed it cannot be again docketed unless by order of the court. Such is the rule. If a return is made and the transcript deposited in the clerk's office in time, our jurisdiction is kept alive. The docketing of the cause after that is mere procedure, and if unreasonably delayed, the parties may be subjected to the consequences of a failure to prosecute a suit, which rest largely in the discretion of the court when not provided for by rules. Rule 9 is of that class. [577]

In this case it is abundantly shown that the omission to give the bond was through inadvertence and without any intention to delay the due prosecution of the suit. No harm has been done, save possibly a short extension of the time for bringing on the hearing. The defendants in error have delayed their motion to dismiss until a new writ is barred by lapse of time.

The motion is denied.

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END OF VOL. 102.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1880.

Vol. 103.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1880.

DANIEL HAND, *Plff. in Err.*

v.

JOHNSON HAGOOD, substituted for THOMAS C. DUNN, Comptroller-General of the STATE OF SOUTH CAROLINA.

131 US clxxxi Appx

A state judgment which is only a direction to transfer the possession of a railroad to the Comptroller-General of the State, subject to such orders as the Circuit Court shall deem necessary for the protection of the parties in the principal suit, is not a final judgment of which this court has jurisdiction.

[No. 2.]

Submitted Oct. 15, 1880. Decided Oct. 25, 1880.

IN ERROR to the Supreme Court of the State of South Carolina.

The case is stated by the court.

Messrs. **P. Phillips, Jas. B. Campbell,** and **John L. Cadwalader,** for plaintiff in error.

Messrs. LeRoy F. Youmans, Jas. Conner, Jas. Lowndes, **D. T. Corbin,** and *T. J. D. Fuller,* for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court.

The judgment from which this writ of error was taken, is not a final judgment in the cause. Hand, a creditor of the Savannah and Charleston Railroad Company, sued that company in the Court of Common Pleas of Charleston County, South Carolina, and obtained the appointment of a receiver to hold and operate the railroad of the company, and apply the net profits to the payment of its debts. In this condition of things, the Comptroller-General of the State applied to the court, by petition in that cause, to permit him to take possession of the road under the provisions of the Act of 1869, and, if for any purpose it should be deemed advisable to continue the receivership, that he might be permitted to perform that duty in addition to those imposed on him by the law. The Supreme Court of the State, on appeal, adjudged that the Comptroller-General was authorized to take possession of the road with its appurtenances, "and hold and administer the same according to the power conferred by said Act," Then followed these words: "The assets of the road to be subject to the direction of the court, and the order now made to be in nowise regarded as affecting the lien obtained by any creditor of the said road established in the principal cause, or in any way affecting the rights of creditors. The petition is remanded to the circuit court for such orders as may be necessary to give effect to the judgment of this court." It nowhere appears that the circuit court has acted on this mandate. In effect, the judgment, as it now stands, is nothing more than a direction to transfer the possession of the road to the Comptroller-General, subject to such orders as the circuit court shall deem necessary for the protection of the rights of the parties in the principal suit. There is nothing to prevent the circuit court from following the suggestion of the Comptroller-General in his petition, and making him receiver. In fact, as the assets were to be kept subject to the direction of the court, that would seem to be what was expected. As receiver, he would be bound to obey the orders of the court for all the purposes of the principal suit, and the practical result of the application of the Comptroller-General would be nothing more than a change of receivers. Under these circumstances it seems to us clear, that the rights of the Comptroller-General as against the parties to the suit, have not been finally settled, and that the writ of error was prematurely sued out. The suit is therefore, *dismissed for want of jurisdiction.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

PAUL LEARY, *Appt.,*

v.

MARY LONG, Admrx. of DANIEL LONG, Deceased, *et. al.*

131 US ccxviii Appx

1. Where there is an express admission of record that a bill for the same identical cause of action as that sued on in the case was dismissed absolutely for the reason that a plea which had been filed and not denied presented a good defense, the presumption is that the dismissal was on the merits and that it is a bar to the present action.

2. A mere averment that there has been no adjudication on the merits is not enough to overcome such presumption.

3. To overcome the effect of such admission, the nature of the defense set up in the plea should have been stated, so that it could be seen that it did not present a bar to the action.

[No. 50.]

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Argued Oct. 29, 1880. Decided Nov. 8, 1880.

APPEAL from the Supreme Court of the District of Columbia.

On motion to dismiss.

The case sufficiently appears from the opinion of the court.

Messrs. L. G. Hine and **S. T. Thomas,** for appellee in support of motion.

Mr. **A. L. Merriman,** for appellant.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Upon the case made by the bill, the appellant is not entitled to recover. Paragraphs 9 and 10 of the bill are as follows:

"9. Complainant further states that he filed his bill of complaint in said court against said defendant and said Kappell, on or about the 19th day of July, 1870, praying that said saie should be set aside, and for other matters, which will more fully appear by reference to said bill, which bill was afterwards dismissed for want of prosecution upon the part of the attorney for complainant.

10. Complainant further states that on or about the 16th day of October, 1871, he filed his second bill in said court, praying for the same relief, and that the defendant pleaded thereto, which bill was also dismissed for the reason of the default of a replication to said plea, the attorney of the complainant having died during the pendency of said last mentioned bill."

Here is an express admission of record that a bill for the same identical cause of action now sued on was dismissed, for the reason that a plea, which had been filed and not denied, presented a good defense. What the plea was, does not appear, but as the bill was dismissed absolutely, the presumption is that it went to the merits. A mere averment that there has been no adjudication upon the merits, is not enough. To overcome the effect of the other allegation, the nature of the defense set up in the plea should have been stated, so that it could be seen that it did not present a bar to the action.

Affirmed.

True copy. Test:
James D. McKenney, Clerk, Sup. Court, U. S.

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[5] JAMES HALL, *Plff. in Err.*,
v.
STATE OF WISCONSIN.

(See S. C., 13 Otto, 5-11.)

Officer—contract by state—impairment of.

1. One may be employed to perform a service, under a contract with a State without becoming an officer.

2. A State may abolish any public office created by a public law, but a contract made by it for the performance of services by a "commissioner" is within the protection of the Federal Constitution, and cannot be impaired by state legislation.

[No. 44.]

Submitted Oct. 27, 1880. Decided Nov. 15, 1880.

IN ERROR to the Supreme Court of the State of Wisconsin.

The case is fully stated by the court.

Mr. **Luther S. Dixon,** for plaintiff in error:

Whether the written agreement, entered into by the Governor of the State with the plaintiff in error, constituted a contract, such as to be impaired by subsequent laws, is a question for this court to decide.

This proposition is maintained by many decisions, and constitutes the very essence of the jurisdiction of this class of cases.

University v. *People*, 99 U. S., 313, 321 (XXV., 387, 389), and cases there cited.

The duty of protecting and enforcing the obligation of a contract necessarily carries with it the power to determine the existence and nature of the contract in all particulars, and in no other way can effect be given to the constitutional prohibition by this court, as the final arbiter of all cases arising under it. "The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here." Taney, *Ch. J.*, in *Life Ins. & Trust Co.* v. *Debolt*, 16 How., 432. As observed by *Mr. Justice* Miller, in *Gelpcke* v. *Dubuque*, 1 Wall., 216 (68 U. S., XVII., 529); "It would be the merest sham."

The agreement in writing entered into between the Governor on behalf of the State, and the plaintiff in error, and signed, sealed and delivered by both parties, was a contract, the obligation of which is protected by the Federal Constitution, against subsequent state law, the effect of which was to impair or destroy it.

It has the form and substance, and every element and part of a complete and perfect contract as ever was made. The parties to it intended it to be a contract, and so named it in the instrument, and it is expressly so denominated by the Legislature in its Acts authorizing and ratifying it.

The contract, so executed by the Governor for the State, was fully recognized by the Legislature, and so bound the State.

That an annual service, a service for one year at least, and for more years than one if the Governor thought necessary, was contemplated and intended by the Legislature, is obvious from the context.

But if there be any doubt about the authority of the Governor, in the first instance, to stipulate for the period of service specified in the contract, the question is put to rest by the Act of 1860, which recognized the contract as a valid, subsisting obligation, and provided for withdrawing from the Treasury such portion of the moneys appropriated by the Act of 1857, as was not drawn previous to the signing of the contracts and which shall not be required to carry into effect the provisions of the contracts.

The court below held that there was no contract between the plaintiff in error and the State, upon two grounds, one of which was, that the the plaintiff in error was a public officer of the State.

The only authority cited by the court in support of the proposition, is the language of the *Chief Justice* in *Dartmouth Coll.* v. *Woodward*, 4 Wheat., 627 to 630, which by no means sustains it. The *Chief Justice* was there considering the ordinary case of a public office.

Mr. Justice Story, whose views fully coin-

NOTE.—*Effect of repeal of statute on pending action.* See *note* to U. S. v. Tynen, 78 U. S., XX., 153.

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cided with those of the *Chief Justice*, was more explicit upon this subject in his opinion delivered in the same case; at page 694 he says:

"But when the Legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

The other ground of decision below was, that the State or the Legislature of the State was incapable of entering into a contract with the plaintiff in error for a specific term of service. The power to do so is one of the necessary and ordinary attributes of sovereignty. There are many objects of government incapable of accomplishment except by means of contract and to deny the power to contract is to deny a faculty necessarily incident to every governmental organization or sovereignty, *pro tanto* to destroy the government itself. In many cases, in this one for example, the duties to be performed may be such that there is no person in the State capable of performing them, and it becomes necessary to call in a person from another State or country. But the services of the person so invited cannot be obtained without a fixed and definite period, for their continuance.

Chief Justice Marshall, in *U. S.* v. *Maurice*, 2 Brock., 96, 109, says: "It will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished, is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States."

And *Mr. Justice* Story, in *U. S.* v. *Tingey*, 5 Pet., 115, 128, said: "Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts."

"Every sovereign State is, of necessity, a body politic or artificial person and, as such, capable of making contracts." *Mr. Justice* Grier, in *Cotton* v. *U. S.*, 11 How., 229, 232.

The Legislature of a State, if not restrained by its Constitution, is capable of doing so, and of binding the State when acting upon any subject within its jurisdiction.

Bk. v. *Knoop*, 16 How., 369.

The court below held that it was incompetent for the Legislature to contract with the plaintiff in error for a specific term of service, upon what it conceived to be a primary governing principle pertaining to all state governments, that the Legislature, where a public office is concerned, has not the power to tie up its own hands by the creation of any vested right in or to the offices or the salary given for the performance of its duties.

But if there be any such primary general principle applicable to any public office or officer, it does not extend to an office or officer of the kind here in question. It has never before been claimed or hinted by any court or writer, any advocate of the principle, that its operation would extend beyond those functions and powers which are strictly governmental in their nature.

2 Greenl. Cruise, Real Prop. 67.

But the court below was wrong in holding that the plaintiff in error was a public officer at all; he was not, in any legitimate and proper sense of the word. An architect or builder, styled by the Legislature, a commissioner, with whom the Governor should be authorized, by statute, to contract for the building of a state capitol, and for which money should be appropriated, might, with equal propriety, be held a public officer.

The plaintiff in error was not, at the time of entering into the service of the State, nor during the continuance of it, a citizen or resident of the State of Wisconsin. A person not a citizen and resident of the State, cannot be a public officer of the State.

State v. *Smith*, 14 Wis., 497; *State* v. *Murray*, 28 Wis., 96.

The question of the capacity of the State to enter into and bind itself by contract being one of general law, not local in its nature, not dependent on the construction of the state Constitution or state laws, the decision of the state court is not binding upon this court on this ground, as well as upon the other ground, that in all cases like the present, this court must determine for itself every point and matter touching the existence and validity of the contract, the obligation of which is claimed to have been impaired.

Olcott v. *Supervisors*, 16 Wall., 678 (83 U. S., XXI., 382).

No counsel appeared for the defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Wisconsin. The case we are called on to consider is thus disclosed in the record:

By an Act of the Legislature, entitled "An Act to Provide for a Geological, Mineralogical and Agricultural Survey of the State," passed March 16, 1857, James Hall, of the State of New York, the plaintiff in error, and Ezra Carr and Edward Daniels, of Wisconsin, were appointed "commissioners" to make the survey. Their duties were specifically defined, and were all of a scientific character. [6]

They were required to distribute the functions of their work by agreement among themselves, and to employ such assistants as a majority of them might deem necessary.

The Governor was required "To make a written contract with each commissioner" for the performance of his allotted work, and "the compensation therefor, including the charge of each commissioner;" and it was declared that "such contract shall expressly provide that the compensation to such commissioners shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of $2,000 per annum, and that payment will be made only for such part of the year as such commissioner may actually be engaged in the discharge of his duty as such commissioner."

In case of a vacancy occurring in the commission, the Governor was empowered to fill it, and he was authorized to "remove any member for incompetency or neglect of duty."

To carry out the provisions of the Act, the sum of $6,000 per annum for six years was appropriated, "To be paid to the persons entitled to receive the same."

By an Act of the Legislature of April 2, 1860,

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Hall was made the principal of the commission, and was vested with the general supervision and control of the survey. He was required to contract with J. D. Whitney and with Charles Whittlesey for the completion within the year of their respective surveys. To carry into effect these provisions, the Governor was authorized to draw such portion of the original appropriation, not drawn previous to the 29th of May, 1858, as might be necessary for that purpose—the residue to be otherwise used as directed.

By a subsequent Act of March 21, 1862, both the Acts before mentioned were repealed without qualification.

On the 29th of May, 1858, Hall entered into a contract with the Governor, whereby it was stipulated on his part that he should perform the duties therein mentioned touching the survey, "This contract to continue till the 3d day [7] of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty * * * or unless a vacancy shall occur in his office by his own act or default."

On the part of the State it was stipulated "that the said Hall shall receive for his compensation and expenses, including the expense of his department of said survey, at the rate of $2,000 per annum * * * Provided, that for such time as said Hall or his assistants shall not be engaged in the prosecution of his duties, according to the terms of said Act and of this contract, deduction shall be made, *pro rata*, from the sum of his annual compensation and expenses."

Hall brought this action upon the contract. The declaration avers that immediately after the execution of the contract he entered upon the performance of the duties thereby enjoined upon him, and continued in their faithful performance until the time specified in the contract for its expiration, to wit: the 3d of March, 1863; that he was not removed by the Governor for incompetency or neglect, nor was any complaint ever made by the Governor against him; that he never at any time, directly or indirectly, assented to the repeal of the Acts of 1857 and 1860; and that thereafter he continued in the performance of his labors the same as before, and that for the year ending March 3d, 1863, he devoted his whole time and skill, without cessation, to the work.

He avers further, that for his services performed prior to March 3, 1862, he was fully paid, but that for the year ending March 3, 1863, he had received nothing; that payment was demanded and refused on the 3d of December, 1863, and that the defendant is, therefore, justly indebted to him in the sum of $2,000, with interest from the date last mentioned.

He avers, finally, that on the 30th of January, 1875, he presented his claim to the Legislature by a proper memorial, and that its allowance was refused.

The State demurred upon two grounds:

1. That the complaint did not show facts sufficient to constitute a cause of action:

2. That it appeared upon the face of the complaint that the cause of action did not accrue within six years before the commencement of [8] the action.

In support of the first objection, it was insisted that the employment of the plaintiff was an office, and that the Legislature had, therefore, the right to abolish it at pleasure. For the plaintiff it was maintained that there was a contract, and that the Repealing Act impaired its obligation in violation of the contract clause of the Constitution of the United States.

The court sustained the demurrer upon the first ground, and the plaintiff declining to amend, dismissed his petition. The opinion of the court is limited to the first point, and ours will be confined to that subject. The whole case resolves itself into the issue thus raised by the parties.

No question is made as to the suability of the State. The proceeding is authorized by a local statute. The question raised by the record is within our jurisdiction. In the exercise of that jurisdiction in such cases this court is unfettered by the authority of State adjudications. It acts independently, and is governed by its own views. *Pine Grove* v. *Talcott*, 19 Wall., 666 [86 U. S., XXII., 227].

The question to be considered was before us in *U. S.* v. *Hartwell*, 6 Wall., 385 [73 U. S., XVIII., 830]. It was there said that "An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties * * * "A government office is different from a government contract. The latter, is necessarily *limited in its duration* and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."

In *U. S.* v. *Maurice*, 2 Brock., 96, *Chief Justice* Marshall said: "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer."

The case before us comes within the definition we have taken from *U. S.* v. *Hartwell*.

The statute under which the Governor acted was explicit, that he should "Make *a written contract* with each of the commissioners aforesaid, expressly stipulating and setting forth the nature and extent of the services to be rendered by each, and the compensation therefor," and that "such contract" should expressly pro- [9] vide that the compensation of each commissioner should be at a certain rate per annum to be agreed upon, and not exceeding $2,000 per annum for the time such commissioner may be actually engaged.

The action of the Governor conformed to this view. The instrument executed pursuant to the statute recites that it is an "agreement" between the Governor as one party, and Hall, Carr and Randall, the Commissioners, as the other. They severally agreed to do what the statute contemplated, and he agreed to pay all that it permitted.

The names and seals of the parties were affixed to the agreement, and its execution was attested by two subscribing witnesses, as in other cases of contract.

Where an office is created, the law usually fixes the compensation, prescribes its duties and requires that the appointee shall give a bond with sureties for the faithful performance of the service required. To do all this, if the employ-

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ment were an office, by a *contract* with the officer and without his bond would, to say the least, be a singular anomaly.

The Acts of 1857 and 1860 both speak of Hall as "of Albany, N.Y." He was not, therefore, a citizen or resident of the State of Wisconsin.

It is well settled in Wisconsin that such a person cannot be a *public officer* of that State. *State* v. *Smith*, 14 Wis., 497; *State* v. *Murray*, 28 Wis., 96

In *U. S.* v. *Hatch*, 1 Pin. (Wis.), 182, the Supreme Court of the State decided that "the term *civil officers* as used in the organic law, Act of Congress of April 20, 1836, 5 Stat. at L., 10, embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided, and does not include such officers as canal commissioners." Syllabus, 3.

In *Butler* v. *Regents of Univer.*, 32 Wis., 124, the same court held, without dissent, that a professor in the State University, appointed for a stated term with a fixed salary, was not a *public officer* in such a sense as prevented his employment from creating a contract relation between himself and the Regents.

It is hard to distinguish that case in principle from the one before us.

[10] In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration or repair of public buildings, or to supply the officers or *employés* who occupy them with fuel, light, stationery and other things necessary for the public service. The same reasoning is applicable to the countless *employés* in the same way, under the National Government.

It would be a novel and startling doctrine to all these classes of persons that the Government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.

It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the State of Wisconsin for the period named, if the idea had been present to his mind that the State had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the State had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties.

Undoubtedly, as a general proposition, a State may abolish any public office created by a public law, *Newton* v. *Comrs.*, 100 U. S., 559 [XXV., 711], but even with respect to those offices the circumstances may be such as to create an exception. In the *Dartmouth Coll.* v. *Woodward*, 4 Wheat., 694, *Justice* Story said: "It is admitted that the State Legislatures have power to enlarge, repeal and limit the authorities of public officers in their official capacities, in all cases where the Constitutions of the States respectively do not prohibit them; and this, among others, for the very reason that there is *no express or implied contract* that they shall always, during their continuance in office, exercise such authorities. But when the Legislature *makes a contract* with a public officer, as in case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of [11] the constitutional prohibition, as a like contract would be between two private citizens."

When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447].

The General Government has no powers but such as are given to it expressly or by implication.

The States and their Legislatures have all such as have not been surrendered, or prohibited to them. *Gilman* v. *Philadelphia*, 3 Wall., 713 [70 U. S., XVIII., 96]. And see, also, 2 Greenl. Cruise, 67.

That the laws under which the Governor acted, if valid, gave him the power to do all he did, is not denied. We will not, therefore, dwell upon that point. The validity of those laws is too clear to admit of doubt. It would be a waste of time to discuss the subject.

We are of the opinion that the Supreme Court of the State erred in the judgment given. *It is, therefore, reversed, and the case will be remanded for further proceedings in conformity with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 795.

UNITED STATES, *Plff. in Err.*, [71]

v.

RUEL HOUGH ET AL., EXRS. of CHARLES B. CHURCH, Deceased, ET AL.

(See S. C., 13 Otto, 71-74.)

Charge to jury—obligation of sureties—limit of.

1. Where all the charge to the jury asked is not sound law and is presented as a whole, the court may refuse the request.
2. The obligation of sureties cannot be extended beyond what they have in terms assumed.
3. Where sureties in a collector's bond limited their liabilities to stamps received under the Act of 1863, they are not liable for stamps received by the collector after such Act was repealed, although it was repealed when the bond was given.

[No. 16.]

Argued Oct. 18, 1880. Decided Nov. 15, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The case is fully stated by the court.

Mr. **Edwin B. Smith,** *Asst. Atty.-Gen.* for plaintiff in error.

Messrs. **P. Phillips** and **W. Hallett Phillips,** for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

Ruel Hough, being the Collector of Internal Revenue for the First District of Tennessee, was [72] furnished by the Commissioner with a large amount of revenue stamps, and on the 16th day of September, 1864, he gave bond to the United States in which the other defendants above named were his sureties, in the sum of $25,000,

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conditioned for payment of the value of all the stamps sold by him and the return of those not sold on demand. The defendants were sued on this bond. Treasury transcripts were offered in evidence by the plaintiff, showing a statement of said Hough's account in reference to revenue stamps, dated September 30, 1870, by which he was found to be indebted to the United States on that account in the sum of $6,093.78. Evidence was offered by the defendants tending to show a balance of $6,484.75 due from the Treasury Department to Hough for salary, commissions, and expenses as disbursing agent, which Hough had, before suit was brought, instructed the accounting officer to convey to the credit of this stamp account, and which was sufficient to satisfy it.

Evidence was also offered tending to show a sum due from Hough to the United States for money received as Collector of Internal Revenue, much larger than the amount of his credit for salary and commissions as disbursing agent.

The case was tried by a jury, and the main assignments of error relate to the charge of the court to the jury, and the refusal of the court to charge as requested by counsel for the United States.

With reference to the charge given by the court, while it is found in the bill of exceptions, there is clearly no exception shown to that charge. The bill, after reciting the charge, is immediately followed by the statement that "The district attorney moved the court for a new trial, which motion was overruled by the court, to all which the district attorney excepted, and tenders this his bill of exceptions," etc. No mention is made of any exception or any objection to the charge of the court, and none can be considered here.

Before this, however, the district attorney had asked of the court to give a charge, consisting of four propositions, which are set out, and "which instructions," says the bill, "the court refused to give, and the district attorney excepted."

According to the well settled rule of this court, if either of these four propositions was [73] erroneous, or, in other words, if all the charge thus asked was not sound law, the court did right in refusing the prayer which presented them as a whole. See, *Johnston* v. *Jones*, 1 Black, 209 [66 U. S., XVII., 117]; *Harvey* v. *Tyler*, 2 Wall., 328 [69 U. S., XVII., 871]; *Lincoln* v. *Claflin*, 7 Wall., 132 [74 U. S., XIX., 106]; *Beaver* v. *Taylor*, 93 U. S., 46 [XXIII., 797].

One of the propositions so asked was that, under the bond sued on in this case, the sureties of Hough are liable for all amounts of stamps which the proof shows came to his hand as stamp agent, both before and since the execution of the bond, unless the same had been properly accounted for.

It is true that one condition of the bond is to make a faithful return, whenever so required, of the moneys received by him for such stamped vellum, parchment or paper, and adhesive stamps, as have been or may hereafter be delivered to him; but it is also a part of the condition of the bond describing the stamps for which they shall be liable, that they were stamps delivered and to be delivered under "The Act of Congress to Provide Internal Revenue for the Support of the Government, Approved March 3, 1863," 12 Stat. at L., 713, pursuant to the sixteenth section of that Act. Now, that Act, and especially the sixteenth section of it, was repealed by the Act of June 30, 1864, 13 Stat. at L., 223, which enacts its own provisions on this subject. The Act of March 3, 1863, was, therefore, no longer in existence when the bond was taken which binds the sureties for stamps received under its provisions, and, as the obligation of sureties cannot be extended beyond what they have in terms assumed, they cannot be held liable for stamps furnished under the Act of 1864. The date of the bond, be it remembered, was September 16, 1864. The Act of 1863 had then been repealed more than two months. Stamps undoubtedly had been delivered, before the repeal of the Act of 1863, to Hough which had not been accounted for when the bond was given, and it was competent for the Government to take a bond covering the stamps advanced to him under that Act.

It was also competent for the sureties to limit their liabilities to stamps received under the Act of 1863; and the record shows that they did. The court below told the jury that the sureties were only liable for stamps received by Hough prior to the 30th of June, 1864, the date of the repealing Act; and to this no exception was taken. As we think he was right in this, the [74] charge asked by the district attorney was properly rejected.

The difficulty seems to have grown out of the use of a form of bond framed under a statute which had been repealed.

Objection is made to the admission of two pieces of evidence designed to show that Hough had applied the credit due him as disbursing agent to the extinguishment of the balance due from him as stamp agent. The objection is not made to the pertinency of the evidence, but to the fact that it was not presented for allowance as a credit to the proper accounting officer of the Treasury and rejected, as provided in section 951, Revised Statutes.

The answer to this is that the claim itself had been allowed by the proper accounting officer of the Treasury, and the point in issue was as to the application of the sum so allowed to one of two distinct claims of the Government against him. To such a case the section has no application.

Though there may have been many errors committed in the trial of this case, there are none so presented by the record that we can correct them, and

The judgment is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF LOUISIANA, *ex rel.* THE SOUTHERN BANK, *Plff. in Err.*, [521]

v.

CITY OF NEW ORLEANS.

(See S. C., 13 Otto, 521.)

Preference on docket—argument of two cases together.

1. A case which does not present questions which entitle it to a hearing in advance of others, will not, where one party objects, be advanced to be heard

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with another which has precedence on the docket.
2. As this court cannot compel a party, against his will, to argue his case with another, it has always denied motions of that kind when they are resisted.
3. But counsel may submit printed arguments in the other case, on the questions presented in that which are common to the two.

[No. 467.]

Submitted Nov. 8, 1880. Decided Nov. 15, 1880.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to advance.

The case is stated by the court.

Messrs. **John A. Campbell** and *Edward Bermudez*, for plaintiff in error.

Messrs. Benjamin F. Jonas and *Henry C. Miller*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We decided at the last Term that this case did not present questions which entitled it to a hearing in advance of others standing before it on the docket. It is now suggested that No. 181, *U. S.* v. *New Orleans* [See No. 206, *post*], involves the consideration of the same questions and the construction of the same statute, and we are asked to advance this case to be heard with that. To this the defendant in error objects. When a case is advanced to be heard with another which has precedence on the docket, the rule is to require the two to be argued as one. This rule is never departed from except under very peculiar circumstances. As we cannot compel a party against his will to argue his case with another, we have always heretofore denied motions of that kind when they are resisted. There are no such special circumstances in this case as to make it proper that it be advanced and heard separately from the other. *The motion to advance is, therefore, overruled*, but counsel may submit printed arguments in the other case on the questions presented in that which are common to the two, provided twenty copies of such arguments are filed with the clerk at least six days before that case comes up for hearing.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BANK OF MONTREAL, *Plff. in Errr.*, *v.* GEORGE E. WHITE.

Immaterial request to charge.

Where the charge asked and refused was wholly immaterial, the judgment will not be reversed because it was not given.

[No. 61.]

Submitted Nov. 8, 1880. Decided Nov. 22, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action brought in the court below, by the plaintiff in error against the defendant in error, upon a promissory note. The defendant in error executed two promissory notes for $5,000 each, due respectively sixty and ninety days from date, payable to the order of the Redfield, Bowen & Walworth Company. These notes were deposited with a trustee in escrow, to be delivered when the payee had deposited with the trustee certain securities. The notes were made for the accommodation of the payee. The payee, however, secured possession of the notes without complying with the conditions, and sent them to plaintiff in error in a letter directing the Bank to discount them and place them to its credit. Evidence was given by the defendant tending to show that on the day after the notes were sent to the Bank, the defendant informed the Bank of the circumstances above stated. The Bank denied this. Evidence was also given for the defendant, to the effect that the notes were delivered back to Bowen, treasurer of payee, by the bank manager, ten days or more after their date, with the request that he get them discounted elsewhere: that he failed to do this, but after retaining them in his possession for nine days returned them to the Bank. The notes were discounted, and passed to the credit of payee. The sixty day note was paid to the Bank at its maturity by the payee. Plaintiff gave evidence that Apr. 3, plaintiff advanced, upon the security of the notes, upwards of $3,000, upon checks drawn the previous week upon the strength of Bowen's promise to furnish security or paper for discount, satisfactory to the Bank, and that within ten days the plaintiff advanced a sum equal to the amount of the notes.

The assignments of error, are:

1. The court erred in refusing to charge the jury as requested by the plaintiff in error, that if they believed from the evidence that the plaintiff had paid out any money on the checks of the said Redfield, Bowen & Walworth Manufacturing Company, on the strength of the security by such note sued on before notice of any defense thereto, then the plaintiff was entitled, for such payment, to protection as a *bona fide* holder for value of such note, and the defense to that extent is not available against it, although the plaintiff did not in fact enter said note to the credit of said company as a discount until after such advances were made, or until Apr. 19, 1876.

2. The court erred in charging the jury that if the note in controversy was not discounted by the plaintiff in error until after it had notice of the defense set up by the defendant in error, then the plaintiff could not recover if the jury were satisfied that such defense had been made out in fact.

3. The court erred in charging the jury that if they should find from the evidence that at any time between the time the bank received the notes on the Monday morning in question and the time they finally concluded to pass them to the credit of the plaintiff, it received notice of the defense of the defendant to these notes, the fact that the notes had been obtained from him by fraudulent pretension or by fraudulent violation of its contract on the part of the company, in failing to put up securities, then the defendant is not liable,

Mr. **Wirt Dexter**, for plaintiff in error.

Messrs. **Allan S. Story** and **Robert Hervey**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

There can be no pretense in this case that the note in suit was ever actually delivered to the Bank as collateral security for past or future indebtedness. In the letter transmitting it, the

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bank manager was asked to discount it and place the proceeds to the credit of the manufacturing company. In that event, the "overdraft kindly allowed on Friday" was to be charged against the credit, but it is nowhere, even in the remotest degree, intimated that if the discount was declined the note might be kept as collateral. The charge asked and refused was therefore, wholly immaterial; and the judgment cannot be reversed because it was not given. No complaint can be made of the charge as given, if this refusal was right. All the errors assigned hinge on this one proposition.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[330] ALBERT BOULDIN ET AL., *Appts.*,

v.

JOSEPH ALEXANDER ET AL.

(See S. C., 13 Otto, 330-336.)

Mesne *profits, when not allowed—moneys collected, liability for*

1. Where there is no claim for an allowance of *mesne* profits in the bill, and the proofs do not show that the defendants or those whom they represent derived individually any such pecuniary advantage from the use of the property, pending the suit, as to make it proper that they should be held personally accountable in that way, such profits will not be allowed.

2. A person wrongfully in possession of property, who collects money for its use, is liable personally for the moneys so received by him.

[No. 62.]

Argued Nov. 8, 9, 1880. Decided Nov. 22, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. **S. S. Henkle** and *O. D. Barrett*, for appellants.

Messrs. **Thomas Wilson** and *J. Parker Jordan*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The bill in this case was filed to determine which of two contending boards of trustees of [331] the "Third Colored Baptist Church" was entitled to the possession and control of the church property, including the church building erected by the association as a place of worship; to correct a mistake in a deed executed by the appellant Bouldin to the trustees of the church, and to obtain a settlement with Bouldin of his accounts as the agent and pastor of the church, and the cancellation and discharge of certain notes secured by real or pretended deeds of trust which had been, from time to time, executed to him. The first and second of these things were accomplished by a decree affirmed in this court at the December Term, 1872, and reported in the 15 Wall., 131 [82 U. S., XXI., 69]. The complainants below, appellees here, were, by that decree, adjudged to be the lawful trustees; the mistake in the deed was corrected, and the present appellants, who were the defendants below, were ordered to deliver the possession of the church building and the lot on which it stood to the complainants. This left nothing to be disposed of but the matters of account between Bouldin and the church, and the notes which had been given to him. With a view to this end, the original decree, affirmed here on the former appeal, was that the cause be referred to the auditor of the court below "to examine and report the facts on the following questions:

"1. Whether the defendant, Albert Bouldin, purchased, under the direction of the church, the entire lot of ground on the corner of Fourth and L Streets of George H. Varnell, for the use and benefit of said church; and whether the money collected by said Bouldin from or on behalf of the church was by him used to aid in the payment of said lot, and, if so, to what amount?

2. To state the accounts between the said Albert Bouldin and the plaintiffs, as trustees of the said church, and the trustees of whom they are the successors; to report the amounts of money received by said Bouldin from the said church, and from other persons on behalf of said church, and the amounts to which he was entitled for his services in behalf of said church, and has expended therein and about the same, and to state the balance due either way, and for these purposes that he may call witnesses and take testimony.

That the plaintiffs, until the further order of this court, are enjoined and restrained from [332] selling, disposing of, or in any way incumbering the title of said church property so as to weaken the security of said Bouldin upon the church property."

When our mandate went down on that appeal, the complainants moved that a writ of possession issue at once; but the court withheld it for the coming in of the auditor's report, and, with the consent of the defendants, the order of reference was made to include the following additional questions:

"3. In whose possession has the church building and property on the corner of Fourth and L Streets, Washington, D. C., been since the commencement of this suit?

"4. What is the fair value of the rents, issues, and profits arising and accruing to the party in possession of said property from and since this suit?"

There was no claim in the bill for compensation for the use and occupation of the property, though it was alleged that the defendants unlawfully and by force kept the complainants, who were the only duly elected trustees, out of possession.

As to the notes, it was alleged in the bill that on the 28th of July, 1862, six notes were made to Bouldin, five for the sum of $100 each, payable in one, two, three, four and five years from date, and the other for $120, payable in six years; and that these notes were secured by a deed of trust to one J. W. Barnaclo. In addition to this, according to the averments in the bill, four other notes of $400 each were afterwards executed to Bouldin, on a settlement of his accounts for the erection of the church building. It was also alleged that the defendants who claim to be trustees of the church property had executed a deed of trust to one Callan, to secure all the notes originally given to Bouldin. The claim on the part of the complainants was, that on a full settlement of all the accounts of Bouldin, and a correction of the mistakes that had occurred in

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former settlements, it would be found there was nothing due on the notes, and that Bouldin would be largely in debt to the church.

The defendants, in their answer, claimed that the notes for $620 were given and secured by deed of trust to Barnaclo, as stated in the bill, and that on the settlement of accounts, when the church building was completed, six notes, of $400 each, were given to Bouldin, instead of four. The execution of the deed of trust by the [333] defendant trustees was also relied on.

On the hearing of the case before the auditor, Bouldin refused to produce the notes that had been given to him, or account for their absence. It was proved, however, that there had been paid to or collected by him divers sums of money which should be credited on the notes. The aggregate of these sums, including interest from the date of payment to November 1, 1875, is, according to the report of the auditor, $1,233.47. On account of the failure of Bouldin to present the notes, the auditor made no statement of the amount due upon them, but treated them as withdrawn from the suit by Bouldin. The auditor also found that the entire lot of ground on the corner of Fourth and L Streets, bought from Varnell, was for the use of the church, and charged Bouldin with the proceeds of a sale made of part of the lot. He also reported that the defendants had been in the possession of the church property since the commencement of the suit, and that the value of the rents, issues and profits accruing to them by reason of such possession, was six per cent per annum on the value of the property, or $498.33 a year. He, therefore, in his accounting, charged the defendants with that amount, payable quarterly each year, from September 28, 1867, the date of the commencement of the suit, until October 1, 1875, and interest on each quarterly installment as it fell due. The total amount of his allowances in this way, on account of rents, was $4,910.26, as of October 1, 1875.

Upon the filing of the report, the complainants excepted because rents had not been charged from July 28, 1867, instead of September 28. The defendants excepted, 1, because they had been charged with *mesne* profits; 2, because Bouldin was not credited for the amount of his notes; 3, because Bouldin was charged for the proceeds of the part of the lot bought from Varnell which he had sold; 4, because no allowance had been made to Bouldin for his services; and, 5, because of the amount allowed for payments made to Bouldin.

The court below at special term overruled the exceptions of the complainants, and sustained the exceptions of the defendants to the allowance against Bouldin for the proceeds of the sale of part of the lot bought from Varnell, and to the allowance against all the defendants for [334] rents, and returned the case to the auditor for a further stating of the accounts in accordance with certain instructions. From this decree at special term an appeal was taken by the complainants to the General Term, where a decree was rendered against all the defendants, the present appellants, for $4,784.12, "As *mesne* profits for use and occupation by them of the church premises during the pendency of this suit, to wit: from the commencement of the suit until March 31, 1877, when the said premises were returned to the possession of the plaintiffs." The decree then further goes on to say, "The promissory notes given by the plaintiffs as trustees of the church to the defendant, Albert Bouldin, are not included in this decree, the same having been withdrawn from the consideration of the court. But all other claims by him made against the church or its trustees are rejected and disallowed. The item of interest on *mesne* profits reported by the auditor in favor of the complainants is disallowed." It was also ordered that the injunction restraining J. W. Barnaclo from proceeding under the deed of trust to him, and that restraining the complainants from selling, disposing of, or incumbering the title to the church property, be dissolved.

From this decree the defendants below have alone appealed, and they assign for error the decree against them for the payment of *mesne* profits, and the disallowance of the claims of Bouldin, not embraced in his notes.

As to the *mesne* profits, we think the decree below cannot be sustained. There is no claim for an allowance of this kind in the bill, and the proofs do not show that the appellants, or those whom they represent, derived individually any such pecuniary advantage from the use of the property pending the suit as to make it proper they should be held personally accountable in that way. Bouldin was the founder of the society. He gathered the congregation together. He bought the church lot and superintended the erection of the church building. If money was wanted that could not be got from others, he furnished it himself from his own means, and in the end, as the case shows, while the society had secured a property worth, according to the report of the auditor, a little more than $8,000, there was a debt owing to him of over $3,000. The congregation had increased under his administration to several hundred members. Afterwards dissensions grew [335] up, and two parties were formed, the complainants representing one and the defendants the other. Each sought to control the property and govern the society. The defendants kept possession, and apparently a part of the time with the approbation of the court, for a writ to put them out was denied when applied for. At last the complainants were successful, and Bouldin and his party were required to submit to their government. The contest all along was not so much for possession of the property as for the control of the church affairs. During the entire controversy, the church property has been kept exclusively for church purposes. Every member of the congregation was permitted to worship there if he chose. It is possible that the parties officiating at the religious services and controlling the property may not at all times have been such as the complainants and their adherents wanted, but no person was excluded from the church building for the purposes of worship if he wanted to go in. Under these circumstances it seems to us that the defendants are not in equity chargeable personally with the value of the use and occupation of the property during the time they were litigating to keep the control of the society and its affairs.

In other respects the decree below is right, so far as it goes. Upon the evidence, Bouldin is not entitled to any further credits than he has got. He voluntarily withdrew or withheld his

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notes from the auditor and the court, and cannot have any affirmative relief on their account. His rights under the Barnaclo deed of trust are saved by the decree, and as the persons who executed the Callan deed were not lawful trustees, all proceedings under that deed were properly enjoined. We think, however, some order should have been made giving the complainants the benefit of the finding in their favor by the auditor in respect to the moneys paid to or collected by Bouldin to apply on his notes. From the answer of Bouldin, it seems probable that a part of these payments have already been indorsed on the notes; but this cannot be determined with certainty without an inspection of the notes themselves. If he will produce the [336] notes, or satisfactorily account for their absence, so that the proper application of all payments can be made under the direction of the court and the notes discharged to the extent of the application, that should be done. But if, on an order to that effect, he shall fail to produce the notes, or fail satisfactorily to account for their absence, a decree should be entered against him personally for the several amounts reported by the auditor as having been paid to or collected by him on that account. As this last proceeding has been rendered necessary by his failure ,to produce the notes on the former hearing, he should be charged with the costs consequent upon such refusal.

The decree is reversed so far as it charges the appellants with any sum for mesne *profits and use and occupation, and the cause is remanded for such further proceedings in conformity with this opinion as may appear to be necessary.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE H. HILL, *Plff. in Err.*,
v.
GEORGE F. HARDING ET AL.

13 US cc Appx

1. Where a judgment has been rendered against a defendant, after his adjudication in bankruptcy, he may prosecute a writ of error in his own name.
2. This court will not, on a motion to dismiss, undertake to decide whether his discharge in bankruptcy releases him from all liability on the judgment.
3. The motion to substitute in his place his assignee in bankruptcy, as a party, overruled. But the assignee, if any of the questions involved may affect the estate of the bankrupt, ordered heard on such questions, by his counsel, when the case comes up for argument.

[No. 785.]
Submitted Nov. 29, 1880. Decided Dec. 6, 1880.

IN ERROR to the Supreme Court of the State of Illinois.

Motion by the defendants in error to dismiss, and by the assignee in bankruptcy of Hill to be substituted as plaintiff in error.

Mr. **Adolph Moses,** in support of motion to dismiss.

Mr. **George W. Brandt,** in support of motion to substitute.

Mr. Chief Justice **Waite** delivered the opinion of the court:

As the judgment in this case was rendered after Hill's adjudication in bankruptcy, we think he may prosecute a writ of error in his own name. We will not undertake to decide on a motion to dismiss, whether his discharge operates to release him from all liability growing out of the judgment. *The motions are, therefore, overruled;* but if the assignee shall be of the opinion that any of the questions involved are such as may affect the estate of the bankrupt, he will be heard on such questions by his counsel, in connection with the plaintiff in error, when the same comes up for argument, if he desires.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DAVIS R. BOOGHER ET AL., *Plffs. in Err.*, [90]
v.
NEW YORK LIFE INSURANCE COMPANY.

(See S. C., 13 Otto, 90-98.)

Review of cases tried by a jury—state practice—findings of referee—motion for new trial—insufficient exception—insurance contract.

1. The review of a case in this court is regulated by the Acts of Congress and not by the laws of the States.
2. Section 700 U. S. R. S. is the only statute which provides for review here of cases where an issue of fact in a civil cause has been tried in the Circuit Court otherwise than by a jury.
3. Where an action cannot be referred, under the practice Acts of a State, without the written consent of the parties, and a case was referred by consent, this court will assume that it was a written consent.
4. This court cannot consider the effect of the evidence in the case, but only determine whether the facts found on the trial below are sufficient to support the judgment; it cannot consider a case tried by a referee, unless the facts found by the referee, when confirmed by the court, are treated as the finding of the court.
5. The rulings of the circuit courts on motions for a new trial are not reviewable in this court on writ of error.
6. If a series of propositions in respect to the report of a referee are overruled and excepted to in a mass, and one of the propositions is correct, the exception will not be good.
7. A contract which abrogates all former contracts between an insurance company and its agent, so far as new business is concerned, does not abrogate a prior bond given by the agent and his sureties.

[No. 49.]
Argued Oct. 29, 1880. Decided Dec. 6, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Messrs. Marshall & **Barclay,** and *Linden Kent,* for plaintiffs in error:

Mr. **Frederick N. Judson,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

By the Act to regulate practice in civil cases in Missouri, "All or any of the issues of fact in the action may be referred upon the written consent of the parties." Wag. Stat., 1,041, sec. 17; Gen. Stat., 169, sec. 17. "All testimony [9 taken before referees shall be reduced to writing, and if either party shall except to the competency of a witness, or the admission or exclusion of evidence, or any other matter to which

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exceptions may be taken, the referees, if required, shall state the particulars of the exceptions in their report." Wag. Stat., 148, sec. 39. "The referees shall, in all cases, report * * showing the * * proceedings had, and return the same, together with the testimony taken, to the court." *Id.*, sec. 40. "All exceptions to the report * * shall be in writing, and filed within four days, in term, after the report is filed * * ." *Id.* sec. 41. "If exceptions are allowed, the matter may again be referred, with instructions, if necessary; but if the report is confirmed by the court, judgment shall be rendered thereon in the same manner and with like effect as upon a special verdict." *Id.*, sec. 42.

In this case the record shows the following entry: "Now come the parties by their attorneys, * * and this cause being regularly called for trial, and both parties being ready, it is ordered that a jury come; and thereupon comes said jury, to wit: * * twelve good and lawful men, duly sworn and empaneled well and truly to try the issues joined herein; and now, by consent of parties, it is ordered that a juror be withdrawn, and said juror being withdrawn, it is ordered that this cause be referred to Amos. M. Thayer for final report, subject, however, to exceptions." Under this order the referee tried the cause and made his report, stating the issues tried and his findings of law and fact thereon. The testimony was returned with the report, and certain exceptions taken before the referee were noted in the return. The plaintiffs in error appeared in court and objected to the confirmation of the report, filing twenty-two separate exceptions. The principal part of these exceptions were to the effect that the findings of fact were not sustained by the evidence. The others were as follows: "4. The conclusions of said referee in said report are not sustained by his findings of fact therein. 5. Said report is erroneous and not in accordance with law. 8. The referee erred in finding that the special plea of release in the answers herein had not been sustained. 15. The referee erred in admitting the accounts mentioned in the report as evidence against the defendants. 16. The referee erred in admitting incompetent and irrelevant testimony in favor of plaintiff. 19. The referee erred in admitting in evidence a note of $1,000, dated October 8, 1873."

[94]

Upon the hearing by the court, the evidence was read together with the report, and, after argument, the exceptions were overruled as a whole. To this the plaintiffs in error excepted generally. A new trial was then moved for and overruled. To this another exception was noted. The court thereupon entered judgment as follows:

"Now come the said parties by their attorney, * * and the exceptions to the referee's report herein being submitted to the court, and the same having been duly considered, it is ordered that said exceptions be overruled, and that the report of the referee be and the same is hereby confirmed and approved, and thereupon this cause is submitted to the court upon the pleadings and the report of said referee, on consideration whereof the court finds that the defendant, Davis R. Boogher, is indebted to the plaintiff by reason of the breaches of the writing obligatory sued upon, in the sum of twelve hundred and seventeen dollars and fifty-two cents. It is therefore considered," etc.

A bill of exceptions was then taken which set forth the report of the referee, the testimony before the referee with the objections noted, the exceptions to the report, the exception to the order of the court confirming the report, the motion for a new trial, the order overruling this motion and the exception thereto.

The errors assigned here are: "1. That the referee erred in finding in favor of the defendant in error, on the counter claim of D. R. Boogher, and the court erred in confirming the finding. 2. The undisputed facts in the case, established by the testimony of the defendant in error, fail to support the finding of the referee, that D. R. Boogher was discharged for good cause, because of an 'unauthorized detention of plaintiff's funds,' and the court erred in confirming that finding. 3. The pleadings of the defendant in error are not supported by any evidence; and, 4. The special plea of discharge made by plaintiff in error was fully sustained, as appears by the pleadings and findings of the referee, and the court erred in not rendering judgment for plaintiff in error thereon."

[95]

It is, to say the least, doubtful whether cases tried in the circuit courts by a referee, in States where such a practice exists, can be reviewed here. While, since the Act of 1872, 17 Stat. at L., 196, now sec. 914, Rev. Stat., the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, the review of a case in this court is regulated by the Acts of Congress and not by the laws of the States. This was decided in *U. S.* v. *King*, 7 How., 844, where the precise question arose under the Act regulating the practice of the courts of the United States in the district of Louisiana. 4 Stat. at L., 62. The Constitution provides (Amend. VII.) that "No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The Judiciary Act of 1789, 1 Stat. at L., 80, sec. 12, provided that the trial of issues of fact in the circuit courts should, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury; but it has always been held that if the parties waived a jury a judgment after trial by the court would not be erroneous. *Kearney* v. *Case*, 12 Wall., 281 [79 U. S., XX., 396]. Such a judgment, however, would not be reviewable here, because, as was said by *Chief Justice* Taney, in *Campbell* v. *Boyreau*, 21 How., 226 [62 U. S., XVI., 96], "If, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. * * And as this court cannot regard facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore open

[96]

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to our revision as an appellate tribunal." To get rid of this difficulty and give parties the right of review here if they submitted their issues to a trial by the court, the Act of 1865, 13 Stat. at L., 501, sec. 4; Rev. Stat., secs. 649, 700, was passed. In this way it was provided that issues of fact in civil cases in the circuit court might be tried and determined by the court, without the intervention of a jury, "whenever, the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts * * shall have the same effect as the verdict of a jury." Provision was also made for presenting the rulings of the court in the progress of the trial for review here by bill of exceptions, and when the finding was special that the review might extend to the determination of the sufficiency of the facts found to support the judgment.

The doubt we have is whether the Act of 1872 enlarged the existing modes of subjecting cases to review here. There is no express provision of that kind, and on its face the Act is confined to the practice, pleadings, and modes of proceedings in the circuit and district courts. Any allusion to a review here seems to have been studiously avoided. The Act of 1865 was not repealed. On the contrary, that Act, as well as the one of 1872, was brought into the Revised Statutes, and it is now, as section 700, the only statute which provides for a review here of cases where an issue of fact in a civil cause has been tried in the circuit court otherwise than by a jury.

This objection was not raised in the argument, and its final determination may perhaps with propriety be postponed, as, if the trial before the referee is treated as a trial by the court, we think the judgment must be affirmed. In *Kearney* v. *Case*, *supra*, it was held that unless there was a written stipulation of the waiver of a jury filed with the clerk, there could be no review here of a case tried by the court. Such a stipulation in writing is a prerequisite to our right to re-examine. We said, however, in that case (p. 283), if it affirmatively appeared in any part of the record proper, that such a writing was made and filed by the parties, we might take jurisdiction, even though the stipulation itself, or a copy of it, should not be sent up with the transcript.

[97]

It nowhere expressly appears in this case that a stipulation was filed, but inasmuch as an action of this kind could not, under the practice Act of Missouri, be referred without the written consent of the parties, and this was referred by consent, we think we must assume that a consent was given in such form as to authorize what was done under it. The withdrawal of a juror after the trial was begun and the consent to a reference, necessarily implied a waiver of a jury, and as this consent to be available must have been in writing, it follows that the waiver which flowed from the consent was also in writing. We think, therefore, it sufficiently appears that the stipulation which the Act of Congress requires was entered into.

We have often held that the Act of 1865, secs. 649, 700, Rev. Stat., does not permit us to consider the effect of the evidence in the case, but only to determine whether the facts found on the trial below are sufficient to support the judgment, and to pass on the rulings of the court in the progress of the trial presented by a bill of exceptions. For all the purposes of our review the facts as found and stated by the court below are conclusive. *The Abbotsford*, 98 U. S., 443 [XXV., 169], and the cases there cited. Neither can we consider this case unless the facts found by the referee, when confirmed by the court, are treated as the finding of the court. In that way alone can it with propriety be said that the facts have been determined judicially by the court, so as to be made the foundation of a review here of the questions of law properly raised on them in the record.

Upon the facts as found and reported, there can be no doubt of the correctness of the judgment. Indeed, no complaint is made, by an assignment of error or otherwise, on that account. This brings us to a consideration of the bill of exceptions, and the only exceptions which we there find to the rulings of the court are: 1, To the overruling of the objections to the referee's report; and, 2, To the order overruling the motion for a new trial. We have many times decided that the rulings of the circuit courts on motions for a new trial are not reviewable here on writ of error. *Railway Co.* v. *Twombly*, 100 U. S., 81 [XXV., 550]. The whole case, therefore, turns on the exception to the overruling of the objections to the report. This exception is a general one, to the single order overruling the twenty-two specific objections as a whole. We have uniformly held that "If a series of propositions is embodied in instructions (to the jury), and the instructions are excepted to in a mass, if any one of the propositions is correct the exception must be overruled." *Johnston* v. *Jones*, 1 Black, 220 [66 U. S., XVII., 120]; *Rogers* v. *The Marshal*, 1 Wall., 654 [68 U. S., XVII., 717]; *Harvey* v. *Tyler*, 2 Wall., 338 [69 U. S., XVII., 872]; *Lincoln* v. *Claflin*, 7 Wall., 139 [74 U.S., XIX., 109]; *Beaver* v. *Taylor*, 93 U.S., 54 [XXIII., 798]. The same rule should be applied to cases of this kind. Here are, so to speak, a series of propositions in respect to the report of the referee. They were overruled and excepted to in a mass. If one of the propositions was correct, therefore, the exception will not be good. The party should, by his exception, direct the attention of the court to the specific proposition or propositions on which he relies, and separate it or them from the rest.

[98]

Among the objections to the report included in the general exception are many relating to the sufficiency of the evidence to support the findings. These cannot be re-examined here. But if we consider the action of the court on the objections to the sufficiency of the evidence as not included in the general exception, the difficulty is not removed, because the five remaining objections embrace separate matters. Some of them are confessedly not well taken, and have not been mentioned here, either in the argument or assignment of errors. Only one is relied on, and that the 8th, which is to the effect that the referee erred in finding that the special plea of release had not been sustained. This, taken in connection with the pleadings, raises the question whether the legal effect of the second agreement between the parties, which was in writing and set forth in the complaint, was to cancel and discharge the bond sued on. We have no hesitation in saying that it did not.

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The bond was not one of the agreements which that instrument abrogated.

This disposes of the case and leads to an affirmance of the judgment, which is ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 623; 112 U. S., 607.

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[666] ST. LOUIS SMELTING AND REFINING C' MPANY, *Plff. in Err.*,
v.
THOMAS KEMP ET AL.

(See S. C., 13 Otto, 666.)

Submission of cause.

This court will not accept the submission of a cause against the wishes of those collaterally interested in the decision that may be made.

[No. 736.]

Submitted Nov. 29, 1880. Decided Dec. 6, 1880.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

Motion to set aside submission.

The case is stated by the court.

Messrs. **R. H. Bradford** and **Willis Drummond**, in support of motion.

Messrs. **A. T. Britton** and **Walter H. Smith**, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The showing made on this motion satisfies us that this case and the one which follows it on the docket, No. 737, were brought here for a determination of the questions on which the title of the plaintiff in error to the St. Louis Smelting and Refining Company's addition to Leadville depends; that the decision of these suits will dispose of a large number of others now pending in the court below; that when the suits were begun below, all the defendants united in the employment of counsel to present their defense, and contributed to a common fund for the payment of the expenses of the litigation; that since these cases Nos. 736 and 737 have been docketed here, the parties to No. 736 have come to an amicable understanding in respect to the subject-matter of their particular litigation, under which this submission has been made, through new counsel employed in behalf of the defendants in error, and without the concurrence of those interested in No. 737 and the suits still pending below. The questions involved are important. Under these circumstances, we think we ought not to accept the submission of the cause against the wishes of those collaterally interested in the decision that may be made.

The submission is, therefore, set aside and the cause restored to its place on the docket.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S

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[522] WILLIAM DENNISON ET AL., Comrs. of the DISTRICT OF COLUMBIA, AND THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK, *Appts.*
v.
COLUMBUS ALEXANDER.

(See S. C., 13 Otto, 522, 523.)

Jurisdiction as to amount.

Under the Act of 1879, this court can no longer hear any case from the Supreme Court of the District of Columbia, unless the matter in dispute exceeds $2,500.

[No. 98.]

Submitted Dec. 3, 1880. Decided Dec. 13, 1880.

APPEAL from the Supreme Court of the District of Columbia.

On motion to dismiss.

The case is stated by the court.

Mr. **Joseph I. Stewart**, for appellee.

Messrs. **A. G. Riddle** and **Wm. A. Cook**, for appellants.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We think this case is governed by *R. R. Co. v. Grant*, 98 U. S., 398 [XXV., 231]. In that case we held that the Act of February 25, 1879, ch. 99, secs. 4, 5; 20 Stat. at L., 320, took away our right to hear and determine cases from the Supreme Court of the District of Columbia where the matter in dispute did not exceed $2,500, and that it operated on pending cases which had been brought here under the provisions of section 847 of the Revised Statutes of [relating to] the District. This case came here under section 848, which provided for the allowance of appeals and writs of error by the Justices of this Court under certain circumstances, when the matter in dispute was less than $1,000, the then general jurisdictional amount, but exceeded $100. There is no reservation in the repealing Act as to this class of pending cases any more than the other. Both sections have reference to the same general sub- [523]
ject-matter, that is to say, our review of the judgments and decrees of the Supreme Court of the District in cases where jurisdiction has been made to depend on the value of the matter in dispute. Under the Act of 1879 we can no longer hear any of that class of cases, unless the amount exceeds $2,500.

The appeal is dismissed, each party to pay their own costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

STEAMBOAT SABINE, ETC., PIERRE S. WILTZ, Public Administrator of SARAH C. [541]
SHIRLEY, Deceased, AMERICA B. SELBY ET AL., *Appts.*,
v.
STEAMBOAT RICHMOND, NATHANIEL S. GREEN, JOHN N. BOFFINGER ET AL.

(See S. C., "*The Richmond*," 13 Otto, 541, 542.)

Appeal in admiralty case—questions of fact.

On an appeal from a decree in admiralty, where the questions involved are of fact only and two courts have found against the appellants, every presumption is in favor of the decrees below, and a clear case must be made in favor of the appellants, to justify this court in reversing such decrees.

[No. 85.]

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Argued Nov. 29, 1880. Decided Dec. 13, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **Bentinck Egan** and **R. H. Marr, Charles B. Singleton**, *Albert Voorhies*, and *M. M. Cohen*, for appellants.

Messrs. **Given Campbell**, *Enoch Totten* and *John H. Kennard*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[542] This is an appeal from a decree in admiralty which was entered before the Act of February 16, 1875, went into effect; consequently the whole case comes up. On examination we find that, so far as the merits are concerned, the questions involved are of fact only. Two courts have already found against the appellants. Under such circumstances the burden is on the appellants to show the error, with every presumption in favor of the decrees below. *The S. B. Wheeler*, 20 Wall., 386 [87 U. S., XXII,, 385]. The testimony is voluminous and conflicting, but it certainly makes no such clear case in favor of the appellants as willjustify us in reversing the decrees against them.

The decree of the Circuit Court is, consequently, affirmed, and as it will serve no useful purpose to enter into a discussion of the evidence in detail, no further opinion will be delivered. Having reached this conclusion, it is unnecessary to consider how much of the case has been brought here by the appeals that were taken.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[471] EDWARD M. EDWARDS, *Plff. in Err.*

v.

UNITED STATES, *ex rel.* WILLIAM F. THOMPSON.

(See S. C., 13 Otto, 471-479.)

Resignation of town officer—return to mandamus *—service of notice.*

1. A town officer who tenders his resignation, does not cease to be such officer until his resignation has been accepted.

2. A return, to a *mandamus* requiring a supervisor of a town to take proper steps to levy a tax to pay a judgment against the town, that he had delivered to and filed with the town clerk his resignation of such office of supervisor, did not sufficiently show that the defendant had ceased to be supervisor of the town.

3. The plea of non-service of notice in the proceeding is inadmissible, where the defendant appeared and made the return.

[No. 187.]

Submitted Dec. 13, 1880. Decided Dec. 20, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

On motion to dismiss.

The case is stated by the court.

Messrs. M. J. Smiley and **John W. Stone**, for defendant in error, in support of motion.

Mr. **H. F. Severens**, for plaintiff in error, *contra*.

Mr. Justice **Bradley** delivered the opinion of the court:

William F. Thompson, the relator of the defendant in error, on the 5th day of September, 1874, recovered a judgment in the Circuit Court of the United States for the Western District of Michigan, against the Township of St. Joseph, in the County of Berrien, in said State, for the sum of $17 327.86 besides costs.

By the laws of Michigan an execution cannot be issued against a township upon a judgment, but it is to be "levied and collected as other township charges;" and when collected to "be paid by the township treasurer to the person to whom the same shall have been adjudged." Comp. Laws of 1871, sec. 6630. The mode of raising money by taxation in townships is prescribed in sections 992 and 997 of the compiled laws of 1871, which make it the duty of the township clerk, on or before the first day of October of each year, to make and deliver to the supervisor of the township a certified copy of all statements on file, or of record, in his office, of moneys proposed to be raised therein by taxation for all purposes; and it is made the duty of the supervisor, on or before the second Monday of said month, to deliver such statements to the clerk of the board of supervisors of the county, to be laid by him before the board at its annual meeting. At this meeting the board are required to direct the several amounts to be raised by any township, which appear by the certified statements to be authorized by law, to be spread upon the assessment roll of the proper township, together with its due proportion of the county and state taxes. The whole [472] is then certified and delivered by the clerk of the board to the town supervisor whose duty it is to make the individual assessment to the various tax payers of the township in proportion to the estimate and valuation of their property. The assessment roll is then delivered to the town treasurer for collection.

The judgment in the present case not being paid, and the township officers having refused to take any steps to levy the requisite tax for the purpose, the relator on the 11th of October, 1876, filed his petition for a *mandamus* against Edward M. Edwards, supervisor of the township of St. Joseph, in which he set forth the judgment, and alleged that, on the 26th of September, 1876, he caused a certified transcript of the judgment to be served on the township clerk, with proper notice and demand; and on the 27th of September, 1876, he caused a similar transcript, notice and demand to be served on Edwards, the supervisor. The petition further alleged that these officers refused to do anything in the premises, the clerk pretending to have resigned his office. An alternative *mandamus* was issued commanding Edwards, as supervisor of the township, forthwith to deliver to the clerk of the board of supervisors of the county a statement of the claim of relator under and by virtue of the judgment.

Edwards duly filed a return, stating that he was not supervisor, and had no authority to perform the acts required of him; that at the general election of April 3d 1876, he was duly elected supervisor, and qualified and entered upon his office and continued in office until the 7th of June, 1876, when he resigned; that his resignation was in writing as follows:

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"To the township board of the Township of St. Joseph, County of Berrien, State of Michigan: I hereby tender my resignation of the office of supervisor of this township. St. Joseph, June 7th, 1876.

(Signed) "EDWARD M. EDWARDS."

That this written resignation was delivered to and filed by the township clerk on the same day; that since then he, Edwards, had not been nor acted as supervisor, nor had charge [473] of the records or papers of the office. He further stated in his return that the township clerk had never delivered to him any certified copy of any statement of the moneys to be raised by taxation, either for the purpose of paying the claim of the relator, or for any other purpose.

To this return the relator demurred and the demurrer was sustained, and a peremptory *mandamus* awarded. The present writ of error is brought to reverse this judgment.

If we could take notice of the affidavits annexed to the petition for *mandamus*, we should not have much difficulty in drawing the conclusion that the pretended resignations of the clerk and supervisor were either simulated or made for the purpose of evading compulsory performance of their duties. But the return being demurred to must be taken as true, and the affidavits cannot be considered. The only question to decide, therefore, is whether the facts set forth in the return exhibit a good and sufficient answer to the alternative writ; whether, in other words, they show such a completed resignation on the part of Edwards as amounts to a deposition of his office of supervisor of the township. This is the issue made by the parties, and it is an issue of law. The plaintiff in error insists that having done all that he could do to discharge himself from the office, by filing a written resignation with the township clerk, his resignation was complete. The defendant in error insists that a resignation is not complete until it is accepted by the proper authority. The question then is narrowed down to this: was the resignation complete without an acceptance of it, or something tantamount thereto, such as the appointment of a successor?

As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and subjected himself to a penalty by refusal. An office was regarded as a burden [474] which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. See 1 Kyd, Corp., ch. 3, sec. 4; Willcock, Corp., pp. 129, 238, 239; Grant, Corp., pp. 221, 223, 268; 1 Dillon, Mun. Corp., sec. 163; *Rex* v. *Bower*, 1 Barn. & C., 585; *Rex* v. *Burder*, 4 T. R., 778; *Rex* v. *Lone*, 2 Str., 920; *Rex* v. *Jones*, 2 Str., 1146; *Hoke* v. *Henderson*, 4 Dev., 1; *Van Orsdall* v. *Hazard*, 3 Hill (N. Y.), 243; *State* v. *Ferguson*, 31 N. J. L., 107. This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. "To complete a resignation," says Mr. Willcock, "it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant." Willcock, Corp., 239.

In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices and, in some States, with regard to offices in general, may have obtained; but we must assume that the common law rule prevails unless the contrary be shown. In Michigan we do not find that any contrary rule has been adopted; on the contrary, the common law rule seems to be confirmed by the statutes of the State, so far as their intent can be gathered from their specific provisions. By section 690 of the Compiled Laws of 1871, if any person elected to a township office, except that of justice, of whom an oath is required, and who is not exempt by law, shall not qualify within ten days, he is subjected to a penalty of ten dollars. By sections 691, 693, resignations of officers elected at township meetings must be in writing, addressed to the township board, who are authorized to make temporary appointments to fill vacancies. The township board is composed of the supervisor, the two justices of the peace whose term of office will soonest expire, and the township clerk, any three of whom constitute a quorum. Sec. 706. Resignations of other officers are directed to be made generally to the officer or officers who appointed them, or who may be authorized by [475] law to order a special election to fill the vacancy. Sec. 615. These provisions indicate a general intention in conformity with the principles of the common law. They make the acceptance of a township office a duty, and they direct resignations of office generally to be made to those officers who are empowered either to fill the vacancy themselves, or to call an immediate election for that purpose; the controlling object being to provide against the public detriment which would ensue from the continued or prolonged vacancy of a public office. The same intention is manifested by section 649, which prescribes the term of office of township officers as follows: "Each of the officers elected at such meetings (that is, the annual meetings of the township), except justices, commissioners of highways, and school inspectors, shall hold his office for one year, *and until his successor shall be elected and duly qualified*." Here is manifested the same desire to prevent a hiatus in the offices. There is nothing in the spirit of this legislation to indicate that the common law rule is discarded in Michigan.

The 617th section of the Compiled Laws declares that "Every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: first, the death of the incumbent; second, his resignation; third, his removal from office," etc., etc. But it is nowhere declared when a

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resignation shall become complete. This is left to be determined upon general principles. And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common law requirement, namely: that a resignation must be accepted before it can be regarded as complete, was not intended to be abrogated. To hold it to be abrogated would enable every office holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law.

The plaintiff in error has referred us to several authorities to show that in this country the doctrine that a resignation to be complete must be accepted, does not prevail. But whilst this seems to be the rule in some States it is not the case in all. In many States the common law rule continues to prevail. In *Hoke* v. *Henderson*, 4 Dev., 1, 29, decided in 1832, *Chief Justice* [476] Ruffin, speaking for the Supreme Court of North Carolina, said: "An officer may certainly resign; but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute-book several Acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he cannot lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged." Similar views were expressed by *Mr. Justice* Cowen in 1842, in delivering the opinion of the Supreme Court of New York, in *Van Orsdall* v. *Hazard*, 3 Hill, 247, 248; and many common law authorities on the subject were referred to. The Supreme Court of New Jersey maintained the same doctrine in 1864 in an able opinion delivered by the present learned *Chief Justice*, in the case of *State* v. *Ferguson* [*supra*]. Speaking of the officer in question (an overseer of highways), the *Chief Justice* said: "If he possess this power to resign at pleasure, it would seem to follow, as an inevitable consequence, that he cannot be compelled to accept the office. But the books seem to furnish no warrant for this doctrine. To refuse an office in a public corporation connected with local jurisdiction was a common law offense, and punishable by indictment." After reviewing the authorities cited to the contrary, particularly that in 1 McLean, 509, the *Chief Justice* concludes: "I do not think any of the other cases relied upon on the argument sustain in the least degree the doctrine, but on the contrary they all imply that the resignation, to be effectual, must be accepted."

In *Gates* v. *Delaware Co.*, 12 Iowa, 405, referred to and much relied on by the plaintiff in error, whilst the court asserts that acceptance is not necessary, it nevertheless finds that there was, in fact, an acceptance in that case. The county judge, to whom the superintendent of schools addressed his resignation, indorsed it [477] "Resignation," and filed it in his office of the date specified; which act, under the circumstances, was considered by the court an acceptance. This case, therefore, cannot be regarded as definitively settling the doctrine even in Iowa.

Much reliance is also placed on the decision of *Mr. Justice* McLean in the Circuit Court in *U. S.* v. *Wright*, 1 McLean, 509, where Wright was sued as surety on a collector's bond for delinquency committed by the collector after he had sent his resignation to the President, but before it was accepted. *Justice* McLean held that the resignation was complete when received and that the defendant was not liable. In announcing his decision he used this broad language: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office." *Chief Justice* Beasley, of New Jersey, in commenting upon this language in *State* v. *Ferguson*, already cited, justly observes: "It is hardly to be supposed that it was the intention of the Judge to apply this remark to the class of officers who are elected by the people and whose services are absolutely necessary to carry on local government; or that it was the purpose to brush away with a breath the doctrine of the common law, deeply rooted in public policy upon the subject. However true the proposition may be as applied to the facts then before the Circuit Court, it is clearly inconsistent with all previous decisions, if extended over the class of officers where responsibility is the subject of consideration."

But conceding that the law in some of the States is as contended for by the plaintiff in error—and he cites cases to this purpose decided in Alabama, Indiana, California and Nevada—and conceding that *Justice* McLean's decision may have been correct in the particular case before him, the question is: what is the law of Michigan? And we think it has been shown that the common law rule is in force in that State.

Now, in the present case, it is true that the defendant in his return avers that he resigned his office on the 7th day of June, 1876. But he does not stop here. He goes on to show precisely what he did do. His whole return on this branch of the subject is as follows: [478]

"That, at the general election of April 3, 1876, this respondent was duly elected the supervisor of said Township of St. Joseph, and on April 8, 1876, respondent qualified and entered upon his office as such supervisor. That respondent continued in said office of supervisor until the 7th day of June, 1876, when this respondent resigned his office as such supervisor. That such resignation was in writing, of which the following is a true copy:

"'To the township board of the Township of St. Joseph, County of Berrien and State of Michigan: I hereby tender my resignation of the office of supervisor of this township. St. Joseph, June 7, 1876. EDWARD M. EDWARDS.'

That said writing, of which the above is a copy, was signed by this respondent, and after being so signed was by respondent delivered to and filed by the township clerk of said Township of St. Joseph, and that said writing was so delivered to and filed by said township clerk on the 7th day of June, 1876. That since said 7th day of June, 1876, this respondent has not been

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the supervisor of said Township of St. Joseph. That he has not acted or assumed to act as such supervisor in any particular. That respondent has not, since said June 7th, 1876, had charge of any of the records or papers of said office of supervisor."

It does not appear that the resignation was ever acted upon by the township board, or that it was ever presented to or seen by them, or that the board was ever convened after the resignation was filed. According to the common law rule, the resignation would not be complete, so as to take effect in vacating the office, until it was presented to the township board, and either accepted by them or acted upon by making a new appointment. A new appointment would probably be necessary in this case, because the township board was not the original appointing power. The supervisor is not their officer, representative or appointee. They only represent the township in exercising the power, vested in them, of filling a vacancy when it occurs. This makes them the proper body to receive the resignation, because they are the functionaries whose duty it is to act upon it.

[479] We think, therefore, that the return made to the alternative *mandamus* did not sufficiently show that the defendant had ceased to be supervisor of the township.

Other excuses for not obeying the *mandamus* are propounded in the return, as follows:

"Respondent further says that he has never had served upon him in the cause in which said alternative writ issued, any process, notice, or paper of any kind, except said alternative writ.

And respondent further shows that the township clerk of said Township of St. Joseph has never made and delivered to respondent any certified copy of any statement on file or of record in his office of the moneys to be raised by taxation, either for the purpose of paying the alleged claim of the relator or for any other purpose, and no statement whatever of the clerk of said township with reference to the amount of money to be raised for township purposes has ever been delivered to respondent."

The plea of non-service of the writ is inadmissible. The appearance of the defendant and the actual making of the return are a sufficient answer to it. Non-service may be good ground for a motion to set aside proceedings based on supposed service, but is not a good return to the writ.

The excuse that the clerk did not deliver to the defendant a certified statement is evasive. Why did he not do so? Was there collusion between them as stated in the petition for *mandamus?* The defendant does not state that the clerk refused to deliver him a statement; nor that he, the defendant, applied to the clerk for one. His own act, in repudiating his office, might well have prevented the clerk from delivering a statement to him. It is to be presumed that, on re-assuming his duties, the clerk will recognize his official character and furnish the requisite statement. But if the clerk should refuse, it would still be the defendant's duty as supervisor to see that the claim of the relator, which is a fixed and indisputable liability of the township, and has been duly presented, is placed before the board of supervisors, and put in the way of payment by means of taxation.

We think the return was insufficient, and the demurrer was well taken.

The judgment of the Circuit Court is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct., U. S.

Cited—108 U. S., 480; 27 Kan., 445; 41 Am. Rep., 421.

LEOPOLD BAMBERGER, *Plff. in Err.*, [40]

v.

GEORGE E. TERRY, RECEIVER,

(See S. C., 13 Otto, 40-44.)

Waiver of jury trial—amendment in process or pleadings—vacating submission.

1. A stipulation in writing, that a cause be tried by the court, is a waiver of a jury.
2. The trial court may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall prescribe.
3. When such an amendment is permitted, the court must, in its discretion, determine whether any submission which has been made ought to be vacated.

[No. 150.]

Submitted Dec. 15, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the District of Connecticut

The case is fully stated by the court.

Messrs. **R. B. Warden, S. W. Johnston** and *Stephen S. Marshall*, for plaintiff in error.

Messrs. **S. W. Kellogg** and **Geo. E. Terry**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [43]

This record shows that on the 25th of May, 1876, Bamberger, the defendant below, moved that the cause be entered on the jury docket of the court, "pursuant to the statute in such case provided, and as of right he may demand. Afterwards he stipulated in writing that the cause be tried by the court. This was equivalent to a waiver of a jury. The stipulation was duly filed and entered of record. Afterwards the parties appeared and the case was tried by the court. At the close of the testimony, Terry, the plaintiff below, asked and, against the objection of the defendant, obtained leave to amend his declaration so as to avoid a variance between the pleadings and the proof. The defendant then put in a general denial to the amended declaration and demanded a jury trial. This the court refused, but gave the defendant leave to introduce additional evidence, if he desired.

By section 954, Revised Statutes, the trial court may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe. This clearly authorizes the allowance of amendments during the progress of a trial in furtherance of justice. When such an amendment is permitted, the court must, in its discretion, determine whether any submission which has been made ought to be vacated. Here the court decided that it [44] ought not, and in this we see nothing wrong. Neither the nature of the case nor the real issue between the parties, as it had been tried, was

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changed by the amendment. All that had been done was to present by the pleadings, fairly and on its merits, the controversy as it had actually been tried.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN A. ALLEN, Admr. of the Estate of CHARLES J. LUND, Deceased, *Plff. in Err.*,

v.

[80] CITY OF LOUISIANA.

(See S. C., 13 Otto, 80-86.)

Authority of a city to subscribe to a railroad—vote—invalid law.

1. The Legislature of Missouri did not, by a valid law, authorize the City of Louisiana to subscribe to the capital stock of the Quincy, Alton and St. Louis R. R. Co., an Illinois corporation.
2. Until the Legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality or confer upon the municipal authorities the power to make such a subscription.
3. Where unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature, the whole law is invalid.

[No. 120.]

Submitted Dec. 6, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case fully appears in the opinion of the court.

Messrs. **Glover & Shepley,** for plaintiff in error.

Mr. **James O. Broadhead,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Article X., section 14, of the Constitution of Missouri, adopted in 1865, is as follows:

"The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The charter of the City of Louisiana, approved March 12, 1870, contained the following sections as article III., sections 8 and 9, and article VII., section 14.

"SEC. 8, Art. III. The bonded or funded debt of the City for all purposes, including one hundred thousand dollars subscribed (or to be lawfully subscribed) to railroads terminating at or passing through the City of Louisiana, shall not exceed the sum of two hundred thousand dollars; *Provided, however,* That said debt may be increased to a sum not exceeding two hundred and fifty thousand dollars in all, by ordi-
[81] nance or ordinances properly passed and submitted to an election under the authority of the city council of all resident tax payers of the City, that is to say, of all adult persons who shall have been assessed and actually paid a tax on real or personal property for the year or the year previous to the year in which such election shall be held, and at such election the judges holding the same shall require proof of the payment of such tax before recording the vote of any person offering to vote at such election; and a majority of all the legal votes cast at said election shall determine the question for or against such ordinance.

"SEC. 9. The City shall have power to subscribe for stock in any incorporated railroad company connecting with the City of Louisiana, or give a bonus to any institution of learning by submitting an ordinance making the appropriation or authorizing the issue of bonds for any such purpose to a vote of the qualified voters (as provided by section 8) of the City, at any general election held in the City, or any special election expressly ordered, at which election a majority of the votes cast shall be for such ordinance."

SEC. 14, Art VII. The City shall not at any time become a subscriber for any stock in any corporation, except as authorized by this or some other Act of the General Assembly; but said City may by ordinance appropriate money to aid in opening any road leading to the City, or in other improvements within the City, or in building any bridge within two miles of the City, and which may be deemed of general public benefit to the inhabitants of the City; *Provided, however,* That no appropriation shall be made for any improvement beyond the limits of the City, unless a vote be taken on such appropriation at some general election or special election ordered for that purpose, and a majority of all votes polled be cast in favor of that appropriation."

Under the authority of these provisions of the charter the city council, on the 10th of August, 1871, passed an ordinance, section 1 of which is as follows:

"SEC. 1. There shall be an election held at the several places in each ward for the holding general election in the City of Louisiana on the 5th day of September, 1871, on the proposition to take stock in the Clarksville and Western Railroad Company, or in the Quincy, Alton and St. Louis Railroad Company; *Provided,* the said Quincy, Alton and St. Louis Railroad Co. shall cross the Mississippi River and make its southern terminus within the corporate limits of the said City of Louisiana, at such place as may be agreed upon by the officers of the said Quincy, Alton and St. Louis Company and the city council of Louisiana, to an amount [82]
not to exceed fifty thousand dollars ($50,000); said election to be conducted by the same judges and at the same places as the general election held on the Tuesday after the first Monday in March, 1871, and the returns to be made and certified to the city council in the same manner as that of any general election."

Other sections provided for the payment of the subscription in bonds, and for the form of the ballots. Section 4 provided that if, on counting the votes, it appeared that tw thirds of the legal votes cast at the election were in favor of the proposition, a subscription might be made; and section 5 made provision for a registration of the voters prior to the day of the election.

The Quincy, Alton and St. Louis Railroad Company was an Illinois corporation, one terminus of whose road was on the bank of the Mississippi River, in the State of Illinois, opposite the City of Louisiana. Before the day of

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election a full registration of the voters of the City was made, from which it appeared that there were three hundred and fifty-six qualified voters then in the City. On the day appointed an election was held, at which there were three hundred and thirty-six votes cast in favor of the subscription and ten against it. Afterwards the stock was subscribed to the Quincy, Alton and St. Louis Company, and the Company having complied with the terms and conditions of the subscription, the bonds were delivered by the City, amounting in the aggregate to $50,000, in the following form.

"*Know all men by these presents*, That the City of Louisiana, in the State of Missouri, is indebted to —— ——, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which the said City of Louisiana promises to pay on the 2d day of October, 1891, at the treasurer's office in the City of Louisiana, Mo., with interest thereon at the rate of eight per cent per annum, payable annually on the first day of January in each year, upon presentation and surrender of the annexed coupons, as they severally become due and payable. This bond is issued by the City of Louisiana, under authority of the General Assembly of the State of Missouri, entitled 'An Act to Amend and Reduce into One, the Several [83] Acts Incorporating the City of Louisiana,' approved March 25, 1870; also an ordinance of the city council of the City of Louisiana, No. 628, passed September 26, 1870.

"In witness whereof, the City of Louisiana has caused its seal to be hereto affixed, and the same to be signed by the mayor, and countersigned by the clerk of the city council, at the City of Louisiana, Mo., the 4th day of November, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.] WM. PARKER,
Mayor of City of Louisiana.
Countersigned, N. H. GRIFFITH,
Clerk City Council."

The City paid without objection the first installment of interest as it fell due, but since that time has been in default. This suit was brought on seventy-nine coupons, past due, of which the plaintiff's intestate was a purchaser for value before maturity without notice.

Upon this state of facts the Circuit Court gave judgment for the defendant, and to reverse that judgment this writ of error has been brought.

The question which lies at the foundation of this case is whether the Legislature of Missouri has, by a valid law, authorized the City of Louisiana to subscribe to the capital stock of the Quincy, Alton and St. Louis Railroad Company, an Illinois corporation. It is conceded that if there was no such law the judgment below was right. It is also conceded that such a subscription could not be made on the vote of a majority of the tax payers of the City, because the General Assembly is prohibited by the Constitution from granting authority for that purpose except upon the assent of two thirds the qualified voters. Neither is it contended that the qualified voters, whose vote is to be taken under section 9 of the charter, are not the resident tax payers specified in section 8; but the claim is that, if this unconstitutional provision is disregarded, enough can be found in the other parts of the sections to authorize the subscription.

It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. "But," as was said [84] by *Chief Justice* Shaw, in *Warren* v. *Charlestown* 2 Gray, 84, "if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the Legislature, if those provisions are stricken out.

It is contented that, with a proper application of these principles, sufficient authority for this subscription can be found either in sections 8 or 9, article III, or section 14, article VII.

1. As to section 8. This section provides in substance, that the bonded or funded debt of the City, including $100,000 subscribed or lawfully to be subscribed to railroads terminating at or passing through the City, shall not exceed $200,000 without the assent of a majority of the resident tax payers, but that with the assent of the tax payers, given in the way pointed out, the debt may be increased to $250,000. It authorizes no subscription to railroad corporations, but recognizes the fact that under certain circumstances such a subscription may be lawfully made, and limits the permanent debt to be incurred for that and other purposes to $200,000, without the consent of the tax payers, and to $250,000, with their consent. In other words, it is a charter provision against incurring a bonded debt beyond the prescribed amounts. That is the whole scope and effect of this section.

2. As to section 9. This, when taken in connection with the requirements of the Constitution, cannot be construed as being of itself a grant of authority to subscribe, because it makes a subscription dependent on a majority vote of the resident tax payers, while the Constitution requires the assent of two thirds of the qualified voters. In the construction of a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoid- [85] ed. It is not to be presumed that the Legislature intended any part to be without meaning. In the light of these maxims of interpretation, the substantial object of this section evidently was to limit the power to subscribe to the stock of railroad companies connecting with the City, more than had been done by the Constitution. Under the Constitution, a two thirds vote of the qualified voters, taken under the authority of law, would be enough; but under the charter, the two thirds vote of the qualified voters required by the Constitution, and a majority vote of the tax payers, were both necessary. The charter limitation could be repealed. It was in the nature of a legislative regulation which could be dispensed with whenever, in authorizing a particular subscription or other-

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wise, the Legislature should so declare. As it stands, it operates as a charter protection to the tax payers against the imposition of burdens of this kind by the qualified voters alone, but of itself it authorizes no subscription.

Had there been no constitutional restriction put on the Legislature in matters of this kind, the language employed might have been susceptible of a different meaning; but with the Constitution as it is, the entire provision as to the majority vote of the tax payers, to which the Legislature evidently attached special importance, must be stricken out, and that of the Constitution as to the two thirds vote of the qualified voters inserted by implication, before it can be said that what now appears to be a limitation was, in fact, a positive grant of power. We are clearly of the opinion that this cannot be done consistently with the evident purpose of the law; and, as a consequence, that no authority for the subscription can be found in this section of the charter.

As to section 14, article VII. This clearly gives no affirmative power to subscribe. It is, in effect, nothing more than a provision that no subscription shall be made unless expressly authorized by law, which is but an enactment of what had before become a well established rule of decision. It authorized appropriations of money for the purposes specified, on a majority vote of the qualified voters at a general or special election, and it recognized the fact, which is no longer disputed, that the Legislature might authorize the City, in a proper way, to become [86] a subscriber to stock in some corporations. This is the full extent of the operation of that section.

These, so far as we can discover from the record, were the only provisions of law relied on in the court below to sustain the subscription for the payment of which the bonds now in question were issued. In this court, however, it is contended that power to make the subscription may be found in section 17, chapter 63, of the General Statutes of Missouri, of 1865, taken in connection with an amendment to that chapter, adopted in 1870 (Session Acts, pp. 89, 90) as additional section 52. Upon this point it is sufficient to say that the Quincy, Alton & St. Louis Company was an Illinois corporation, and under section 17 authority was only given to subscribe to the stock of companies organized under the laws of Missouri. By the amendment of 1870, section 52, under certain circumstances, railroad companies of other States might extend their roads into Missouri, "And for that purpose * * * possess and exercise all the rights, powers and privileges conferred by the general laws of this State (Missouri) upon railroad corporations organized thereunder;" but this did not make them corporations "organized under the laws of Missouri." If, as is argued, the foreign corporation got, as one of the privileges conferred on it by this law, the right to receive municipal subscriptions, it was of no practical value as a privilege until the power to subscribe was in some form given to the municipalities.

It is of no importance that two thirds of the qualified voters of the City gave their assent to the subscription at the election which was called. It has been uniformly held that until the Legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality or confer upon the municipal authorities the power to make such a subscription. The legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court U. S.

Cited—108 U. S., 123.

LEWIS WEITZEL, Collector of Internal Revenue, *Plff. in Errr.*, [340]

v.

GERHARD H. RABE.

(See S. C., 13 Otto, 340-344.)

Distillery, reduction of capacity.

Where a distiller did what was required of him under section 3311 of Rev. Stat., to get a reduction of capacity of his distillery while it was in operation, he was entitled to have the capacity estimated in such a way as not to charge him with material in mash when the change was applied for, as material used in excess of capacity.

[No. 134.]

Submitted Dec. 13, 1880. Decided Jan. 10, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Previous to May 2, 1876, the capacity of Mr. Rabe's distillery was fixed by the survey at 415.96 bushels of grain each twenty-four hours, the fermenting period being forty-eight hours. On that day he went to the Collector's office and notified the deputy, in charge of distilleries, that he desired to reduce his capacity to 207.45 by closing six fermenting tubs then in use; he then, by agent, signed three blank notices given him by said deputy, and left them with the deputy who filled them up and filed them. The notices when filed stated that Mr. Rabe desired to reduce his capacity from 415.96 to 346.29 bushels, by closing tubs Nos. 3 and 8, having a capacity of 9,406 gallons, on and after May 2, 1876; from 346.29 to 276.03 bushels by closing tubs Nos. 12 and 15, capacity 9,485 gallons, on and after May 3; and from 276.03 to 207.45 bushels by closing tubs Nos. 10 and 14, capacity 9,258 gallons, on and after May 4, 1876.

Said deputy thereupon closed and sealed the six tubs successively on the 2d and 3d and 4th in accordance with said notices. May 2 and 3, 1876, Mr. Rabe mashed about 207.45 bushels of grain, but distilled the beer from 415.96 bushels of grain mashed April 30 and May 1. On each remaining day of May, the exact amount of grain fixed by the capacity was used. Upon receipt of the distiller's returns for the month, the Commissioner of Internal Revenue made an assessment against him for an excess of grain used May 2 and 3, over and above the reduced capacity specified in the notices, *viz.:* in excess of 346.29 bushels on the 2d, and of 276.03 bushels on the 3d. This assessment was paid to Mr. Weitzel, the Collector of Internal Revenue, and this suit brought for its recovery. The mode of reducing capacity by giving three notices, closing tubs on successive days after they had remained empty twenty-four hours, was the uniform practice in the first collection district of Ohio until changed in accordance with

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circular No. 38, from the Commissioner of Internal Revenue, dated Feb. 20, 1877, and the distiller desiring to reduce capacity was required by the Collector to give the three notices. Mr. Rabe reported all spirits produced by him during May, 1876, and paid tax thereon according to law. In Nos. 135 and 136, the facts are identical except the immaterial difference of names, dates and amounts. The court charged the jury as follows:

"The conclusion to which I have arrived is, that the producing capacity of this distillery was not in law reduced until the 4th day of May; that it continued for the 2d and 3d days of May to be 415.96 bushels; and this being the amount of grain in fact used, there was no use of grain by the distiller in excess of the capacity of his distillery. The assessment was, therefore illegal."

The court refused to charge according to this request of the District Attorney.

"When the distiller gave notice in the form described, that he desired to reduce capacity on and after a day specified in the notice, by closing a designated fermenting tub, and such tub was thereupon closed by the deputy-collector, in accordance with the notice, the legal effect was to reduce the capacity of the distillery on and after that day, and if the distillery, on or after that day used grain in excess of the reduced capacity, although mashed before the reduction, the Commissioner was authorized by law to make an assessment for the excess, and the distiller cannot recover the same from the collector."

The question to be determined arises under the following section of the Revised Statutes:

"Sec. 3311. Whenever any distiller desires to reduce the producing capacity of his distillery, he shall give notice of such intention in writing to the collector, stating the quantity of spirits which he desires thereafter to manufacture or produce every twenty-four hours, and thereupon said collector shall proceed, at the expense of the distiller, to reduce the limit of the producing capacity of the distillery to the quantity stated in the said notice, by placing upon a sufficient number of the fermenting tubs close fitting covers, which shall be securely fastened by nails, seals and otherwise, and in such manner as to prevent the use of such tubs without removing said covers or breaking said seals, and shall adopt such other precautions as may be prescribed by the Commissioner of Internal Revenue, to reduce the capacity of said distillery."

Mr. **Edwin B. Smith,** *Asst. Atty-Gen.*, for plaintiff in error.

Mr. Warner M. Bateman, for defendant in error.

[342] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

We think the court below was right in holding that the producing capacity of the distillery was not in law reduced so as to make the distiller liable for material used in excess of the reduced capacity, until May 4. The original capacity, as estimated according to law, was 416.90 bushels of grain each twenty-four hours, but the spirits could not be properly developed and separated until the expiration of forty-eight hours from the time the grain was put into the mash, that being the fermenting period allowed. According to the rulings of the Commissioner of Internal Revenue, grain has been *used* when the spirits have been properly developed and separated by distillation; and in determining, under the requirements of section 3309 of the Revised Statutes, whether a distiller has accounted for all grain used by him in a month, the practice has been to take the quantity of mash and beer on hand at the beginning of the month, add to it the quantity put into mash during the month, and from the total deduct the quantity of mash and beer on hand at the end of the month. The remainder is the quantity used. Under the law the distiller must pay a tax equal to eighty per cent of his estimated producing capacity, whether the spirits are actually produced or not. Consequently, to save himself from taxation beyond his actual production, he must keep his distillery running all the time within twenty per cent of its full capacity. [343]

The application in this case, under section 3311 of the Revised Statutes, for a reduction of capacity, was made when the distillery was in full operation, and when mash or beer equal to the full producing capacity was in the process of distillation. The spirits could not be properly developed and separated from this material until the expiration of forty-eight hours from that time. This both the government officers and the distiller knew. Under these circumstances, the application for the reduction of capacity was evidently made with the intention of having the reduced capacity date from the time when it could go into effect without subjecting the distiller to a tax on excess of material used, by reason of the further distillation of what was then in mash. To accomplish this purpose, a practice had grown up in the collection district where this distillery was situated, to give three notices and close tubs on successive days after they had remained empty twenty-four hours. Forms seem to have been prepared by the revenue officers for such notices; and when the application for reduction was made in this case, the notices were signed in blank and left with the Collector to be filled up by him in a way that would, according to the practice which prevailed, bring about the reduction at the proper time. The reduction was made. The distiller reported his actual product, and paid the taxes thereon in full. The amount now sued for was evidently paid on account of a constructive and not an actual use of material in excess of capacity. There is no pretense of bad faith. The distiller did what was required of him to get a reduction of capacity while his distillery was in operation. Under such circumstances he was entitled to have the capacity estimated while the reduction was going on, in such a way as not to charge him with material in mash when the change was applied for, as material used in excess of capacity. [344]

Judgment affirmed.

Weitzel v. *Kayser et al.*, No. 135, and *Weitzel* v. *Caldwell*, No 136. These cases are in all material respects like that of *Weitzel* v. *Rabe*, just decided. The judgments are affirmed upon the authority of that case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[754] WILLIAM P. SINCLAIR & COMPANY, A Firm Composed of WILLIAM P. SINCLAIR, AND SAMUEL GIBSON SINCLAIR, Owners and Claimants of the SHIP CONNEMARA, Her Cargo, etc, by JOHN CAMERON, Master, ET AL., *Appts.*,

v.

JOSEPH COOPER, Owner of the TUG, JOSEPH COOPER, JR., JOHN J. WILLIAMS, Master, ET AL.

(See S. C., "*The Connemara*," 13 Otto, 754-756.)

Jurisdiction as to amount.

In a suit by a set of salvors to recover for a single salvage service, where there was but one claim filed for the property saved, and the total amount of the recovery was $14,198, the owners cannot be deprived of their appeal to this court because the court below apportioned the recovery among the salvors according to their respective merits, and some received less than $5,000.

[No. 842.]

Submitted Jan. 3, 1881. Decided Jan 10, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Motions to dismiss or affirm.

The case is stated by the court.

Messrs. **Richard De Gray** and **J. R. Beckwith**, for appellee, in support of motion.

Mr. **P. Phillips**, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The suit below was by a set of salvors to re-
[755] cover for a single salvage service, and there was but one claim filed for the property saved. The total amount of the recovery was $14,198, but in the division among the several parties entitled to share in the recovery some got less than $5,000. Separate and distinct interests were not united in the suit. The service rendered was the joint service of all the salvors, and the recovery was on that account. It was a matter of no consequence to the owners of the property saved how the money recovered was apportioned among those who had earned it. The owners were decreed to pay the salvors for what they, acting together in a common service, had done. In such a suit we think the owners cannot be deprived of their appeal because the court below, in the further progress of the cause, saw fit to apportion the recovery among the salvors according to their respective merits. The decree is, in legal effect, one decree in favor of all the salvors, they having, as between themselves, unequal interests.

In all the cases where we have held that several sums decreed in favor of or against different persons could not be united to give us jurisdiction on appeal, it will be found that the matters in dispute were entirely separate and distinct, and were joined in one suit for convenience and to save expense. Thus, in *Seaver* v. *Bigelow*, 5 Wall., 208 [72 U. S., XVIII., 595], separate judgment creditors joined to set aside a fraudulent conveyance of their debtor, and the appeal was from a decree dismissing their bill; in *Rich* v. *Lambert*, 12 How., 347, several owners of cargo, having distinct interests united in a libel against the ship to recover for damages done the goods, and the appeal was from a decree in favor of each owner for his separate loss; in *Oliver* v. *Alexander*, 6 Pet., 143, the libel was by seamen to recover their wages, and the decree was in favor of each man separately for the amount due him individually; and in *Stratton* v. *Jarvis*, 8 Pet., 4, the decree was against each claimant of goods saved by salvage service for his separate and distinct share of the salvage. The cases were heard, so far as the merits were concerned, precisely the same as if separate libels had been filed for each cause of action, and the decrees as entered were as in case of separate suits. *Rich* v. *Lambert*, *supra*, 353. Here, however, the matter in controversy was the amount due the salvors collectively, and not the particular sum to which each was entitled when the amount due was distributed among them. As in *Shields* v. *Thomas*, [756]
17 How., 3 [58 U. S., XV., 93], "They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellants how it was to be shared among them. If there was any difficulty as to the proportions, * * * the dispute was among themselves."

The case, upon the merits, is one which we are not inclined to consider on a motion to affirm.

The motions are denied.

True copy: Test.

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 6, 271; 108 U. S., 356; 112 U. S., 40.

JOSEPH SALUSTINE CUCULLU, *Appt.* [105]

v.

JOSEPH HERNANDEZ, MARY HERNANDEZ WALKER, Individually and as Testamentary EXRX., ET AL.

(See S. C., 13 Otto, 105-117.)

Re-inscription of mortgage—surety—insufficient pleading—litigious right.

1. By the omission to re-inscribe a mortgage within ten years from the date of the first inscription, as required by the Code of Louisiana, the effect of the inscription and not of the mortgage itself ceases. The mortgage remains, unimpaired as between the mortgagor and his heirs and the mortgagee.
2. A debtor is not converted into a surety by his creditor's acceptance of an additional promise from a third person to pay the debt due him by his debtor.
3. Evidence to show the facts on which a claim is based cannot be regarded, where there is no averment in the bill to which it can be applied.
4. One cannot, after contesting a claim inch by inch and up to the court of last resort, cancel it by paying what it cost his adversary, on the ground that he is the transferee of a litigious right under the Code of Louisiana.

No. 848.]

Submitted Dec. 20, 1880. Decided Jan. 17, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. Francis W. Baker, **Joseph P. Hornor** and **Wm. S. Benedict**, for appellant.

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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Messrs. **Thos. J. Semmes** and *J. Hernandez*, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

On February 1, 1850, the complainant, Joseph S. Cucullu, was the owner of certain real estate situate in the Parish of St. Bernard, in the State of Louisiana, known as the Myrtle Grove Plantation. On the day mentioned, he made and delivered to one E. Villavaso his note of that date for $10,000 borrowed money, due in twelve months, and secured the same by an act of mortgage, dated February 7, 1850, on said plantation; and on February 4, 1853, he [106] made another note, also for $10,000 borrowed money, due in one year, payable to himself, and indorsed and delivered it to the same Villavaso, and secured it by another act of mortgage on said plantation. No part of the money which Cucullu by these notes promised to pay has ever been paid. The mortgages executed to secure the notes were duly inscribed in the proper mortgage office, but have never been re-inscribed.

On September 28, 1857, Cucullu sold and conveyed the Myrtle Grove Plantation to one Augustus W. Walker for the purchase price of $135,000. Twenty-five thousand dollars of the consideration was paid in cash, and for the residue Walker gave his notes, two for $5,000 each, both payable January 31, 1858; six for $13,333, payable respectively on December 10 in the years 1858, 1859, 1860, 1861, 1862 and 1863; and he assumed to pay for Cucullu the two notes above mentioned, made by him for $10,000 each, payable to Villavaso. To secure the payment of these obligations for the purchase money, including the Villavaso notes, Walker, in the act of sale from Cucullu to him, granted a mortgage on the Myrtle Grove Plantation, with vendor's privilege in favor of Cucullu.

The two notes for $5,000 were never paid; it is conceded that they are prescribed, and they do not appear in this case.

Walker paid in full the second of the notes for $13,333, being the one which fell due January 10, 1859, and one half of the first note for $13,333, being the one which fell due January 10, 1858. The other half of this note, with interest, and the four other notes for $13,333, remain wholly unpaid. These unpaid notes of Walker were all claimed by Cucullu, in the bill filed in this case, to be his property.

The mortgage granted in the act of sale by Walker to secure the obligation entered into by him for the payment of the purchase price of the Myrtle Grove Plantation was duly inscribed and twice re-inscribed in the mortgage office, according to law, thus preserving the privilege of the mortgage. By act dated February 4, 1858, between Villavaso and Walker, the time for the payment by the latter of the Cucullu notes was extended until February 1, 1859.

In 1860 Cucullu desiring that the notes for $10,000, given by him to Villavaso, and secured by mortgage on the Myrtle Grove Plantation, should be paid off by Walker, who had assumed their payment in the manner above mentioned, began a suit against Walker in the District [107] Court for the Parish of St. Bernard, to compel him to pay them, and he prayed that Walker be ordered and adjudged to discharge the said Villavaso mortgages. To this suit Walker filed an exception, in which he alleged that the petition disclosed no cause of action; the exception was overruled. Walker then filed an answer, in which he denied that the Villavaso notes were due and alleged that they had been extended and renewed. The court gave a decree for Cucullu, treating the suit as one to enforce the specific performance of Walker's contract to pay off the Villavaso notes and mortgages. This decree was reversed by the Supreme Court of Louisiana, on the ground that Villavaso was not made a party to the suit, and the cause was remanded in order that Villavaso might be brought in.

Thereupon, on October 7, 1861, Cucullu filed an amended petition, in which he averred that, "By the decision of the Supreme Court rendered in this case, the holders of the mortgage notes and claims, the payment of which petitioner sought to enforce in his original petition, were necessary parties to the suit;" the amended petition, therefore, prayed that Villavaso be made a party, and judgment rendered as prayed for in the original petition.

Villavaso, having been cited, filed an answer to the amended petition on February 7, 1862, in which he averred that Cucullu had no cause of action against him, because he being the holder and owner of the two notes of Cucullu for $10,000 each, secured by the mortgages of Cucullu to enforce their payment, had already issued executory process against Walker on his contract to pay these notes. After the filing of this answer nothing was done in the suit, and it is still pending.

On October 21, 1861, a petition was filed in the District Court of St. Bernard Parish by Villavaso against Walker to foreclose the mortgages given by Cucullu to him on the Myrtle Grove Plantation to secure the two notes made by Cucullu for $10,000 each. This suit was a writ of seizure and sale taken out against Walker, who was Cucullu's vendee, and who was, at the time the writ was issued, in possession of the plantation. The writ bore date November 21, 1861.

In this suit Hernandez, on October 1, 1874, intervened and filed his petition, in which he averred that he was the owner of certain of the notes made by Walker to Cucullu, and secured by mortgage on the Myrtle Grove Plantation, and claimed that the Walker mortgage had [108] precedence of the mortgages from Cucullu to Villavaso, because the latter had not been re-inscribed within ten years, and prayed an injunction against the sale of the plantation under the writ of seizure and sale, which had been issued upon the mortgage given by Cucullu to Villavaso. The injunction was allowed. Before this suit was finally terminated, Villavaso sold out to one James E. Zunts his interest therein, and all his title to the notes executed by Cucullu, and to the mortgages on the Myrtle Grove Plantation given to secure them, and Zunts was substituted as plaintiff in the suit.

The court declared Hernandez, by reason of his ownership of the Walker notes, to be a first-mortgage creditor on the Myrtle Grove Plantation. Zunts, the vendee of Villavaso, alone appealed from this judgment. It was affirmed by the Supreme Court in May, 1876, on the ground that Villavaso had not preserved the priority of his mortgage as against Hernandez,

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who was declared to be a third person, by proper re-inscription, and therefore Hernandez, representing a part of the second mortgage, had priority over the first.

On August 7, 1875, the mortgaged property had been sold by the sheriff, and adjudicated to Zunts for $10,000. He paid no part of the purchase money, because he claimed the right, as first mortgagee, to retain the entire price as in part payment of his mortgage.

After the decision in favor of Hernandez, just mentioned, Zunts, by notarial act dated July 7, 1877, sold and transferred to Hernandez "All his right, title, interest, claim and demand, of whatsoever nature or kind, in and to Myrtle Grove Plantation."

Hernandez having thus, as he claimed, acquired all the rights of Zunts in the suit, took a rule to compel the sheriff of St. Bernard Parish to execute a deed to him for the Myrtle Grove Plantation on payment of $10,000, the price at which it was struck off to Zunts at the sale made on August 7, 1875. This rule was made absolute July 7, 1877.

On November 23, 1877, the bill in this case was filed by Cucullu. He claimed to be the owner of five of the notes made by Walker for the purchase money of the Myrtle Grove Plantation. [109] He averred that the plantation was the property of the succession of Walker, the mortgagor, but that it was claimed by Hernandez and various other persons, each of whom asserted title to four of the Walker notes, which he, the complainant, claimed as his property, and to collect which he had brought the suit to foreclose.

On March 23, 1879, the Circuit Court made a decree in the case, by which it was declared that the title to the Myrtle Grove Plantation was in the succession of Walker; that Cucullu was the holder and owner of the unpaid notes made by Walker and secured by his mortgage on said plantation, being the same mentioned in the bill of complaint, amounting to the sum of $57,000, with interest, as claimed in the bill, and that the same continued to be a lien upon said plantation; that Hernandez, by purchase from Zunts, the vendee of Villavaso, was the owner of the two notes for $10,000 made by Cucullu and secured by mortgages on said plantation before its sale by Cucullu to Walker. The decree directed the sale of the plantation and the application of the proceeds, first, to the payment of the Cucullu notes held by Hernandez, and the surplus, if any, to the payment of the Walker notes held by complainant; the effect of the decree being to give priority to the notes and mortgages executed by Cucullu.

The complainant Cucullu alone appealed from this decree. This fact eliminates from the case many controversies decided by the Circuit Court, and the evidence applicable thereto, and leaves only for decision by this court these questions: whether the Villavaso notes and mortgages were subsisting obligations; whether Hernandez was their owner; and whether, as such owner, he was entitled to priority of payment over the unpaid Walker notes and the mortgage by which they were secured, and of which Cucullu was decreed to be the owner.

The complainant insists; first, that Hernandez is not the owner of the Villavaso notes; that the act of transfer by Zunts to Hernandez, dated July 7, 1877, conveyed only the rights of Zunts as purchaser of the plantation at the sheriff's sale, made on August 7, 1875; and to support this view the complainant refers to the affidavit of Zunts, filed by him in the Circuit Court in support of a petition for rehearing in [110] this case. In this affidavit Zunts declares that by said act he did not transfer to Hernandez the Cucullu notes, but only his rights as purchaser of the Myrtle Grove Plantation under the sale of August 7, 1875.

This affidavit cannot be considered in evidence, for two reasons: first, because the transfer by Zunts to Hernandez being in writing must speak for itself, and the purpose of Zunts in executing the transfer must be derived from it, and not from his subsequent declarations; and, second, even if the evidence were competent, it should have been presented in the form of a deposition regularly taken, according to the equity rules by which the witnesses might have been subjected to cross-examination. The affidavit, being purely *ex parte*, cannot be considered on the final hearing.

Looking at the act of transfer from Zunts to Hernandez, we think that by a fair construction it conveys the Cucullu notes and mortgages. It purports to transfer to Hernandez "All the right, title, interest, claim and demand, of whatsoever nature or kind," of Zunts in and to the Myrtle Grove Plantation. These terms clearly include a conveyance of the rights of Zunts as mortgagee of the plantation.

But if the transfer had specifically and in terms conveyed to Hernandez the rights of Zunts as purchaser under the sale of August 7, 1875, and nothing more, we think it would have carried with it the notes and mortgages under which the sale was made. By virtue of the transfer the vendee would have the right to use the notes and mortgages under which the sale had been made to pay his bid. This clearly implies title to the notes, and the mortgages by which they were secured. The fact that the sale was not effectual to convey the title did not devest Hernandez of his claim to the notes and mortgages, and re-invest them in Zunts. It is a question between Zunts and Hernandez. Zunts sold to Hernandez his rights as adjudicatee, and all other title and claim which he held to the Myrtle Grove Plantation; he received his pay for the transfer; he has no rights left, either as purchaser or mortgagee, and whatever interest he had in either character is vested in Hernandez by the act of transfer. [111]

But a conclusive answer to complainant's claim, that the ownership of the Cucullu notes and mortgages was not transferred to Hernandez by Zunts, is found in the bill of complaint, which is framed on the assumption of such ownership by Hernandez. The bill avers that "Said James E. Zunts, by public act, in the City of New Orleans, on the 16th of April, 1877, did sell and transfer unto said Joseph Hernandez all his pretended right, title and interest in and to said Myrtle Grove Plantation, and all his pretended rights in and to the said suit of E. Villavaso, James E. Zunts subrogated, *versus* Augustus W. Walker, No. 413 of the docket of the Second Judicial District Court of the Parish of St. Bernard, and all his pretended right in and to the notes sued on, and the pretended privileges and rights of mortgage thereunto

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attached, whatever they might be; and the said Joseph Hernandez, in consequence of said transfer and sale by James E. Zunts, now claims and pretends to be the owner of said property hereinbefore fully described."

After such an averment in the bill, of the purpose and effect of the act of transfer between Zunts and Hernandez, it does not lie in the mouth of Cucullu to say that the act did not convey to Hernandez the title to the Cucullu notes and mortgages. The effect of the act of transfer is not put in issue. What Hernandez claims to be its legal import is admitted by the bill, and that is the end of the controversy upon the point. We think, therefore, that the title of Hernandez to the Cucullu notes and mortgages must be considered as settled.

Second. It is insisted, however, by complainant, that even should the title of Hernandez to these notes and mortgages be conceded, nevertheless it can avail him nothing, because the notes are prescribed.

Article 3540 (3505) of the Civil Code of Louisiana declares: "Actions on bills of exchange, notes payable to order or bearer, except banknotes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements were payable." By article 3551 (3516) of the same Code, prescription may be interrupted in the two modes laid down in article 3516 (3482); *viz.*, first, by a natural interruption, as when the debtor makes acknowledgment of the debt; or, second, by the institution of a suit against the debtor. [112]

One of the Cucullu notes fell due February 1, 1851, and the other February 4, 1854. By his act of sale of the Myrtle Grove Plantation to Walker on September 28, 1857, Cucullu declared that these notes had been renewed and would fall due February 4, 1858.

The complainant claims that this was the last natural interruption of the prescription on the notes by Cucullu, and that as no suit has ever been instituted against him on the notes by any person, or any demand made upon him for their payment, the notes are prescribed.

By the act of sale from Cucullu to Walker of the Myrtle Grove Plantation, under date of September 28, 1857, Cucullu acknowledged the notes given by him to Villavaso to be valid debts, and specified the time when they would fall due. Walker agreed to pay the Cucullu notes in the place and stead of the latter, and such payment was to be in part payment of the purchase price of the plantation.

Walker made payments of interest on these notes from 1858 up to February 4, 1861. It is the settled law of Louisiana that payments made by a purchaser of property who assumes as part of the price a debt due by his vendor, is an interruption of prescription as to that debt, both as to the purchaser and vendor. *Cockfield* v. *Farley*, 21 La. Ann., 523; *Collier* v. *His Creditors*, 12 Rob. (La.), 399. So that prescription on the Cucullu notes was interrupted as late as February 4, 1861.

But on February 2, 1860, Cucullu, as we have seen, instituted suit against Walker, to enforce the latter's contract included in the act of sale to him of the Myrtle Grove Plantation, to compel him to pay the Cucullu notes. To this suit Walker appeared and made various defenses, and the case has been pending from that time until now, and still remains undisposed of. In our opinion this suit is a natural interruption of the prescription, for it is an acknowledgment by Cucullu, in the most explicit form, that the notes are unpaid and of his liability to pay them. It is an acknowledgment that continues from day to day as long as the suit remains pending, so that it is not merely an interruption but is a suspension of the prescription. *Wilson* v. *Marshall*, 10 La. Ann., 331; *Furguson* v. *Glaze*, 12 La. Ann., 665; *Barrow* v. *Shields*, 13 La. Ann., 57. [113]

The claim, therefore, that the Cucullu notes are prescribed will not hold.

Third. It is next insisted by complainant that the mortgages given by him to Villavaso, not having been re-inscribed, as required by the Code of Louisiana, within every period of ten years after their date, have become prescribed, and have lost their lien upon the property described in them.

It is clear from the decisions of the Supreme Court of Louisiana that this result follows only as to third persons, and not as to the parties to the mortgage. A mortgage, to affect third persons, must be inscribed in the mortgage office, and to preserve its original rank as to third persons, it must be re-inscribed before the expiration of the year from the original inscription. The policy of the law is to make an investigation of liens easy and simple, and therefore, except for legal mortgages in favor of minors and married women, no search for mortgages in the mortgage office is required for a greater period than ten years prior to the date of search.

But this applies to third persons only, and not to the mortgagor or his heirs.

"By the words, third persons, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded." Civil Code, art. 3343.

"Consequently neither the contracting parties nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the non-inscription of the mortgage." Civil Code, art. 3344.

By the omission to re-inscribe a mortgage within ten years from the date of the first inscription, the effect of the inscription and not of the mortgage itself ceases. The mortgage remains unimpaired as between the mortgagor and his heirs, and the mortgagees.

The general doctrine as stated has been repeatedly declared by the Supreme Court of Louisiana. *Bonin* v. *Durand*, 2 La. Ann., 776: *Haines* v. *Verret*, 11 La. Ann., 122; *Seyburn* v. *Deyris*, 25 La. Ann., 483; *Adams* v. *Dannis*, 27 La. Ann., 323.

The rule was applied to a witness to the mortgage in the case of *Brown* v. *Sadler*, 16 La. Ann., 206. [114]

From these provisions of the Code of Louisiana and the decisions of the Supreme Court of the State it is clear that no inscription of the Villavaso mortgages was necessary to affect Cucullu. He being the mortgagor, the mortgages remained valid as against him, without inscription or re-inscription, and preserved their rank over a subsequent mortgage in which he was the mortgagee.

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It is claimed, however, by complainant, that although the doctrine may apply to the original inscription it does not apply to the re-inscription of a mortgage; that unless re-inscribed within ten years from its date the mortgage becomes prescribed and ineffectual to bind even the mortgagor.

This claim does not seem to us to be founded in reason nor to be sustained by any decisions of the Supreme Court of Louisiana. On the contrary, that court, as will be seen by the cases above cited, makes no distinction, so far as this question is concerned, between the original inscription and subsequent re-inscriptions.

We think, therefore, that neither the lien of the mortgages executed by Cucullu nor their priority as against the subsequent mortgage executed to him by Walker has been lost.

The complainant claims, fourthly, that Hernandez is estopped from setting up the mortgages from Cucullu to Villavaso as superior to the mortgage from Walker to Cucullu, because, in his intervention in the case of *Villavaso, Zunts, substituted*, v. *Walker*, he had claimed that the mortgage from Cucullu to Villavaso had lost its lien for want of re-inscription, and the complainant asserts that this claim was sustained in that case by the Supreme Court of Louisiana.

An examination of the petition of Hernandez in that case, and the decision of the Supreme Court, shows that the question of precedence between the mortgages was raised on a different state of facts from that on which the question arises here.

Hernandez, in the suit of *Villavaso* v. *Walker*, in which Cucullu was not a party and did not in any way appear, claimed that the mortgage from Cucullu to Villavaso had, for want of re-inscription, lost its rank as against him, he being the owner of the mortgage from Walker to Cucullu. [115] The Supreme Court of Louisiana sustained this view, and put its decision expressly on the ground that Hernandez was a third person in the act of mortgage given by Cucullu to Villavaso, which had not been re-inscribed.

In the present suit Cucullu is a party, and is insisting that the mortgages given by himself to Villavaso has lost its lien for want of re-inscription, and that the mortgages given to him by Walker should have priority.

The question whether the Walker mortgage, in the hands of Hernandez as owner, is entitled to priority over the Cucullu mortgages when held by Villavaso, because the latter had not been re-inscribed, is very different from this question whether Cucullu, when claiming to be the owner of the Walker mortgage, can assert priority over the mortgages executed by himself to Villavaso, because the latter had not been re-inscribed.

In his intervention, Hernandez claimed priority for the Walker mortgage as against Villavaso, holder of the Cucullu mortgages, because, as to the latter, he was a third person and the mortgage had not been re-inscribed. In this case it is Cucullu who claims priority for the Walker mortgage, which, he says, he owns, against his own mortgage to Villavaso, for want of the re-inscription of the latter. But as to the mortgage made by himself, he is a party and not a third person, and as to him no re-inscription is necessary.

The position of Hernandez in his petition in the case of *Villavaso* v. *Walker* is not inconsistent with his claim here, and his claim in this case has not been decided against him by the Supreme Court of Louisiana in the case referred to. See, *Villavaso* v. *Walker*, 28 La. Ann., 775.

Fifth. The complainant claims that the notes given by Cucullu to Villavaso were novated, and Cucullu released by the extension of the time for their payment, granted to Walker by Villavaso, by the act of February 4, 1858.

This claim is based on article 3063 of the Civil Code, which declares: "The prolongation of the time granted to the principal debtor, without the consent of the surety, operates as a discharge of the latter."

To make this article applicable, it must appear that by the act of February 4, 1858, by [116] which Walker agreed with Cucullu to pay the notes executed by the latter to Villavaso, Walker became the principal debtor, and Cucullu the surety.

It cannot, we think, be reasonably claimed that a debtor is converted into a surety by his creditor's acceptance of an additional promise from a third person to pay the debt due him by his debtor. There is no element of suretyship in such a contract; unless it be that the additional debtor might be regarded as surety for the original debtor. The relation between the creditor and the original debtor is not changed by such an arrangement.

It is, however, a sufficient answer to this claim to say that the bill of complaint contains no allegation in reference to the extension of the time of payment granted by Villavaso to Walker, and no claim that Cucullu was discharged thereby, and no allusion is made to the subject in any part of the pleadings. The claim that, by the contract of Walker with Cucullu to pay his notes to Villavaso, Walker became the principal debtor and Cucullu the surety, and that by the indulgence given by Villavaso to Walker, Cucullu, as such surety, was discharged, appears in the case for the first time in the brief of complainant's counsel.

The evidence to show the facts on which this claim is based cannot be regarded, for there is no averment in the bill to which it can be applied. It is not pertinent to any issue in the case. *Whitley* v. *Martin*, 3 Beav., 226; *Smith* v. *Clarke*, 12 Ves., 477; *Langdon* v. *Goddard*, 2 Story, 267; *Gordon* v. *Gordon*, 3 Swans., 400.

Lastly, It is averred by complainant that the purchase made by Hernandez from Zunts, of the notes and mortgages given by Cucullu to Villavaso, was the purchase of a litigious right; and even if the notes and mortgages are valid claims, no more can be recovered by Hernandez than he paid to Zunts, and this sum complainant avers to be $2,100.

This claim is based on article 2652 of the Civil Code of Louisiana, which declares: "He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with the interest from date." [117]

The next article, 2653, defines what is a litigious right, as follows: "A right is said to be litigious, whenever there exists a suit or a contestation on the same."

This claim cannot be sustained for two reasons: first, Hernandez did not purchase the Villavaso notes until after the judgment in the Supreme Court thereon. The right ceases to

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be litigicus when judgment has been rendered. *Marshall* v. *McCrea*, 2 La. Ann., 79. Secondly, it has been repeatedly decided by the Supreme Court of Louisiana that the purpose of article 2652 was to prevent litigation, and therefore a defendant who, instead of paying the price of the transfer, contests the suit and prolongs the litigation, defeats the very object of the article, and cannot exercise the privilege it gives. The complainant should have paid or tendered to Hernandez the real price of the transfer with interest from date. He would then have been in a position to claim the benefit of article 2652. He cannot, after contesting the claim inch by inch and up to the court of last resort, cancel it by paying what it cost his adversary. *Leftwich* v. *Brown*, 4 La. Ann., 104; *Pearson* v. *Grice*, 6 La. Ann., 233; *Rhodes* v. *Hooper*, 6 La. Ann., 356; *Evans* v. *De L'Isle*, 24 La. Ann., 248.

We think that the attempt of Cucullu to get rid of his notes and mortgages given by him to Villavaso, or postpone them to the subsequent notes and mortgage given to himself by Walker, must fail, and ought in equity to fail. Thirty years ago he borrowed from Villavaso $20,000, and to secure this money executed mortgages to him on the Myrtle Grove Plantation which he then owned. He has never paid that debt. He afterwards sold the plantation to Walker and took his notes for part of the purchase money, and for the residue his stipulation to pay off the Villavaso notes and mortgages. Walker has not paid them. While enforcing the lien of the Walker mortgage, and bringing the property to sale to satisfy it, equity requires that out of the proceeds the notes of Cucullu to Villavaso should be first paid, unless some reason in law exists by which they are postponed. We have been able to find no such reason. *We think the decree of the Circuit Court was right, and that it should be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[118]

FLORIDA CENTRAL RAILROAD COMPANY, *Appt.*,
v.
J. FRED SCHUTTE ET AL.

JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY, *Appt.*,
v.
J. FRED SCHUTTE ET AL.

WESTERN NORTH CAROLINA RAILROAD COMPANY, *Appt.*,
v.
GEORGE F. DREW, GOVERNOR, ETC., JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY ET AL.

(See S. C., 13 Otto, 118-145.)

Indorsement of state bond—effect of—estoppel—contracts created by statute—statutory lien—statute partly unconstitutional and partly valid—case, when authority—obligation of indorser.

1. Where a railroad company put on the market and sold bonds of a State, indorsed by the railroad company with its certificate that the State held the first-mortgage bonds of the company for a like amount as security to the holder; held, that, although the State was not liable upon its bonds because they were unconstitutional, this certificate was equivalent to an engagement by the company that the bonds, so far as the security was concerned, were the valid obligations of the State.

2. The case is within the rule which makes an indorser of commercial paper the guarantor of the genuineness and validity of the instrument he indorses.

3. Under these circumstances, the company is estopped, so far as its own liabilities are concerned, from denying the validity of the bonds.

4. Contracts created by or entered into under the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed.

5. Where a statutory lien in the nature of a first mortgage duly registered, was given the State on the property of the company to secure the company bonds, and the State as trustee, on the request of the bondholders, commenced proceedings to enforce such lien, held, that the statute has made the mortgage of the company security for the payment of the obligations of the State.

6. Although the provision of the Act in respect to the execution and exchange of the State bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is not void also. The unconstitutional part of the statute may be stricken out, and the obligation of the company including its statutory mortgage in favor of the State bondholders left in full force.

7. It cannot be said that a case is not authority on a point because, although that point was properly presented and decided, something else was found in the end which disposed of the whole matter.

8. A *bona fide* holder can require an indorser of a commercial security to pay what he in effect agreed the maker must pay.

[Nos. 667, 668, 669.]

Argued Oct. 12, 13, 14, 15, 1880. Decided Jan. 17, 1881.

APPEALS from the Circuit Court of the United States for the Northern District of Florida.

The cases are fully stated by the court.

Messrs. **George F. Edmunds, S.F. Phillips, James M. Baker, P. Phillips, W. A. Maury** and **James Baker**, for the Florida Central R. R. Co., appellant, in No. 667.

Messrs. **James M. Baker** and **James Baker**, for the J. P. & M. R. R. Co., appellant, in No. 668.

Messrs. S. F. Phillips and **C. M. McLoud**, for the Western N. C. R. R. Co., appellant, in No. 669.

Mr. Joseph B. Stewart, for the Western Division of the Western N. C. R. R. Co.

Messrs. **Matt. H. Carpenter, C. D. Willard, Wayne McVeagh, Theo. F. H. Meyer** and **W. G. M. Davis**, for appellees, Schutte, Drew *et al.*

Mr. Chief Justice **Waite** delivered the opinion of the court: [120]

These cases, although separate in form, are so connected in their facts that they may properly be considered and decided together. The facts are these:

The Florida, Atlantic and Gulf Central Railroad Company, incorporated by the General Assembly of Florida in 1853, built a railroad from Jacksonville to Lake City. The Penascola and Georgia Railroad Company, also incorporated during the same year, built a road from Lake City through Tallahassee to Quincy in the direction of Mobile, with a branch to Monticello; and the Tallahassee Railroad Company, incorporated at a somewhat earlier date, built another road from Tallahassee to St. Marks. Each of these Companies became indebted to the

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State of Florida under the provisions of the Internal Improvement law, and, as a consequence, the road of the Florida, Atlantic, and Gulf Central Company was sold, on the 4th of March, 1868, by the trustees of the Internal Improvement Fund, under the authority of law, to William E. Jackson and his associates; that of the Pensacola and Georgia Company, on the 6th of February, 1869 to F. Dibble and his associates; and that of the Tallahassee Company on the same day and to the same parties.

The road from Jacksonville to Lake City was paid for in full, and a conveyance in due form executed to the purchasers, who, on the 29th of July, 1868, were incorporated by the General Assembly of the State, under the name of the Florida Central Railroad Company, and given all the powers and franchises of the Florida, Atlantic and Gulf Central Company. They were also authorized to fix the amount of the capital stock of the Company, and the number of shares into which it should be divided. In this way the capital was put at $550,000, with five thousand five hundred shares. Of these shares George W. Swepson afterwards became the purchaser of four thousand three hundred and seventy, which he paid for with money in his hands belonging to the Western Division of the Western North Carolina Railroad Company, a North Carolina Corporation, which he fraudulently diverted from the use to which it had been appropriated by that Company.

[121] Swepson also purchased, with the funds of the same North Carolina Corporation, bonds of the Pensacola and Georgia and Tallahassee Companies to the amount of $960,000, or thereabouts, and on the 24th of April, 1869, he entered into a contract with the purchasers of the roads of those companies by which he was to deliver them these bonds to use in making their payments of purchase money; and they, as soon as they could get the necessary authority from the Legislature, were to raise money by a mortgage on the property and pay him what he had advanced to buy the bonds, with certain commissions and attorney's fees, and $100,000 in addition. The contract contemplated an incorporation of the purchasers after the manner of the Florida Central Company, with a distribution of one third of the stock to Swepson. As security for the payment of the sum agreed to be paid, the bonds issued under the contemplated mortgage were to be disposed of in a particular way, and Swepson was to be given certain privileges in the election of directors. Under this arrangement Swepson handed over $960,300 of Pensacola and Georgia and Tallahassee bonds to the purchasers; but after these bonds had been applied in the way contemplated there still remained a balance of the purchase money, amounting to $472,065, to be paid. Deeds conveying the property to Dibble for himself and his associates were executed in due form, but their delivery was withheld on account of this default in payment. Dibble and his associates being unable to raise the money, Swepson, by putting off on the trustees of the Improvement Fund a worthless check that was never paid, for the amount that was due, got possession of the deeds and had them duly recorded April 22, 1869. On the same day Dibble, for himself and his associates, party of the first part, executed a paper which on its face purported to convey the roads to Swepson, "Said party of the second part, in trust for the express purpose of enabling said party of the second part—which he hereby agrees and binds himself to do—to convey the same to that incorporation, consisting or to consist as incorporators of said F. Dibble and his associates, as soon as said Dibble and his associates shall have granted to them such a similar relief as the Legislature of the said State of Florida granted to Wm. E. Jackson and his associates by act for relief of Wm. E. Jackson and his associates, approved July 29th, 1868, and also for the further purpose of securing said party of the second part in all advances made as specified and agreed upon in the said agreement between these parties, executed and dated March 26th, 1869, and the advancement, as aforesaid, of said sum of four hundred and seventy-two thousand and sixty-five dollars, until such time as said relief shall have been granted and said party of the second part shall have conveyed said property to said incorporation, as hereinbefore prescribed." [122]

This instrument was never acknowledged or recorded.

On the 24th of June, 1869, the proposed Act of incorporation was obtained, by which Dibble and his associates, as purchasers of the roads, were made a body corporate under the name of the Tallahassee Railroad Company, to hold, operate and enjoy the property purchased, with all the powers, privileges and franchises of the Pensacola and Georgia and the original Tallahassee companies, and with power to issue bonds secured by mortgage; "*Provided*, That any deed of trust, mortgage or conveyance, bond or bonds, or security which may have been executed, made, created or contracted for, as a lien on said railroad or otherwise, by said Franklin Dibble, in behalf of himself and his associates, prior to the passage of this Act, shall be valid and effectual to all intents, either at law or in equity, as a lien or a mortgage, or security on said railroad, as if the same had been made by virtue of this Act, and shall in nowise be affected by any provisions thereof." (Sec. 6.)

The new Tallahassee Company was duly organized under this charter, and took possession of and operated the roads. Afterwards, to remove all doubts as to the title of the Corporation to the property of the old Companies, Dibble, for himself and his associates, at some time during the year 1870, executed a paper which purported to be a conveyance, in due form, for that purpose, by which he professed to relinquish and quitclaim to the corporation all his rights. This paper was not acknowledged, and was not in fact a legal conveyance of the property. No conveyance in form was ever executed by Swepson, neither has he at any time, so far as appears, attempted to exercise any rights under the conveyance or transfer which was made to him. [123]

On the 24th of June, 1869, an Act was passed by the General Assembly of Florida to "perfect the public works of the State." By this Act, "In order to secure the speedy completion, equipment and maintenance of a connection by railroad between Jacksonville, on the Atlantic coast, and Pensacola, on the Gulf coast, and Mobile, in Alabama," George W. Swepson, Milton S. Littlefield, J. P. Sanderson, J. L. Re Qua,

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William H. Hunt, their associates, successors and assigns, were constituted a body politic and corporate under the name of the Jacksonville, Pensacola and Mobile Railroad Company. This Company was authorized to build a railroad from Quincy to the Alabama state line, and there connect with any road running to Mobile, and to consolidate with the several companies owning roads from Quincy to Jacksonville, from Tallahassee to St. Marks, and the branch to Monticello. The original charter was somewhat amended on the 28th of January, 1870, after which sections 9, 10, 11 of the original charter, and section 4 of the amended charter, were as follows:

"Sec. 9. In order to aid the said Jacksonville, Pensacola and Mobile Railroad Company to complete, equip and maintain its road, and to aid in perfecting one of the public works embraced in the internal improvements of the State, the governor of the State is hereby directed to deliver to the president of the said company coupon bonds of the State to an amount equal to sixteen thousand dollars per mile for the whole line of road and length of railroad owned by or belonging to said Jacksonville, Pensacola and Mobile Railroad Company, in exchange for first-mortgage bonds of said Railroad Company, of the denomination of one thousand dollars, when the president thereof shall certify upon his oath that the road or parts of road for which he asks for an exchange of bonds is completed, and is in good running order. The said bonds shall be of the denomination of one thousand dollars, signed by the governor, countersigned by the treasurer, sealed with the great seal of the State; shall bear eight per cent interest, payable semi-annually, and shall be payable to bearer. They shall be dated on the first day of January, A. D. 1870, and shall be due thirty years thereafter, and principal and interest shall be payable at such place in the City of New York as the governor shall designate. The coupons for interest shall be payable to bearer, and shall be authenticated by the written or engraved signature of the treasurer: *Provided, however*, That when the Jacksonville, Pensacola [124] and Mobile Railroad Company shall or may determine to pay the interest in gold for or upon their bonds or the bonds designated in the 10th section of an Act entitled 'An Act to Perfect the Public Works of the State,' approved June 24, 1869, upon giving notice to the governor of such intention, then the State bonds aforesaid and the coupons for interest on said bonds shall be payable in gold, notice of which shall be given by the governor in some paper published in the City of New York, and at the capital of this State, to be designated by the governor.

"Sec. 10. In exchange for the bonds of the State above described, the president of the Company shall deliver to the governor of the State coupon bonds of the company, bearing a like rate of interest, payable to the State of Florida, signed by the president, sealed with the corporate seal; coupons payable to State of Florida, authenticated by the written or engraved signature of the president. The bonds shall be of such denominations, not less than one thousand dollars, as the said Company may choose, and principal and interest shall be payable at the same time and place as the aforesaid state bonds.

"Sec. 11. To secure the principal and interest of the said company bonds, the State of Florida shall, by this Act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage duly registered, on the part of the road for which the state bonds were delivered, and on all the property of the Company, real and personal, appertaining to that part of the line which it may now have or may hereafter acquire, together with all the rights, franchises and powers thereto belonging, and in case of a failure of the Company to pay either principal or interest of its bonds or any part thereof for twelve months after the same shall become due, it shall be lawful for the governor to enter upon and take possession of said property and franchises, and sell the same at public auction, after having first given ninety days' notice by public advertisement in at least one newspaper published in each of the following places: the City of New York, in the State of New York, the City of Savannah, in the State of Georgia, and the City of Tallahassee, in the State of Florida, for lawful money of the United States, and for nothing else, except that the State, for its own protection, may become the purchaser at said sale, and may pay on said purchase any evidences of indebtedness the State may hold against said roads, which purchase money or said evidences of indebtedness shall be paid on the day of sale into the Treasury of this State, or within ten days thereafter; and all moneys arising from said sale and paid into [125] the Treasury of this State, as heretofore prescribed, shall be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State of Florida, under this Act; and in case the holders of said bonds do not present them for redemption within ninety days after said sale, the treasurer shall invest the same, or any part thereof which may be remaining in his hands, in the securities of the United States, to be held by the State of Florida, as trustee for the bondholders, until said bondholders shall demand the same, upon which demand the treasurer shall immediately turn over or pay said securities to the bondholders. The purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges and franchises of said defaulting Company, together with the franchise of use and being a body politic, and the governor shall, upon the payment of said purchase money into the Treasury of this State, as above provided, immediately cause the purchaser or purchasers of said road at said sale to be placed in the actual possession, use and enjoyment thereof, and cause all the books, papers and real and personal property of said Company, of every description, together with its franchise of use and being a body politic and corporate, to be turned over to said purchaser or purchasers, and the purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges and franchises of said defaulting company, together with the franchise of use and being a body politic and corporate, and may use any new corporate name they see fit, and make and use a new seal upon signifying their action in writing to the governor, and thereafter may exercise all the rights of a body corporate and privileges thereof, and of said defaulting Company, under said new name, for the term of thirty-five years, to date from the time of pur-

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chase as aforesaid. That any such sale shall be ratified by the Legislature before the same shall become effective."

"SEC. 4. That the governor shall, for the purpose of further aiding said Jacksonville, Pensacola and Mobile Railroad Company in the speedy construction of its road, deliver to the president of said Company coupon bonds of this State, of the same character as those above described in this Act, to the amount of sixteen thousand dollars per mile, upon receiving for and from the president of said Company first-mortgage bonds of like amount on any part or portion of the road between Quincy and Jacksonville; *Provided, however*, The state bonds under this section shall not be exchanged for first-mortgage bonds for a greater length than one [126] hundred miles of any part of railroad between Quincy and Jacksonville; *Provided*, The said railroad company or companies shall not issue first mortgage bonds to a greater amount than sixteen thousand dollars per mile."

Under the authority of this Act the new Tallahassee Company was consolidated with the Jacksonville, Pensacola and Mobile Company, May 25, 1870, by the name and having the corporate powers of the Jacksonville, Pensacola and Mobile Railroad Company, with a capital of $6,000,000, divided into 60,000 shares. Previous to this time M. S. Littlefield had succeeded to all the rights of Swepson in these several transactions, and in the distribution of stock in the consolidated Company he was given 38,433 shares of the agreed capital. He represented 9,930 out of the 10,000 shares at the meeting of the stockholders of the Jacksonville, Pensacola and Mobile Company which voted for the consolidation, and 17,998, of the 30,000 shares of the Tallahassee Company voting to the same effect. The Florida Central Company never entered into the consolidation, and the consolidated Company, therefore, only became the owner of the roads west of Lake City.

After the consolidation was perfected, the Jacksonville, Pensacola and Mobile Company executed its bonds, payable to the State for $3,000,000, as allowed by section ten of its charter, and received in exchange bonds of the State for the same amount, such as were provided for in section nine, and in the following form:

"UNITED STATES OF AMERICA.

No.] *State of Florida.* [No.

It is hereby certified that the State of Florida justly owes to or bearer, one thousand dollars, redeemable in gold coin of the United States, at the Florida State agency, in the City of New York, on the first day of January, 1900, with interest thereon at the rate of eight per centum per annum, payable half-yearly at the said Florida State agency, in gold, on the first days of July and January in each year, from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed.

Tallahassee, January 1st, 1870.

HARRISON REED, *Governor*

(FLORIDA GREAT SEAL.)

S. B. CONNER, *Treasurer*.

[127] Issued in accordance with Act of the Legislature of Florida, approved January 28th, 1870."

Form of Coupon.

The State of Florida will pay to bearer forty dollars in gold, at the state agency in the City of New York, for interest due....., on bond for $1,000.

"No. S. B. CONNER, *Treasurer*.

"*Indorsement.*

"STATE OF FLORIDA.

THIRTY-YEAR

No. .] EIGHT PER CENT BOND. [$1,000

Payable January 1st, 1900. Interest payable 1st July and January, in gold, at Florida state agency, in the city of New York.

This bond is one of a series issued in aid of the Jacksonville, Pensacola and Mobile Railroad Company, to the extent of $16,000 per mile upon completed road. The State of Florida holding the first-mortgage bonds of said railroad company for a like amount, as further security to the holder hereof.

HARRISON REED,

Governor of Florida."

These bonds of the State, thus indorsed, were put in the hands of Littlefield, the president of the Company, to be disposed of, and he, under an arrangement previously made with S. W. Hopkins & Co., of New York and London, handed the bonds over to them for sale.

Some time in the spring of 1870, Littlefield, who was at the time president of the Jacksonville, Pensacola and Mobile Company, and a director in the Florida Central, caused $1,000,000 of the bonds of the last named Company to be printed in New York, and signed there by one H. H. Thompson as treasurer of the Company. These bonds were made payable to the State, and purported to be executed under the authority of the Act of January 28, 1870, to amend the Act of June 24, 1869, "To perfect the public works of the State," and given in exchange for bonds of the State to aid the Jacksonville, Pensacola and Mobile Company. After having been signed by Thompson, they were taken by Littlefield to Washington, where they were signed by Swepson as president of the Company. Afterwards the seal of the Company was put to them, but undoubtedly in an irregular and surreptitious way. It is apparent, also, from the evidence, that when Thompson signed the [128] bonds as treasurer he had not been formally elected to that office by the directors, but at a meeting of the directors, on the 25th of May, Littlefield stated that Swepson, the late president, had appointed Thompson as secretary and treasurer of the Company for the past year, and on his motion this action of the president was approved.

On the 30th of May, 1870, an agreement was entered into between Littlefield and one Edward Houston, both stockholders of the Florida Central Company, by which this $1,000,000 of bonds was put in the hands of Houston as collateral security for a debt from Littlefield to him, and on the 2d of June, at a meeting of the stockholders of the Company, the following resolutions were unanimously adopted:

"*Resolved*, that bonds to the extent of sixteen thousand dollars per mile be issued by this Company, which bonds shall be a first lien or mortgage on the Florida Central railroad, its equipments, franchise, road-bed, workshops and depots, excepting, however, the town-lots in the City of Jacksonville not used for depot purposes.

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And, whereas, the late president, George W. Swepson, caused to be prepared bonds to be issued by this Company preparatory to an order of the board of directors to that effect, and which bonds were signed by said Swepson as president of this Company and countersigned by H. H. Thompson, treasurer:

Be it therefore resolved, that the said bonds so signed by said Swepson and countersigned by said Thompson, to the extent of sixteen thousand dollars a mile, be and they are hereby adopted as the bonds to be issued under the foregoing resolution, and that such bonds when so issued shall be a first lien or mortgage on the said Florida Central Railroad, its equipment, franchise, road-bed, workshops and depots (excepting the lots in Jacksonville not used for depot purposes).

"*Be it further resolved*, that said bonds shall be placed in the hands of Edward Houston for the purposes agreed upon by an arrangement between himself and Milton S. Littlefield, who is the owner of nearly all the stock in this company, which bonds or their proceeds are to be held and applied according to the terms of said arrangement, except the proportion thereof applicable or apportionable to the stock owned by [129] other parties and upon the satisfaction otherwise of the terms of said arrangement with said Houston, the said bonds are to be by him transferred to Milton S. Littlefield, or according to his direction, to the extent of the stock owned by him at the time.

Resolved further, that the directors be directed to carry the foregoing resolutions into effect."

On the seventh of June, after these resolutions were passed, the original agreement between Littlefield and Houston was modified so as to provide for a substitution and exchange of the bonds of the State for the bonds of the Company, and a sale of the bonds of the State by Hopkins & Co., they to pay from the proceeds certain sums to different parties, and the remainder, if any, to Littlefield. So far as appears, nothing was to go to the Jacksonville, Pensacola and Mobile Company.

Afterwards, on the 21st of November, 1870, at a meeting of the directors of the Company, a report was received from a committee appointed to take into consideration the past issue of bonds, as follows:

"The committee finding that the bonds signed by G. W. Swepson, president, and counter-signed by H. H. Thompson, treasurer, are in such form as that they cannot be used to carry out the intention of their issue when they were adopted, report the following resolution in respect thereto:

Resolved, That the resolution adopting the bonds to be issued by the company, signed by George W. Swepson, president, and H. H. Thompson, treasurer, at a meeting of the board of directors, held on the 2d of June, A. D. 1870, be and the same is hereby rescinded, and that said bonds be destroyed."

The resolution as reported was unanimously adopted, but the bonds were never destroyed, and Houston, on the 11th of January, 1871, delivered them to Coddington upon certain trusts, and he exchanged them for state bonds, which he took to New York, and afterwards, on the 18th of April, placed in the hands of Hopkins & Co. in London, for sale. On the 13th of April, 1871, at a meeting of the stockholders of the Company, the following resolution was passed:

"*Resolved*, That Edward Houston is authorized to place the bonds referred to in the preamble and resolutions of the stockholders, adopted June 2, 1870, in the hands of S. W. Hopkins & Co., for the purposes mentioned in said resolutions, subject to the same exceptions therein expressed with respect to the proportion thereof applicable to the stock owned by [130] other parties, and according to the same terms therein mentioned."

These state bonds were in the same form as those exchanged with the Jacksonville, Pensacola and Mobile Company, and they had upon them similar indorsements.

On the 24th of March, 1870, J. L. Henry, N. W. Woodfin, W. P. Welch, W. G. Candler, and W. W. Rollins were appointed by the General Assembly of North Carolina a commission "To examine and fully investigate the condition and affairs of the Western Division North Carolina Railroad Company, as far as it concerns the administration of G. W. Swepson, late president thereof, and to make a full and final settlement of all accounts and liabilities of said president, G. W. Swepson, in connection with said company," and this commission, on the 16th of April, 1870, entered into the following agreement:

"Memorandum of agreement and settlement between the Florida Central Railroad Company, George W. Swepson, president, and the Jacksonville, Pensacola and Mobile Railroad Company, Milton S. Littlefield, president, and Milton S. Littlefield, majority owner of the stock of said companies, and also of the stock of the Tallahassee Railroad Company, of the first part, and the Western Division of the Western North Carolina Railroad Company, represented by N. W. Woodfin, W. G. Candler, W. Pink Welch, and W. W. Rollins, Commissioners appointed by an Act of the Legislature of North Carolina, approved by the stockholders of said Corporation, of the second part, witnesseth:

"That, whereas, George W. Swepson, late president of the Western Division of the Western North Carolina Railroad Company, made certain investments of the funds of said Company in securities of and interests in the said Florida Central Railroad, Jacksonville, Pensacola, and Mobile Railroad, and the Tallahassee railroad, of the said State of Florida, as per report made by the said George W. Swepson to the said Commissioners, amounting in the aggregate to the sum of one million two hundred and eighty seven thousand four hundred and thirty six dollars and three cents, to bear interest from the first day of November, 1869, at the rate of eight per cent per annum; and whereas, the said George W. Swepson heretofore conveyed to the said Milton S. Littlefield, subject to the payment of the above recited claim, his interest in the above recited railroads; and whereas, the [131] said Littlefield has received authority from the Legislature of the State of Florida and the several railroad companies to receive bonds to be issued by and for account of the several railroad companies, which bonds are to be exchanged for the bonds of the State of Florida, to be

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issued for the purpose of aiding the finances of the said several railroad companies, all of which bonds are now in a state of preparation; and whereas, the said Milton S. Littlefield has made a contract with S. W. Hopkins & Co., No. 71 Broadway, for the disposition of said bonds as the same may be issued, the proceeds of the issue of the bonds of the Florida Central Railroad Company of the said State of Florida, amounting to nine hundred and sixty thousand dollars, are to be applied to the payment of the existing liabilities of the said several railroad companies, including the sum of one hundred and fifty thousand dollars to be paid to the commissioners aforesaid, for the purpose of paying existing liabilities of the said Western Division of the Western North Carolina Railroad Company.

It is understood and agreed by the parties of the first and second part that the proceeds of the sale of the said bonds, so to be issued by the said Florida Railroad Companies and the said State of Florida, are to be equally divided, dollar for dollar, between the Western Division of the Western North Carolina Railroad Company and the said Florida railroads, and as the commissioners aforesaid receive by this first sale of bonds only the sum of one hundred and fifty thousand dollars, it is further understood and agreed that out of the proceeds of the sale of the issue of the bonds of the Jacksonville, Pensacola, and Mobile Railroad there is first to be received by the commissioners aforesaid a sum sufficient to be equal to the amount received by and on account of the said Florida railroads, and then an equal amount is to be received by the said Commissioners and the said Florida railroads, dollar for dollar, until the entire amount of one million two hundred and eighty-seven thousand and thirty-six dollars and three cents, with interest at eight per cent, as aforesaid, being the sum reported by the parties of the first part as due to the Western Division of the Western North Carolina Railroad, is fully paid.

It is further understood and agreed by the parties of the first and second parts, that all the interest owned or claimed by the said parties of the first part, George W. Swepson and Milton S. Littlefield, or which they as individuals have a right to control, in the said Florida railroads, are hereby pledged for the faithful fulfillment of this contract without the right on the part of any party to interfere with our man-
[132] agement or control of the affairs of the road.

(Signed) GEORGE W. SWEPSON,
Pres't Fla. Cent. R. R. Co.
M. S. LITTLEFIELD,
M. S. LITTLEFIELD,
Pres. J. P. & M. R. R. Co.
N. W. WOODFIN,
W. W. ROLLINS,
W. G. CANDLER,
W. P. WELCH,
Commissioners.

Witnesses: M. W. RANSOM,
R. R. SWEPSON."

While these different proceedings were going on, and for a very considerable time afterwards, strenuous efforts were made by some parties interested to prevent a sale of the bonds of the State which had thus been put out. Notices of the fraud were extensively published both in this country and in Europe. Letters were written to those engaged in putting the bonds on the market, and suits were begun; but, notwithstanding all this, we are entirely satisfied from the evidence that twenty-eight hundred, or thereabouts, of bonds given in exchange for those of the Jacksonville, Pensacola and Mobile Company, and two hundred and six given for those of the Florida Central Company, were actually sold and are now owned by *bona fide* purchasers, most or all of whom are citizens of Holland. We have reached this conclusion without the aid of the depositions taken in Amsterdam and which were excluded in the court below. There cannot be a doubt that the Governor of Florida was active in promoting the sale, as was also, to some extent, the chairman of the commission appointed by the General Assembly of North Carolina. The bonds were taken at once to London, and from there put on the market in Holland, where most or all of the sales appear to have been made. The bonds were undoubtedly steeped in fraud at their inception, but they were nevertheless apparently state bonds on the market in a foreign country, among a people largely unacquainted with the English language, and offering tempting inducements by reason of their liberal interest to those who were seeking investments. [133]
To promote their sale, those interested in the scheme kept a part of the proceeds to meet the interest for a time as it matured. Under these circumstances it is easy to see how, in the course of two or three years, with the help of skillful managers, the amount now out would be found in the hands of persons who believed they were holding a good and safe investment. At any rate, upon the facts as they are presented to us, we must hold that in this suit the present owners of the bonds occupy the position of purchasers for value and in good faith and are entitled to relief accordingly.

In March, 1872, the Trustees of the Internal Improvement Fund of Florida commenced a suit in Duval Circuit Court, Florida, against the Jacksonville, Pensacola and Mobile Company, to recover the balance that was due upon the purchase of the Pensacola and Georgia and Tallahassee roads, for which the fraudulent check was given by Swepson, and to enforce an equitable lien they claimed to have on the property as security for the payment. After this suit was begun, Daniel P. Holland recovered a judgment against the Company and levied upon and sold its railroad under execution, he himself becoming the purchaser and getting into possession. He thereupon was made a party to the suit of the trustees, and in his answer claimed to be the owner of the road, free of all liens in favor of the trustees or of the State on account of the bonds exchanged for the Company's bonds under the amended charter. At its January Term, 1876, the Supreme Court of the State decided in that case that the title which Holland took by his purchase was subject to the prior liens on the property, and that the bonds of the State were unconstitutional and void, but that the *bona fide* holders of the State bonds were entitled to the benefit of the statutory lien to secure the company bonds which were given in exchange for the state bonds. This case is reported in 15 Fla., 455 to 549.

In March, 1872, the State of Florida insti-

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tuted another suit in the Duval Circuit Court against the Florida Central Railroad Company and others, alleging a default in the payment of the interest due on the bonds of that Company given in exchange for the bonds of the State, and seeking to enforce the statutory lien by sale and an application of the proceeds to the holders of the bonds of the State. To this suit the Company answered, setting up to some [134] extent the frauds that are complained of in the present case, and further averring that the bonds of the State were unconstitutional and void and that the railroad bonds were not a lien. This suit also went to the Supreme Court of the State on appeal, and it was there decided, at the January Term, 1876. 1, That the state bonds were unconstitutional; 2, that the Florida Central Company was authorized by the Act of January, 28, 1870, to issue the bonds held by the State, and that thereby a first lien was created on the road of the Company in favor of the *bona fide* holders of the state bonds; 3, that there were no such circumstances connected with the issue, delivery and exchange of the bonds as would excuse the Company from their payment to *bona fide* holders; but, 4, that there was no proof in that case showing that any of the state bonds were actually so held. This case is reported in the same volume of reports, pp. 690 to 732.

Afterwards, at the January Term, 1878, in the case of the *Trustees Imp. Fund* v. *J. P. & M. R. R. Co.*, the same court repeated its decision that the state bonds were unconstitutional and that the statutory lien was good in favor of *bona fide* holders. The court also in that case established the lien of the trustees on the roads of that Company prior in right to all others, as security for the payment of the balance due on the sales under which the present Company got title to its roads. The amount due, as found by the court below in its decree, is $661,845.55, as of April 2, 1874. 16 Fla., 708-733.

After some of these decisions, and on the 30th of December, 1876, the holders of the state bonds represented in the present suits, and having 2,751 of the Jacksonville, Pensacola and Mobile issue, and 197 of the Florida Central, united and, through a committee, applied to the Governor of the State to seize and sell the roads under the statutory liens for their benefit. Complying with this request, the Governor advertised the roads for sale, and thereupon the Western Division of the Western North Carolina Railroad Company filed two bills in the Circuit Court of the United States for the Northern District of Florida, one to enjoin the [135] sale of the Florida Central road, and the other that of the Jacksonville, Pensacola, and Mobile Company. A preliminary injunction having been granted and the sale stopped, J. Fred. Schutte and others, representing the state bondholders, filed their bill in the same court to obtain a decree for the sale of the roads to pay their bonds. In all these cases, pleadings were filed and testimony taken, but before any final hearing the General Assembly of North Carolina passed an Act repealing all Acts creating or continuing in existence the Western Division of the Western North Carolina Company, and vesting in the Western North Carolina Railroad Company absolutely all its rights, credits, rights of action and effects. with authority for the Western North Carolina Company to prosecute, defend and manage any or all suits pending in which the Western Division Company was interested. This having been suggested to the court below after the cases were called up for hearing, the suits instituted in the name of the Western Division Company were revived in the name of the Western North Carolina Company, and the parties to the suit of Schutte and others corrected so as to adapt that case to this change in circumstances. A hearing was then had in all the suits, which resulted in decrees dismissing the bills of the Western North Carolina Railroad Company. In the Schutte suit a first lien was declared in favor of the Trustees of the Internal Improvement Fund upon the road of the Jacksonville, Pensacola and Mobile Company as far west as Quincy, to secure the payment of $463,175.37, with interest at eight per cent from March 20, 1869, that being the amount of the original purchase money of that road unpaid, and a second lien in favor of the complainants upon the entire road of that Company, including a few miles built west of Quincy, to secure the amount of state bonds held by them, given in exchange for the bonds of the Jacksonville, Pensacola and Mobile Company, the principal of which was $2,751,000, and the accrued interest $1,655,001.60. A first lien was declared on the road of the Florida Central Company for $197,000 of principal, and $118,515.20 of interest, on account of bonds of the State given in exchange for the bonds of that Company. Further provision was made in the decree for the sale of the roads separately, and an application of the proceeds to the payment of the several sums [136] so found to be due from each respectively, in the order of the priority of the liens.

From the decrees dismissing the bills of the Western North Carolina Company, that Company appealed. From the decree in the Schutte case the Western North Carolina Company, the Florida Central Company, and the Jacksonville, Pensacola and Mobile Company were allowed an appeal. In perfecting their appeal the Western North Carolina Company and the Florida Central Company gave bonds which operated as a *supersedeas*. Before, however, either appeal was docketed here, a settlement was concluded between the Western North Carolina Company and the bondholders, and pursuant to an understanding to that effect, the appeal of that Company was docketed and dismissed in this court on the 13th of September, 1879, pursuant to the 28th Rule.

At the last term an application was made to set aside the *supersedeas* obtained on the bond of the Florida Central, because the approval of the bond was obtained by fraud and perjury. This motion was granted. *R.R. Co.* v. *Schutte*, 100 U. S., 644 [XXV., 605]. After this, on application to this court in behalf of parties interested in the administration of the assets of the Western Division Company, and upon a representation that the settlement which had been made by the Western North Carolina Company was in fraud of their rights and without their consent, an order was made to the effect that the dismissal be set aside and the cause re-instated, if the Western Division Company filed with the clerk of this court by the first Monday in February a bond, such as was specially designated. This bond was given and approved

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on the second day of February, 1880, and in time.

Upon these facts, gathered, with the help of counsel, from the confused mass of papers brought here as the transcript of part of the record below, and filling nearly fifteen hundred printed pages, many questions have been presented and ably argued. We will first consider the special position which the Western North Carolina Company, as the successor of the Western Division Company, occupies. So far as the Florida Central is concerned, it is not claimed that the Western Division could have had any other rights than such as belong to a stockholder holding a controlling interest in the stock [137] of the Corporation. Its moneys were wrongfully invested in that stock by an embezzler. Swepson, the embezzler, bought the stock as stock, and if the Company whose money was embezzled adopts his purchase, the stock must be taken as he held it, and subject to such incumbrances as were put on it while in his hands. This is not seriously disputed.

As to the Jacksonville, Pensacola and Mobile Company, an attempt is made to reach the property of the Company because of the trust deed or agreement executed by Dibble to Swepson, after the conveyances from the Trustees of the Internal Improvement Fund had been procured through Swepson's fraud. That instrument purported, however, to be in trust for Swepson, to convey to the Company to be created by an Act incorporating the purchasers of the property as soon as the necessary legislation to that effect could be obtained. It was not executed in a form to pass title, and the security was only to continue under this plan until the contemplated corporation could be organized. When the Act of incorporation was obtained, the Company at once, without objection from Swepson or anyone in his interest, took possession of the property and operated the railroad as owner. Littlefield, who had succeeded to all of Swepson's rights under his several contracts, assumed the absolute control of the Company and was its principal stockholder. Both Swepson and Littlefield were named as corporators of the Jacksonville, Pensacola and Mobile Company, incorporated on the same day with the purchasers, which shortly after, as no doubt was from the beginning intended, absorbed the purchasers' Corporation and took possession of its property. No one ever disputed the title of the Jacksonville, Pensacola and Mobile Company until long after this litigation began, and the Western Division Company in its original bill distinctly averred that the ownership of the property was in that company. Littlefield held a controlling interest in the stock, and that undoubtedly represented the proceeds of Swepson's embezzlements invested in the Pensacola and Georgia and Tallahassee bonds, through which the North Carolina Company seeks to reach the property. This is clearly recognized in the contract of settlement entered into between Swepson, Littlefield and the commissioners of North Caro- [138] lina, on the 16th of April, 1870, by which it was agreed that the North Carolina Company should be paid the money it had lost from the proceeds of the sales of the state bonds to be issued to the Jacksonville, Pensacola and Mobile Company on the faith of its ownership of this very property. Certainly under such circumstances the North Carolina Company is estopped from setting up title to the property as against the *bona fide* holders of these bonds. In this litigation that Company can occupy no other position than that of an equitable owner of the stock of Littlefield in the Jacksonville, Pensacola and Mobile Company, and all incumbrances on the property are necessarily incumbrances on the stock which the property in legal effect represents. The settlement with Swepson was undoubtedly conditional, and not to be complete until the money agreed on was paid, but nevertheless the North Carolina Company became by the transaction a seller of the bonds and is estopped accordingly.

This disposes also of the claim that the lien in favor of Swepson, created by the deed, or agreement, of trust to him, was saved by the proviso at the end of section 6 of the Act incorporating the new Tallahassee Company. It is apparent from the whole tenor of the instrument that this was not intended as a continuing security, and it is equally clear from the evidence that the stock that stands in Littlefield's name represents all the interest which he or Swepson held in the property, as security or otherwise, when these suits were begun. In addition to this, as the instrument was imperfectly executed and was never recorded, it passed no title as against *bona fide* purchasers. The cases, then, in all their aspects, are to be treated as they would be if the several companies were alone, each for itself, defending the claims made by the bondholders.

We proceed, then, to inquire whether the Companies or either of them can successfully defend the Schutte suit. At the outset it will be conceded that the state bonds are unconstitutional. The Supreme Court of the State has three times so decided in cases where the question was directly presented by the pleadings, and apparently fully argued. In *State of Fla.* v. *Anderson*, 91 U. S., 667 [XXIII., 290], we said this delicate question was "one it was eminently proper the courts of Florida should determine," and while we are not now prepared to say [139] that these decisions are conclusive on us, they certainly are not of such doubtfull correctness as to make it proper that they should be disregarded. The conclusions were reached by applying the language of article 12, section 7, of the Constitution of 1868, to the condition of affairs in the State when that Constitution was adopted. Such a question is peculiarly within the province of the courts of the State to decide, and we ought not to depart from what they have done, except for imperative reasons.

But it by no means follows that, because the State is not liable on its bonds, the Companies are free from responsibility under their statutory mortgages. By the express provisions of the Act the state bonds were to be given the Company in exchange for its own bonds. The Company, not the State, was to use and dispose of the state bonds. The object of the State was to aid the Company with its credit. The state bonds were to be made payable to bearer and negotiable, while the company bonds were to the State alone and not negotiable. The company bonds were to be coupon bonds and payable at the same time and place as the state bonds, and, if the Company paid its interest in

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gold, it was the duty of the State to pay in the same way. It is clear, therefore, the intention was that, as between the State and the Company, the State was to be the guarantor of the company bonds, and the Company the principal debtor. With the public, however, it was different. There the State was the debtor, and the Company was only known through the statutes under which the bonds were put out, and the certificates indorsed on the bonds themselves, which were that the State held "the first-mortgage bonds of the railroad company for a like amount as security to the holder hereof." Such bonds of the State with such indorsements the Company put on the market and sold. Under these circumstances, the certificate of the Governor as to the security held by the State is in legal effect the certificate of the Company itself, and equivalent to an engagement on the part of the Company that the bond, so far as the security is concerned, is the valid obligation of the State. The case is clearly within the reason of the rule which makes every indorser of commercial paper the guarantor of the genuineness and validity of the [140] instrument he indorses. We cannot doubt that under these circumstances the Company is estopped, so far as its own liabilities are concerned, from denying the validity of the bonds. Having negotiated them on the faith of such a certificate, the Company must be held to have agreed, as part of its own contract, whatever that was, that the bonds were obligatory.

What, then, were the engagements into which these several Companies entered when, as is alleged, they accepted the bonds of the State in exchange for their own, and put them on the market for what they appeared on their face to be worth as commercial paper? And here it is proper to say that contracts created by or entered into under the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed. Where the State is concerned the words employed are sometimes to be taken most strongly against the other party, but in this, as in other cases of contracts, language is to be given, if possible, its usual and ordinary meaning. The object is to find out from the words used what the parties intended to do. Every statute, like every contract, must be read by itself, and it no more follows that one statutory contract is like another than that one ordinary contract means what another does. Of course, general rules of construction may and should be called into use when required, and sometimes, when certain words used in statutes are understood to have a certain meaning, the same words will be given the same meaning in other like cases; still, in the end, it must be determined from the language used in each particular case what has been done, or agreed to be done, in that case. We have been thus careful to state these familiar principles in this connection to guard against the use of this case as authority in others where the contract, even though it be created by or under the authority of a statute, is not the same.

In the present case, a statutory lien, in the nature of a first mortgage duly registered, was given the State on the property of the Company to secure the principal and interest of the company bonds, with power in the Governor, if default, for a certain length of time, should be made in the payment of principal or interest, to [141] take possession of, advertise and sell the property for lawful money of the United States, and nothing else, unless the State, for its own protection, should become the purchaser, when the price might be paid in money or such obligations of the Company as the State should hold. In case of a sale the purchase money, as well as the evidences of the Company's indebtedness taken as money, were to be paid into the state treasury, and promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State under the authority of the Act now in question. If the holders of the state bonds did not present them within ninety days after the sale, the treasurer was required to invest the money remaining in his hands in the securities of the United States, "to be held by the State of Florida as trustee for the bondholders," until demand of the payment of the bonds, when it was made the duty of the treasurer to turn over the securities to the bondholders. It would seem as though language could not be used indicating more clearly an intention to have the lien, what the Governor when he made the exchange certified it to be, a security for the holder of the state bonds. It is quite true that, by section 13 of the Act under which the Jacksonville, Pensacola and Mobile Company was organized, the Company could, at any time before maturity, pay off its own bonds in national currency, or in bonds of the State; but that does not change the character of the trust created by section 11, in case no such payment was made. Here no payment of any kind has been made, and no foreclosure of the lien has been attempted by the State except in the interest of the bondholders. The State, from the beginning, has recognized its obligations as trustee, and, on the request of the bondholders, commenced the proceedings, under the authority of this statute, which have resulted in the present suits. Indeed, one of the decisions against the constitutionality of the bonds was rendered in a suit instituted by the State, apparently on its own motion, to enforce the lien in behalf of the bondholders. In our opinion there is no occasion for applying here the doctrines of subrogation, because, in unmistakable language, the statute has made the mortgage of the Company security for the payment of the obligations of the State. This we understand to be in accordance with the opinion of the state court, as expressed in the Holland and Florida Central cases, reported in the 15th and 16th of [142] Florida Reports.

It is contended, however, that as the provision of the Act in respect to the execution and exchange of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the Company is void also, and must fall. We do not so understand the law. Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional, as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void; but in this, as in every other case of statutory construction, all depends on the intention of the Legislature, as shown by the general scope of the law. To

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our minds it is clear, in the present case, that the object of the Legislature was, not to create a debt which the State was expected to pay, but to aid the Company in borrowing money upon the credit of the State. As between the State and the Company the debt for the money borrowed was to be the debt of the Company. If the State paid its bonds from its own funds the mortgage could be enforced to compel the Company to make the State good for all such payments. If the State did not pay, then the creditors had their own recourse upon the mortgage. The state credit, so far as the State and the Company were concerned, was only to aid the Company in borrowing money on its own bonds. In any event, the Company was to be bound for the payment of the entire debt when it matured, and its property was to be given as security. Under these circumstances, it seems to us that the unconstitutional part of the statute may be stricken out and the obligation of the Company, including its statutory mortgage in favor of the state bondholders, left in full force. The striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision, and reading the statute as if that provision was not there. These bonds, as state obligations, were void, but as against the Company which had actually put them out, they were good.

This disposes of this part of the case so far as the Jacksonville, Pensacola and Mobile Company is concerned. No claim is made that the [143] statute does not on its face authorize that Company to exchange its bonds for those of the State, or that the lien is not created by the exchange. Neither is it claimed that the necessary corporate action was not had to get the bonds out under the forms of law. Although on the 10th of December, 1870, a resolution was passed by the directors of the Company, ordering a recall of the bonds on account of the proposed misapplication of the proceeds of the sales to be made, an actual withdrawal was never effected, and the bonds have got into the hands of *bona fide* holders. The very resolutions which directed the recall asserted the previous lawful and regular issue.

As to the Florida Central Company, however, the case is different, and it is claimed not only that the statute did not authorize the exchange of the bonds and the creation of the lien, but also that the Company did not in its corporate character execute its own bonds or make the exchange.

As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this Company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

This, like the constitutionality of the Act, is a question of local law. It depends on the peculiar condition of local affairs. If the decision is not conclusive on us, it is of high authority under the circumstances, and we are not inclined to disregard it. The holders of the commercial paper put out by the Company and bought on the faith of the State are entitled to [144] the benefit of every presumption in their favor.

The next important inquiry is whether the necessary authority for the issue and exchange of the bonds was given by the Corporation itself. Certainly the resolution of June 2, 1870, is on its face sufficient for that purpose, as is also that of April 13, 1871. It is true Littlefield now swears that these meetings of the stockholders and directors were irregular and without sufficient notice; but it is worthy of remark that, in the resolution of November 21, rescinding that of June 2, there is no pretense that the original resolutions were not lawfully passed and binding on the Company. The rescission is put entirely on the ground that the form of the bonds was not such as to carry out the intention of the Company in directing their issue. Mr. L'Engle also, in his letter to Boissevain, giving notice of the frauds that had been practiced on the Company, substantially conceded that the issue of the bonds was authorized by the Company, and confined his protest to the improper use that was being made of them. It is clear to our minds from the whole case, that, but for the fraudulent disposition of the bonds, the corporate action of the Company in putting them out would have been considered sufficient. Littlefield's character, as it appears all through this voluminous record, is not such as to entitle him to any favorable consideration as a witness or otherwise. He and Swepson have both shown themselves capable of the most shameless frauds, and we cannot but look with suspicion upon everything they do or say. We regret it is not in our power to relieve the Corporations, whose affairs they have been permitted to manage, from the consequences of their wanton breaches of trust; but in our judgment this cannot be done without injuring those who are innocent of all wrong.

It is next contended, that, as the bonds were fraudulently put out by the officers of the Companies and are unconstitutional, the recovery must be confined to the amount actually paid for the bonds to the agents of the Companies. As we have endeavored to show, the bonds, although void as to the State, are valid as to the Company that sold them. Having been put on the market by the Companies as valid bonds, the Companies are estopped from setting up their [145] unconstitutionality. As against the Companies, they occupy in the market the position of commercial securities, and may be dealt with and enforced as such. The Companies, through their faithless agents, are in a position where they must meet those they have dealt with commercially, and respond accordingly. In commerce, commercial paper means what on its face it represents, regardless of what its maker or promoter may have got for it. The bonds of the State in the open market purported to be what they called for. The Companies put them out and, in legal effect, as

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we think, indorsed them. A *bona fide* holder can now require the indorser to respond to his indorsement commercially; that is to say, by paying what he in effect agreed the maker must pay.

We believe we have now disposed of all the questions the record presents. It has been suggested that since the appeal the property has been sold under the decree below. That is not shown by the record. The *supersedeas* in favor of the Florida Central Company we have decided was fraudulently obtained. The Justice who accepted the bond was imposed upon. That *supersedeas* was promptly vacated when the facts were called to our attention. The *supersedeas* secured by the Western North Carolina Company was, to say the least, suspended when that Company voluntarily dismissed its appeal under the 28th Rule. This suspension was not vacated until the bond of indemnity was filed on the 2d of February, 1880. It will be for the court below to determine, when it is called on to confirm any sale that has been made, whether a sale was stayed by a valid subsisting *supersedeas*. From relief against any order in that behalf the parties must resort to such measures as they may be advised they are entitled to. We cannot, from anything now before us, settle any such question.

The decree in each of the cases is affirmed with costs.

Mr. Justice **Field** was not present at the argument of these causes, and took no part in their decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 312.

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[673] N. L. McCARTHY, *Appt.*,

v.

JOSEPH ALCIDE PROVOST *et al.*

(See S. C., 13 Otto, 673.)

Jurisdiction as to amount.

Where the matter in dispute on an appeal is only one two hundred and fortieth part of the property sought to be partitioned, as that is all the appellant claims, and the value of that part is not shown to be more than $5,000, this court has no jurisdiction.

[No. 889.]

Submitted Jan. 3, 1881. Decided Jan. 17, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **Thos. J. Semmes,** for appellant.

Mr. **Henry B. Kelly,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We have no jurisdiction in this case. The suit was brought to recover one two hundred and fortieth part of certain lands, and for a partition so as to set off to the appellant in severalty that interest. It is averred in the bill that "the value of the property sought to be partitioned amounts to more than $5,000," but the matter in dispute on this appeal is only one two hundred and fortieth part of the whole property, as that is all the appellant claims. Our jurisdiction, therefore, depends on the value of that part, which certainly is not shown to be more than five thousand dollars.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

RICHARD E. WHITSITT ET AL., *Appts.*, [770

v.

UNION DEPOT AND RAILROAD COMPANY, ET AL.

(See S. C., 13 Otto, 770.)

Jurisdiction as to amount.

The Act of Mar. 3, 1875, ch. 137, did not change the jurisdiction of this court to review the judgments and decrees of the circuit courts. That depends upon the value of the matter in dispute, which must exceed $5,000.

[No. 1070.]

Submitted Jan. 3, 1881. Decided Jan. 17, 1881.

APPEAL from the Circuit Court of the United States for the District of Colorado.

The case is stated by the court.

Messrs. **Amos Steck,** *Wells, Smith & Macon,* for appellants.

Messrs. **Bela M. Hughes,** *Willard Teller,* and *H. M. Teller,* for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Although the Act of 1875, 18 Stat. at L., pt. 3, p. 470, ch. 137, gave the Circuit Courts of the United States original cognizance of suits of a civil nature arising under the Constitution and laws of the United States, when the value of the matter in dispute exceeds $500, it did not change our jurisdiction for the review of the judgments and decrees of those courts. That depends now, as it did before, on the value of the matter in dispute, which must exceed $5,000. This record does not show in express terms or by fair implication that the value of the property in controversy reaches that sum, and *the appeal is, therefore, dismissed for want of jurisdiction.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LIFE ASSOCIATION OF AMERICA, [222]
WILLIAM S. RELF, Superintendent of the Insurance Department of MISSOURI, and DANIEL M. FROST, Special Agent, etc., *Appts.*,

v.

SAMUEL E. RUNDLE ET AL.

(See S. C., "*Relfe* v. *Rundle*," 13 Otto, 222-226.)

Removal of insurance cause to federal court

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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Where an insurance company was sued in a State other than that where it was incorporated, by a citizen of the former State, and it was afterwards dissolved and its property vested in the Superintendent of the Insurance Department of the State where the corporation was created, such Superintendent, after being made a defendant in the suit, is entitled to remove the cause to the Circuit Court of the United States.

[No. 897.]

Submitted Dec. 15, 1880. Decided Jan. 24, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisana.

The case is stated by the court.

Messrs. **James Carr** and **Geo. D. Reynolds,** for appellants.

Mr. **Armand Pitot,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Life Association of America was, on the 5th of November, 1879, a corporation of the State of Missouri, for the purpose of doing a life insurance business, with its chief office at St. Louis, in that State. By the laws of Missouri, the Superintendent of the Insurance Department of the State Government might, under certain circumstances, institute proceedings in the courts of the State for the dissolution of such a corporation and the winding up of its affairs. Section 6043 of the Revised Statutes of Missouri is as follows:

"Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the Superintendent of the Insurance Department of this State, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policy-holders of such company, and such other persons as may be interested in such assets."

On the 13th of October, 1879, L. E. Alexander, a citizen of Missouri, and the Receiver of the Columbia Life Insurance Company of Missouri, recovered a claim against the Life Association of America for one million one hundred thousand dollars, and thereupon William S. Relf, the Superintendent of the Insurance Department of the State, commenced proceedings under the statute to dissolve the last named Corporation and wind up its affairs. In his petition he prayed that the Company might be enjoined from doing any further business, and that an agent might be appointed to take charge of its property temporarily. Such an order was made in the cause, and D. M. Frost, a citizen of Missouri, appointed temporary agent and Receiver. Frost at once qualified under this appointment.

[223]

On the 5th of November, 1879, Rundle and wife, the appellees, policy holders of the Company, commenced suit in the Fifth District Court of the Parish of New Orleans, against the Life Association, Frost, the temporary agent and Receiver, John R. Fell, the local agent of the Company at New Orleans, and L. E. Alexander, Receiver of the Columbia Life Insurance Company, the object of which was to have the assets of the Company in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana creditors and policy holders in preference to others. In the bill the decree in favor of the Receiver of the Columbia Life Insurance Company and the proceedings by Relf, the Superintendent of the Insurance Department, with the appointment of Frost as temporary Receiver, were set out in detail, and the whole object and purpose of the suit was to keep the Louisiana assets out of the hands of Relf and his successors in office. No special relief was asked against the Receiver of the Columbia Life Insurance Company. Upon the filing of the bill, Walter B. Wilcox was appointed Receiver. Service of process was made on Alexander only through Francis B. Lee, who was appointed *curator ad hoc* at the same time that Wilcox was appointed Receiver. Fell was made a party only for the purpose of reaching property in his hands.

On the 10th of November the Company was dissolved by a decree of the Missouri court, and its property vested in Relf, Superintendent of the Insurance Department, as provided by the statute. On the 17th of the same month Relf was, on his own motion, made a party to the suit in New Orleans, as the legal representative of the late Corporation, and on the 28th he filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Louisiana. In his petition he set forth his own citizenship in Missouri, and that of the appellees in Louisiana. The citizenship of all the other persons named as parties to the suit appeared in the pleadings. He also gave the security required by the Act of Congress, and on the 5th of December, which was in time, filed in the circuit court a copy of the record in the state court. On the 9th of the same month the Receiver appointed in the state court moved to dismiss the cause and strike it from the docket of the circuit court: 1, because that court was without jurisdiction either of the person or the subject-matter; 2, because Relf had no standing in court, he being a creature of the State of Missouri, without capacity to sue or remove causes in Louisiana; 3, because the suit was improperly removed; and, 4, because the state court having first taken charge of the property, the circuit court could not interfere with the possession of the Receiver of that court. While this motion was pending, and on the 30th of December, the Life Association and Frost filed their petition in the state court, setting forth the former petition of Relf, and adopting it and all that had been done under it as their own, and also asking that the suit be removed on their own account. They also gave the security required by the Act of Congress. On the 5th of January the Circuit Court heard the motion of the state court Receiver made on the 9th of December, and remanded the cause. From that order the Life Association, Relf, and Frost took this appeal, under the Act of 1875. 18 Stat. at L., pt. 3, p. 470, sec. 5, ch. 137.

[224]

We think the circuit court erred in remanding the cause. The entire controversy is between the appellees, representing the Louisiana creditors and policy holders, on one side, and Relf, the statutory representative of the Corporation and its property, on the other, as to their respective rights to what the appellees claim are Louisiana assets belonging primarily to Louisiana creditors. Fell and the Receiver of the Columbia Life Insurance Company are formal parties only. Fell has in his possession, as a naked trustee, some of the Louisiana assets, and the Receiver of the Columbia Life is, so far as

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anything appears, no more than a general creditor of the dissolved Corporation whom, necessarily, under the law, Relf represents. After [225] the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the Corporation was transferred to Relf and he became under the law entitled to the possession.

Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the Corporation. He was the statutory successor of the Corporation for the purpose of winding up its affairs. As such he represents the Corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact, the Corporation itself for all the purposes of winding up its affairs.

We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and, that a receiver appointed by a state court has no extraterritorial power, but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the State which creates it may say who those agents shall be. One may be its representative when in active operation and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without [226] limitation express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

By the charter of this Corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. Every policy holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the Corporation can insist shall be regarded. The appellees, when they contracted with the Missouri Corporation, impliedly agreed that if the Corporation was dissolved under the Missouri laws, the Superintendent of the Insurance Department of the State should represent the Company in all suits instituted by them affecting the winding up of its affairs. Relf, therefore, became, by operation of law, the successor of the Corporation in the litigation these appellees instituted in Louisiana. He was, in legal effect, their only opponent in the suit they had begun, and as he appeared in time and was a citizen of Missouri, representing a Missouri Corporation, he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the Courts of the United States.

The order of the circuit court remanding the suit is, therefore, reversed, and the record remanded to that court with instructions to proceed according to law as with a pending suit within its jurisdiction by removal.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 16; 109 U. S., 537.

ZEB. WARD, *Plff. in Err.*, [327]

v.

JOSEPH C. TODD, Survivor of the Firm of TODD & RAFFERTY.

(See S. C., 13 Otto, 327-330.)

Equity court—relief in.

A court of equity having once obtained rightful jurisdiction of the parties can retain it until complete relief is afforded, within the general scope of the subject-matter of the action.

[No. 155.]

Submitted Dec. 16, 1880. Decided Jan. 24, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The case is fully stated by the court.

Mr. **U. M. Rose**, for plaintiff in error.

Mr. **Chas. P. Redmond**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit against Ward, the plaintiff in error, on a judgment in the Fayette Circuit Court of the State of Kentucky, and the only question is whether, in the record of the judgment sued on it appears that the state court had jurisdiction to render a personal judgment against Ward. The facts are these:

On the 17th of June, 1872, Ward executed to the firm of Todd & Rafferty his note for $10,733.28, payable two years after date, with interest at the rate of seven per cent per annum until paid, and secured it by a mortgage on certain property. Afterwards, on the 31st of July, in the same year, he gave his note to the same firm for $3,528, payable, with interest at the same rate, in one year from date, and secured it by mortgage on the same property. On the 8th of August, 1873, Todd, as surviving partner of the firm of Todd & Rafferty, filed a petition in the Fayette circuit court in which he set forth the due execution of these two notes and

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mortgages and their respective liens on the mortgaged property. He also stated that the note of July 31 was due and unpaid and that the one of June 17 was a subsisting debt but not due. He also set forth a purchase of the mortgaged property by him at tax sale for $55.09, and that the City of Lexington had a lien on the property for unpaid purchase money. The notes and mortgages were filed as exhibits to the petition and the prayer was for a judgment [328] on the small note which was due, for a sale of the mortgaged property to pay that note, and that the residue of the proceeds might be retained to satisfy the other note, and the claim for taxes. Ward was served personally with process in the case Sept. 8, 1873. On the 17th September, Todd amended his petition by setting forth that he had paid the City of Lexington $680 in full for the amount due as purchase money of the property, and asking that this sum might be paid out of the proceeds of any sale that should be made. After this, process was again issued and served personally on Ward, Sept. 18. On the 19th of November a decree was entered in the cause by default, finding the amount due on the note of July 31 and the claim for taxes, and establishing the lien for the debt originally due the city. The lien under the mortgage to secure the note under date of June 17 was also recognized and established, and inasmuch as the property could not be sold in parts, except to a limited extent, it was ordered that the whole be sold. On the 29th of November, Ward appeared, and on his motion this judgment or decree was set aside and he had leave to answer, which he did, setting up, in effect, that the debt of June 17 was not due; that Todd had no lien on the mortgaged property for the amount he had paid the City of Lexington; that he was not entitled to foreclose any lien for taxes, as that was not due, and that the property was capable of division for the purposes of a sale. He therefore asked that only so much of the property be sold as was required to satisfy the debt then due. Thereupon, on the 9th of December, it was adjudged: 1, that Todd recover of Ward the amount of the note of July 31, with interest until paid; and, 2, that so much of the mortgaged property as was necessary to pay that debt be sold. "Upon the other questions raised in the petition and answer" the court took further time. On the 4th of February, 1874, the master reported a sale of part of the mortgaged property sufficient to pay the note of July 31. This sale was confirmed on the 5th of February, 1874, but no decree was entered in respect to the claim for taxes or the amount paid the city to discharge its claim for purchase money and, on the 15th of August following, Todd produced and asked leave to file an amended petition in the cause. To this, Ward appeared by his counsel and objected but the objection was overruled and the [329] leave granted. In this petition Todd set forth that the note of July 31 had become due, and he asked a judgment for this debt and a further foreclosure of the mortgage. After this, service on Ward by publication was made; he being at the time absent from Kentucky and a resident of Arkansas. No personal service of process was made on him within the State after this amendment. On the 27th of November a decree was entered that Todd recover of Ward the amount of the note of June 17, 1872, with interest; that what remained of the mortgaged property be sold; that so much of the petition as related to the claim of the City of Lexington for the original price of the lot, and to the claim for taxes, be dismissed, and that execution might issue for so much of the debt and costs adjudged to Todd as remained unpaid by the sale of the mortgaged property. Under this decree, the property was sold for $7,000. That sale was confirmed, and this suit was brought on the judgment to recover the balance remaining due after the proceeds had been applied as directed by the decree.

This statement of the facts shows clearly that the court had jurisdiction of Ward personally. He was not only served with process in Kentucky, but he appeared personally in the action and filed an answer to the petition. In this answer he put in issue his liability in that suit for the money paid the City of Lexington and the money paid for the taxes. In the first decree these issues were left undecided and the cause retained on that account. Afterwards Todd asked leave to amend his petition and Ward appeared unconditionally to resist that application. The leave was granted and a judgment afterwards rendered in accordance with the prayer of the amendment. At the same time the issues, left undetermined under the original petition, were decided in favor of Ward. The amendment was germane to the matters set forth in the original petition, and the court having once obtained rightful jurisdiction of the parties, could retain it until complete relief was afforded within the general scope of the subject-matter of the action. *Ober* v. *Gallagher*, 93 U. S., 206 [XXIII., 831]. Ward evidently recognized this fact when he appeared by his counsel and resisted the application to amend so as to charge him personally with the amount of the note which had fallen due while the suit had been pending. The claim is not that the attorney had no authority to appear in the suit, but that his appearance was for a special pur- [330] pose only. This is clearly contradicted by the record. A part of the issues originally made in the suit were then pending, and it was the duty of counsel to be in attendance on the court to protect his client's interest until the whole subject-matter of the litigation was finally disposed of.

The service by publication after the amendment was, under the circumstances, unnecessary, and did not deprive the court of the jurisdiction which it had acquired before.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

TIPTON COUNTY, *Plff. in Err.*, [523]
v.
ROGERS LOCOMOTIVE AND MACHINE WORKS.

(See S. C., 13 Otto, 523-540.)

Tennessee law as to municipal subscriptions to railroad—estoppel—fraud in issue of bonds.

1. The Acts of Tennessee, under which the County of Tipton subscribed to the stock of the Miss. Riv. R. R. Co., were not repugnant to the Constitutions

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of the State, by reason of the authority they confer on a limited number of counties to make, and on a particular railroad corporation to receive, a subscription of stock, nor because they dispensed with the previous assent of the people of such counties expressed at a popular election.

2. Where a county, through its representatives, gave assurances before the transfer of the bonds to a *bona fide* holder, that it would provide for the payment of the bonds and their coupons, it is estopped from denying their validity.

3. The subsequent discovery by the county, of fraud and corrupt practices upon the part of the railroad company in procuring the issue of the bonds cannot affect the rights of those who had, in good faith, acquired the bonds in reliance upon the explicit assurance which the county previously gave.

[No. 75.]

Argued Nov. 18, 19, 1880. Decided Jan. 24, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The case is fully stated by the court.

Messrs. **Gantt** *&* *Patterson* and *Henry Craft*, for plaintiff in error.

Messrs. **Humes** *&* *Poston*, *S. P. Walker*, *Estes &* **Ellett** and **Stanley Matthews**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a writ of error from a judgment in favor of the defendant in error, against the County of Tipton, in the State of Tennessee, for the principal and interest of fifty bonds of [524] $500 each, dated January 1, 1869, and payable on the first day of January, 1873, to the Mississippi River Railroad Company or bearer, with interest from date at the rate of six per cent per annum.

Each bond, signed by the chairman of the Tipton County Court, and countersigned by its clerk, recites that it is "Issued under and by virtue of section 6 of an Act of the Legislature of the State of Tennessee, passed February 25th, 1867, amended on the 12th day of February, 1869;" also, that "A special tax is levied, by authority of law, upon all the taxable property in the County of Tipton, to meet the principal and interest of these bonds, collectible in equal installments, running through five years, as the bonds themselves mature;" and further, that "This is one of four hundred bonds, all of the same denomination and rate of interest, issued by Tipton County in payment of a subscription of $200,000 to the Mississippi River Railroad Company, made by the county court of said county, under the authority of the Acts above recited; these bonds, transferable by delivery and redeemable in 5 years at the rate of $40,000 a year, commencing January 1st, 1870."

When the foregoing Acts were passed, there was in force a general statute, under the provisions of which, counties, incorporated cities and towns, could subscribe stock in railroads, upon certain terms and conditions, one of which was the previous approval of the legal voters of such county, city or town, at an election called and held for the ascertainment of their will. These special Acts, in connection with the Act of November 5, 1867, for the benefit of the Mississippi River Railroad Company, authorized the county courts of counties *on the line of that company's road* (among which was the County of Tipton) to subscribe to its capital stock, without requiring a submission of the question of subscription to a popular vote; the majority of the justices in commission being present, and a majority of those present concurring.

The validity of those Acts is questioned here, as it was in the court below, upon the ground that they are unconstitutional and, therefore, gave no authority to make the subscription, or issue bonds in payment thereof.

The provisions of the Constitution of Tennessee (that of 1834), to which, it is supposed, they are repugnant, are section 8 of art. 1, and section 7 of art. 11; the first of which declares, that [525] "No freeman shall be taken, or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life or property, except by the judgment of his peers, or the law of the land;" and the last of which provides, that "The Legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals, inconsistent with the general law of the land; nor to pass any law granting to any individual or individuals, rights, privileges or immunities, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law. *Provided, always*, the Legislature shall have power to grant such charters of incorporation as may be deemed expedient for the public good."

It is contended, that these special Acts are in violation of section 7, article 11 of the State Constitution in that they authorized a limited number of counties to subscribe to the capital stock of a particular railroad corporation and, also, because they dispensed with the previous sanction of a popular vote, as required by the general statute regulating railroad subscriptions by counties, incorporated cities and towns; and, further, that being partial and special laws, inconsistent with the general law upon the subject of municipal subscriptions, they do not constitute "the law of the land," within the meaning of section 8, article 1 of that constitution. The argument, in behalf of the plaintiff in error, is, that the power, reserved to the Legislature in the proviso to section 7 of article 11, "To grant such charters of incorporation as may be deemed expedient for the public good," is limited, in its exercise, by the prohibitions contained in the body of the same section; and that a charter, conferring, upon a particular railroad company or upon particular municipal corporations, special privileges and immunities, not given by the general law, was inconsistent with those prohibitions, and was not a "law of the land" within the meaning of section 8 of article 1.

These propositions have received at our hands [526] that consideration which their importance confessedly demands; and if we err in the conclusions reached, it will not be the fault of able counsel who, both in oral and printed arguments, have pressed upon our attention every suggestion which seems to have any bearing upon the question presented for determination.

The earnestness with which they have asserted their positions to be sustained by the adjudications of the Supreme Court of the State, has made it necessary for us to examine, with great care, a very large number of the reported decis-

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ions of that learned tribunal. If, when the Acts in question were passed, the General Assembly was without power, under the Constitution, as interpreted by the highest court of Tennessee, to enact a special law authorizing a designated number of counties, without a previous vote of the People, to make subscriptions of stock to a particular railroad running through such counties, our duty is to accept that construction of the fundamental law of the State. But if there was no such cotemporaneous or fixed construction, this court, as was the court of original jurisdiction, is under a duty, imposed by the Constitution of the United States, from the performance of which it is not at liberty to shrink, to determine, for itself, what were the legal rights of parties at the time the bonds in suit were issued.

It would extend this opinion to an improper length should we extract from the numerous decisions of the state court, cited by counsel, so much of their language as seems pertinent to the questions before us. We must, therefore, content ourselves with stating only the general doctrines to be deduced from the adjudged cases, some of which are cited in a note to this opinion.*

[527] Prior to the case of *Wallace* v. *Tipton County*, to which we will hereafter refer more particularly, the following rules or principles seem to have been established by repeated adjudications in the Supreme Court of the State, *viz.*:

That a law, which did not alike embrace and equally affect all persons in general, or all persons who exist, or may come into the like state and circumstances, was a partial and special law and, therefore, not "the law of the land" within the meaning of the Constitution of 1796, from which was taken section 8 of article 1 of the Constitution of 1834;

That the 7th section of article 11, prohibiting the suspension of a general law for the benefit of any particular individual, or the passage of any law for the benefit of individuals, inconsistent with the general laws of the land, or the passage of any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may by the same law be extended to any member of the community who may be able to bring himself within the provisions of such law, is a statement, in condensed form, of the construction which the Supreme Court of the State had in several decisions placed upon the phrase "the law of the land," as used in both the Constitutions of 1796 and of 1834;

That, nevertheless, the authority of the Legislature to create corporations, with special rights and privileges, existed as an incident of sovereignty; that a law creating a corporation and granting a franchise was more in the nature of a contract than a "law of the land," in the sense of the Constitution; and, upon that ground, the right given to a bank by its charter, granted in 1832, to take a greater rate of interest than was allowed by a general statute to individual citizens, was held not to be obnoxious to the Constitution upon the ground that it was not a general law, or "the law of the land;"

That the proviso in section 7 of article 11 of the Constitution of 1834 was inserted "for the purpose of enabling the Legislature thereby to grant exclusive privileges, which, but for the proviso, would be prohibited by the body of the section;" that the power to create corporations was not curtailed or restricted by the general prohibitions in that section, but only by the positive provisions to be found in other parts of the Constitution;

That, prior to the adoption of the Constitution [528] of 1834, the Supreme Court of the State suggested doubts as to whether the taxing power, being legislative in its nature, could be constitutionally conferred upon the subordinate municipal corporations or civil divisions of the State; and, that for the purpose of removing those doubts, the Convention which framed that Constitution incorporated into it the 29th section of article 2, which declares that "The General Assembly shall have power to authorize the *several* counties and incorporated towns in the State to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation;"

That the construction of a railroad to or through a county or incorporated town, is, in the one case, a county, and in the other, a corporate purpose, for which the Legislature may invest such county or town, respectively, with the power to impose taxes;

That under section 29 of article 2 the Legislature could, by special Act, confer upon the mayor and aldermen of an incorporated town, directly and exclusively (and, consequently, upon the county court of a county), the power to subscribe railroad stock, without first, or at all, submitting the question of subscription to a vote of the inhabitants of such town.

Such were, beyond question, as we think, the established principles of the Constitution as announced by the highest judicial tribunal of the State, up to the decision in *Wallace* v. *Tipton Co.*, to which reference has already been made. These doctrines, it must be conceded, would sustain the Statutes of 1867 and 1869 against the objections urged. But it is contended that the decision in *Wallace* v. *Tipton Co.* is a direct authority against the constitutionality of those Acts, and should control our judgment.

That case deserves special examination. It was a suit commenced in 1873, in an inferior state court of Tennessee, by certain tax payers of Tipton County against the county court of that county, the Paducah and Memphis Railroad Company (a corporation lawfully created by the consolidation, in 1872, of the Mississippi River Railroad Company, with the Paducah and [529] Gulf Railroad Company, a Kentucky corporation), and the local collectors of Tipton County engaged in the collection of taxes which had been levied to meet the bonds constituting the issue of $200,000 to the Mississippi River Railroad Company, under the aforesaid Acts of 1867 and 1869. The object of that suit was to

*Budd v. *State*, 3 Humph., 483; *Vanzant* v. *Waddel*, 2 Yerg., 260; *Bk.* v. *Cooper*, 2 Yerg., 599; *Tate* v. *Bell*, 4 Yerg., 202; *Officer* v. *Young*, 5 Yerg., 320; *Fisher* v. *Dabbs*, 6 Yerg., 119; *Jones* v. *Perry*, 10 Yerg., 59, 78; *Marr* v. *Enloe*, 1 Yerg., 452; *Sheppard* v. *Johnson*, 2 Humph., 285; *Hazen* v. *Bk.*, 1 Sneed, 115, 118; *Nichol* v. *Mayor, etc.*, 9 Humph., 252; *Memphis* v. *Water Co.*, 5 Heisk., 495; *Railway Co.* v. *City*, 4 Cold., 406; *R. R. Co.* v. *Davidson Co. Ct.*, 1 Sneed, 638; *McCallie* v. *Mayor, etc.*, 3 Head, 317. See, also, numerous cases cited in the head notes of the foregoing cases as they appear in Chancellor Cooper's Tennessee Reports.

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enjoin the collection of such taxes, upon the ground that those Acts were unconstitutional and void. In May, 1874, certain citizens of other States, holders of a portion of the Tipton County bonds, were, upon their own appplication, made parties defendant in that suit. They, thereupon, filed a petition for its removal to the circuit court of the United States, and, as to them, the opinion of the court states, the suit was removed. The railroad company, by an amended answer, disclaimed all interest in the suit, and informed the court that it neither held nor owned any of the bonds, but that they were held and owned by others who had paid value therefor. Thenceforward it was a suit, practically, if not exclusively, between parties who had no interest in enforcing the collection of the county's bonds. It was finally determined without the presence of any of the holders of the bonds. Waiving any question as to whether, under the Act of Congress, the whole suit was not removed to the Federal Court, it is sufficient to say that, in accordance with the prayer of the tax payers, a decree was entered, which was, by the Supreme Court of the State, in all respects, affirmed. Although the case was determined in the Supreme Court, at its September Term, 1875, it has not, that we can ascertain, been published in its reported decisions, and we are not, therefore, advised of the precise grounds upon which the Acts of 1867 and 1869 were assailed in argument, as being in conflict with the Constitution. But the opinion of the court discloses the fact that those Acts were held to be repugnant to section 8 of article 1, and section 7 of article 11 of the State Constitution, upon the ground, that while the general Law of 1852 regulating railroad subscriptions by counties, towns and cities, required a popular vote as a condition precedent to any authority to make subscriptions, the special Acts of 1867 and 1869 permitted a few counties, upon the line of the Mississippi River Railroad, by their respective county courts, and without [530] a submission of the question to the people, to subscribe to that company's stock. No comment whatever is made in the originial opinion, and very little in the opinion on the rehearing, upon the scope or effect of the proviso in section 7 of article 11, giving or reserving to the Legislature the power to grant such charters of incorporation as it deemed expedient for the public good. But it is to be assumed that the court did not regard that proviso as materially affecting the conclusion reached. If there had been no decision of the state court, subsequent to that of *Wallace* v. *Tipton Co.*, on the subject of municipal subscriptions, under special statutes, we should feel greatly embarrassed by the circumstance, that the judgment of the circuit court could not, upon this branch of the case, be sustained, except by disregarding that decision.

But all difficulty, we think, is removed by the decision of the state court in the more recent case of the *Knoxville and Ohio R. R. Co.* v. *Hicks*, determined in 1877. Unless we mistake, altogether, the import of that decision, it is inconsistent with the doctrines of *Wallace* v. *Tipton Co.*, and, upon the point now before us, practically overrules the latter case.

In *R. R. Co.* v. *Hicks*, it was a question whether an Act passed in 1852, exempting the capital stock, dividends, roads and fixtures of the Knoxville and Kentucky Railroad Company from taxation, until the stock paid a dividend equal to the legal rate of interest, was in conflict with the Constitution of 1834. That Constitution declared (sec. 28, art. 2), "That *all* lands, liable to taxation, held by deed, grant, or entry, town lots, bank stock, etc., and such other property as the Legislature may from time to time deem expedient, shall be taxable." In view of that constitutional injunction, the case was a very strong one for the application of the prohibitions, against special and partial laws, contained in section 7 of article 11, if such prohibitions had any application whatever to charters of incorporation granted by the Legislature. But the court, after stating that the Convention of 1834 comprised among its delegates some of the ablest lawyers the State ever had, who were familiar with the principles of the *Dartmouth College Case*, and knew that the Legislature, under the previous Constitution, had, without question, exercised the power of [531] granting charters, with total or partial exemptions, said: "With these facts prominently before the Convention, if it was their purpose to restrict the power of the Legislature, one should expect to find such restriction expressed in unequivocal language. But the only direct provision, in regard to the power of the Legislature in respect to charters of incorporation, is in the proviso to section 7 of article 11, to the effect that the restriction upon the power of the Legislature to grant special privileges, immunities, and exemptions *was not to be construed to affect the power of the Legislature to grant such charters of incorporation as they might deem expedient for the public good*, thereby leaving the power as it previously existed. See, *Hope* v. *Deaderick*, 8 Humph., 1. If it had been the purpose of the Convention to restrict the power of the Legislature in this particular, this would certainly have been the appropriate place to insert the restriction; but so far from doing so, we find only the proviso above referred to, which *was intended to exclude the idea that the first clause of the section against the granting of special privileges, immunities, or exemptions was intended to limit the power of the Legislature in regard to granting charters of incorporation.* From this, the conclusion seems necessarily to follow, that the Legislature was *still left* the power to pass laws creating bodies corporate, *with all the rights, privileges, immunities, and exemptions which it was usual to vest in such fictitious persons under the general principles previously recognized;* and, as we have seen, the power in question was previously recognized by the general law and the authorities of the State. We do not say rights, privileges, or immunities might be granted inconsistent with other positive restrictions of the Constitution." The court then proceeds to consider the language of section 28 of article 2, already cited, in reference to taxation, and says: "On the other hand, this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the Legislature, in this regard, as it stood before. This is the more natural construction when we take this section in connection with the clause before referred to, and find that *no express restriction is placed upon the power conceded to have previously existed in*

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the Legislature, in respect to corporations, in that [532] *clause which refers directly to the power to grant such charters.*"

The chief significance of the decision in the last case lies in the explicit declaration by the court, that the power expressly granted to the Legislature in the proviso to the 7th section of article 11, to create corporations with such charters as, in its judgment, were expedient for the public good, was not limited or restrained in its operation by the prohibitions in the same section against special rights, privileges, immunities, or exemptions; in other words, that the Legislature, as to corporations, could grant special rights and privileges which, but for the proviso, might be deemed obnoxious to the prohibitory clauses of that section. And in that view we concur.

The case of *McKinney* v. *Overton Hotel Co.*, 12 *Heisk.*, 104, cited by counsel for plaintiff in error, is not adverse to this conclusion. The main question there was as to the constitutionality of an Act, passed in 1860, authorizing the hotel company to issue mortgage bonds bearing a greater rate of interest than was allowed by the general law of the State. It was held that section 7 of article 11, giving power to grant such charters of incorporation as the Legislature deemed expedient for the public good, must be construed in connection with section 6 of the same article, which imposed upon the Legislature the duty of fixing the rate of interest, and declared, that the "rate so established shall be equal and uniform throughout the State." The decision was that the Legislature, in creating corporations under section 7, could not grant to them "powers or rights expressly forbidden by any other clause of the Constitution." Consequently, the rate of interest fixed by the Legislature was applicable to corporations as well as to individuals. The language of the court, in connection with prior decisions, upon the general subject of corporations, justifies the conclusion that the Act of 1860 would not have been declared void had not the Constitution of 1834 expressly required the rate of interest to be equal and uniform throughout the State.

Looking, then, as well at the language of the Constitution as at the course of decision in the Supreme Court of Tennessee up to the time the Acts of 1867 and 1869 were passed, and giving full effect to its latest utterance, to which our attention has been called, and remembering, [533] also, that the power given to a municipal corporation to subscribe to the stock of a railroad company may be, also, a right and privilege of that company [*Scotland Co.* v. *Thomas*,] 94 U. S., 682 [XXIV., 219]; [*Wilson* v. *Salamanca*,] 99 U. S. 499 [XXV., 330]; [*Empire* v. *Darlington*,] 101 U. S., 87, 91 [XXV., 878, 879], our conclusion is, that those Acts were not repugnant to the Constitutions of the State, by reason of the authority they confer on a limited number of counties to make, and on a particular railroad corporation to receive, a subscription of stock, nor because they dispensed with the previous assent of the people of such counties expressed at a popular election.

It remains to inquire whether, in view of the evidence, the circuit court committed any error of law, either in giving or refusing instructions to the jury.

Certain facts should be stated as explanatory of the instructions which were given to the jury. Upon the trial, evidence was introduced in behalf of the County tending to establish "fraud, moral coercion, intimidation and bribery in the procurement and issuance of the bonds in suit in this case upon the part of the Mississippi River Railway Company," and that such corrupt practices were not known to the county court until February, 1875. On the 30th of September, 1871, at a meeting of the board of directors of the railroad company, a resolution was offered by one who, at the time, was a justice of the peace of Tipton County, which, after reciting the failure of the County to provide means for the payment of its bonds and coupons, designated E. Norton, as agent of the company, to make the following proposition to the County, viz: "That this company will grant an extension of time for the payment of said bonds and interest, so that the said payments shall be extended to the period of ten years from the date of the bonds, in ten annual installments, instead of the time they now have to run; this extension to apply to all bonds which this company owns or controls. But this proposition should be made on condition, that the County Court of Tipton County shall immediately levy a tax and proceed to its collection, for the amount now due under this offer, and that they shall each year levy, collect and promptly pay over the amount to fall due each year, as the same falls due during the whole period of this proposed extension; and, in case of a failure to levy, collect or promptly pay over said annual [534] amount, then the remaining bonds to become due, according to their original terms."

This proposition was presented to the county court by Norton at its October Term, 1871. Several of the justices were then present who had attended the July meeting of 1870, on which latter occasion, the court, by resolutions, entered upon its records, declared that the bonds had been issued without lawful authority, and were not binding upon the County. Across the record of those resolutions was, however, subsequently written the word "*void*," but by whom, or when, so written, does not appear.

In addition to this evidence, the substantial facts upon which the case went to the jury are indicated in the following charge given by the court at the request of the plaintiff:

"That if you credit the testimony and, from it, believe that Mr. Norton, as president of the Paducah and Gulf R. R. Co., in October, 1871, appeared before a duly organized County Court of Tipton County, and in open court fully explained to it that a consolidation was contemplated between his Company and the Mississippi River R. R. Co., and that such consolidation depended upon the fact whether the bonds in controversy were to be paid by the County, and whether it would proceed to levy a tax for the same, and then and there presented the proposition of the said Mississippi Company, recited in the resolution of that date, passed by the said county court, and that said Paducah Company was then solvent, and owned and operated a railroad from the Town of Paducah, in Kentucky, to Troy, in Tennessee, and that no portion of the railroad in Tipton County was then completed, and that but a few thousand dollars had been expended in work thereon, and

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that the purpose of said consolidation was to complete said road in Tipton County, and to connect it with the line of said Paducah and Gulf road, and that said road has since been completed to the Town of Covington, in said County, to the City of Memphis, being a distance of thirty-seven miles, twenty-one whereof are in said Tipton County, and that said Norton communicated to his Company the action of said county court at its said October session of 1871, and that *in consequence thereof*, and *in reliance thereupon*, said *consolidation took place*, whereby [535] said Paducah and Memphis Railroad was created and that said latter company thereafter completed the road from Covington to Memphis, and has regularly run and operated the same from the 25th of June, 1873, to this date, and that the plaintiffs in this action, in the ordinary course of trade, and without any notice of ill faith in the procuration of said bonds, gave full value therefor to the said Paducah and Memphis Railroad Company, by furnishing engines to be employed on said road, and that said Paducah and Memphis Railroad Company received said bonds without any notice whatsoever of any fraud in their issuance; then the fact that one or more of the justices of said county court, who originally voted for said subscription of stock, were induced so to do by corrupt means, and all other proofs or matters of fraud, constitute no defense to this action."

To the giving of that charge the County, by its attorney, excepted.

At the request of the County, the court charged the jury that "if the railway procured the issuance of the bonds by bribery, fraud and corruption, that they would be void in the hands of the railway, just as if they had not been issued; that all persons taking them from the company with notice, or under circumstances to put the vendor on inquiry, would stand in no better plight than the railway company would;" and that "if it appears that there was actual fraud in procuring the bonds, then the plaintiffs would be bound to show that they were *bona fide* holders."

The defendant requested the court to further charge the jury as follows: "That if the plaintiff took them (the bonds) after due, they would stand like the railway company's:" which request was granted, with the modification that "unless the jury believed as stated in the charge given at the request of the plaintiffs:

That a party may waive the fraud by subsequent acts, but in order to make this doctrine apply, it must appear that the party waiving was fully apprised of the fraud which he waives. He must know of the fraud, and, knowing, waive it;" which was given with this modification: "Although this is generally true, it has no [536] application to this case if the jury believe as in the charge stated in favor of the plaintiff. If one citizen about to buy a demand against another applies to him in good faith to ascertain whether the demand will be paid, and is informed that it will be, and buys in reliance upon such information, the party admitting his obligation will not be permitted to defend, although the admission was made in ignorance of a valid defense.

"That if, before a contract which was void, which is no contract, had become a subsisting and valid contract, a constitutional provision intervenes, which took away all power from one of the contracting parties to enter into the contract, then there could be no contract by ratification, because the party would be under disability of contracting either expressly or by ratification. Therefore, if the contract was void in its making, for fraud, and the facts of the fraud were not known, and [or] known waived, before May, 1870, when the new Constitution was adopted, then there could be no contract by ratification or otherwise, as all power to make such a contract as this was then, by the mandate of the Constitution, taken away from the county court." That instruction was also granted, with this modification: "That, although the general reasoning of this request is correct in legal principle, still, if the jury believe as stated in the charge for the plaintiffs, the defendant will be estopped to set up fraud as a defense, after having induced their purchase by answering to an inquiry of whether they would be paid, that they would be. And if the jury believe that such were the facts in this case, then fraud will not constitute a defense.

That if the influences which procured the contract were afterwards successfully exerted in concealing the fraud and defeating its discovery and efforts to resist the contract, then there can be no such thing as a waiver; that communities may waive fraud, but more indulgence is extended to them than to individuals; that accepting the road and using it, and paying a part of the consideration in ignorance of the fraud by which a vote was produced will not be a waiver." This request was given with the same modifications, however, as made in reference to the last two preceding requests by the defendant. [537]

We are unable to perceive that any error of law was committed to the prejudice of the County. The case went to the jury under circumstances quite as favorable to it as the evidence justified. If the facts disclosed in the instructions were believed by the jury to be established by the testimony, its duty was to return a verdict for the plaintiffs. The charge of fraud, bribery, moral coercion and intimidation applied, it must be observed, to the Mississippi Railroad Company and to the justices composing the county court at the time the original subscription was made, and the bonds issued and delivered. When the court, subsequently, received the written proposition from the railroad company, for an extension of time upon certain conditions, it was distinctly informed that its action would affect and control large business operations in which others were concerned who had no connection with the original subscription, or with the issue of the bonds. The extension of time was accepted upon the terms and conditions set out in the proposition of the company, and without, so far as the record discloses, any dissent among the twenty-two justices present; and, as evidence of its purpose to adhere to the new agreement and provide for the payment of the bonds and coupons, the county court ordered the levy of a tax upon all of the taxable property of the County. We have already seen that at the meeting of the county court held in July, 1870, resolutions were entered of record declaring that the bonds had been issued without lawful authority, and directing such steps to be taken as were

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necessary to protect the people against the proposed burden. With this record before the justices who composed the court in October, 1871, the proposition for an extension of time was accepted, and an assurance of record was thereby given, that the County would meet the bonds according to the new terms. The force of this action of the court was increased in view of section 402 of the Code of Tennessee, adopted in 1858, declaring that "Every county is a corporation, and the justices in the court assembled are the representatives of the county and authorized to act for it."

Whether upon the faith of these proceedings in the county court the Paducah and Gulf Railroad Company consolidated with the Mississippi River Railroad Company, was fairly submitted [538] for the determination of the jury. The new company having become, in virtue of that consolidation, the owner of the assets of the constituent companies, including the bonds in suit, proceeded with the work of construction. There was evidence tending to show that at the time of the consolidation only a few thousand dollars had been expended in building the Mississippi River railroad in Tipton County; that after the consolidation about half a million of dollars had been expended in Tipton County by the Paducah and Memphis Railroad Company; that the road from Memphis to Covington, the county seat of Tipton, a distance of 37 miles (of which 21 miles were in Tipton County), had been built and equipped, and trains running thereon regularly, ever since June 25, 1873; that the road had been graded, bridged, and made ready for the cross-ties and rails from Covington to 1¼ miles north of Ripley, in Lauderdale County; that since the consolidation the road had been completed and equipped from Troy to Trumber, a distance of 15 miles, and trains run regularly between those places; that the road had been graded, bridged and cross-tied for the rails from Trumber to Dyersburg, and the right of way secured on about 21 miles of the road between Dyersburg and Ripley. This is not all. The stock which Tipton County originally received in payment of its subscription was voted by its official representative in favor of the consolidation, and the County received, in place of its stock in the Mississippi River Railroad Company, stock for like amount in the new company. Besides, the County voted the new stock in favor of the execution of a mortgage for $1,951,000, which was placed upon the property of the company which was formed by the consolidation.

The acceptance by the county court of the terms and conditions set forth in the proposition of September 30, 1871, and its participation, under the circumstances adverted to, by its authorized representatives, in the proceedings which resulted in the consolidation, whereby the situation of the Paducah and Gulf Railroad Company became materially altered, was, in effect, a representation to those interested in that company that the County would not withhold payment of its bonds or coupons, but would meet them according to the terms of the new agreement. By its conduct, it induced those in- [539] terested in the Paducah and Gulf Railroad Company—then solvent, out of debt and owning and operating a complete railroad from Paducah, Kentucky, to Troy, Tennessee, worth $1,000,000—to believe that the bonds would constitute a part of the available assets of the new company. The defendants in error received a portion of these bonds as early as March 15, 1873. The integrity of the business transaction by which they acquired them is not questioned by any evidence recited in the record. Nor does it appear that any evidence was offered that impugned in any degree the good faith, in respect of these matters, of those who controlled the Paducah and Gulf Railroad Company, nor of those who controlled the Paducah and Memphis Railroad Company subsequent to the consolidation of 1872. The defendants in error obtained the bonds in suit from the Paducah and Memphis Railroad Company, paying value therefor and, so far as the record discloses, without any reason to suspect their payment would be resisted by the County. In view, then, of the conduct throughout all these proceedings of those who represented the County of Tipton, it is estopped, by every consideration of law, justice and fair dealing, from disputing its liability to defendants in error upon the bonds in suit. The discovery by the County, in February, 1875, of fraud and corrupt practices upon the part of the Mississippi River Railroad Company, in procuring the issue of the bonds in 1869, cannot be permitted to affect the rights of those who had, in good faith, acquired the bonds in reliance upon the explicit assurance which the County, in effect, gave in October, 1871, that it would provide for the payment of the bonds and their coupons. The defendants in error having obtained the bonds under the circumstances which have been detailed, may rightfully invoke, in support of their claims, any facts which would have estopped the County from disputing the claim of the Paducah and Memphis Railroad Company, had the latter company never parted with the bonds.

There are other grounds arising upon the evidence upon which the judgment below might, perhaps, be sustained, and there are other questions suggested in argument upon which we deem it unnecessary to comment. [540]

Mr. Justice **Swayne** and *Mr. Justice* **Strong** participated in the decision of this case in conference before their retirement, and we are authorized to say that they concur in this opinion and judgment.

The judgment is affirmed.

Tipton County, Plff. in Err., v. *Norton, Slaughter & Co.*, No. 76.

The judgment of the circuit court is affirmed upon the authority of *Tipton County* v. *The Rogers Locomotive and Machine Works* [*ante*, 340].

Tipton County, Plff. in Err., v. *J. T. Edmunds & Co.*, No. 77.

This case is affirmed upon the authority of *Tipton County* v. *The Rogers Locomotive and Machine Works* [*ante*, 340].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 76.

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[49] CONGRESS & EMPIRE SPRING COMPANY, *Plff. in Errr.*,

v.

DEXTER J. KNOWLTON, JR., ET AL, as Admrs. of DEXTER A. KNOWLTON, Deceased.

(See S. C., 13 Otto, 49-62.)

Money paid on illegal contract—when recovered back.

1. Money, paid on an illegal contract which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void.
2. Payment on shares of stock to be illegally issued may be recovered back, the stock not having been delivered.

[No. 200.]

Argued Jan. 14, 1881. Decided Jan. 31, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Messrs. **Francis Kernan** and *Chas. S. Lester*, for plaintiff in error:

I. The scheme and contract to increase the stock were in violation of the statute under which the corporation was organized and against public policy. They were illegal and fraudulent.

Knowlton v. *C. & E. Spring Company*, 57 N. Y., 518-527.

This was also the finding and decision of the U. S. Circuit Court.

The statute expressly required that all stock should be paid for at its par value in money, or in property necessary to the Company in carrying on its corporate business.

2 R. S., of N. Y., 6th ed., p. 504, sec. 38; 505, secs. 40, 41; 507, sec. 49.

The scheme under consideration was in violation of the terms of the statute and the public policy of the State of New York.

II. The plaintiffs' intestate was *particeps criminis* and *in pari delicto* as to this illegal and fraudulent scheme and contract. Indeed he was more guilty than the Corporation.

It certainly cannot be successfully claimed that an officer of a corporation, who, by his advice, votes and action, involves the corporation in an illegal and fraudulent scheme, and who as an individual becomes a party to this scheme with the corporation, is not at least *in pari delicto* with the corporation. In fact and in law he is the criminal.

Thomas v. *Richmond*, 12 Wall., 349 and 356 (79 U. S., XX., 453, 457).

III. On these facts the plaintiffs' intestate was not entitled to recover, either in a court of law or equity, from the Corporation the $13,980, with interest from Feb. 20, 1866.

Where the scheme or contract is *malum in se*, as in the case at bar, and the parties to it are *in pari delicto*, the law refuses to aid either of them in reference to it against the other. It leaves them where they have placed themselves by their own acts.

Smith, Cont., 3d Am. ed. (star), 187-191; *Burt* v. *Place*, 6 Cow. (N. Y.), 431; *Nellis* v. *Clark*, 20 Wend., 24; *S. C. in error*, 4 Hill, 424; *Smith* v. *Hubbs*, 10 Me., 71; *Schermerhorn* v. *Talman*, 14 N. Y., 94; *Knowlton* v. *Cong. & Emp., Spring Co.*, 57 N. Y., 518; *Howson* v. *Hancock*, 8 T. R., 575.

The alleged right of action for the money sought to be recovered herein, arises out of this illegal and fraudulent scheme, and the plaintiffs, therefore, cannot recover. *Ex turpi causa non oritur actio.*

IV. There is no federal question involved in this suit.

The action was brought by the deceased plaintiff in the Supreme Court of the State of New York. It was tried in that court, and a recovery had. On appeal by the defendant, the court of last resort in that State decided that the plaintiff was not entitled to recover, and reversed the judgment of the Supreme Court and ordered a new trial.

Knowlton v. *C. & E. Spring Co.* (*supra*)

It is confidently submitted that this court should, and in accordance with the established rule by its own decisions, will follow the decision of the Court of Appeals of New York in deciding this case.

Bk. v. *Skelley*, 1 Black, 436 (66 U. S., XVII., 173); *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Scipio* v. *Wright*, 101 U. S., 665 (XXV., 1037); *Elmwood* v. *Marcy*, 92 U. S., 289 (XXIII., 710); *Fairfield* v. *Gallatin*, 100 U. S., 47 (XXV., 544).

Mr. **H. M. Ruggles**, for defendants in error:

1. There was a total failure of consideration for the payment made by Knowlton, and the court below might properly have so held.

The steps taken by the Company towards the increase of its capital stock, as shown by the record, were initiatory merely.

No stock was created. There having been no stock created, there was none to forfeit, and the resolution of forfeiture was nugatory.

The money paid to the Company was not affected by it. The subsequent action in regard to the outstanding receipts for payments was a waiver, if one was needed, of any prior default.

2. The contract of the Company was *ultra vires* and void. It had no power to deliver to subscribers full paid stock on receipt of eighty per cent. of its par value. The certificates might contain the statement that the shares were full paid, but neither against the Company nor against creditors would such statement be conclusive.

Secs. 10, 11, 14, Act of 1848; *Thomas* v. *R. R. Co.*, 101 U. S., 78 (XXV., 950); *R. R. Co.* v. *Stewart*, 41 Pa., 54; *Nav. Co.* v. *Comrs. of Newbern*, 7 Jones (L.), 275; Ang. & Ames on Corp., secs. 255, 527; *Hibernia T. Co.* v. *Henderson*, 8 S. & R., 219. *Sturges* v. *Stetson*, 3 Phila., 204.

A void contract is not a good consideration for the payment of money, and money paid upon it may be recovered.

Dill v. *Wareham*, 7 Met., 438.

All the elementary writers agree that while an illegal contract remains executory, money paid or goods delivered in partial performance of it may be recovered.

2 Com. Cont., 109; Chit. Cont., 553; 2 Pars. Cont., 1st ed., 252; Story, Cont., 5th ed., sec. 611; Add. Cont., Am. ed., sec. 1412; 2 Greenl., Ev., sec. 111.

Addison states the rule thus: "The law, so

NOTE.—*Whether, when parties are* in pari delicto *or* particeps criminis, *equity will relieve*, see, *note* to Sample v. Barnes, 55 U. S. (14 How.), 70.

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long as an illegal contract continues executory, implies from the person who has received the money in furtherance of the execution of the contract, a promise to refund it in favor of the party who paid the money, and who repudiates the illegal transaction.

Aside from this case in the N. Y. Commission of Appeals, every English and every American case sustains the position so stated.

Walker v. *Chapman*, Lofft, 345; *Lowry* v. *Bourdieu*, 2 Doug., 471; *Tappenden* v. *Randall*, 2 Bos. & P., 466; *Hastelow* v. *Jackson*, 8 Barn. & C., 221; *Bone* v. *Ekless*, 5 Hurl. & N., 925; *Taylor* v. *Bowers*, L. R., 1 Q. B. D., 291; *Ins. Co.* v. *Kip*, 8 Cow. (N. Y.), 20; *Merritt* v. *Millard*, 4 Keyes (N. Y.), 213; *Morgan* v. *Groff*, 4 Barb., 526; *Skinner* v. *Henderson*, 10 Mo., 207; *Adams Ex. Co.* v. *Reno*, 48 Mo., 268; *White* v. *Bk.*, 22 Pick., 184; *Lowell* v. *R. R. Co.*, 23 Pick., 32; *Thomas* v. *Richmond*, 12 Wall., 355 (79 U. S., XX., 456.)

Mr. Justice **Woods** delivered the opinion of the court:

[50] This suit was brought in 1869 by the intestate, Dexter A. Knowlton, against the plaintiff in error, in the Supreme Court of the State of New York, to recover the sum of $13,980, with interest from February 20, 1866. In 1876 Knowlton died, and the present defendants in error having been appointed administrators of his estate, the suit was revived and continued in their names. At the time of his death Knowlton was a citizen of Illinois. His administrators were citizens of that State. On their application the suit was, on March 20, 1877, removed to the Circuit Court of the United States for the Northern District of New York. The parties waived a jury and the case was tried by the court at the October Term, 1877.

The court found the facts of the case to be substantially as follows:

The Congress & Empire Spring Company, the plaintiff in error, is a Corporation of the State of New York, organized under the statute of that State passed February 17, 1848, authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes, and subsequent Acts amendatory thereof. The capital stock was $1,000,000, divided into 10,000 shares of $100 each, and was issued in payment of property purchased by the trustees of the Corporation for its use.

The mode by which corporations, such as the plaintiff in error, might increase their capital stock is prescribed by sections 21 and 22 of chapter 40, of the Laws of 1848.

Section 21 prescribes how the notice of a meeting of the stockholders to consider the proposition to increase the capital stock shall be given, and what vote of the stockholders shall be necessary to carry the proposition.

Section 22 prescribes how the meeting of the stockholders, called under section 21, shall be organized, and declares that if a sufficient number of votes has been given in favor of increasing the amount of capital stock, "A certificate [51] of the proceedings showing a compliance with the provisions of this Act, the amount of capital actually paid in, * * the whole amount of debts and liabilities of the company, and the amount to which the capital shall be increased * * * shall be made out, signed and verified by the affidavit of the chairman and countersigned by the secretary, and such certificate shall be acknowledged by the chairman and filed, as required by the 1st section of this Act; and when so filed the capital stock of such Corporation shall be increased * * * to the amount specified in such certificate, * * * and the Company shall be entitled to the privileges and provisions, and subject to the liabilities, of this Act, as the case may be."

On January 11, 1866, the Corporation passed a resolution to increase its capital stock by the addition thereto of $200,000, for the purpose of building a glass factory for the manufacture of bottles and providing a working capital. It also resolved that the books of the Company should be opened for subscriptions to the additional stock and that each stockholder should be allowed to take one share of the new stock for every five shares he held of the original stock, and that when he had paid $80 on each share, the Company should issue to him a certificate as for full-paid stock.

At a meeting of the Board of Trustees of the Corporation, held February 8, 1866, a dividend of four per cent on the original stock was declared, payable February 20, and it was resolved that a call of twenty per cent on the new stock should be made, payable February 20, 1866; that the books of the Company should be at once opened for subscriptions to the new stock and that each stockholder should have the privilege of taking one share of the new stock for every five shares of the old stock held by him, and that on failure of any stockholder to pay, on or before February 20, 1866, $20 on each share of the new stock taken by him, all his claim to such new stock should be forfeited and the same should be divided ratably among the stockholders who had paid the installment of $20 per share.

A stock subscription agreement was immediately issued by the trustees in pursuance of the said resolutions, by which the subscribers stipulated to take the number of shares set opposite [52] their names and to pay for each share $80, in installments, as called for by the directors, and upon failure to pay the installments within sixty days after call, that the money already paid on the stock should be forfeited to the Company. And by the same agreement the Company bound itself to pay interest, up to February 1, 1867, on all sums paid on the new stock, and on February 8, 1867, to issue for every share of said new stock on which $80 had been paid, a certificate to the holder as for full-paid stock, and it was provided that the holders of such stock should be entitled to vote thereon and the same should draw dividends and be treated in all respects as full-paid stock.

This agreement was signed by one C. Sheehan, who subscribed for 690 shares of the new stock, he being the holder of 3,490 shares of the old stock.

Thereupon a contract was made between Sheehan and Knowlton, the intestate, whereby Sheehan agreed to lend his dividend on the old stock held by him to Knowlton, and the latter agreed to assume the new stock, subscribed for by Sheehan, and pay all future calls thereon. Sheehan's dividend on his old stock amounted to $13,988. Knowlton, in consideration of the transfer to him of this dividend, delivered his

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note to Sheehan for $13,980, dated February 20, 1866, payable in one year, and secured the same by a pledge of 150 shares of the stock of the Company, and paid the residue, to wit: $8, in cash.

On March 8, 1866, Knowlton paid to the Company the call of twenty per cent on the new stock, subscribed by Sheehan and sold to him as aforesaid, by the application thereto of Sheehan's dividend on the old stock, amounting to $13,980, for which the Company gave Knowlton a receipt.

About December, 1868, Knowlton paid in full his note to Sheehan for $13,980.

Calls and personal demands were made both upon Sheehan and Knowlton more than sixty days before January 25, 1867, for the payment of subsequent installments on the stock subscribed by Sheehan, and both of them neglected and refused to pay the installments called for; whereupon the trustees of the Company passed a resolution by which they declared that the new stock subscribed by Sheehan and assumed by Knowlton should be and was forfeited.

[53] From August, 1865, to August, 1866, Knowlton, the intestate, was a trustee and vice-president of the Company; he advised the increase of the capital stock above mentioned, and proposed the resolutions in relation thereto, and moved their adoption, and drew up the stock subscription agreement and signed it, and advised others to sign.

On August 7, 1867, a meeting of the stockholders of the Company was held, at which it resolved that the capital stock of the Company should be reduced to the original sum of $1,000,000, and that the trustees be authorized to arrange with the holders of the new stock for retiring the same on such terms and conditions as they should deem for the interest of the Company.

On the same day the board of trustees met and passed a resolution, whereby the executive committee of the board was authorized to adjust, on the best terms for the Company, the claims of all persons holding receipts for payments on the new stock ordered to be retired.

On March 27, 1868, the executive committee passed a resolution that the Company issue five-year coupon bonds sufficient to refund the payments made on the new stock of the Company which had been retired.

No tender of these bonds was ever made to Knowlton, the intestate, nor was any demand made for them by him, but he demanded repayment of the amount paid by him on his new stock, and the Company refused to repay it or any part of it.

The majority of the holders of the original stock became subscribers for the new stock, and all of them except Sheehan and Knowlton, the intestate, and one or two other subscribers for small amounts, paid the calls made on them in respect to the new stock. The first call of twenty per cent on the new stock was paid mainly by the dividend on the old stock above mentioned, but about $3,000 were paid in cash. All the stockholders who did not subscribe for new stock were paid their part of the dividend in cash. About $86,500 of said five per cent bonds were issued by the Company to retire the new stock.

The intestate, Dexter A. Knowlton, having commenced this action, and having died during its pendency, the plaintiffs, as the administrators of his estate, succeeded to his interest therein.

As a conclusion of law from these facts, the court found that the plaintiffs were entitled to judgment against the Congress and Empire [54] Spring Company for the sum of $13,980, with interest from February 20, 1866, and rendered judgment accordingly.

This writ of error is prosecuted by the Congress & Empire Spring Company to reverse the judgment rendered against it by the Circuit Court.

The plaintiff in error claims that the plan [56] adopted by the Company to increase its capital stock, by which certificates as for full-paid stock were to be issued on the payment of eighty per cent thereof, was against the law and public policy of the State of New York, and was, therefore, void; that Knowlton, having been an active party in devising this scheme, and having paid his money in part execution of it, his legal representatives cannot recover the sum so paid.

It is conceded by the defendants in error that the plan adopted by the Company to increase its stock was in violation of the law of New York and, therefore, void, and it has been so held, in effect, by the Court of Appeals of the [57] State of New York in the case of *Knowlton* v. *Spring Co.*, 57 N. Y., 518.

We are, then, to consider whether, upon the hypothesis that the plan for the increase of the stock was illegal, there can be a recovery upon the facts of the case as found by the Circuit Court.

We think it clear that there was only a part performance of the illegal contract between the Company and Knowlton in reference to the new stock, for which Sheehan subscribed and which he agreed to transfer to Knowlton.

The Company, in fact, created no new stock. It only proposed to do so. To increase the stock of the Company, it was not only necessary that the meeting of the stockholders should be called, as prescribed by the law, and a vote of two thirds of all the shares of stock should be cast at the meeting in favor of the increase, but that there should be a certificate of the proceedings, showing, among other things, a compliance with the provisions of the law, and the amount of the increase of the stock, signed and verified by the affidavit of the chairman of the meeting at which the increase was voted, and countersigned by the secretary, and such certificate should be acknowledged by the chairman and filed, as required by the 1st section of the Act. And the law declared that "When so filed, the capital stock of such corporation shall be increased to the amount specified in such certificate."

It does not appear from the findings of the Circuit Court that any such certificate was ever made or filed. Consequently, it does not appear that the steps necessary, under the law, to an increase of the stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition of the Company, on the one

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hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an installment of twenty per cent thereon. There was no performance of the contract whatever by the Company, and only a part performance by Knowlton.

It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in [58] such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered back, the other party not having performed the contract, or any part of it, and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition.

Their result is fairly stated in 2 Comyn on Contracts, 361, as follows:

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto*, neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on Contracts, Vol. 2, page 746, says:

"All contracts which provide that anything shall be done which is distinctly prohibited by law or morality or public policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money."

To the same effect, see, 2 Add. Cont., sec. 1412; Chit. Cont., 944; 2 Story, Cont., sec. 617; 2 Greenl. Ev., sec. 111.

[59] The views of the text writers are sustained by a vast array of authorities, both English and American.

A few will be cited. The case of *Taylor* v. *Bowers*, L. R., 1 Q. B. D., 291, was an action to recover the value of property assigned for the purpose of defrauding creditors. A verdict was rendered for plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict, the *Chief Justice*, Cockburn, delivering the opinion. The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice Mellish, in the Court of Appeals, said: "If the illegal transaction had been carried out, the plaintiff himself could not, in my judgment, have recovered the money. But the illegal transaction was not carried out, it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined on and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done."

The same rule substantially is laid down in the following English cases: *Lowry* v. *Bourdieu*, 2 Doug., 468; *Tappenden* v. *Randall*, 2 Bos. & P., 467; *Hastelow* v. *Jackson*, 8 Barn. & C., 221; *Bone* v. *Ekless*, 5 Hurls. & N., 925; *Lacaussade* v. *White*, 7 T. R., 535; *Colton* v. *Thurland*, 5 T. R., 405; *Smith* v. *Bickmore*, 4 Taunt., 474; *Munt* v. *Stokes*, 4 T. R., 561.

In *Morgan* v. *Groff*, 4 Barb., 524, it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the [60] ground that it is void.

To the same effect are the following cases: *Ins. Co.* v. *Kip*, 8 Cow., 20; *Merritt* v. *Millard*, 4 Keyes, 208; *White* v. *Bk.*, 22 Pick., 181; *Lowell* v. *R. R. Co.*, 23 Pick., 24.

In *Thomas* v. *Richmond*, 12 Wall., 349 [79 U. S., XX., 453], this court cites with approval the *note* of Mr. Frere to the case of *Smith* v. *Bromley*, 2 Doug., 696, to the effect that a recovery can be had as for money had and received, when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiæ*; the *delictum* is incomplete; the contract may be rescinded by either party

The rule is applied in the great majority of the cases, even when the parties to the illegal contract are in *pari delicto*; the question, which of the two parties is the more blamable, being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan.

The law of New York does not in express terms forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress & Empire Spring Company was organized, namely: sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the Company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal; and that when

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they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan, would be a very harsh one, not founded on any law or public policy.

It is suggested by counsel for plaintiff in error, that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of [61] the parties, and this court ought to consider the questions raised in this case as *res judicata*.

The reply to this suggestion is, that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any court except the United States Circuit Court for the Northern District of New York, from which the case has been brought to this court on error. We cannot consider facts not brought to our notice by the record.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** delivered the following dissenting opinion:

This action was commenced in the Supreme Court of the State of New York. The present transcript is imperfect in that it does not contain all the proceedings in the courts of the State up to the removal of the case into the Circuit Court of the United States for the Northern District of New York. It is, however, conceded, in the briefs of counsel, that the plaintiffs succeeded in the Supreme Court of the State; and that upon writ of error to the Commission of Appeals the judgment of the inferior court was reversed upon the grounds stated in *Knowlton* v. *Spring Co.*, 57 N. Y., 578. The learned District Judge, who tried the case in the Circuit Court, opens his opinion, which is made a part of the transcript, with the statement that "this case comes here by removal from the state court, after a decision adverse to the plaintiff by the Commission of Appeals, reversing the judgment of the Supreme Court in favor of plaintiff, and ordering a new trial." He then proceeds to determine the case upon principles of law different from those announced by the Commission of Appeals. Had the case been again tried in the Supreme Court of the State, judgment must have been rendered in behalf of the plaintiffs in error, because the reversal by the Commission of Appeals was upon such grounds as precluded any recovery whatever by the defendants in error. I am of opinion that the decision in *Knowlton* v. *Congress and Empire Spring Co.*, should have been accepted as the law of this case. It is, in my judgment, an immaterial circumstance, that the present transcript does not contain the proceedings had in the Commission of Appeals. An examination of the case reported in 57 N. Y. shows, beyond question, that it is the identical case now before us; at any rate, that it was a case between the same parties who are now before us, and that it involved the same issues that are here presented for our determination. We know that the adjudication in that court was long prior to the removal of this case into the federal court. We know also that the ques- [62] tions decided in the Circuit Court, and which we are asked to determine, have been once passed upon, between the same parties, in a court of competent jurisdiction. All this plainly appears upon the face of the decision reported in 57 N. Y. The defendants in error should not, therefore, be permitted to escape the legal effect of that decision by a removal of the case into the Circuit Court of the United States.

Upon these grounds, and without expressing my own views upon the propositions of law discussed in the opinion of the court, I dissent from the judgment just rendered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—13 R. I., 302; 43 Am. Rep., 31.

NEW YORK AND WILMINGTON STEAMSHIP COMPANY, *Appt.*, [239]
v.
WILLIAM H. MOUNT *et. al.*

(See S. C., "*The Benefactor*," 13 Otto, 239-250.)

54th Rule in admiralty—proceedings for limitation of liability—when ineffectual—parties—appraisement—general rule.

1. A petition in the District Court under the 54th Rule in admiralty, claiming the benefit of limitation of liability provided for in section 4283 of the Revised Statutes, may be filed after trial of the cause of collision upon its merits and a final decree thereon.
2. The amount recovered, whether before the limitation proceedings are commenced or afterwards, and whether in the courts of first instance or an appellate court, will stand as the recoverers' basis for a *pro rata* division when the condemned fund is distributed.
3. The proceedings for a limitation of liability must be regarded as ineffectual as to any specific party, if not undertaken until after such party has obtained satisfaction of his demand.
4. The omission to take the benefit of the law in reference to a particular party will not preclude the owners of a ship from claiming its benefit as against other parties suffering loss by the same collision.
5. The libelants and interveners may be restrained from collecting or attempting to collect or enforce their respective decrees in any other manner than by the *pro rata* distribution of the fund standing, by stipulation, in place of the ship and freight.
6. The appraisement of the value of the ship, made at the time she was libeled, is sufficient for the purposes of the proceeding to obtain limitation of liability. Our law, following the admiralty rule, limits the liability to the value of the ship and freight after the injury has occurred.

[No. 66.]

Argued Nov. 15, 1880. Decided Jan. 31, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The case is fully stated by the court.

See same case, *post*, for a modification of the decision here made.

Messrs. **C. Van Santvoord,** and *Edward L. Owen*, for appellant.

Messrs. Beebe, **Wilcox** *& Hobbs, Evarts, Southmayd & Choate,* **Robert D. Benedict** and *Charles H. Tweed*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

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On the 17th of February, 1875, a collision occurred off the coast of New Jersey in the vicinity of Squan, between the schooner Susan Wright and the steamship Benefactor, which resulted in the sinking of the former with a total loss of vessel and cargo. Soon afterwards a libel was filed against the steamer in the District Court of the United States for the Eastern District of New York, at the suit of the owners of the schooner for the loss of their vessel; and a separate libel at the suit of the crew for the [240] loss of their personal effects; and pending the proceedings on these libels, a petition of intervention was filed by the owners of the schooner's cargo to recover the value of the same. The steamer being attached, was duly appraised and her value fixed at $40,000, and the appellants, the New York and Wilmington Steamship Company, having appeared as claimants and owners thereof, an order was made granting them leave to give a stipulation, with sufficient sureties, in said appraised value of the steamer, and directing that said stipulation should be for the benefit of the libelants in both of said suits, in case they should establish the liability of the steamship, and of all persons and parties who might, by due proceedings in the court, show themselves entitled to liens upon her by reason of said collision; and that upon giving such stipulation the steamer should be discharged from all liability. A stipulation was filed by the claimants in pursuance of this order, and the steamer was thereupon discharged.

The claimants then filed answers to each of the libels, denying that the steamer was in fault and denying all liability by reason of the collision. Upon the issue thus formed proofs were taken by the parties. On the 21st day of April, 1876, the district court adjudged the steamer to have been in fault, and the damages of the libelants and interveners were assessed, amounting in the aggregate to $61,810.49. The suits were then consolidated, and on the 21st day of October, 1876, a decree was rendered in favor of the libelants and interveners for the several amounts awarded to them respectively; and directing the claimants and their sureties to pay into the registry of the court the amount of their stipulation, namely: $500 for costs, and $40,000 and the interest thereon for the value of the steamer. The decree further directed that unless an appeal should be taken within the time limited by law, the clerk should distribute the proceeds of said stipulation among the libelants and co-libelants in proportion to their several recoveries. From this decree an appeal was taken to the circuit court.

It thus appearing that the damages of those interested in the schooner and her cargo exceeded the value of the steamer, and she being [241] condemned by the court of first instance as being in fault for the collision, the claimants on the 15th day of February, 1877, filed a petition in the said district court under the 54th Rule in Admiralty, claiming the benefit of limitation of liability provided for in section 4283 of the Revised Statutes.

In this petition the claimants allege, as required by the Act, that the collision happened and the loss and damage occurred without their privity or knowledge. They then state the fact of the filing of the libels before mentioned, and the proceedings which took place thereon; and restate the facts and circumstances on which they relied in their answers to the libels for exemption from all liability. They then state that they desire to contest their liability and that of the steamship for the damage occasioned by the collision, and also to claim the benefit of limitation of liability provided for by section 4283 of the Revised Statutes. They further state that the freight pending at the time of the collision was $1,220.32; and they tender themselves ready and willing and offer to give a stipulation with sureties in the value of the steamship and freight for the payment thereof into court whenever it should be so ordered. They also offer to admit in evidence, at the proper time, the depositions and proofs taken in the libel suits. Then, having stated the fact that the damages were assessed in said suits to an amount greatly exceeding the value of the steamship and freight pending, they pray for an order permitting them to give the stipulation proffered; and that, if it shall be ultimately adjudged that the steamship is liable, a monition may issue against all persons claiming any damage from the collision, citing them to appear before the court and make proof of their claims before a commissioner to be designated for that purpose; and for a final decree that the amount of the stipulation, after payment of costs and expenses, be divided *pro rata* among the claimants, and that upon payment thereof the steamship and the petitioners be forever discharged from further liability; and that an order be made to restrain the libelants in the other suits from further prosecuting the same, and that the court proceed to hear and determine the liability of the petitioners upon the testimony taken on the trial of those suits; and that they may have the benefit of appeal from any decree to [242] be made, without giving further or other security than that required by the said Act limiting their liability; and that the testimony taken as aforesaid be used on said appeal as though originally taken in this proceeding; "and that they may have and receive such other and further order in the premises as in equity they may be entitled to receive."

A copy of this petition, with notice of an application for an order restraining the libelants in the first suits from the further prosecution thereof, being served upon said libelants, they filed three exceptions to the petition; the first of which was overruled. The second and third were as follows:

"Second. For that the said two suits of William H. Mount and others, and William Hirst and others, against the said steamship Benefactor having been tried upon the merits, and submitted and determined, and the final decree, a copy whereof is annexed to the said petition, having been entered in the suit formed by the consolidation of such two suits, before the filing of the petition herein; and no other suit or proceeding, for any loss, damage, destruction or injury occasioned by said collision, having been commenced, and it not being alleged or claimed that any other persons or parties than the libelants in said two suits, being the libelants in said consolidated suit, have any claims for loss, damage, destruction or injury occasioned by said collision, but the contrary there-

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of appearing upon the face of said petition, the petitioner is not entitled to the relief sought in and by its said petition.

"Third. For that the facts stated in said petition show that the relief sought thereby cannot now be granted by this court."

The district judge not only denied the motion for a restraining order, but, upon the exceptions taken, dismissed the petition; and, on appeal to the circuit court, this decree was affirmed. The ground of dismissal relied on by the district judge, which was adopted by the circuit court, was, that the petition came too late, inasmuch as it was not filed until after a trial of the cause of collision upon its merits and a final decree thereon. The judge referred to the 56th Admiralty Rule, which declares that in proceedings [243] to obtain a decree for a limited liability, the owners may contest all liability on their part or that of their vessel, as well as claim a limitation of liability under the statute; provided, that in their libel or petition they shall state the facts and circumstances by reason of which exemption from liability is claimed. He supposes that this right to contest the case on the merits at the same time and in the same proceedings that a limited liability is claimed, implies that such proceedings must be instituted before the case has been tried on its merits; because a second trial of the same matter, after it has once been adjudicated, will not be deemed to have been contemplated by the Rule. In supposing that a second trial of the merits, between the same parties, was not contemplated by the rule, the judge was correct. But it was certainly not the intention of the admiralty rules to preclude a party from claiming the benefit of a limited liability after a trial of the cause of collision. The 56th Rule was merely intended to relieve shipowners from the English rule of practice, which requires them, when they seek the benefit of the law of limited liability, to confess the ship to have been in fault in the collision. This was deemed to be a very onerous requirement; for in many, if not in most cases, it is extremely doubtful which vessel, if either, was in fault; and to require the owners of either to confess fault before allowing them to claim the benefit of the law, would go far to deprive them of its benefit altogether. Hence this court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation, to contest any liability whatever. But this rule of procedure was not intended to abrogate, and indeed could not abrogate, the rule of law, that *res judicata*, or a matter once regularly decided between parties in a competent tribunal, cannot be again opened by either of them except in an appellate proceeding. Of course, therefore, the rule of procedure allowing a contestation of all liability is subordinate to this rule of law; and cannot apply where the question of general liability has already been adjudicated. Nor, in such case, can the proceedings for a limitation of liability prevent the due course of appeal in the primary cause of collision; though, by the exercise of the court's authority, they may prevent the parties [244] from attempting, by execution or other process, to collect any moneys recovered by them beyond the amount awarded in the said proceedings. The amount recovered, whether before the limitation proceedings are commenced or afterwards, and whether in the court of first instance or an appellate court, will stand as the recoverer's basis for *pro rata* division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in ordinary course. If suit against the vessel or the owners has been commenced and evidence has been taken, though no trial had, it will be in the discretion of the court to require that such evidence shall be received and used in the limitation proceedings. The flexibility of admiralty proceedings will enable the court, in most cases, so to shape their course as to attain justice between the parties.

But since the statute is imperative, that where a loss occurs in a vessel by embezzlement or by collision or other thing, without the privity or knowledge of the owner, his liability "Shall in no case exceed the amount or value of his interest in the vessel and her freight then pending," it would be a questionable exercise, by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all. Such was not the intention of the Rules adopted in 1872. Admiralty Rules, 54–57. They were intended to facilitate the proceedings of the owners of vessels for claiming the limitation of liability secured by the statute, without regard to the time when such proceedings might be commenced, or whether before or after the general liability should be fixed. To require such proceedings to be commenced before a trial of the cause of collision, would in many cases work injustice. In addition to the reasons already adverted to, it may be added that the owners of the vessel found in fault may often not know the amount of damage and loss sustained by the other vessel and her cargo. It may greatly exceed their expectations and, contrary to what was originally known or supposed, may turn out to be much greater than the value of their own vessel and the freight pending thereon.

The institution of proceedings for a limitation [245] of liability must, however, be subject to some limitations growing out of the nature of the case. They must be regarded as ineffectual as to any specific party if not undertaken until after such party has obtained satisfaction of his demand. The doctrine of laches, as applied in admiralty courts, would be properly applicable to such a case. The court would justly refuse its aid in compelling a return of money received. But the omission to take the benefit of the law in reference to a particular party ought not to preclude the owners of a ship from claiming its benefit as against other parties suffering loss by the same collision. There may be many persons who have sustained but trifling losses which the owners may be perfectly willing to pay; whilst, at the same time, they may have just ground for resisting the claims of others. In such cases, a concession to the demands, or a failure to resist the claims, of one party, ought not to conclude them as against the demands of other parties.

Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded so

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long as any damage or loss remains unpaid. But in a particular case relief should not be granted except upon condition of compensating the other party for any costs and expenses he may have incurred by reason of the delay in claiming the benefit of the law.

But it is unnecessary to pursue the subject further. Each case as it arises will suggest the proper course to be pursued therein.

The petition for relief in the present case was justly amenable to exception so far as it sought to retry the question of fault and general liability as between the petitioners and the parties in the libel suits. That question was determined by the decree made upon the libels which had been filed; which decree could only be reviewed on appeal. But so far as the petition sought a limitation of the owners' liability to the value of the ship and freight, it was free from objection and ought to have been sustained; and the libel- [246] ants and interveners ought to have been restrained, by order of the court, from collecting or attempting to collect or enforce their respective decrees, whether obtained in that court or in the court of appeal, in any other manner than by the *pro rata* distribution of the fund standing by stipulation in place of the ship and freight.

A question has been raised by the counsel for the appellees, whether the appraisement of the value of the steamship, made at the time she was libeled, is sufficient for the purposes of the proceeding to obtain limitation of liability. The court below having dismissed the petition, did not pass upon this question; and, therefore, it is not essential that we should express an opinion in reference to it at this time. But since the petitioners specifically pray that the court will order and direct that they be permitted to give a stipulation in the sum of $41,220.32, which is precisely the amount of the former stipulation in the libel suits, with the addition of the freight pending, it may be advisable that we should indicate our views on the subject. The counsel for the appellees is mistaken in supposing that the value of the offending vessel at the time of the collision furnishes the only criterion of the amount for which her owners are liable. In the case of *Norwich Trans. Co* v. *Wright*, 13 Wall., 104 [80 U. S., XX., 585], we held that the owners of the offending vessel could, under the statute, discharge themselves from personal liability by surrendering the ship and freight. This would imply that the value of the ship at the time of surrender, with the addition of the pending freight, if the surrender is made in a reasonable time, would furnish a proper criterion of the amount of liability. In the case cited it was also said, p. 124 [592] that, "If the vessel were libelled and either sold or appraised, and her value deposited in court, this sum, together with the amount of freight, when proper to be added, would constitute the *res* or fund for distribution." In England, the value of the vessel immediately before the collision was regarded as the true criterion of liability. But the English law is different from ours. It makes the owners liable to the extent of the value of the ship at the time of the injury, even though the ship itself be lost or destroyed at the same time; whereas our law, following the Admiralty Rule, limits the liability to the value of the ship and freight after the injury has occurred; so that if the ship is destroyed the liability is gone; and whether damaged or not damaged, the owners may surrender her in discharge of their liability. [247]

What may be the rule if, after the collision has occurred, the offending vessel should meet with other disasters greatly impairing her value, is a question which may require further consideration when the case arises. Nothing of the kind is alleged in the present case.

It seems to us, therefore, that the district court, unless it has some cause to believe that the former valuation was unfairly made, may adopt that valuation in the proceedings for a limitation of liability.

The decree of the Circuit Court is reversed and the record remanded with directions to enter a decree reversing the decree of the District Court, and giving directions for further proceeding in accordance with this opinion.

True copy. Test:

James H. McKenney, Clerk Sup. Court, U. S.

Cited—109 U. S., 591.

CHARLES KERN, *Plff. in Err.*, [485]

v.

FREDERICK W. HUIDEKOPER ET AL.

(See S. C., 13 Otto, 485-494.)

Removal of cause—action of replevin—trial in state court—pleading.

1. If a cause is removable from a State to a Federal Court and the statute for its removal has been complied with, no order of the State Court for its removal is necessary, to confer jurisdiction on the Court of the United States, and no refusal of such an order can prevent that jurisdiction from attaching.

2. An action of replevin, where the sheriff of a State Court is the defendant, is removable. The suit and the subject-matter of the suit are both transferred to the Federal Court by the same act of removal.

3. Upon the question of removal, it is entirely immaterial whether or not the suit, as an original action, could have been maintained in the Federal Court.

4. The fact that a party has, after the removal, contested the suit in the State Court, does not, after judgment against him in such court, constitute a waiver, on his part, of the question of the jurisdiction of the State Court to try the case. The State Court being without jurisdiction, its subsequent proceedings and judgment were absolutely void.

5. Asking leave to plead to the jurisdiction is, in effect, a withdrawal of a plea to the merits.

[No. 538.]

Submitted Jan. 24, 1881. Decided Jan. 31, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Mr. **E. Walker,** for plaintiff in error.

Mr. **Henry Crawford,** for defendants in error.

Mr. Justice **Woods** delivered the opinion of the court:

This was an action of replevin brought by Frederick W. Huidekoper, John N. Dennison and Thomas W. Shannon, in the Circuit Court of Cook County, Illinois, at its May Term, 1877, [486] to wit: on May 22, 1877, against Charles Kern,

NOTE.—*Removal of causes under Act of 1875; citizenship.* See *note* to Removal Cases, 100 U. S., XXV., 593.

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the plaintiff in error, to recover the possession of one thousand tons of old railroad iron, which they claim was wrongfully detained from them by Kern.

The writ of replevin was issued on May 23, 1877, and upon the same day was served by the coroner of the county, who received from the plaintiffs in replevin a statutory bond, and delivered to them the possession of the iron. The summons was made returnable at the next Term of the court, which began on the third Monday of June.

The declaration, which was filed June 30, alleged that plaintiffs were the owners and lawfully entitled to the possession of certain goods and chattels, to wit: the iron in controversy, which formerly had been in track of the Chicago, Danville & Vincennes railroad, but that it was then lying along the Mud Lake track, near Twenty-Fourth Street, in the City of Chicago, and that it was of the value of $18,000; that on May 9, 1877, Kern, the plaintiff in error, had wrongfully taken possession of said iron, and still detained the same from them.

Kern, on July 6, 1877, pleaded that he was the sheriff of Cook County, and that he held the iron by virtue of two certain executions against the Chicago, Danville & Vincennes Railroad Company levied on the same, both issued upon judgments in the Superior Court of Cook County, one in favor of the Bank of North America, and the other in favor of one John McCaffrey, for the aggregate sum of about $11,000.

That as such sheriff, on or about May 1, 1877, the said writs being then in full force and unsatisfied, he took said iron and detained the same in execution of said writs, and that at the time of the levy the iron was the property of the Chicago, Danville & Vincennes Railroad Company.

On May 31, 1877, the plaintiffs filed in the court their petition to remove said cause to the United States Circuit Court for the Northern District of Illinois. The petition alleged that the defendant, Kern, was a citizen of the State of Illinois, and that the plaintiffs at the institution of the action were, and still continued to be, citizens of States other than the State of Illinois; that the amount in controversy in the suit exceeded $500, and there had been no trial of the suit, and the same could not have been tried before the term at which said petition was filed; and that the suit involved a controversy between citizens of different States, which could be wholly determined as between them.

The petition was accompanied by the bond required by the statute of the United States.

[487] On June 2 the court denied the petition for removal, on the ground that it was prematurely presented and filed; that at that date no declaration had been filed, the defendant was not in court, and was not required to appear until the third Monday of June.

On June 30 the petition of the defendants in error and their bond for the removal of the cause being still on file, and the time for the appearance of the plaintiff in error having passed, the defendants in error filed their declaration, and immediately moved the court for an order transferring the cause, in accordance with their petition, to the United States Circuit Court. This motion was denied.

On July 6, the date upon which the plaintiff in error filed his plea, and after said plea had been filed, the defendants in error caused an order to be entered dismissing their petition for the removal of the cause filed May 31, and immediately filed another for the same purpose, containing the same averments, together with a bond, as required by the statute.

This petition was also denied by the State Court.

Nevertheless, on July 27, 1877, the plaintiffs below filed a transcript of the record of the cause in the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, the term of said court prescribed by law to begin on the first Monday of July being then current.

On November 14, 1877, the said Term of the United States Circuit Court still continuing, that court made an order approving the filing of the said record on July 27 preceding.

On June 5, 1878, the counsel of the plaintiffs below moved the United States Circuit Court that an order be entered declaring that the cause had been removed from the Circuit Court of Cook County, and that the Circuit Court of the United States had exclusive jurisdiction thereof by reason of such removal, and that the cause be placed on the trial calendar of the court. The court sustained the motion and directed an order to be made in accordance therewith.

On June 26, 1878, the defendant below, by his attorney, entering special appearance for that purpose, filed a written motion in the United States Circuit Court for the dismissal of said action. This motion was overruled. [488]

At the July Term, 1878, of the Circuit Court of Cook County, that court still claiming jurisdiction of the cause, notwithstanding the proceedings for its removal above recited, the plaintiffs below filed in that court a replication to the plea of the defendant, in which they alleged that said railroad iron at the time of the levy was the property of the plaintiffs, and not of the railroad company, as alleged in defendant's plea.

On November 12, 1878, the defendant below moved in the Circuit Court of the United States for leave to file a plea to the jurisdiction, which, after argument of counsel, was granted. Thereupon, on the same day, he filed the following plea:

"The defendant, by E. Walker, his attorney, comes and prays judgment of the said record herein filed, because he says that the plaintiffs first instituted their said action of replevin in the Circuit Court of Cook County, in the State of Illinois, which said court has exclusive original jurisdiction of said action, and caused the clerk of said State Court to issue a summons against the said defendant and a writ of replevin, under which said last named writ the property described in said writ and declaration was seized by the officer of said court and delivered to the said plaintiff.

That said writs were made returnable to the June Term of said court, A. D., 1877, at which said Term the said defendant appeared and filed his plea to said declaration.

The said defendant further shows that long after the filing of the said transcript of record in this court the said plaintiffs, to wit: at the May Term, A. D. 1878, filed in the said Circuit Court of Cook County their replication to the said defendant's plea, and at said Term of said

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State Court prosecuted their said action to a final hearing, and such proceedings were thereupon had in said action that afterwards, to wit: at said May Term, to wit, on the 5th day of June, A. D. 1878, the said defendant, by the consideration and judgment of the said Circuit Court of Cook County, recovered a judgment against the said plaintiffs for the return to him of the property described in said declaration and writ of replevin, being the same identical property described in the aforesaid transcript of record, [489] and for his costs in said action, as by the record and proceedings thereof still remaining in said Circuit Court of Cook County more fully appear, which said judgment is in full force, and unreversed and unsatisfied, and this the defendant is ready to verify by the record. Wherefore the said defendant prays judgment if the court here will take jurisdiction and cognizance of the action aforesaid."

The plaintiffs below filed a demurrer to this plea, and afterwards, on November 21, 1878, the demurrer was argued. The minutes of the court state its judgment upon the demurrer as follows:

"Now come the plaintiffs, by Henry Crawford, Esq., their attorney, and the defendant by Edwin Walker, Esq., his attorney, and now comes on to be heard the demurrer of the plaintiffs to the plea to the jurisdiction herein, and after hearing the arguments of counsel the court sustains the demurrer, to which ruling of the court the defendant by his counsel excepts and the defendant failing to make further answer herein, and electing to abide by his said, plea, it is thereupon considered by the court that the plaintiffs have and retain possession of the goods and chattels described in the writ issued in this court." etc.

This judgment the plaintiff in error seeks to reverse in this court.

The following are his assignments of error: That the Circuit Court erred:

1. In overruling the motion made by the plaintiff in error on June 26, 1878, to dismiss the said cause.

2. In sustaining the demurrer to the special plea filed by the plaintiff in error on November 12, 1878.

3. In rendering judgment against the plaintiff in error upon the demurrer.

4. The court had no jurisdiction over the subject-matter of the action.

The Circuit Court of Cook County and the Circuit Court of the United States both claimed jurisdiction of the case and both rendered final judgments therein, the State Court in favor of the plaintiff in error and the United States Court in favor of the defendants in error.

Most of the points raised upon the record will be solved by a settlement of the question, which court had jurisdiction of the case when said final judgments were rendered.

The jurisdiction was, of course, originally in [490] the State Court. It is unnecessary to decide whether the state court rightfully or wrongfully denied the first two petitions of the defendants in error for the removal of the cause. The petition for its removal, filed July 6, 1877, contained every averment required by law. It was filed at the proper time, and it was accompanied by a bond with good and sufficient surety, conditioned according to the statute.

According to the terms of the Act of Congress it was the duty of the state court "To accept said petition and bond and proceed no further in said suit." Sec. 3, Act of March 3, 1875, 18 Stat. at L., 470.

Notwithstanding the refusal of the state court to make an order for the removal of the cause, the defendants in error filed in the United States Circuit Court, within the time prescribed by the statute, a transcript of the record of the state court. This invested the United States Court with full and complete jurisdiction of the case, for in the language of the statute just referred to, "The said copy being entered as aforesaid in said Circuit Court of the United States, the cause should then proceed in the same manner as if it had been orginally commenced in said Circuit Court."

If the case is a reasonable one and the statute for the removal of the cause has been complied with, no order of the State Court for the removal of the cause is necessary to confer jurisdiction on the United States Court, and no refusal of such an order by the State Court can prevent the jurisdiction from attaching. *Ins. Co.* v. *Dunn*, 19 Wall., 214 [86 U. S., XXII., 68].

It is, therefore, clear that when the defendant below filed, on July 27, 1877, in the United States Circuit Court a transcript of the record of the state court, the former acquired and the latter lost jurisdiction of the case.

The contention of the plaintiff in error seems to be, that an action of replevin, where the sheriff of a State Court is the defendant, is not removable, because the sheriff, an officer of the State Court, being in possession of the property, the subject-matter of the controversy, the Federal Court is without legal authority or power by writs, process or orders to wrest its possessions from him.

There is no support either in the Act of Congress for the removal of causes, nor in any case [491] adjudged by this court, for this position.

The Act of Congress makes no exception of causes where the subject-matter of the controversy is in possession of the State Court. Under the Constitution and laws of the United States a citizen of the United States, party to a suit in a State Court which falls within the terms of the statute for the removal of causes, has the right to have it removed to and heard by a United States Court.

The cases of *Taylor* v. *Carryl*, 20 How., 583 [61 U. S., XV., 1028]; *Freeman* v. *Howe*, 24 How., 450 [65 U. S., XVI., 749], and *Buck* v. *Colbath*, 3 Wall., 334 [70 U. S., XVIII., 257], relied on by the plaintiff in error, are not in point.

Those cases decide that property held by an officer of one court by virtue of process issued in a cause pending therein, cannot be taken from his possession by the officer of another court of concurrent jurisdiction, upon process issued in another case pending in the latter court.

But here there is but one case. It is brought in the State Court. It falls within the terms of the Act of Congress for the removal of causes. When the prerequisites for removal have been performed, the paramount law of the land says that the case shall be removed, and the case and the *res* both go to the Federal Court. The fact that the State Court, while the case was pending in it, had possession of the subject-matter of the

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controversy, cannot prevent the removal, and when the removal is accomplished, the State Court is left without any case, authority or process by which it can retain possession of the *res*. The suit and the subject-matter of the suit are both transferred to the Federal Court by the same act of removal; or when a bond for the delivery of the property has been taken, as in this case, the bond as the representative of the property is transferred with the suit. There is no interference with the rightful jurisdiction of the State Court, and no wresting from its possession of property which it has the right to retain.

If the contention of the plaintiff in error is that the State Court, having seized property by virtue of a *fieri facias* issued on a judgment rendered by it, the Federal Court cannot take such property from its possession by writ of replevin, or, in other words: that the replevin suit which was sought to be removed in this case, could not have been originally brought in the federal court, the answer is that, upon the question of removal, it is entirely immaterial whether or not the suit, as an original action, could have been maintained in the Federal Court. In short, no provision of the state law, no peculiarity in the nature of the litigation which would forbid the United States Court from entertaining original jurisdiction, could prevent the removal, provided the case fell within the terms of the statute for the removal of causes. *R. Co.* v. *Whitton*, 13 Wall., 270 [80 U. S., XX., 571]; *Ins. Co.* v. *Morse*, 20 Wall., 445 [87 U.S., XXII., 365]; *Gaines* v. *Fuentes*, 92 U. S., 10 [XXIII., 524]; *Boom Co.* v. *Patterson*, 98 U. S., 403 [XXV., 206].

[492]

The United States Court having acquired jurisdiction, and the State Court lost it by the proper removal of the cause, has the State Court been re-invested with jurisdiction by the facts stated in the plea to the jurisdiction filed by the defendant below, namely: that long after the removal of the cause to the United States Court, the plaintiffs below filed their replication in the State Court, and prosecuted their action therein to a final hearing. In other words: is the plea to the jurisdiction of the United States Court, filed by the defendant below on November 12, 1878, a good plea?

It has been expressly held by this court that when a case has been properly removed from a State into a United States Court and the State Court still goes on to adjudicate the case, against the resistance of the party at whose instance the removal was made, such action on its part is a usurpation, and the fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the State Court to try the case. *Ins. Co.* v. *Dunn*, 19 Wall., 214 [86 U. S., XXII., 68]; *Removal Cases*, 100 U. S., 457 [XXV., 593]; and *R. R. Co.* v. *Mississippi*, decided at the present Term [*ante*, 96].

These cases are directly in point. In the action of replevin the defendant, if he succeeds, recovers in effect the same judgment against the plaintiff as the plaintiff, in case he succeeds, recovers against the defendant. So that the plaintiffs below, in contesting the suit in the State Court after its removal, were seeking to protect themselves against a judgment in favor of the defendant for the return of the property in controversy, a judgment which was in fact entered against them.

[493]

Our conclusion, therefore, is that by the proceedings for the removal of this case jurisdiction over it was transferred to the United States Circuit Court, and the filing by the plaintiffs below of a replication in the State Court, after such removal, and the prosecution of the action to a final hearing in that court, did not re-invest the State Court with jurisdiction of the cause, nor did it amount to a waiver of any rights resulting to the plaintiffs below from the removal.

This conclusion is strengthened by the fact that the plaintiffs below constantly insisted, as the record shows, upon the jurisdiction of the United States Court over the case, and even while the case was on final trial in the State Court, procured the entry of an order in the United States Court to the effect that, upon the filing of the transcript of the record of the State Court in the United States Court, the latter court acquired exclusive jurisdiction over the case.

After the filing in the United States Circuit Court, on July 27, 1877, of the record of the proceedings in the State Court, the latter lost all jurisdiction over the case, and being without jurisdiction, its subsequent proceedings and judgment were not, as some of the State Courts have ruled, simply erroneous, but absolutely void. *Gordon* v. *Longest*, 16 Pet., 97; *Ins. Co.* v. *Dunn* [*supra*]; *Virginia* v. *Rives*, 100 U. S., 313 [XXV., 667].

It only remains to consider the contention of the plaintiff in error that the court below should not have entered judgment against him after sustaining the demurrer to his plea to the jurisdiction filed November 12, 1878, because there was still remaining his plea to the merits filed July 6, 1877, before the case was removed from the State Court.

The facts disclosed by the record make it clear that there is no solid ground for this assignment to stand on.

The plea of November 12, 1878, was a plea to the jurisdiction. The defendant below was allowed to file it on special leave asked by him and given by the court.

The asking of leave to plead to the jurisdiction was in effect a withdrawal of the plea to the merits, for after a plea in bar the defendant cannot plead to the jurisdiction of the court; for by pleading in bar he submits to the jurisdiction. 1 Chit., Pl., 440, 441; *Palmer* v. *Robertson*, 2 Conn., 417; Co. Lit., 303; Com. Dig. Abatement (C.); Bacon's Abr. Abatement, (A.)

[494]

The plea in bar being in effect withdrawn by the plea to the jurisdiction, when the demurrer to the latter was sustained the defendant below was left without plea.

If the defendant had so desired, the judgment of the court would have been *respondeat ouster*. But he elected, as the record shows, to stand by his demurrer and declined to make any further answer. There was nothing then left for the court to do but to pronounce judgment against him, which was done.

There was no error in this. The suggestion that there should have been a trial upon the plea in bar appears to have been an afterthought.

There is no error in the record or the judg-

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ment of the Circuit Court. *The judgment must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited.—103 U. S., 495; 104 U. S., 15; 106 U. S., 128; 3 McCrary, 315.

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[289] MAYOR AND COUNCIL OF THE CITY OF LOUISIANA, *Plffs. in Err.*,

v.

UNITED STATES, *ex rel.* THOMAS J. WOOD.

(See S. C., 13 Otto, 289-293.)

City of Louisiana—power to tax.

1. The City of Louisiana, Mo. can be required to levy taxes in any year for more than one and one half of one per cent on the value of the taxable property within its jurisdiction.
2. It is within the power of the court to carry the tax up to fully one per cent for each debt, on account of which such special relief is asked.

[No. 1131.]

Submitted Jan. 5, 1881. Decided Feb. 24, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Mr. **David P. Dyer**, for plaintiff in error.

Mr. **John D. S. Dryden**, for defendant in error.

[290] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The following are sections 2 and 13 of art. III. and section 23 of art. VII. of the charter of the City of Louisiana, Missouri:

"Sec. 2. The City Council shall have power within the city by ordinance: first, to levy and collect taxes not exceeding one and one half of one per centum per annum upon all property made taxable by law for state purposes, and to provide for the collection of the same by sale of real and personal estate in such manner as the council may, by ordinance provide.

Sec. 13. The Council shall not fix or reduce the rate of taxation to less than one and one-half of one per centum per annum until two-thirds of such reduced rates of taxation shall be sufficient, including all sources of revenue to meet and pay all accruing interest for the year affected by such reduction, without increasing the principal of the debt.

"Sec. 23, art. 7. If at any time the City Council shall fail to make suitable provisions for the payment in whole or in part of any of its debts or liabilities contracted after the passage of this Act, or heretofore lawfully contracted, for the term of twelve months after such debt or liability shall have become due and demand for payment made, it shall then be lawful for the circuit court or court of common pleas, before which judgment of any such debt or liability shall have been obtained to make and enter up any such orders, decrees and appointments as may be necessary for the levying, assessing and collecting taxes in the city not exceeding one per centum per annum until such debt or liability shall be fully paid and discharged by the city authorities. The amount so collected to be applied, under the decree of the court, strictly to the payment of such debt or judgment."

Sections 2415 and 2416 of the Revised Statutes of the State are as follows:

"Sec. 2,415. Whenever an execution issued out of any court of record in this State against an incorporated town or city shall be returned, unsatisfied, in whole or in part for want of property whereon to levy, such court, at the return term or any subsequent term thereof, may, by writ of *mandamus*, order and compel the chief officer, trustees, council, and all other proper officers of said city or town to levy, assess and collect a special tax to pay such execution and all costs.

Sec. 2416. The court shall determine the time within which the levy and collection of such tax shall be made, and shall make all necessary orders to secure the prompt and speedy payment of such debt." [291]

Wood, the relator, having recovered a judgment against the City in the Circuit Court of the United States for the Eastern District of Missouri, for $22,226.40, which had remained unpaid for more than twelve months, and on which an execution had been returned, unsatisfied, asked the court for a writ of *mandamus* to compel the levy and collection of a special tax for its payment. The City in defense claimed that it could not under its charter be required to levy such a tax, because it had already levied the full amount allowed by section 2, article III., and there were other judgments (enumerating them) against it, amounting with this to more than $100,000, while its taxable property was only $907,200.

Upon the trial of the cause several questions arose which resolved themselves into the following: 1, whether the City could under the circumstances of this case be required to levy taxes in any one year for more than one and one half of one per cent on the value of the taxable property within its jurisdiction; and 2, if it could, whether the additional amount could exceed one per cent for all creditors having special judgments or contract rights. Upon these questions the Judges of the court were divided and they certified that fact here. The presiding Judge, however, was of the opinion that the relator was entitled to a peremptory writ of *mandamus* requiring the levy and collection of a special tax sufficient to raise and pay $9,000 a year on his debt until it with the costs was fully satisfied, and a judgment was rendered accordingly. To reverse that judgment the case has been brought here by writ of error.

We are entirely satisfied that the view which the Circuit Judge took of the case was right, and that the judgment should be affirmed. The tax referred to in section 2, article III., of the charter, is evidently the ordinary tax which the necessities of the City demand, and before anything more can be required, a case must be made for relief under section 23, article VII., or sections 2415 and 2416 of the Revised Statutes, which are the same as sections 77 and 78, chap. 160, of the General Statutes of 1865, p. 650. There cannot be a doubt that the General Statutes embrace this City. They in express terms apply to all incorporated towns and cities. Whether, so far as this City is concerned, the discretionary power which the court has is limited to a tax of one per cent for each judgment obtained, is a question we need not decide, for in this case that limit has not been exceeded. The taxable value [292]

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of the property in the City is over $900,000, and the tax each year for this judgment is limited to $9,000. We are, however, entirely clear that under the charter it is within the power of the court to carry the tax up to full one per cent for each debt on account of which such special relief is asked. Both the Revised Statutes and this particular section of the charter contemplate judgments against the City which cannot be collected by execution. In such a case permission is given to apply to the court in which the judgment has been rendered for special relief, or perhaps more properly, a special order on the City to make provision for payment. What that provision shall be is left largely to the court to determine under the particular circumstances of each case, with a view to securing the prompt and speedy payment of the debt, but the money, when collected, must be applied strictly to the payment of the particular debt for which the special direction is given. Each tax must be levied and kept separate, but the amount to be levied in a particular case may be made dependent somewhat on other levies for other judgments or debts made payable at the same time. All such questions are with propriety left to the sound judicial discretion of the court, with a view to the prompt and speedy discharge of all the obligations of the City, without unnecessarily oppressing the tax payers. The corporate authorities are fully empowered to tax to the extent of one and one half per cent, and should do so if necessary, but if more is required in any particular case, resort must be had to the courts. The city authorities must in all cases make provision to pay all debts at maturity, if they have the power under the law, but if their powers are too much limited to enable them to do so, then the creditors have been given a special remedy on appeal to the courts. The effect of the several statutes is to limit the ordinary powers of the municipality for taxation, but to [293] give the courts ample authority, when a judgment has been obtained, to enforce execution by requiring the levy, at a proper time, of a sufficient tax to meet the judgment. A *mandamus* in such a case is in the nature of an execution to collect the judgment.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[1] ANNAPOLIS AND ELK RIDGE RAILROAD COMPANY, *Plff. in Errr.*,
v.
COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY.

(See S. C. 13 Otto, 1-5.)

Grant to railroad company—exemption from taxation.

A grant to one company of the powers and privileges of another, for the purpose of making and repairing a railroad, carries with it only such powers and privileges as are necessary for such purpose, and does not include exemption from taxation, which was one of the privileges of the other company.

[No. 157.]

Argued Dec. 16, 1880. Decided Feb. 28, 1881.

IN ERROR to the Court of Appeals of the State of Maryland.

The case fully appears in the opinion of the court.

Messrs. **Montgomery Blair, William H. Tuck** and *P. H. Tuck*, for plaintiff in error.

Messrs. **Charles J. M. Gwinn,** *Atty-Gen., of Maryland* and **Henry Aisquith,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Annapolis and Elk Ridge Railroad Company was incorporated by an Act of Assembly of Maryland, passed March 21, 1837. Section 5 of its charter is as follows:

"Sec. 5. *And be it enacted*, That the president and directors of the said Company shall be, and they are hereby, invested with all the rights and powers necessary to the construction and repair of a railroad from the City of Annapolis, [2] to connect with the Baltimore and Washington Railroad, not exceeding sixty feet in width, with as many sets of tracks as the said president and directors or a majority of them may think necessary; and for this purpose the said president and directors may have and use all the powers and privileges, and shall be subject to the same obligations, that are provided in the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third sections of the aforesaid Act, entitled an Act to incorporate the Baltimore and Ohio Railroad Company."

The capital stock of the Company was fixed at $450,000, the State taking $300,000 on which a payment of at least six per cent per anuum was to be guarantied by the Company. None of the sections of the charter of the Baltimore and Ohio Company referred to, except the 18th, have any special bearing on the present case. They related entirely to the powers and privileges necessary to the construction, operation and maintenance of the road. Section 18, on which the case depends, was as follows:

"18. *And be it enacted*, That the said president and directors or a majority of them shall have power to purchase, with the funds of said Company, and place on any railroad constructed by them under this Act, all machines, wagons, vehicles or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they shall have power to charge for tolls upon (and the transportation of persons) goods, produce, merchandise or property of any kind whatsoever, transported by them along said railway from the City of Baltimore to the Ohio River, any sum not exceeding the following rates, *viz.:* on all goods, produce, merchandise or property of any description whatsoever, transported by them from west to east, not exceeding one cent a ton per mile for toll, and three cents a ton per mile for transportation; on all goods, produce, merchandise or property of any description whatsoever, transported by them from east to west, not exceeding three cents a ton per mile for tolls, and three cents a ton per mile for transportation, and for the transportation of passengers not exceeding three cents per mile for each passenger; and it shall not be lawful for any other company or any person or persons whatsoever, to travel upon or

NOTE.—*Exemption from taxation, whether a contract or not; not implied.* See *note* to Tucker v. Ferguson, 89 U. S., XXII., 805.

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use any of the roads of said Company, or to transport persons, merchandise, produce or [3] property of any description whatsoever, along said roads or any of them, without the license or permission of the president and directors of said Company; and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in said Company, incorporated by this Act, and their successors, forever; and the shares of the capital stock of the said Company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law."

Under the last clause of this section it was held, at an early day, by the Court of Appeals of Maryland, that the property of the Baltimore and Ohio Company was exempt from taxation. *Mayor, etc., of Balt.* v. *R. R. Co.*, 6 Gill, 288; *State* v. *R. R. Co.*, 48 Md., 49. In 1876 the General Assembly passed an Act to provide for the assessment and taxation of railroad companies, and under that Act the Commissioners of Anne Arundel County proceeded to assess the property of the Annapolis and Elk Ridge Company. The object of the proceeding instituted in the court below was to vacate this assessment, on the ground that the property of the Company was by its charter exempt from taxation. The court of appeals refused the relief asked, holding that no such exemption existed. To reverse that judgment the case has been brought here by writ of error.

We think the judgment below was right. Grants of immunity from taxation are never to be presumed. On the contrary, all presumptions are the other way and, unless an exemption is clearly established, all property must bear its just share of the burdens of taxation. These principles are elementary, and should never be lost sight of in cases of this kind.

The Annapolis and Elk Ridge Company was "invested with all the rights and powers necessary to the construction and repair" of its railroad, and *for that purpose* was to "have and use all the powers and privileges," and be subject to the obligations contained in the enumerated sections of the Baltimore and Ohio charter. Clearly this is not a grant of all the powers and privileges of the Baltimore and Ohio Company named in those sections, but only of such as were necessary to carry into effect the objects for which the new Company was incorporated. Such is the plain import of the language em- [4] ployed. Consequently only such of the privileges of the old Company could be enjoyed by the new as were appropriate to the work the new Company was authorized to do.

The power to construct and repair a railroad undoubtedly implies, in the absence of any restrictions, the power to use the road when constructed as railroads are ordinarily used. Such use is in general an incident to the ownership of that kind of property. The powers and privileges of the Baltimore and Ohio Company, therefore, which the new Company was permitted to "have and use," were such as were necessary to the construction, repair and use of its railroad. Exemption from taxation is not one of these privileges It is undoubtedly a privilege, but not necessary either to the construction, repair or operation of a railroad. We so held in the case of the *Knoxville & Charleston Railroad Company* v. *Gaines*, 97 U. S., 711 [XXIV., 1094], where the language of the charter was much like this. Our conclusion then was that the grant to one company of the rights and privileges of another, for the purpose of making and using a railroad, carried with it only such rights and privileges as were essential to the operations of the company or, to use the language of *Mr. Justice* Field for the court in *Morgan* v. *Louisiana*, 93 U. S., 217 [XXIII., 860], the positive rights and privileges without which the road of the company could not be successfully worked.

It seems to us that case is conclusive of this. We cannot see that the claim of the Company is at all strengthened by the fact that the State was to be the largest stockholder, and to some extent preferred in the division of profits. The Corporation was not in that way made a part of the government. It had certain duties to the public to perform, but it was, notwithstanding the State's interest in its stock, just as much a private corporation as any other railroad company is. There are no more presumptions in its favor, than any other railroad company with the same general powers and privileges can claim. The public ownership of the stock gave the Company no more rights against the State than a private ownership would. The State was not, in any respect, "her own grantee." She granted a charter, and those who claim under her charter, whether it be herself or [5] some one else, must be content with what she granted in that way. Ordinarily the same rules of construction which are applied to other charters will be applied to such as this. The State, as a stockholder, must take what she, as sovereign, gave to the other stockholders, unless she, in express terms, provided specially for herself. She did in this case make provision for a preferred dividend but did not, on that account or any other, relieve the property of the Company from the burdens of taxation, such as were common to all property holders in the State. She did give the Baltimore and Ohio Company such an exemption, but that privilege was kept back from this Corporation.

We are all clearly of the opinion that the power to tax the property of the Company was never relinquished by the State, either in express terms or by any fair implication.

The judgment of the Court of Appeals is, consequently, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 371; 12 N. W. Rep., 567.

RICHARD PREWIT ET AL., *Appts.* [22]
v.
ROBERT H. WILSON, Assignee in Bankruptcy of RICHARD PREWIT.

(See S. C., 13 Otto, 22-25.)

Deed, when fraudulent—knowledge of intention—ante-nuptial settlement—marriage.

1. When a deed is executed for a valuable and adequate consideration, without knowledge by the

NOTE.—*Settlements or conveyances for benefit of wife and child, when good or void as to creditors.* See, *note* to Sexton v. Wheaton, 21 U. S. (8 Wheat.), 229.

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grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose.

2. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.

3. To make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud.

4. Marriage is a valuable consideration to support such a settlement.

[No. 320.]

Submitted Jan. 17, 1881. Decided Feb. 28. 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Alabama.

The case is fully stated by the court.

Messrs. L. P. Walker and **John T. Morgan,** for appellants:

The only consideration which Mrs. Prewit gave for the settlement was marriage. This, however, was not only a valuable but the highest consideration known in law.

Fraser, Dom. Rel., 87; Schuler, Dom. Rel., 24.

It is wrong to apply the rules of ordinary contracts to the marriage relation.

1 Bish. Mar. & Div., 4th ed., sec. 18.

"To say, therefore, that it is to be regarded, when it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth."

1 Bish. on Mar. Wom., sec. 775.

Lord Coke says: "There is no consideration so much respected in law as the consideration of marriage."

Co. Litt., 9 (6).

It is the consideration of marriage, which runs through the whole settlement or agreement and supports every part of it, thus making marriage not only a high, but the highest consideration known to the law.

Schuler, Dom. Rel., 263; *Ford* v. *Stuart*, 15 Beav., 499; *Nairn* v. *Prowsé*, 6 Ves., 752; Peachy, Mar. Set., 56.

Chancellor Kent says (2 Com., 165): "These marriage settlements are benignly intended to secure to the wife a certain support in any event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband."

The Supreme Court of the United States has pronounced that marriage, of itself, is not only a valuable consideration to support a marriage settlement, but "a consideration of the highest value."

Magniac v. *Thompson*, 7 Pet., 348.

To the same effect are the following cases, in addition to those *supra*.

Herring v. *Wickham*, 29 Gratt., 628, a strong case; *Armfield* v. *Armfield*, 1 Freem. Ch., 311; *Sterry* v. *Arden*, 1 Johns. Ch., 261; *S. C., on appeal*, 12 Johns., 536; *Johnston* v. *Dilliard*, 1 Bay, 232; *Huston* v. *Cantril*, 11 Leigh, 136 (154-5); *Tunns* v. *Trezevant*, 2 Desaus., 264; *Whelan* v. *Whelan*, 3 Cow., 538.

The leading English case on this subject is given in Bright, on Husband and Wife: "Sir William Grant, M. R., decided against the creditors because it was immaterial whether the stock was, as recited, purchased with the wife's money or not; for if it were the husband's, he had a right to settle it in contemplation of marriage, which settlement could not be defeated by his creditors; and that the fact of his being indebted at the time, and of B's knowing it, would not affect the validity of the settlement; and His Honor thought that the misrecital of the property being the wife's, when it was the husband's, did not necessarily imply fraud, since he might choose to adopt that mode in giving her the property."

2 Bright, 102.

The doctrine of this case has been followed, both in England and the United States; and the law is well settled that the wife is deemed to be a purchaser of the property settled on her in consideration of marriage, and will hold it against creditors.

In the language of the Supreme Court of the United States, *Magniac* v. *Thompson*, 7 Pet., 348 "From motives of the soundest policy, marriage settlements are upheld by the courts, with a steady resolution."

See, also, *Campion* v. *Cotton*, 17 Ves., 264-272; *Ex parte McBurnie*, 1 DeG. M. & G., 446; *Ex parte Gardner*, 11 Ves., 40 and *notes*.

When a conveyance is founded on a valuable consideration, *e. g.*, money, it cannot be held invalid as against creditors, unless fraud on them was actually concerted between the parties to the conveyance. A mere knowledge on the part of the purchaser that the seller is insolvent, and that debts and judgments are outstanding against him, is not sufficient to render the conveyance fraudulent and void.

Kittredge v. *Sumner*, 11 Pick., 50; *Violett* v. *Violett*, 2 Dana, 323; *Sisson* v. *Roath*, 30 Conn., 15; *Governor* v. *Campbell*, 17 Ala., 571; *Ins. Co.* v. *Pettway*, 24 Ala., 544; *Hooks* v. *Anderson*, 9

To set aside a deed for fraud, fraudulent intent must be shown in the grantee as well as in the grantor.

To impeach a conveyance for a valuable consideration, or a mortgage for value, or an assignment by way of lawful security, or an ante-nuptial settlement, it is necessary to show fraudulent intent on the part of the grantee, or that he took with notice of the grantor's fraudulent intent. Carpenter v. Muren, 42 Barb., 300; Griffin v. Cranston, 1 Bosw., 281; Jackson v. Mather, 7 Cow., 301; Fifield v. Gaston, 12 Iowa, 218; Magniac v. Thompson, 32 U. S. (7 Pet.), 348; Baudin v. Roliff, 1 Mart. (N. S.), 165; S. C., 14 Am. Dec., 181; Crawford v. Kirksey, 55 Ala., 282; S. C., 28 Am. Rep., 704; Hall v. Heydon, 41 Ala., 242; Covanhovan v. Hart, 21 Pa. St., 495; Diefendorf v. Oliver, 8 Kan., 365; Wilson v. Fuller, 9 Kan., 176; Bump, Fraud. Con., 227, *et seq.*

Although a sale may be made on the part of the vendor with intent to hinder, delay or defraud his creditors, the title of the vendee is not affected thereby, unless he had previous notice or knowledge of the fraudulent intention of the vendor. Ruhl v. Phillips, 48 N. Y., 125; S. C., 8 Am. Rep., 522.

To invalidate the deed, it is absolutely essential that both parties concur in the fraud. Herring v. Wickham, 29 Gratt., 628.

A conveyance will not be vacated as fraudulent unless there is fraud on the part of the grantor, knowledge of it by the grantee and injury to the complaining party. Kenney v. Dow, 10 Mart., 577; S. C., 13 Am. Dec., 342.

A voluntary conveyance from father to son, made by grantor with intent to defraud his subsequent creditors, is void as to such creditors, without allegation or proof of fraudulent intent of grantee. Laughton v. Harden, 68 Me., 208.

A grantee in good faith, for value, is protected, although part of the consideration was an agreement to support the grantor and the grantor intended to defraud his creditors. Frulin v. Sook, 30 Kan., 401; S. C., 46 Am. Rep., 100.

A creditor may lawfully take a conveyance from his debtor with the honest intention of securing his own debt, although he knows it is intended to hinder and delay other creditors. Shelley v. Boothe, 73 Mo., 74; S. C., 39 Am. Rep., 481.

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Ala., 704; *Abercrombie* v. *Bradford*, 16 Ala., 560-570; *Price* v. *Masterson*, 35 Ala., 496; *Covanhovan* v. *Hart*, 21 Pa., 495; 1 Bish. Mar. Wom., sec. 447; Tyler, Inf. & Cov., 465; *Magniac* v. *Thompson* (*supra*); *Smith* v. *McQueen*, 55 Ala., 368.

If the purchase is for a valuable consideration, it is valid, even though the known effect of it may be to defeat or delay creditors, and the fact that the conveyance is of the grantor's entire estate, is not sufficient to stamp the transaction as fraudulent.

1 Bish. M. W., sec. 748 *Young* v. *Dumas*, 39 Ala., 60; *Allen* v. *R. R. Co.*, 11 Ala., 437.

The object of the Statute of Frauds and Perjuries was to prevent deeds, fraudulent in their intention, and not such as in their effect might hinder or delay creditors. It is the corrupt and covinous motive—the mind with which a deed is made or an act is done, that gives it character, without the existence of which, fraud cannot be imputed.

Bk. v. *Huth*, 4 B. Mon., 423.

The same principles apply to a conveyance in consideration of marriage, which, as we have seen, is not only a valuable consideration, but the highest consideration known in law.

Thus, it is said by Story, *J.*, in *Magniac* v. *Thompson*, 7 Pet., 393:

"Nothing can be clearer, both upon principle and authority, than the doctrine that, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the seller alone intends a fraud, and the other party has no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and, from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract are, therefore, deemed in the highest sense, purchasers for a valuable consideration; and, so that it is *bona fide* and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors."

To the same effect, see, *Campion* v. *Cotton*, 17 Ves., 264 (272), and *notes*.

This is also the settled doctrine in Alabama. *Andrews* v. *Jones*, 10 Ala., 400 (421).

Tyler, on Infancy and Coverture, p. 464, says: "A court of equity will always support a marriage settlement, if no particular evidence of fraud is made out, showing an intention to deceive and defraud creditors."

Bishop states the doctrine on this subject as follows:

"If a man, wishing to enter into matrimony with a particular woman should, being insolvent, convey to her all his property, which was accepted by her with full knowledge of the fact, the nuptial intent being not to defraud his creditors, as a primary object, but to contract marriage, each on such terms as could be reasonably procured from the other, the case would not be within either of the Statutes of Elizabeth. Neither would it be in violation of any principles of the common law, because the common law, though it abhors every sort of cheating, loves matrimony; its principles all point towards it, whenever the circumstances of a case expose them to this attractive force."

1 Bish. Mar. Wom., sec. 784.

The conveyance was not of all the grantor's property.

It does not appear that Mrs. Prewit knew that Mr. Prewit was insolvent. All that is shown is that she knew that he was embarrassed.

See, *Frow* v. *Smith*, 10 Ala., 571.

Even conceding that the conveyance embraced all of the grantor's estate, it is not shown that Mrs. Prewit knew it.

The primary object of the parties, certainly of Mrs. Prewit, was, to secure a settlement; not to defraud the creditors of Prewit, as is apparent from the fact, clearly proven, that the grantor tried and failed to procure the marriage without the settlement, and that the settlement, although not the sole was an indispensable inducement to the marriage on the part of Mrs. Prewit.

Two facts must be established before the conveyance can be held invalid; first, that the primary purpose of the grantor was to defraud his general creditors, rather than to perform his marriage contract; second, that the grantee knew this when she accepted the conveyance.

These indispensable facts must be established by proof, not merely conjecture or suspicion.

Ruhl v. *Phillips*, 48 N. Y., 125; *Jaeger* v. *Kelley*, 52 N. Y., 274; *Smith* v. *Mobile*, 21 Ala., 125; *Ala L. I. & T. Co.* v. *Pettway*, 24 Ala. 566.

Mr. **F. P. Ward**, for appellee:

Marriage is a valuable consideration for the conveyance of property; but, it must be made in good faith and free from any knowledge or notice, on the part of the wife, of any intent, on the part of the husband, to hinder, delay or defraud his creditors.

See, *Cadogan* v. *Kennett*, 2 Cowp., 432.

Lord Mansfield said: "The question in every case is, whether the settlement is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors.

In *Magniac* v. *Thompson*, 7 Pet., 394, *Judge* Story said: "It was not possible that the wife and her trustee, with notice of an intended fraud on the part of her husband, could execute the instrument without being in the sense of the law *particeps delicti*."

Bump, on Fraudulent Conveyances says: "It is not to be understood that because marriage is equal to a money consideration, it is to be considered in the nature of an actual purchase.

A settlement is not intended as the price of the wife, but as a provision for the family. It must, therefore, be reasonable, and with due regard to the rights of others.

Although marriage is a good consideration, and a settlement founded thereon may prevail against creditors, it is not, necessarily, so, under all circumstances."

Bump, Fraud. Conv., 310, citing *Simpson* v. *Graves*, 1 Riley, Ch., 232; *Ex parte McBurnie*, 1 DeGex M & G. 441; *Croft* v. *Arthur*, 3 Desaus, 223.

If there is an intent to hinder, delay or defraud creditors and make the celebration of marriage a part of the scheme to protect property against the right of creditors, the consideration of the marriage cannot support the settlement.

Bump, 308, citing *Columbine* v. *Penhall*, 1 Smale & G., 228; *Ex parte Mayor*, Montagu, 292; *Bulmer* v. *Hunter*, L. R., 8 Eq., 46.

"Notice of fraud to the wife may be inferred

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from the facts and circumstances of the settlement."

Bump, 309.

"If the amount of property settled is extravagant or grossly out of proportion to the station and circumstances of the husband, this of itself is sufficient notice of the fraud."

Bump, 309, citing *Ex parte McBurnie* (*supra*); *Croft* v. *Arthur* (*supra*).

Mr. Justice **Field** delivered the opinion of the court:

On the 27th of April, 1866, Mrs. Josephine Prewit was a widow, only twenty years of age. Her husband was the late John Prewit. Not many months after his death another Mr. Prewit, Richard this time, proposed marriage to her. He was of mature age, being in his fifty-eighth year. His proposal was rejected. He renewed it and accompanied it with a promise to settle upon her, if she would consent to the marriage, a large amount of property. This promise moved her to consent. The deed of settlement was accordingly executed, and in May following the marriage took place. Both parties affirm that the marriage was the only consideration for the settlement, and it is so stated in the deed.

A little more than two years and a half afterwards, in December, 1868, the husband was adjudged to be a bankrupt in the District Court of the United States for the Northern District of Alabama, in proceedings taken upon his own application, and in the following month the plaintiff was appointed assignee of his effects, and to him an assignment was made. The present suit is brought by him to set aside the deed of settlement, on the alleged ground that it was executed by Prewit to defraud his creditors.

At the time of the settlement Prewit was the [23] holder of a large amount of property, consisting chiefly of lands in Alabama, but was indebted in an amount greater than their value. It is stated that his property was not worth more than $50,000, and that his debts exceeded $70,000.

It would seem from the evidence, and we assume it to be a fact, that he was insolvent at the time he executed the deed of settlement, in the sense that his debts largely exceeded the value of his property. It may also be taken as true, so far as the present suit is concerned, that he intended by the deed to hinder, delay and defraud his creditors, and that he made the settlement to place his property beyond their reach.

There is no evidence that Mrs. Prewit was aware at the time of the amount of property he held, or of the extent of his debts, or that he had any purpose in the execution of the deed except to induce her to consent to the marriage. It is not at all likely, judging from the ordinary motives governing men, that whilst pressing his suit with her, and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would, by the deed he proposed to execute, defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was at that time anxious to secure. If capable of the fraud charged, he was capable of deceiving Mrs. Prewit as to his pecuniary condition. She states in her answer that she knew he was embarrassed and in debt, but to what extent or to whom she did not know, and that it was because of the knowledge that he was embarrassed that she insisted upon his making a settlement upon her. The deed itself shows that he owed a large sum, for of the 6,770 acres of land embraced by it, 2,185 acres were charged with the payment of certain designated debts to the amount of $18,000. A knowledge of these facts justified her in saying that she knew he was embarrassed, but they rather dispelled than created any suspicion that he had a design to defraud his creditors. Her statements do not warrant the inference of knowledge of any such purpose, much less of any assent to its execution. Besides the property charged in the deed with the payment of the large amount of indebtedness mentioned, he owned 4,700 acres of land not included in it, and [24] personal property of the value of several hundred dollars.

When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.

Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes, that "marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by unquiet or repose to the State; by what money ordinarily buys and by what no money can buy, to an extent which cannot be estimated or expressed except by the word infinite. To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth." And, also, that "marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value." Law of Married Women, secs. 775, 776. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an ante-nuptial settlement. *Barrow* v. *Barrow*, 2 Dick., 504; *Nairn* v. *Prowsé*, 6 Ves., 752; *Campion* v. *Cotton*, 17 Ves., 264; *Sterry* v. *Arden*, 1 Johns. Ch., 261; *Herring* v. *Wickham*, 29 Grat., 628.

In *Magniac* v. *Thompson*, this court said that "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the [25] highest value, and from motives of the soundest policy is upheld with a steady resolution." 7 Peters, 393.

The same doctrine is asserted by the Supreme

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Court of Alabama, in which State the parties to the deed of settlement reside and in which it was executed. *Andrews* v. *Jones*, 10 Ala., 400.

According to these authorities there can be no question of the validity of the settlement in this case. There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an ante nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement.

It follows that the decree of the court below must be reversed, and the cause remanded with directions to dismiss the bill of complaint; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

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[30] CHARLES J. FOLGER, *Appt.*,

v.

UNITED STATES.

(See S. C., 13 Otto, 30-40.)

Commission on sale of Government stamps.

An Assistant Treasurer of the United States, who receives government stamps for distribution, is not entitled to any compensation or commission on their sale.

[No. 168.]

Argued Dec. 22, 1880. Decided Feb. 28, 1881.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Messrs. Walter H. Coleman and **George F. Comstock**, for appellant.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

In the month of June, 1866, some correspondence passed between Mr. Van Dyck, then Assistant Treasurer of the United States at the City of New York, and the Commissioner of Internal Revenue, as to whether the former should be required, in addition to his ordinary duties, to assist in the distribution of adhesive [31] stamps among those desiring to purchase them for their own use. An official communication from the Secretary of the Treasury to the Assistant Treasurer, under date of July 2, 1866, shows upon its face that the latter officer objected to being required to perform any such services. In that communication the Secretary says:

"The Commissioner of Internal Revenue has referred to me your recent letter to him in relation to the distribution of revenue stamps in the City of New York. I am aware that the cares and responsibilities of your position are burdensome, and I should not think of increasing them were it not for the seeming necessity of so doing. The adhesive revenue stamps are all printed in Philadelphia, and it is deemed imprudent to multiply the places of their production. It is indispensable, however that every facility shall be given by the Government for their purchase and distribution. The consumption of stamps in New York alone is very large, while the amount which is naturally distributed from that city is no small part of the supply for the whole country. It seems to me very advisable, therefore, because of their great value, that they should be kept, as other property of the Government is kept, in the possession of the government itself until actual sale. I am aware that the distribution will require a room set apart, perhaps, exclusively for that purpose, and some additional clerical force; but reasonable prudence and a proper regard for the public convenience, as I have suggested, constrain me to ask your critical consideration of the subject. It may not be improper for me to add that the Assistant Treasurer at San Francisco is employed in the distribution of stamps, and that I am disposed to ask the same service of the several other assistant treasurers in different parts of the country."

In a subsequent communication of date September 11, 1866, the Secretary said:

"It has been deemed proper, as an additional means of facilitating the distribution of internal revenue stamps, that packages containing such denominations of stamps as are in most general demand should be placed in the hands of the Assistant Treasurers of the United States and some of the designated depositaries. Printed circulars will be furnished to you, specifying the contents and the cash value of each package, and the packages are to be sold, with seals unbroken, at such value, which will be stated upon each package. The amounts received from the sale of these packages should be transmitted to the Commis- [32] sioner of Internal Revenue, in the form of certificates of deposit, daily or weekly, as may be most convenient."

At a later period the present appellant became Assistant Treasurer of the United States at the City of New York. Between November 16, 1869, and the 22d day of July, 1870, inclusive, in obedience to the instructions and requirements contained in the foregoing communications and without any application upon his part, he was furnished by the Commissioner of Internal Revenue with sealed packages of adhesive stamps for sale and distribution. He was not required to give and did not give any bond with reference to such stamps. Upon each package as it came to him, was marked as well the aggregate face value of the stamps placed therein for delivery to purchasers, as the amount of stamps of like kind, to be paid out to purchasers, as their commissions under the regulations established by the commissioner. The packages were directed to be sold and delivered without disturbing their seals.

The commissions at the time allowed by such regulations, to purchasers of *common* stamps were: two per cent in purchases of $50 or more, three per cent on $100 or more, four per cent on $500 or more, and five per cent on $1,000 or more; while as to *proprietary* stamps, the commissions allowed by statute, were as hereinafter stated.

The sales of stamps by appellant from November 16, 1869, to July 22, 1870, inclusive, amounted of common stamps to $3,642,754.60, and of proprietary stamps, to $31,589.54. These sums, respectively, included the amount in

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stamps, which appellant passed over to purchasers as their commissions. Upon retirement from office, his accounts were settled and adjusted at the Treasury Department, without any assertion of a right to commissions for himself. In that settlement he was allowed or credited with all payments made by him in stamps, of commissions to purchasers. The appellant derived no personal advantage from the sales.

He brought this action on the first day of May, 1875, to recover from the United States the sum of $184,934.95, to which he claims to be entitled as commissions upon such sales. His claim was denied, and judgment was entered for the Government.

[33] By section 161 of the Act of June 30, 1864, providing internal revenue to support the Government, to pay the interest on the public debt, and for other purposes, it is provided among other things, that,

"The Commissioner of Internal Revenue be and he is hereby, authorized to *sell to* and supply collectors, deputy collectors, postmasters, stationers or any other persons, at his discretion, with adhesive stamps or stamped paper, vellum or parchment, as herein provided for, in amounts of not less than $50, *upon payment at the time of delivery*, of the amount of duties said stamps, stamped paper, vellum or parchment, so sold or supplied, represent, and may allow, upon the aggregate amount of such stamps, as aforesaid, the sum of *not exceeding five* per centum as commission to the collectors, postmasters, stationers or other *purchasers;* but the cost of any paper, vellum or parchment shall be paid by the purchaser of such stamped paper, vellum or parchment as aforesaid; *Provided*, That any proprietor or proprietors of articles named in Schedule C, who shall furnish his or their own die or design for stamps, to be used especially for his or their own proprietary articles, shall be allowed the following commission, namely: on amounts purchased at one time, of not less than $50 nor more than $500, five per centum; on amounts over $500, ten per centum." 13 Stat. at L., 294.

Section 170 of the same Act declares:

"That in any collection district where in the judgment of the commissioner the facilities for the procurement and distribution of stamped vellum, parchment or paper, and adhesive stamps, are or shall be insufficient, the commissioner is authorized to *furnish, supply and deliver* to the collector and to the assessor of any such district and to any Assistant Treasurer of the United States, or designated depositary thereof, or any postmaster, a suitable amount of stamped vellum, parchment or paper, and adhesive stamps, *without prepayment therefor*, and shall allow the highest rate of commissions allowed by law to any other parties purchasing the same; and may in advance require of any such collector, assessor, Assistant Treasurer of the United States, or postmaster, a bond with sufficient sureties to an amount equal to the value of any stamped vellum, parchment or paper, and adhesive stamps, which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment monthly of [34] all quantities or amounts sold, or not remaining on hand.

And it shall be the duty of such collector to supply his deputy with, or sell to other parties within his district who may make application therefor, stamped vellum, parchment or paper, and adhesive stamps, upon the same terms allowed by law or under the regulations of the commissioner, who is hereby authorized to make such other regulations not inconsistent herewith, for the security of the United States and the better accommodation of the public, in relation to the matters hereinbefore mentioned, as he may judge necessary and expedient.

And the Secretary of the Treasury may from time to time make such regulations as he may find necessary to insure the safe keeping or prevent the illegal use of all such stamped vellum, parchment, paper and adhesive stamps." 13 Stat. at L., 297.

Section 161 plainly provides for sales by the commissioner, while section 170 authorizes him to furnish and supply certain officers with stamps for sale to others. Whether stamps were purchased directly from the Commissioner of Internal Revenue, for cash, under section 161, or from one of the officers to whom they were furnished for sale and distribution under section 170, in either case the purchaser, it is conceded, was allowed commissions according to the rate or scale established by the regulations of the commissioner. Touching the particular sales made by appellant, the purchasers of common or general stamps were entitled, respectively, to five per cent in commissions, and the purchasers of proprietary stamps to ten per cent. There can be no doubt of this, since the petition of appellant distinctly alleges that his sales of common stamps were in amounts of not less than $1,000, and of proprietary stamps in amounts exceeding $500. If, therefore, it be suggested that appellant was entitled to the difference between the highest rate or per cent allowed by the Government (five per cent in purchases of common stamps, and ten per cent in purchases of proprietary stamps) and the amount paid over by him, in stamps to purchasers, the obvious answer is that there was in this case no such difference. This interpretation of the statute, we may observe, could therefore, be of no practical value to appellant. His contention, and upon no other ground could appellant's claim be sustained, is, that without reference to the commissions which the purchaser of stamps received—although he may have [35] received the highest rate allowed—appellant was, nevertheless, given by the statute, to his own use and as his personal allowance or compensation for distributing stamps, under section 170, *the highest rate* of commissions which was allowed to anyone buying from the Commissioner of Internal Revenue.

For instance, upon the theory advanced by appellant's counsel, a purchaser from the Commissioner of Internal Revenue, of common stamps to the amount, at one time, of $1,000 or more, would be allowed five per cent as commissions, payable in stamps (which, in such cases, would be the full extent of the Government's loss), while upon a sale, through an assistant treasurer of the United States, to the same purchaser of the same stamps, in sealed packages, the Government would lose altogether ten per cent in commissions; five per cent to the Assistant Treasurer, and five per cent to the

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purchaser; that, is, double commissions. In other words, according to that construction of the statute, the Government held out an inducement to officers named in sections 161 and 170, not to become themselves purchasers, for cash, of stamps for sale and distribution in their respective localities, as they might under section 161, but to receive them, under section 170, and thereby, without advancing any money, secure for themselves, outside of what the purchasers from them would be allowed, the highest rate which the law allowed in purchases directly from the commissioner.

We cannot give our assent to any such construction of the statute. The officers, named in section 170, were charged at the outset, with the value of each sealed package of stamps delivered to them for distribution. In the settlement of their accounts they were entitled to be credited with the amount of stamps unsold and returned; with the sums received upon sales, and paid over to the Government; and, also, with the value of the stamps placed in the sealed packages for delivery to purchasers as commissions allowed, *to them*. In this way they were relieved from the responsibility assumed when they were supplied with stamps for distribution under section 170. The statutory direction that the commissioner, in such cases, "shall allow the highest rate of commissions allowed by law to any other parties purchasing [36] the same," was an awkward mode of expressing the idea that the same commissions, up to the highest rate, should be allowed in purchases under section 170, as under section 161; that is, that those wishing stamps might purchase from the officers named in section 170 at the like rate, even the highest, accorded to "any *other* parties *purchasing* the same" stamps, for cash, directly from the commissioner.

As to assistant treasurers distributing stamps under section 170, we are of opinion that Congress did not intend that they should receive any compensation whatever for services of that character; certainly not in any case where the commissions paid to those who purchased from such officers were as large as the highest rate prescribed in sales by the commissioner, for cash, under section 161. It was for the better accommodation of the public that the Secretary of the Treasury required assistant treasurers to aid in the distribution of adhesive stamps. The communications addressed to the Assistant Treasurer of New York, announcing his purpose to adopt that course, show upon their face that the Secretary had no expectation thereby of increasing the loss, in the way of commissions, which the Government would sustain upon sales of stamps. He believed that he had the power to impose that duty upon assistant treasurers, as an additional means of facilitating the distribution of internal revenue stamps.

The conclusion we have indicated is in line with the settled policy which has existed upon the subject of extra compensation to officers having fixed salaries or pay, especially in regard to Assistant Treasurers of the United States.

By an Act approved March 3, 1839, making appropriations for the civil and diplomatic service, it was declared, that "No officer in any branch of the public service, or any other person whose salaries, or whose pay or emoluments is or are fixed by law or regulations shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or for the performance of any other service, unless the said extra allowance or compensation be authorized by law." 5 Stat. at L., 349. In a subsequent Act of August 23, 1842, this prohibition against extra compensation to officers with fixed salaries was somewhat enlarged, and this provision was inserted: "No officer in any branch of the public service, or any other person whose sal- [37] ary, pay or emoluments is or are, fixed by law or regulations shall receive any *additional pay*, extra allowance or compensation, in any form whatever, for the disbursement of public money, or *for any other service or duty whatsoever*, unless the same shall be authorized by law, and *the appropriation therefor explicitly set forth* that it is for such additional pay, extra allowance, or compensation." 5 Stat. at L., 510. And at the same session of Congress, by an Act approved August 26, 1842, it was declared that "No allowance or compensation shall be made to any clerk or other officer, by reason of the discharge of duties which belong to any other clerk or officer, in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any clerk or other officer may be required to perform." 5 Stat. at L., 525.

We come, then, to the Act of August 6, 1846, under which appellant was appointed to office, providing for the better organization of the Treasury, and the collection, safe-keeping, transfer and disbursement of the public revenue. Among the duties imposed by that Act upon assistant treasurers was that of doing and performing all duties as fiscal agents of the Government which might be imposed by that or any other Act of Congress, or by any regulation of the Treasury Department made in conformity to law; and, "Also to do and perform all acts and duties required by law, or by direction of any of the executive departments of the Government, as agents for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by law to make, and which are of a character to be made by the depositaries hereby constituted, consistently with the other official duties imposed upon them." 9 Stat. at L., 60. The same Act fixed the salaries of the assistant treasurers, and declared: "And these salaries, respectively, shall be in full for the services of the respective officers; nor shall either of them be permitted to *charge* or *receive any commission*, pay or perquisite, for *any official service, of any character or description whatsoever*." 9 Stat. at L., 65. The foregoing provisions in the Acts of 1839, 1842 and 1846 have been preserved in sections 1763, 1764, 1765 and 3597 of the Revised Statutes. They were all in force when the General Revenue Statute of 1864 [38] was passed. Commenting upon the Act of August 23, 1842, 5 Stat. at L., 510, this court in *Stansbury* v. *U. S.*, 8 Wall., 37 [75 U. S., XIX., 816], said: "The law was passed to remedy an evil which had existed of detailing officers with fixed pay to perform duties outside of their regular employment, and paying them for it, when the Government was entitled, without this double pay, to all their services. The law prohibited, and was intended to do so, the allow

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ance of such claims as these, made by public officers, for extra compensation, on the ground of extra services."

It will be observed that while the Act of August 23, 1842, allows an officer having a fixed salary to receive additional pay, extra allowance or compensation, if "The appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation," the Act of 1846 contains no such reservation in favor of Assistant Treasurers of the United States. As to those officers, the statute expressly forbids *them* from receiving "Any commission, pay or perquisite, for any official service of any character or description whatsoever." And so the law is to this day. R. S., sec. 3597.

Of course these provisions would not avail the Government, should Congress, by subsequent enactment, allow assistant treasurers to receive, outside of their fixed salaries, commissions, pay or perquisites for extra services. But, in view of the established policy of the Government, as shown in the statutes to which we have referred, the Act of 1864, 13 Stat. at L., 294, should not be construed as a departure from that policy. Its language does not clearly indicate an intention to allow assistant treasurers additional pay or compensation for such services as those which appellant performed. We are not satisfied that Congress had any purpose to alter the existing statutes in reference to the allowance of extra compensation to assistant treasurers, with fixed salaries. The services of appellant in connection with the distribution of adhesive stamps were of a character which he might consistently with his other official duties, be required to perform. But if they were not, he was not entitled to compensation, because the statute does not explicitly state that he was to receive additional pay therefor.

[39] The views we have expressed are further fortified by the 25th section of the Act of 1864, which declares that "There shall be allowed to collectors, *in full compensation for their services and that of their deputies*, a salary of $1,500, to be paid quarterly, and in addition thereto a commission of three per cent upon the first $100,000, and a commission of one per cent upon sums above $100,000 and not exceeding $400,000, and a commission of one half of one per cent on all sums above $400,000, such commissions to be computed upon the amounts by them respectively collected and paid over and accounted for under the instructions of the Treasury Department." According to the argument advanced by counsel for appellant, collectors, notwithstanding the foregoing provision, would be entitled to receive, for their services in distributing stamps, under section 170, compensation other and beyond that which section 25 of the same Act declares shall be "in full compensation for their services." Such was not. as we think, the intention of Congress.

If an assistant treasurer wished to derive personal advantage or profit from the distribution of adhesive stamps, he was at liberty to do so by becoming himself a purchaser, for cash, directly from the commissioner, under section 161. The stamps in that case would become his property, whereas, if received under section 170, they remained the property of the Government until actual sale. By *purchasing* stamps for cash, in amounts of $1,000 and over, he would be allowed, as any other purchaser would be, five per cent as commissions, and upon sales in small amounts by him to others he could realize to his own use the difference between five per cent and the rate, whatever it was, at which the purchaser from him could have obtained stamps directly from the commissioner. But when he received stamps, under section 170, for distribution, he could derive no advantage from their sale, certainly not in cases where the commissions allowed to the purchasers amounted, in sales of common stamps, to five per cent, and in sales of proprietary stamps to ten per cent. Congress never intended that the Government should, in any contingency, lose on sales of adhesive stamps, by whomsoever and in whatever quantities made, more than five per cent of the face value of common stamps, and more than ten per cent [40] of the face value of proprietary stamps.

Mr. Justice **Swayne**, who heard the argument and participated in the decision of this case in conference, concurs in this opinion.

The judgment of the Court of Claims is affirmed.

Mr. Justice **Field** dissenting.

I dissent from the judgment of the court. I think that Mr. Folger was entitled to the difference between the five per cent given by the Government and the amount he allowed to the purchasers.

Mr. Justice **Bradley** concurs in this dissent.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

SARAH A. PENNOCK ET AL., *Plffs. in Err.* [44]

v.

BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY, GEORGE D. STINEBAUGH, Clerk, and MILO R. HARRIS, Treasurur OF FRANKLIN COUNTY.

(See S. C., 13 Otto, 44-49.)

Land of half-blood Indian—taxation of.

1. A mixed or half-blood Indian of the Tribe of Sacs and Foxes, to whom a patent for land was issued under article 17, of the Treaty of 1868, is not entitled to exemption from taxation thereon.
2. The case of the Kansas Indians, XVIII., is not to the contrary.

[No. 119.]

Argued Dec. 6, 1880. Decided Feb. 28, 1881.

IN ERROR to the Supreme Court of the State of Kansas.

The case is fully stated by the court.

Messrs. George R. Peck and **Thomas Ryan**, for plaintiffs in error.

Messrs. W. L. Parkinson and *A. W. Benson*, for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff, Sarah A. Pennock, is an Indian,

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and a member, by "birth, blood, and descent," of the Confederate Tribes of Sacs and Foxes of the Mississippi. At the date of the Treaties of 1859 and 1867, between those Tribes and the United States, she was the wife of William Whistler, a member of the same Tribe. After his death she intermarried with one Henry Pennock, a white person, a citizen of the United States, and a resident of Kansas, with whom she now lives. In May, 1871, she was the owner in fee of certain lands in Franklin County in that State, which were listed and assessed by its officers for taxes in the same way as other real property in the county. The taxes and charges being unpaid, the lands were sold to pay them, and certificates of sale given. To restrain the issue of deeds to the purchasers, and to set aside the tax sale as illegal, the present suit was brought. The district court of the [45] county held the sale illegal, and gave a decree for the plaintiff. The Supreme Court of the State reversed the decree and rendered judgment for the defendants, and the plaintiff has brought the case on writ of error to this court.

It is admitted in the record that the plaintiff, though residing with her husband in Kansas, keeps up her relations with her Tribe, and the question is presented, whether under these circumstances her lands in Kansas are exempt from taxation by that State. With some exceptions not applicable to them, other property within its limits, real and personal, is subject to taxation. The solution of the question depends upon the construction given to the Treaties between the United States and the Tribes mentioned.

By the treaty concluded with them in October, 1842, they ceded to the United States all the lands west of the Mississippi River to which they had any claim or title, or in which they had any interest. In consideration of the cession it was, among other things, agreed that the United States should pay to them an annual interest of five per cent on $800,000, and discharge certain debts which they had contracted, and that the President should assign to them a tract of land on the Missouri River, or some of its waters, suitable and convenient for Indian purposes, "for a permanent and perpetual residence for them and their descendants." 7 Stat. at L., 596. Pursuant to this latter provision, the President soon afterwards assigned to them a tract of land on the Missouri River, afterwards known as their reservation, situated within what are now the limits of the State of Kansas. The lands were held by them in common until 1860. In the meantime white settlements had sprung up around them, and they had adopted many of the habits and customs of the white people. It was by comparison of their own condition with that of their white neighbors—at least we may so infer from what subsequently occurred—that they were induced to believe that the continued ownership of their lands in common was not beneficial to them, and that their prosperity would be promoted if limited quantities were held by individuals in severalty. This consideration led to a new Treaty, which was concluded on the 1st of October, 1859, and ratified in July, 1860. 15 Stat. at L., 467. It recited that the [46] Tribes had more lands than were necessary for their occupancy and use, and that they were anxious to promote "habits of industry and enterprise amongst themselves by abolishing the tenure in common" by which they held their lands, and "by assigning limited quantities thereof in severalty to the individual members of the tribes, to be cultivated and improved for their individual use and benefit," and it stipulated, among other things, that a portion of their reservation, amounting to 153,600 acres, should be set apart and retained for that purpose; and that out of it there should be assigned to each member of the Tribes, without distinction of age or sex, a tract of eighty acres. It declared that these tracts should not be aliened in fee, leased or otherwise disposed of by the parties to whom they were assigned, except to the United States or to members of the Tribes, and then under such rules and regulations as might be prescribed by the Secretary of the Interior, and that they should be exempt from taxation, levy, sale or forfeiture, until otherwise provided by Congress.

In order to establish the members of the Tribes upon the lands thus assigned to them in severalty, by building them houses and furnishing them with agricultural implements, stock animals, and other necessary aid and facilities for commencing agricultural pursuits under favorable circumstances, the Treaty further provided that the lands in the reservation of the Tribes which were not thus set apart and retained, should be sold, under the direction of the Secretary of the Interior, and the proceeds expended for those purposes, and to pay the debts of the Tribes and of the individual members thereof.

These stipulations, which are set forth in the first five articles of the Treaty, would be deemed to apply to all members of the confederate Tribes, but for the special provisions contained in article ten. The latter relate exclusively to such members as were either "mixed and half bloods," or women, being whole bloods, who had intermarried with white men. To each of them three hundred and twenty acres were to be assigned from that portion of the land relinquished by the Treaty to the United States in trust, provided the parties desired to take such tracts. The lands thus granted were to remain inalienable except to the United States or members of the Tribes, and the grantees were not to [47] participate in the proceeds of the land sold. This article operates as a limitation upon the provisions of the previous articles, and confines them to members of the Tribes other than the mixed or half-bloods, or the females intermarried with white men. These parties, by accepting the grant of the 10th article, were excluded from the benefits and freed from the restrictions of the other articles, except as they were repeated in it. Under it various tracts of the quantity specified, were assigned to the parties coming under the classes designated and, among others, to Mrs. Pennock, who is of mixed and half-blood, the plaintiff in this suit, at the time the wife of William Whistler.

In February, 1867, another Treaty was concluded with the Sacs and Foxes, which was ratified in October, 1868. 15 Stat. at L., 495. By it they ceded to the United States all the lands in Kansas to which they had any claim, and agreed to remove to the Indian Territory, where the United States promised to give them for

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their future home another tract of land. The Treaty provided for their removal, the payment of certain debts contracted by them, the erection of various buildings for their use, and other measures designed for their improvement and civilization. It also allowed various parties to select half and quarter sections of land, and provided for the issue of patents to them. Article 17 declared that the half-breeds and full-bloods, who were entitled to selections of land under the Treaty ratified in July, 1860, and whose selections had been approved by the Secretary of the Interior, should be entitled to patents in fee-simple for the lands selected, according to certain schedules annexed.

Under this Treaty the Tribes removed to the Indian Territory, where they now reside, and under the 17th article patents were issued to Mrs. Pennock under her former name of Sarah A. Whistler, and to other parties of a like class, for the tracts of land severally assigned to them under the 10th article of the Treaty ratified in July, 1860. Mrs. Pennock did not accompany her Tribe, but remained with her white husband in Kansas, having an indefeasible and absolute title to the lands covered by her patent, and having acquired by purchase other tracts from parties to whom similar patents had been issued. [48] She had renounced all claim to share in the proceeds of lands in the reservation sold by the United States, by accepting the grant under the 10th article of that Treaty. Her subsequent relation to her Tribe as a member of it, if she chose to keep it up, cannot affect the jurisdiction of the State over her property for governmental purposes. She might have followed her Tribe; she can now do it; but as that Tribe, under a Treaty with the United States, has left the State, while she remains, and has taken—not an imperfect title, to be held under the guardianship of the Secretary of the Interior, to be disposed of only to the United States, under regulations to be prescribed by him, but a title carrying with it absolute ownership, with a right of free disposition at her will, she and her property have come under the control of the State, and are subject to its laws, entitled to its protection, and bound to bear a portion of its burdens.

The 18th article of the Treaty does not, in our judgment, apply to the lands covered by the patent to the plaintiff, or by the patents to the other parties from whom she purchased. Its language is that "All sales hereafter made by or on behalf of persons to whom lands are assigned in this Treaty shall receive the approval of the Secretary of the Interior before taking effect or conveying title to lands so sold." This language strictly considered would, it is true, place a limitation upon all subsequent sales, by or on behalf of *persons* to whom lands were assigned under the Treaty, but we think the restriction was only intended to apply to the alienation of the *lands* thus assigned, and not to other lands which such persons may have had assigned to them by other treaties. And we are also of opinion that the restriction upon alienation only applies to lands where the sole title of the holder is by the assignment made. When the patent of the Government is once issued for the lands, all restrictions upon their alienation, not expressly named, are gone. Without such designation, inability to alienate the property would be inconsistent with the perfect title which accompanies the patent.

There is nothing in the case of the *Kansas Indians*, reported in 5th Wallace, 737 [72 U. S., XVIII., 667], in conflict with these views. There the Indians resided in Tribes, though their tribal organizations had been much broken in [49] upon by their intercourse with the whites. Patents to individual members, enabling them to hold lands in severalty, were accompanied with a condition against alienation without the consent of the Secretary of the Interior. A Treaty of the United States with one of the Tribes stipulated that their lands should not be liable to "levy, sale, execution or forfeiture"—terms which were held to prevent a levy and sale by officers of the State for taxes, as well as a levy and sale under judicial proceedings. And the Act admitting Kansas into the Union as a State provided that the rights of the Indians in the territory should remain unimpaired, and the general government be at liberty to make any regulation respecting them and their lands which it would have been competent to make had Kansas not been thus admitted. Their tribal organizations continuing in the State, and the United States treating with them as distinct political communities, the Legislature of Kansas could not interfere with their lands or the lands of individual members of the Tribes, and subject them to taxation.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 100.

ROBERT MITCHELL, *Plff. in Err.*, [62]

v.

A. M. OVERMAN, Admr. of CONRAD STUTZMAN, Deceased.

(See S. C., 13 Otto, 62-66.)

Death of party after cause submitted.

Where a party dies after his cause is finally submitted for decision, the court has the power to enter the decree as of the term when, in the lifetime of the party, the cause, after argument, was finally submitted for decision.

[No. 176.]

Submitted Jan. 5, 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The case is fully stated by the court.

Messrs. **Rufus King,** *Samuel J. Thompson* and **Lawrence Maxwell, Jr.,** for plaintiff in error.

Messrs. **Stanley Matthews** and **Wm. M. Ramsey,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 26th day of July, 1866, Conrad Stutzman commenced an action against Robert Mitchell and others, in the District Court for the County of Webster, a court of general jurisdiction, in the State of Iowa. Two of the defendants, although duly served with process, failed to appear, and against them a decree *pro con-*

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feso was entered by the state court, at its October Term, 1868. As to all the other parties, the plaintiff and the defendants being present in [63] person or by counsel, "The cause (quoting from the record) was submitted upon the pleadings and proofs on file; and, after argument of counsel, the cause was then finally submitted, and taken under advisement by the court, the decree herein to be rendered as of the Term of said trial and submission." Thereafter, at the October Term, 1870, Mitchell "asked leave to amend his answer, which was granted at the May Term, 1871, upon terms." Subsequently, at the October Term, 1872, that "amendment was stricken from the files for non-compliance with such terms;" and, thereupon, the court, at the last named Term, to wit: on November 10, 1872, rendered a decree in favor of Stutzman against Mitchell for the sum of $3,395.58, with interest thereon at the rate of six per cent per annum, from October 16, 1868, and for the costs. It was further ordered that the decree be "entered now (then), as of the 16th day of October, 1868, the last day of the October Term of this court, 1868; and shall take effect as of that date."

It appears that while the case was held under advisement, to wit: on the 10th November, 1869, Stutzman, the sole plaintiff, died intestate. No suggestion or notice of his death was ever made of record, nor was the suit revived in the name of his personal representative, to whom, under the laws of Iowa, the right of action survived. Indeed, administration upon his estate was not had until November 26, 1872.

At the time the decree was rendered, neither Mitchell nor his attorney had any knowledge of Stutzman's death, but that fact was known to Stutzman's attorney of record, who drafted and procured the entry of the decree. It is, however, found by the court below, to which the cause was submitted upon a written stipulation, waiving a jury, that there was no fraud in obtaining the decree.

Upon the decree of the state court, Overman, administrator of Stutzman, on the 15th September, 1878, commenced an action against Mitchell in the Circuit Court of the United States for the Southern District of Ohio. The defense is placed upon the ground that Stutzman was dead when, on the 10th of November, 1872, the decree in the state court was, in fact, entered; and, for that reason, the decree, it is claimed, is absolutely void. The defense was held insufficient and judgment was rendered against Mitchell for the full amount of the Iowa judgment. It is assigned for error that the facts found do not authorize the judgment in the circuit court.

[64] The common law was in force, in Iowa, during the whole period from the commencement to the conclusion of the suit in the state court, except as modified by sections 3469, 3470, 3472, 3473, 3477 and 3478 of the Iowa Code of 1860, and by the Act of April 8, 1862. The latter Act —of which, as well as of the State Code, we must take judicial notice—substitutes, for one of the sections of the Code the following provision: "Actions, either *ex contractu* or *ex delicto*, do not abate by the death, marriage or other disability of either party, nor by the transfer of any interest therein, if, from the legal nature of the case, the cause of action can survive or continue. In such cases, the court may, on motion, allow the action to be continued by or against his legal representative or successor in interest; but in case of the death of the defendant, a notice shall be served upon his representative under the direction of the court." Laws of Iowa, 1862, p. 229. These statutory provisions prescribe the manner in which actions may be revived, and the time within which such revivor must take place. But it is clear that they do not provide for a case like the one before us. The question here is, whether the state court was wholly without jurisdiction to enter the decree against Mitchell as of, or make it take effect from, the last day of the Term at which the cause, during the lifetime of Stutzman, was finally submitted for determination. We are not informed, by any decision of the Supreme Court of Iowa to which our attention has been called, that this precise question has been passed upon in that court. The cases, cited from that court, do not, in our opinion, meet the question, in the exact form in which it is here presented. Its disposition must, therefore, depend upon the rules of practice which obtain in courts of justice, in virtue of the inherent power they possess.

The adjudged cases are very numerous in which have been considered the circumstances under which courts may properly enter a judgment or decree as of a date anterior to that on which it is, in fact, rendered. We deem it unnecessary to present an analysis of the authorities, some of which are cited in a note to this opinion, but content ourselves with saying that the rule established by the general concurrence of the American and English courts, is, that where the delay in rendering judgment [65] or decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business or the intricacy of the questions involved, or for any other cause not attributable to the laches of the parties, but within the control of the court, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim, *Actus curiæ neminem gravabit*, which has been well said to be founded upon justice and good sense and to afford a safe and certain guide for the administration of justice, it is the duty of the court to see that the parties did not suffer by the delay. Whether a *nunc pro tunc* order should be made, depends upon the circumstances of the particular case. It should be granted or refused, as the justice of the cause may require. These principles control the present cause. Stutzman was alive when the cause was argued and submitted for decree. He was entitled at that time, or at the Term of submission, to claim its final disposition. A decree was not then entered because the case, after argument, was taken under advisement. The delay was altogether the act of the court, and its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree.

We attach no consequence to the fact that, while the cause was under advisement as to a final decree, Mitchell asked and obtained leave to amend his answer. The leave was granted upon terms, but as the terms were not com-

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plied with, the amendment was stricken from the files. The question must, therefore, be determined as if no amendment of the pleadings had been attempted.

It is scarcely necessary that we should extend this opinion by any comments upon the numerous cases cited in the printed argument of appellant's counsel. Many of them are cases where, although the death occurred after the submission of the cause or after verdict, the judgment was, in fact, entered as of a time subsequent to the death. Such cases manifestly have no bearing here, where the decree in the state court was entered as of a time when the party was alive, and to take effect from the date when the decree would have been entered, but for the act of the court, induced by causes beyond the control of the parties.

It seems to us to be entirely clear that the state court had the power, upon well settled rules of practice, both in courts of law and of [66] equity, to enter the decree as of the Term when, in the lifetime of Stutzman, the cause, after argument, was finally submitted for decision.

The decree is affirmed

NOTE.—*Bk.* v. *Weisiger*, 2 Pet., 481; *Clay* v. *Smith*, 3 Pet., 411; *Griswold* v. *Hill*, 1 Paine (C.C.), 484; *Gray* v. *Brignardello*, 1 Wall., 627 [68 U. S., XVII., 698]; *Campbell* v. *Miser*, 4 Johns. Ch., 342; *Vroom* v. *Dumas*, 5 Paige, 528; *Wood* v. *Keyes*, 6 Paige, 478; *Perry* v. *Wilson*, 7 Mass., 393; *Currier* v. *Lowell*, 16 Pick., 170; *Stickney* v. *Davis*, 17 Pick., 169; *Springfield* v. *Wooster*, 2 Cush., 62; *Hess* v. *Cole*, 3 Zab., 116; *Cumber* v. *Wane*, 1 Str., 426; *Astley* v. *Reynolds*, 2 Str., 916; *Davies* v. *Davies*, 9 Ves. Jr., 461; *Belsham* v. *Percival*, 2 Cooper's Rep. of Cases in time of Lord Cottenham; *Green* v. *Cobden*, 4 Scott, 486; *Lawrence* v. *Hodgson*, Y. & J., 370; *Freeman* v. *Tranah*, 12 C. B., 406; *Collinson* v. *Lister*, 1 Jur. (N. S.), 835; 20 Beavan's Rolls Court, 355; *Blakedell* v. *Harris*, 52 N. H., 191; 2 Dan. Ch. Pr., 1017, 1018, 5th Am. ed.; Tidd's Pr., 952, 4th ed., with Am. *notes*; 1 Barb. Ch. Pr., 2d rev. ed., 341; Freeman, Judg., sec. 57, and other authorities cited by those authors.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 11; 130 Mass., 539.

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[146] CITY OF CHICAGO, *Plff. in Err.*,

v.

THOMAS TILLEY.

(See S. C., 13 Otto, 146-155.)

Contract partly performed.

One who, having performed a part of his contract according to its terms, has been prevented from performing the residue by the failure of the other party thereto to do his part, may receive compensation for work actually performed.

[No. 1034.]

Submitted Jan. 24, 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. John N. Crawford and **W. C. Goudy**, for plaintiff in error.

Messrs. **Melville W. Fuller** and *R. H. Forrester*, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

On August 28, 1872, the City of Chicago entered into a contract with the County of Cook, of which it was the county seat, for the joint occupancy of block No. 39, in the City, known as the court-house square, whereby, among other things, it was agreed, as follows: "The said parties shall join in the erection of a public building on said block 39, for the use of the county and city governments respectively, and the courts of record of said county.

The general exterior design of said building shall be of a uniform character and appearance, as may hereafter be agreed upon by the board of county commissioners and the Common Council of the City of Chicago.

That portion of said building situate west of the north and south center line of said block shall be erected by the City of Chicago at its own expense."

In June, 1875, the county being ready to proceed with its portion of the building, appointed James J. Egan as its architect, who entered upon the preparation of plans and the construction of the foundation for the county's portion of the building.

On August 9, 1875, the city council passed an ordinance which repealed all former ordinances, orders and resolutions of the council, pertaining to the erection and construction of the City's portion of the new city hall and court-house, and rescinded all former action in relation to the appointment of architects, and expressly [147] provided that "Nothing in this ordinance shall be construed as to in any manner affect, or in anywise rescind, impair or amend any contract or other agreement now subsisting between the City of Chicago and the County of Cook."

On the same day the council passed an order, the material portion of which was as follows:

"*Ordered*, That one architect shall be appointed, whose duty it shall be to prepare the necessary plans and specifications for the erection of the City's portion of a new city hall and court-house, upon block 39, in the original Town of Chicago, commonly known as the court-house square, and the general exterior design of the same to be of a uniform character and appearance, as shall be agreed upon by said architect and board of public works and said county commissioners; said architect, when the plans and specifications shall have been prepared by him, and agreed upon by said board, to take charge of and superintend the construction of said building to its completion under the direction and control of said board of public works, and said architect shall also do and perform every other service or thing necessary to be done, in and about the construction and erection of the City's portion of said building to completion, which shall be required to be done and performed by him as such architect, by said board of public works, and said architect shall receive from the City of Chicago as his full compensation for his entire services as such architect the sum of $37,500, said sum being 3 per cent of the sum of $1,250,000, which shall be the entire cost of the City's portion of said building; and such compensation shall be in full for all services of such architect, and no other or further compensation whatever shall be paid to him by said City."

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The order further provided that, whenever the plans and specifications should be agreed upon in manner aforesaid, the board of public works should proceed with the City's portion of said building.

After the passage of this order, the city council proceeded to elect an architect to act under its provisions, and the defendant in error was chosen.

On August 24 he was officially notified of his election, and on the same day made known to the officers of the City his acceptance of the office, and offered to enter into a written contract and give bonds, but they were not deemed necessary by the city authorities and were dispensed with. [148]

Soon after the acceptance of employment by him as architect, under the order of August 9, he proceeded to prepare plans for the City's portion of the building.

He made plans for the several floors or stories of the buildings, consulted with the heads of the various departments of the city government as to the accommodations their departments would respectively need, and from the information thus obtained, made interior plans for the proposed building, and he also prepared designs and plans for the exterior of the building; these plans or designs were exhibited to the members of the board of public works and to the city officers, from time to time, during the months of September, October, and a part of November, 1875.

The board of public works proceeded to advertise for bids for excavations for the foundations, and the plaintiff prepared the plans and specifications for such excavations, and also prepared plans and specifications for the foundations and sub-basement of the proposed building.

Early in November it was ascertained that the plans prepared by plaintiff did not harmonize with the plans which had been prepared by Egan, the architect of the county, and pursuant to a resolution of the common council, passed November 15, a joint meeting of the mayor, the city board of public works, the building committee of the common council, the president of the board of county commissioners, and the building committee of the county board, was held to consult in regard to some feasible plan by which the difference arising between the city and county architects might be satisfactorily settled. This joint meeting was held, and was attended not only by the city and county officials mentioned, but also by the plaintiff as architect of the City, and Egan as architect for the county. They had their respective plans there and explained them to the officials in attendance. The result of this meeting for consultation and examination of plans was a direction, by the joint meeting, to the architects to prepare a joint compromise plan for the exterior of the building.

The joint meeting adjourned to a future day, for the purpose of giving the architects time to prepare their new plan or plans. On the day to which the adjournment was taken, the joint meeting re-assembled, and Egan presented sketches of a compromise plan, embodying substantially the features upon which the building is now being constructed, but Tilley, the plaintiff, presented no plan and did not concur in nor indorse Egan's plan. [149]

After an examination and discussion of Egan's compromise plan, the proof tends to show that it was adopted by the joint meeting, and the county authorities proceeded to act upon that plan as the one which had been agreed upon and settled by the city and county authorities. After the last joint meeting the proof tends to show that the plaintiff proceeded to prepare "compromise plans," which, after a time, he exhibited in the ante-room of the council-chamber, and also to members of the board of public works at the office of the board.

On January 13, 1876, at a special meeting of the council called for the purpose of considering matters pertaining to the city hall and court-house, a resolution was passed by the council which, in effect, directed the board of public works to adopt the compromise plans of the defendant in error.

After this meeting of the common council the defendant in error proceeded to complete his compromise plan, including floor plans for each story, specifications for foundations and sub-basements, and plans for exterior elevation, so that early in the spring of 1876 his plans were so far advanced that he could have proceeded with the construction of the building, and could have had the tracings and working drawings ready as soon as needed for the progress of the work. He was ready at all times to proceed with the construction of the building, but was not allowed to do so.

In the fall of 1876 and spring of 1877, when the city council determined to proceed with the construction of the building, he offered his services as architect, but they were refused; that is to say, he offered to proceed and perform his part of the contract by supervising the erection of the building when the City was ready to proceed with its construction.

On August 27, 1878, the defendant in error brought this suit. He declared on the special contract contained in the order passed by the city council on August 9, 1875, and claimed the contract price for his services, namely: $37,500. His declaration also contained the common counts for work and labor, goods sold, money lent, etc. [150]

The following is a copy of the account appended to the declaration:

The City of Chicago to Thomas Tilley, Dr.

For services as architect in preparing plans for the new city hall	$25,000 00
" services as architect in preparing a second set of plans with specifications and diagrams for the new city hall.....	42,500 00
" services as architect in superintending the building of the new city hall.....	42,500 00
	$110,000 00

The City of Chicago pleaded the general issue.

The evidence introduced on the trial of the cause tended to establish the facts above recited.

Thereupon the court, among other things, charged the jury as follows:

"There is no provision in the contract, or in any subsequent dealings or relations between

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the parties, that shows how this sum of $87,500, the compensation that Tilley was to receive for his services, was to be paid, but I think the fair presumption is, inasmuch as it was expected that the erection of this work would extend to a long term of years, perhaps, that the plaintiff was not to wait until the entire completion of the work before he received some compensation, and that he was to be paid from time to time upon some basis to be established, so that when the work was done he should not have received more than the aggregate amount of his compensation.

Tilley was employed like any other *employé* of the City, to do a certain thing. It was as far as practicable, to contribute his professional skill, and the suggestion of plans which might or might not be adopted.

It may then be considered as undisputed that Tilley was employed to prepare plans and [151] specifications, and did some work in the line of his employment, and for this he is entitled to compensation, as far as possible, at the rate for which he was to do the whole work under the contract; that is to say, he had agreed to prepare plans and specifications and superintend the entire construction of the building for $37,500. He did a part of that work. He did something in the line of his duty; and if it is possible to ascertain from the proof and contract how much his compensation should be for the work, in the ratio of the entire compensation, the jury should arrive at that."

The City of Chicago excepted to these charges. There were other charges excepted to, but these present all the questions which are raised by the assignments of error.

The jury returned a verdict for the plaintiff in the court below for $13,000, on which the court rendered judgment. This writ of error is brought to reverse that judgment.

The assignments of error all refer substantially to the construction put by the court upon the contract between the plaintiff in error and the defendant in error. If the contract was rightly construed by the court, then all its charges to the jury were correct and the plaintiff in error has no ground of complaint.

The question at what time the defendant in error was to receive his compensation had become entirely immaterial. If he was entitled to recover at all, he could, at the time the suit was brought, lawfully claim all the compensation that was owing to him. The point which the plaintiff in error makes is that he was entitled to nothing. Its argument is that the contract was an entire one, and the defendant in error was entitled to no part of his compensation until he had fully completed and performed the contract on his part; and not having done this, was entitled to nothing.

The evidence submitted to the jury tended to show, and the jury must have found, that the defendant in error, when the city council decided in the fall of 1876 to go on with the construction of the building, offered to proceed and perform his part of the contract, and that his services were refused.

The question is thus raised whether, up to that time, he had done what the contract required him to do. It is clear from the record that the defendant in error never did procure the concurrence of the board of county commissioners in his designs for the exterior of the [152] building.

The City claimed that his contract was not only to prepare the necessary plans and specifications for the erection of the City's portion of the new city hall, but to obtain the approval and adoption of his plans by the board of county commissioners. In our opinion this was not the meaning of the contract.

The agreement between the City and county for the erection of a building for their joint use, whose general exterior design should be of uniform character and appearance, one half to be built by the City, at its own expense, and the other by the county, was still in force. The county had previously appointed its own architect. The contract between the City and the defendant in error was not based on the idea that there was to be but one design prepared, and that by the defendant in error, which was to be satisfactory both to the City and county, but that both architects were to devise plans, and there was to be a general conference and a selection of one or the other of these plans, or the adoption of some compromise plan.

The City could not reasonably expect any architect to give his time and labor in devising plans for a building on the condition that he was to receive no compensation unless he procured the assent to his plans of another body of fifteen persons, which had employed its own architect to devise plans for the same building, and no prudent man would agree to such a contract.

It seems reasonably clear from the contract itself, and the circumstances under which it was made, that the City itself took the risk of securing the agreement of the county to some plan. It was indispensable that there should be some concurrence of views between the authorities of the City and county touching the external appearance of the building. The antecedent contract between the City and the county required this. It was clear that sooner or later the authorities of the City and county would concur in some common plan. The contract between the City and the defendant in error was for the services of the latter to aid in devising a plan to which the county might be induced to accede. The county at the same time had [153] its own architect at work devising a plan for the same building. The City and county would thus have two designs from which to make their choice and, if neither were acceptable, have two architects to devise a compromise plan.

The preparation of a design for the exterior of the building was but a small part of the work which the defendant in error contracted to do. He was required to prepare plans and specifications for excavations for the foundations, and for the foundations themselves, and for the sub-basement; to prepare plans and specifications for the interior of the building; to divide it into the apartments necessary to accommodate the business of the City; to lay off the corridors, halls, staircases, to devise all the interior conveniences and decorations of a large and costly building; to select and specify the materials of every description that were to be used; to decide upon and make drawings for the structure of the inside walls, the floor, the roof; to make designs for the wood-work, and to provide for plastering, plumbing and paint-

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ing. All these matters were to be settled by him, and minute and detailed specifications were to be prepared for the entire work, so that contractors might be able to bid intelligently.

The work which the defendant in error undertook to do, in preparing the necessary plans and specifications for the building, was a vast one, requiring much time and great labor and skill on his part, and the aid of draftsmen, clerks and other assistants. To construe his contract to mean that he was to do all this work and receive no compensation for it unless he could induce the board of county commissioners to agree to his plan for the exterior design, and reject that of their own architect, is to give it a meaning which in our judgment neither of the parties to it ever contemplated. It is no reply to this to say that he might have prepared his designs for the exterior of the building and secured the concurrence of the county board therein, before proceeding with the residue of the work. There is nothing in the contract which indicates that the defendant in error was expected to do this. If such had been the purpose of the parties it would have been easy to express it. On the contrary, by the very terms of the contract, it was as much the duty of the [154] city board of public works as of the defendant in error to procure the approval by the county board of the exterior design prepared by him.

The fact is apparent that the contingency of a disagreement between the city and county authorities in regard to the exterior plan of the building was not anticipated and no provision was made for it. The thing to be done by the defendant in error was "to prepare the necessary plans and specifications for the erection of the new city hall and court-house," and to superintend the erection of the building when the exterior design had been agreed upon by himself, the board of public works of the City, and the county commissioners.

The proceedings of the city council show that this was the construction which it put on its contract with the defendant in error. In November, 1875, when it was found that the plans of the defendant in error and Egan did not harmonize, the city council passed a resolution calling a joint meeting of the mayor, the board of public works, the building committee of the council, and the president and building committee of the county board, to consult about some plan by which the difference between the city and county architects might be satisfactorily settled. The result of the meeting was a direction to the two architects to prepare a compromise plan for the exterior of the building.

The compromise plan prepared by Egan appears to have been adopted by a joint meeting of the same parties held on a subsequent day. Nevertheless, afterwards, on January 13, 1876, the city council passed a resolution by which they directed the board of public works to adopt certain compromise plans prepared by the defendant in error.

All this shows that it was not considered by the City that the contract imposed on the defendant in error, alone, the duty of bringing about the assent to his plans of the county board.

If the construction we have put upon the contract is the correct one, then the plaintiff having performed a part of it according to its terms, and having been prevented from performing the residue by the failure of the other party to do its part, may receive compensation for the work actually performed. *Planché* v. [155] *Colburn*, 8 Bing., 14; *Goodman* v. *Pocock*, 15 Q. B., 576; *Hall* v. *Rupley*, 10 Pa., 231; *Moulton* v. *Trask*, 9 Met., 577; *Hoagland* v. *Moore*, 2 Blackf., 167; *Derby* v. *Johnson*, 21 Vt., 17.

This, in effect, disposes of all the assignments of error, which all turn upon the construction of the contract between the parties.

If the defendant was not bound by the contract to obtain the assent of the county board to his plans before he was entitled to compensation, then all the instructions given by the court were correct, and none of the assignments of error are well founded.

The judgment must, therefore, be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS TILLEY, *Plff. in Err.*, [155]

v.

CITY OF CHICAGO AND COUNTY OF COOK.

(See S. C., "*Tilley* v. *County of Cook*," 13 Otto, 155-164.)

Contract by acceptance of offer—proof of usage, when immaterial—unreasonable custom—voluntary services—exclusion of evidence.

1. An offer of a bargain by one person to another imposes no obligation upon the one offering it unless it is accepted upon the terms on which it was made.
2. Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract.
3. Unless some contract is shown, evidence of usage or custom is immaterial.
4. An absurd and unreasonable custom is not binding.
5. Proof of the value of services voluntarily rendered, for which the law does not imply a contract to pay, is immaterial.
6. Where defendants were sued for a joint liability, evidence offered which did not tend to establish a joint liability was properly excluded.

[No. 1035.]

Submitted Jan. 24, 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Mr. **Melville W. Fuller,** for plaintiff in error.

Messrs. **Wm. C. Goudy** and *Francis Adams*, for City of Chicago.

Mr. **Consider H. Willett,** for Cook County.

Mr. Justice **Woods** delivered the opinion of the court:

This was an action of *assumpsit*, brought by the plaintiff in error in the Circuit Court of the United States for the Northern District of Illinois, jointly against the County of Cook and the City of Chicago. The declaration consisted of the common counts for work and labor done, [156 goods sold and delivered, money lent and advanced, and upon account stated.

The following is a copy of the account sued on, which was appended to the declaration:

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The County of Cook and the City of Chicago to Thomas Tilley, Dr.

For services as architect in preparing plans, drawings, specifications, diagrams, estimates and details for the new court-house and city hall, and superintendence of erecting the same, 5 per cent on $2,909,629, the estimated cost of the building, the plan being that known as "Eureka," $145,481.45

The defendants pleaded the general issue.

By provision of the Constitution and laws of the State of Illinois, the county affairs of Cook County are managed by a board of commissioners of fifteen persons. Ill. Con., 1870, art. 10, sec. 7. The affairs of the City are controlled by the common council. Private L. of Ill., 1863, p. 40.

The County of Cook was the owner of a block of ground in the City of Chicago, known as the court-house square, on which it was proposed to erect a building to be used as a city hall and county court-house, in which both the business of the City and County might be conducted.

On July 10, the board of county commissioners, and on July 15, 1872, the common council, adopted, each for itself, the following resolution:

"*Resolved*, That it is the sense of the joint meeting that they recommend to the common council of the City of Chicago and the board of commissioners of Cook County that the City of Chicago and the County of Cook will authorize the building committees of the several boards to offer a prize of five thousand dollars ($5,000) for the best plan, two thousand dollars ($2,000) for the second and one thousand dollars ($1,000) for the third best plan for a court-house and city hall, to be erected jointly by the County of Cook and the City of Chicago, upon the public square in the City of Chicago, the said plans to be submitted to respective boards, in conjunction with the board of public works of the City of Chicago."

[157] On August 5, 1872, the common council of the City and the board of county commissioners both passed an order providing for a joint contract between the City and County for the erection of a building on the court-house square, and on August 28, 1872, the contract was executed by the city and county authorities. It declared that it was for the public convenience that the courts and the offices of the City "should be located at some one convenient point and readily accessible to each other," and provided for the erection, by the City and County, of a public building on the court-house square, for the use of the county and city governments respectively, and the courts of record; that the general exterior design of the building should be of such uniform character and appearance, as might thereafter be agreed upon by the board of county commissioners and the common council of the City.

The contract further provided as follows:

"3. That portion of the said building situate west of the north and south center line of said block shall be erected by the City of Chicago at its own expense.

4. The City of Chicago shall occupy that portion of said block west of the said centre line for a city hall and offices incidental to the administration of the city government, and for no other purpose whatever, except as hereinbefore provided.

5. Each of the parties will heat, light and otherwise maintain and furnish its own portion of said building."

On November 25, 1872, the building committees of the common council and the county commissioners published an advertisement calling for designs for the proposed building.

The advertisement declared that, in order to secure suitable designs, the City and County jointly offered the following premiums: for the best design, $5,000; for the second best, $2,000; and for the third best, $1,000.

It provided as follows: "Each design must have a device or motto marked on each drawing, and be accompanied by a sealed letter giving the name of the author, which will be opened after the final award is made, only for the purpose of ascertaining the names of the successful architects and for the return of the unsuccessful drawings to their authors.

Each competitor will give the cubical contents of his building, and an estimate of the cost of the same complete."

Designs were submitted by a large number of [158] architects, and the building committees of the city council and the board of county commissioners made a report awarding the prizes. The plaintiff in error, who had adopted for his drawing the word "Eureka" as the device or motto to distinguish it, was awarded the third prize, of $1,000.

On August 4, the county board, and on August 18, 1873, the city council, adopted the following resolution:

"That the report of the majority of the joint committee awarding the prizes for plans of court-house and city hall shall be concurred in and the award confirmed, provided that nothing herein or in said report contained shall be construed as indicating a preference for either of said plans as to which shall be finally adopted, from which the said building shall be erected."

The plaintiff in error was paid the $1,000 awarded to him as a prize.

Afterwards, on August 25, the county commissioners, and on October 10, 1873, the city council, adopted the following resolution:

"That the plan known as Eureka, or number 5 (five) in the collection, submitted for court-house and city hall, be, and is hereby, selected and adopted as the plan after which to build such court-house and city hall (the board of commissioners of Cook County concurring), subject to such change and modifications as may hereafter be determined upon by the common council of the City of Chicago and the county board, provided the estimate of the architect who presented said plan as to the cost of construction of the building shall be verified."

Upon the trial of the case, the testimony tending to establish the facts above recited having been given in evidence by the plaintiff, he was sworn as a witness in his own behalf, and testified that he was an architect of fifteen years' standing, that he had made the design designated by the word "Eureka," and that, after the passage by the city council and board of county commissioners of the resolution last above mentioned, he had verified the cost of the construction of the proposed building in the

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way customary and usual with architects, which was made up at the rate of thirty-five cents per cubic foot for the building, and was indorsed by fourteen or fifteen architects.

[159] The plaintiff produced before the jury all his plans for which the prize had been awarded him. He offered to prove their value, and offered to prove the time employed and expense incurred in the preparation of them. The court excluded the evidence so offered.

The plaintiff further offered evidence to establish that by the usage and custom of architects, in the absence of a special contract, the superintendence of the construction of a building belonged to the architect whose plans were adopted. This was also excluded.

The plaintiff also offered evidence to prove that by the usage and custom of architects, where prizes for plans were offered, the plans of the successful competitors belonged to them and, if subsequently adopted as the plans to build by, were always paid for in addition to the prize itself. To this, defendants objected and the court sustained the objection.

The plaintiff also offered evidence to establish the value of the services rendered in verifying the cost of the proposed building according to the "Eureka" plans, to which the defendants objected and the court sustained the objection.

This was all the evidence given or offered to be given in the cause.

The plaintiff then rested his case; whereupon the court directed the jury to find for the defendants.

The jury returned a verdict for defendants as directed by the court, and judgment was entered therein.

To reverse this judgment, this writ of error was brought.

It will be observed that no evidence was introduced or offered to show that the plans of the plaintiff were used by the defendants or either of them, or that the building for which they were used was ever erected.

It is clear that if the plaintiff has any right of action it must arise on the resolutions adopted by the board of county commissioners, August 25, and the city council, October 10, 1873. All that had taken place before those dates, was the [160] making of a contract between the City and the County, by which they agreed to join in the erection of a public building in the court-house square, each party to build and pay for its own part of the structure, an offer by the City and County of three prizes for the best plans; an award of the prizes by which the third prize, of $1,000, was given to the plaintiff in error, with the distinct notice that "The award should not be considered as indicating a preference for either of said plans as to which should be finally adopted from which the said building should be erected," and the payment to and the receipt by the plaintiff of the prize awarded him.

By the payment to the plaintiff in error of the prize, the defendants discharged every obligation due from them to him arising out of the preparation of plans for the proposed building. Upon that payment being made, no contract whatever, either express or implied, existed between the plaintiff and the defendants.

If, therefore, the plaintiff had any right of action against defendants, it must have arisen by reason of the adoption of the resolution just mentioned and what was done by plaintiff after its adoption.

The resolution was the voluntary act of the city council and county commissioners. It was not a proposition, but simply the expression of a purpose to build their structure after the plans of the plaintiff, subject to such changes and modifications as might thereafter be determined upon by the common council and the county board. The resolution was not adopted at the instance or suggestion of the plaintiff. Suppose that the day after its adoption the resolution had been reconsidered and rescinded, would the defendants nevertheless have been liable for the value of the plans and for five per cent on the estimated cost of the building for superintendence, amounting in the aggregate to near one hundred and forty-six thousand dollars?

Suppose a private person should announce his purpose to build a house after a design which he had seen in an architect's office, but before he begins the execution of his purpose changes his mind, never calls for or uses the plans or even builds the house; is he liable to the architect for the value of the plans and for superintendence? In such a case there certainly is no contract between him and the architect upon which a recovery can be based.

The claim of the plaintiff is that by the adop- [161] tion of the resolution by the city council and the county board, without any act done or assent on his part, they were bound to go on and erect the building on his plans and expend $2,909,000, its estimated cost.

The resolution did not bind the plaintiff to furnish his plans and superintend the building. There was no mutuality and, therefore, no consideration; both of which are essential to a contract. Notwithstanding the resolution, the plaintiff might have said, I will not furnish my plans, and I will not superintend the building, and the defendants would have had no claim on him.

If one does not accede to a promise as made, the other party is not bound by it. *Tuttle* v. *Love*, 7 Johns., 470. When A signs a writing by which he declares he will sell to B his house at a certain price, this is a mere proposition and not a contract. *Tucker* v. *Woods*, 12 Johns., 190.

In *Wood* v. *Edwards*, 19 Johns., 205, where A wrote that he had agreed to a substitute for an existing agreement which he would execute, Spencer, *Ch. J.*, said the proposition of A to execute the new agreement was not binding on him, as well on the ground of want of consideration as want of mutuality, since the plaintiffs on their part were not bound to execute the agreement.

In the case of *Kingston* v. *Phelps*, Peake, *N.P.* Cas., 229, the plaintiff proved that the defendant consented to be bound by an award to be made on a submission by other underwriters on the same policy, but the witness proved no agreement on the part of the plaintiff to be bound by the award. Lord Kenyon held there was no mutuality, and, therefore, the defendant's agreement was a mere *nudum pactum*.

An offer of a bargain by one person to another imposes no obligation upon the former unless it is accepted by the latter upon the terms on which the offer was made. Any quali-

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fication of or departure from these terms invalidates the offer unless the same be agreed to by the party who made it. *Eliason* v. *Henshaw*, 4 Wheat., 225; see, also, *Webb* v. *Alton Ins. Co.*, 10 Ill. (5 Gil.), 225; *Maclay* v. *Harvey*, 90 Ill., 525.

[162]

In this case, there being only an expression of purpose by one party to erect a building according to plans antecedently made by another, and no obligation entered into by the other party, and no plans used or building erected, there was no contract between the parties, either express or implied.

If we are correct in this conclusion, then all the evidence offered by the plaintiff to prove the value of the plans, and the time employed, and the expenses incurred in their preparation was irrelevant and immaterial.

The only purpose for which such evidence could be admitted would be to prove the damage sustained by the plaintiff by the breach of his alleged contract with the defendants. But if he had no contract, express or implied, he was entitled to no damage, and could show none.

It is complained that the evidence offered to prove the custom of architects was excluded. We think it was rightly excluded.

Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. *Hutchinson* v. *Tatham*, L. R., 8 C. P., 482; *Field* v. *Leiean*, 30 L. J. Exch., 168; *Bywater* v. *Richardson*, 1 Ad. & E., 508; *Robinson* v. *U. S.*, 13 Wall., 363 [80 U. S., XX., 653.]

In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. *Holding* v. *Pigott*, 7 Bing., 465, 474; *Clarke* v. *Roystone*, 13 Mees. & W., 752; *Yeats* v. *Pim*, Holt, *N. P.*, 95; *Trueman* v. *Loder*, 11 Ad. & E., 589; *Bliven* v. *N. E. Screw Co.*, 23 How., 420 [64 U. S., XVI., 510].

The inference from these principles is inevitable that unless some contract is shown, evidence of usage or custom is immaterial.

The plaintiff in error says he was ready to prove a custom of architects, that when prizes were offered for plans of a building, the successful competitor remained the owner of his own designs, and if they were adopted he was entitled to compensation therefor in addition to the prize, and that, by the same custom, the adoption of his plans entitled him to superintend the erection of the building, and to the usual remuneration therefor. He claims, therefore, that in view of this custom, the adoption of his plans by the passage of the resolution referred to by the city and county boards, amounted to a contract, on the part of the defendants, to pay for the plans and employ him to superintend the erection of the building, and pay him therefor.

[163]

The offer of the plaintiff in error to prove certain facts having been rejected, he must be presumed to be able to prove what he offered to prove. We must, therefore, assume that the custom which he offered to prove did, in fact, exist. But what was that custom? Clearly, that if the building was erected according to the successful plans, the architect was entitled to pay therefor. That was such an acceptance and adoption of his plans as would give him the right to compensation therefor, and the right to superintend the erection of the building and receive the usual remuneration. The custom certainly did not bind the party who offered prizes for plans, after having paid the prizes, to pay also for plans that he never used, and for superintendence of a building that he never erected, merely because he had selected a particular plan and announced his purpose to build in accordance with it. If such were the custom and usage of architects in Chicago, it was an absurd and unreasonable custom and, therefore, not binding. *U. S.* v. *Buchanan*, 8 How., 83, 3 Wash., 149.

If the plaintiff in error had offered to show that after the passage of the resolution by which his plan was accepted, the defendants had erected their building according to his plans, then the evidence of the custom would have been pertinent. But he made no such offer, and it is to be presumed no such fact existed. The evidence of this custom was, therefore, properly excluded.

The plaintiff in error complains that he was not allowed to prove the value of his services in verifying the cost of the proposed building according to his plans.

We think the court was right in excluding this evidence. There was no proof nor any offer of proof to show that the services of the plaintiff were rendered at the instance or request of defendants or either of them. From all that appears, the services were voluntarily rendered by the defendant, and no use whatever was made of the results of his investigation. The law, therefore, does not imply a contract to pay for them, and proof of their value was quite immaterial.

[164]

The evidence rejected was properly excluded on another ground. The defendants were charged in the declaration with a joint liability, but there was no privity between them, either by law or contract. The evidence offered was to show a joint liability. So far as it went it failed to do this; on the contrary, it was made to appear that each of the defendants was building its own part of the structure at its own expense, and for its own use. After the award and payment of the prizes they assumed no joint liability, as the evidence admitted clearly showed. And the evidence offered did not tend to establish a joint liability. It did not, therefore, support the case made in the declaration, and was properly excluded from the jury. As the plaintiff asked no leave to amend, this ruling of the court is not a ground of error.

We find no error in the record. *The judgment of the Circuit Court must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—10 N. W. Rep., 42.

HALLET KILBOURN, *Plff. in Errr.*, [168]

v.

JOHN G. THOMPSON ET AL.

(See S. C., 13 Otto, 168-205.)

Right of House of Representatives to punish for contempt—power to punish its own members—

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absent members—qualification of members—impeachment—power to punish witness—limit of power—governmental powers—invalid resolution—want of authority—power of courts—false imprisonment—privileges of members.

1. The right of the House of Representatives to punish citizens for a contempt of its authority or a breach of its privileges, can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices.

2. Whether this power exists as one necessary to enable either House of Congress to exercise successfully its function of legislation, is a proposition which this court does not propose to decide in the present case.

3. The Constitution expressly empowers each House to punish its own members for disorderly behavior. There is no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.

4. So, also, the penalty which each House is authorized to inflict, in order to compel the attendance of absent members, may be imprisonment; and this may be for a violation of some order or standing rule on that subject.

5. By the Constitution, each House is made the judge of the election and qualification of its members. The House of Representatives has the sole right to impeach officers of the Government, and the Senate to try them.

6. No person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire.

7. Neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

8. All the powers intrusted to Government, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial. The powers confided to one of these departments, by the Constitution, cannot be exercised by another.

9. The House of Representatives in passing a resolution reciting that the U. S. is a creditor of Jay Cooke & Co. and appointing a committee to inquire into the nature and history of the real estate pool, not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial.

10. The committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell, and the orders and resolutions of the House and the warrant of the Speaker, under which Kilbourn was imprisoned for refusal to testify before such committee, are void for want of jurisdiction in that body; and his imprisonment for such refusal was without any lawful authority.

11. *Anderson* v. *Dunn* (6 Wheat., 204), limited and partially overruled.

12. This court does not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited. The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court.

13. The Resolution of the House of Representatives, finding Kilbourn guilty of contempt, and the warrant of its Speaker for his commitment to prison are not conclusive, and are not justification in an action brought by him for false imprisonment.

14. Members of the House of Representatives who did not personally assist in the arrest of Kilbourn or his imprisonment, nor order or direct the same, except by their votes and by their participation as members in the official acts and proceedings of the House, cannot be held liable in such action.

15. The constitutional privilege of freedom of speech and debate applies to things generally done, in a session of the House, by one of its members in relation to the business before it.

[No. 18.]

Argued Jan. 13, 14, 1880. Decided Jan. 24, 1881. Rescinded Feb. 28, 1881. Redecided Feb. 28, 1881, as of Jan. 24, 1881.

IN ERROR to the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. **Charles A. Eldredge, Enoch Totten** and *N. L. Jeffries*, for plaintiff in error:

Did the House of Representatives possess the power to punish the plaintiff, as for a contempt, upon the facts set out in the special pleas?

It did not, because of the Act of Congress, approved Jan. 24, 1857, 11 Stat. at L., 155, as the same was modified by Congress in the Revised Statutes of the United States, Secs. 102, 104.

"Sec. 102. Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

Sec. 104. Whenever a witness summoned as mentioned in section 102 fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact, under the seal of the Senate or House, to the District Attorney of the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action." Rev. Stat., 17.

When the statute fixes the punishment for an offense, no other punishment, be it greater or less, can be inflicted. *Haney* v. *State*, 5 Wis., 529; *Scrinegrour* v. *State*, 1 Chand., 48.

This is true in matters of contempt. *Bickley* v. *Com.*, 2 J. J. Marsh., 572; *Ex parte Edwards*, 11 Fla., 174; *Dunham* v. *State*, 6 Iowa, 245; *People* v. *Liscomb*, 60 N.Y., 559.

Double penalties cannot be inflicted. *Driskill* v. *Parish*, 3 McLean, 640; *Brooklyn* v. *Toynbee*, 31 Barb., 282; *Sipperly* v. *R. R. Co.*, 9 How. Pr., 83; *Washburn* v. *McInroy*, 7 Johns., 134; *Tiffany* v. *Driggs*, 13 Johns., 253.

Because, as a punishment, the law has denounced a loss of two of the rights of citizenship, it does not follow that a third right is to be withheld from the delinquent. Indeed, the reverse result is the reasonable deduction, because it is clear on common principles that no penalty for crime can be inflicted except that which is expressly prescribed. The fact that several penal consequences are annexed by statute to the commission of a breach of law, cannot warrant the aggravation, by the judicial hand, of the punishment prescribed.

State v. *Pritchard*, 12 Am. Law. Reg. (N. S.), 518, and 19 N. J.; *Ex parte Lange*, 18 Wall., 163 (85 U. S., XXI., 872); *Rex* v. *Wright*, 1 Burr., 544; *State* v. *Bishop*, 7 Conn., 185; *Respublica* v. *De Longchamps*, 1 Dall., 116; *Scrinegrour* v. *State* (*supra*); *Emery's Case*, 107 Mass., 172; *State* v. *Egglesht*, 41 Iowa, 574.

Perjury being punished by the ordinary crim-

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inal tribunals, is not punishable as a contempt. Cush. Par. L., secs. 1012-1014.

This author declares that there are many crimes which the House has no jurisdiction to punish. Cush., 1052.

The fact that Congress provided by the Statute of 1857, for the indictment and trial of a recusant witness is conclusive of the intention of Congress to have the whole case tried and determined in the court, so that, whether the witness has criminally refused to answer shall be ascertained by the verdict of a jury.

The power claimed here is purely judicial, and the only powers expressly granted by the Constitution to the House, which have any similarity to judicial power, are:

1. It shall be the judge of the election, returns and qualifications of its own members.

2. It may authorize a number smaller than a quorum to compel the attendance of absent members, in such manner and under such penalties as it may provide.

3. It may punish its members for disorderly behavior and, with the concurrence of two thirds, expel a member.

4. And it has the sole power of impeachment.

These powers partake of a judicial nature, but neither House can exercise the judicial instruments of the courts, such as the *subpœna duces tecum*, *fieri facias*, and the like, without an Act of Congress, made under the general power contained in the last paragraph of section 8, article I., to pass all laws "necessary and proper," etc., etc. Nor can either House authorize one of its own members to administer oaths. This power was given by the Act of Congress of May 3, 1798. R. S., 17.

All investigating committees ordered by the House, unless authorized by an Act of Congress passed to carry into execution one or more of the powers above named, vested, by the Constitution, in the House of Representatives, are unauthorized and unwarranted by law. If crime has been committed, the grand jury shall investigate; if fraud, the courts of equity and law.

All the judicial power is vested in the courts by the Constitution.

Implied powers do not exist in either House.

The argument, that the English Parliament punishes for contempts, is unsound. We are not governed under the British constitution.

Parliament exercises this power under positive law.

The powers of the States of the United States are plenary; they possess all the powers not delegated to the United States.

All state courts punish for contempts by virtue of express statutory enactments, and so do the United State Courts.

As to latter, see R. S., secs. 721, 725.

The argument that it is necessary for self-protection or maintenance of good order, is also unsound. Congress may, by law, provide for the punishment of all offenders against good order, under the last paragraph of section 8, article I. of the Constitution. It has done so by providing a Sergeant-at-Arms and assistants for both Houses of Congress. R. S., pp. 9, 10.

The power to punish for contempt cannot be held to be implied without violating many cardinal provisions of the Constitution, to wit:

1. The 10th Amendment, relating to the reserved rights of the People.

2. The 1st section, article III., depositing the judicial power of the United States in the Supreme and inferior courts.

3. The 4th Amendment, preserving the right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches.

4. The 3d paragraph, section 9, article I., which declares that no *ex post facto* law shall be passed.

There is no written law on the subject of punishing contempts in the House, and the penalty is declared after the fact, and the degree thereof rests in the irresponsible discretion or caprice of the members of the House.

5. The 5th Amendment: (*a*) it puts a man twice in jeopardy; (*b*) it deprives him of his liberty without "due process" of law.

6. The 3d paragraph of section 2, article III., which provides that the trial of all crimes, except in cases of impeachment, shall be by jury. A contempt of court is an offense against the United States. See authorities in next paragraph. There is no such thing as an offense against the House of Representatives.

7. The 2d section, article II., which confides to the Executive the power "To grant reprieves and pardon all offenses against the United States, except in cases of impeachment." See 3 Story, Const., sec. 1495, where he says a citizen committed by the House for contempt is beyond the reach of the pardoning power.

In re Mullee, 7 Blatchf., 28; *Ex parte Kearney*, 7 Wheat., 38; *In re Dixon*, 3 Ops., 622; *In re Rowan*, 4 Ops., 458; *In re Drayton & Sears*, 5 Ops., 579; *State* v. *Sauvinet*, 24 La. Ann., 119.

8. It violates, also, the provisions of the 2d paragraph of article VI., which provides that "This Constitution, and laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land." This implied power, if sustained, will override the Act of Jan. 24, 1857, and sections 102, 103, R. S.

It has been recently held by the Privy Council of Great Britain, that the power to punish for contempt was not inherent in legislative assemblies, nor necessary to the proper discharge of their duties. In one of the opinions, the case of *Anderson* v. *Dunn*, 6 Wheat., 225, and the assertions of *Judge* Story, in his Commentaries on our Constitution, were referred to with disapprobation. *Kielley* v. *Carson*, 4 Moore (P. C.), 63; *Fenton* v. *Hampton*, 11 Moore (P. C.), 347; *Doyle* v. *Falconer*, L. R., 1 P. C., 328. It was denied that the House of Commons had this power as a necessity, but possessed it only from long use of it. In the case of *Kielley* v. *Carson*, 4 Moo. (P. C.), 63, a reargument was ordered by the court, and it was reargued before the *Lord Chancellor*, Lyndhurst, Lords Brougham, Denman, Abinger, Cottenham and Campbell, the *Vice-Chancellor* of England, Shadwell, the *Lord Chief Justice* of the Common Pleas, Tindall, *Mr. Justice* Erskine, Dr. Lushington, and *Baron* Parke; the latter delivered the opinion.

The original Resolution of the House upon which the investigating committee was ordered, stated no case nor subject-matter about which a legislative body has jurisdiction to inquire. It contemplated no legislation nor legislative duty.

If it referred to anything or any matter in

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which the United States or the public had any interest, such thing or matter was alleged to be judicial and then pending in the court, and not the subject of any legislative action. Nor had the legislative department any right to interfere therein. Cushing, secs. 611, 640-642, 648, 649, 1106, 1107.

No court nor officer can acquire jurisdiction by the mere assumption or assertion of it, nor by falsely alleging the existence of facts on which jurisdiction depends.

People v. *Cassels*, 5 Hill (N. Y.), 164.

The warrant is void on the face of it. It delegated a discretion to the Sergeant-at-Arms, which is judicial, and which cannot legally be delegated to any mere ministerial or executive officer.

Geisse v. *Beall*, 5 Wis., 224.

It has been said that it is no reason against the exercise of this indefinite and discretionary power, that it may be abused; that it is even an indecency to suggest the possibility of its abuse by so respectable a body as the House of Representatives. That the power has been most flagrantly and repeatedly abused, granting its existence for the sake of the argument, is a fact, whatever the denunciation for knowing and expressing it.

Floyd's Case in the British House of Commons, cited in May's Parliamentary Law, p. 91, and the case of *Patrick Woods*, in the House of Representatives, are instances. The latter was absolutely tried for assault and battery, condemned to imprisonment for three months, beyond even the session in which he was convicted, and the sentence was carried into execution.

But the liability, the possibility of abuse, without any mode of redress, a power so dangerous to the liberty of the citizen, was said by the court in *Emery's Case*, 107 Mass., 172, to be a powerful argument against the existence of the power in the legislative assembly.

The courts are all limited by law, by statutory provisions, in the punishment of contempts, to those which are committed in their presence. And yet the constitutional lodgment of judicial power in the courts alone would seem to justify trusting them with the punishment of contempts in their discretion, much more than a legislative assembly, if it were fit or proper in our government of written Constitution and laws to intrust any department thereof with discretionary or despotic powers. *Powers* v. *Wyckoff*, 6 N. Y., 358; *People* v. *Edmonds*, 15 Barb., 539.

There is an ultimate responsibility and accountability of the judges for any usurpation or wrong they may commit. They may be impeached; and they act at all times under the sense of this accountability and responsibility. Their victims may be reached by the pardoning power.

But if the House of Representatives has this unbounded jurisdiction of discretion, there is no redress. The House may despoil any citizen of his life, liberty or property, and there is no power on earth to stay its hand! There is no redress!

There is, there can be, no such unlimited power in any department of the government of the Republic. *Loan Association* v. *Topeka*, 20 Wall., 662, 663 [87 U. S., XXII., 461]; *Taylor* v. *Porter*, 4 Hill, N. Y., 140; Sedg. Stat. and Const. L., 215.

The citations that even the House of Representatives is not a court, and that it requires the concurrence of the "three estates" to create any new privilege in either House of Parliament, and that many of the pretensions of the Commons are without authority of law, based upon and grown out of a mere *dictum* of Lord Ellenborough, will be found in the case of *Stockdale* v. *Hansard*, 36 Eng. C. L., 91, 92, 104, 106, 111, 118-120, 128. That the House of Commons is a court in any true sense, is indignantly denied by Lord Denman in his opinion.

Messrs. **Frank H. Hurd** and **Walter H. Smith**, for defendants in error:

Upon the facts admitted in these pleadings, we propose to consider:

1. The power of the House of Representatives to arrest and commit persons guilty of a contempt of its authority.

2. Its power to conclusively determine the fact of contempt; and

3. The protection that should be afforded to those who execute its commands.

I. That the House has exercised this power, from the foundation of the government to the present time, is abundantly shown by the record of its proceedings. Among the cases that might be cited, we refer to the following:

Case of *Robert Randall*, House, 1795; charged with an attempt to corrupt members of the House;

Case of *William Duane*, Senate, 1800; charged with having published a libel on the Senate.

Case of *John Anderson*, House, 1818; charged with bribery;

Anderson v. *Dunn*, 6 Wheat., 204.

Case of *Samuel Houston*, 1832, House; charged with having assaulted a member of the House;

Case of *John Nugent*, Senate, 1848; charged with refusing to answer as a witness;

Case of *J. W. Simonton*, House, 1857; same charge;

Case of *J. D. Williamson*, House, 1858; charge, contumacy as a witness;

Case of *John W. Wolcott*, House, 1858; same charge;

Case of *Thaddeus Hyatt*, Senate, 1860; same charge;

Case of *Patrick Woods*, House, 1870; assault on a member;

Cases of *H. J. Ramsdell* and *L. S. White*, Senate, 1871; refusing to testify;

Case of *Joseph B. Stewart*, House, 1873; same charge.

In each of these cases the persons charged were actually taken into custody by the Sergeant-at-Arms of the respective Houses.

That the House of Representatives has the right to arrest and commit for contempt, has been settled by the judgment of this court.

In *Anderson* v. *Dunn* (*supra*), the court said: "The present question is: what is the extent of the punishing power which the deliberative assemblies of the Union may assume and execute, on the principle of self-preservation? Analogy and the nature of the case furnish the answer: the least possible power adequate to the end proposed, which is the power of imprisonment. It may, at first view and from the history of the practice of our legislative bodies, be thought

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to extend to other inflictions. But every other will be found to be mere commutation for confinement, since commitment alone is the alternative, where the individual proves contumacious. And even to the duration of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution; it follows that imprisonment must terminate with that adjournment."

Wickelhausen v. *Willett*, 10 Abb. Pr., 164, was an action brought by the plaintiff against the defendant, who was a sheriff, for the escape of one John D. Williamson, who had been arrested upon execution against his person and was confined within the liberties of the jail.

The defense was, that Williamson had been subpœnaed by the House of Representatives of Congress to appear before said House, or a committee thereof, and give evidence in a matter then pending and under investigation by said House, and within its jurisdiction; that Williamson, being so confined within the jail limits, did not appear in response to said subpœna, and thereupon he was adjudged in contempt of the House, and a warrant duly issued to the Sergeant-at-Arms to bring him forthwith before the House to answer said charge; and the Sergeant-at-Arms did arrest him within the jail liberties, and take him before said House, and while he was thus in charge of the Sergeant-at-Arms, this suit was brought.

Hoffman, *Judge*, reviewed at length the authorities, and among other things said:

"In my judgment, neither branch of Congress has the right to disclaim the power I deem it to possess, and which in this instance the House of Representatives has exercised. It is a power clothed with a trust, and vested for the fulfillment of a trust. * * * * It cannot be renounced without impairing the means of duly executing the office committed to that body and, therefore, may not be relinquished without a breach of duty." * * * "If the views I have taken be correct, the being out of prison was upon a process equivalent to a *habeas corpus*, or in a case provided by law."

See, *Yates* v. *Lansing*, 9 Johns., 417; *Hiss* v. *Bartlett*, 3 Gray, 468; *Johnston* v. *Com.*, 1 Bibb, 598.

The same rule is laid down in all the text books.

1 Kent, 11th ed., 244; Story, Const., secs. 845, 849; Rawle, Const., 254.

It is very forcibly stated in Sergeant, Const. L., 354.

"The grant in the Constitution, of power to punish or expel members, does not abridge this power. That is only a grant of an additional power which might otherwise have been questioned. They are not bound, in the first instance, to define such contempts and ascertain their punishment by legislative Act. The modes in which this offense may be committed are not, in their nature, susceptible of legislative definition. Such power is indisputably necessary to the security and liberty of the public functionaries and to the safety of the people." The same doctrine is held by the English courts.

Murray's Case, 1 Wils., 299.

In *Burdett* v. *Abbott*, 14 East, 1., the subject was exhaustively examined by Lord Ellenborough, *Ch. J.* Abbott brought an action of trespass against Burdett, for arresting and confining him in the Tower of London. The defendant justified on the ground that he was the Speaker of the House of Commons.

See, *Beaumont* v. *Barrett*, 1 Moore (P. C.), 59; *Gosset* v. *Howard*, 10 Ad. & Ell. (N. S.), 447.

II. The decision of the House of Representatives, as to the fact of contempt, is conclusive and cannot be collaterally impeached.

Having jurisdiction, its decision must be final and conclusive unless reviewed by some higher authority on error or appeal. But there is no such higher authority.

In the case of *Anderson* v. *Dunn*, 6 Wheat., 225, the plea did not set out the facts that constituted the contempt. It alleged simply that Anderson had been adjudged guilty of a contempt. This court must have regarded the matter as conclusively settled by the judgment of the House.

In *Ex parte Kearney*, 7 Wheat., 38, this court held that Kearney, who had been committed to jail by the Circuit Court of the District of Columbia, for refusing to answer a question put to him on the trial of a criminal case, could not be discharged on a *habeas corpus*, because the judgment for contempt was final and could not be reversed by this court.

Hurd, on *Habeas Corpus*, 2d ed., 405, says, the decision is conclusive unless absolutely void.

In *Stockdale* v. *Hansard*, 9 Ad. & El., 1, Lord Denman said:

"Where the subject-matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject-matter does fall within the jurisdiction of the House of Commons."

In the case of *Sheriff of Middlesex*, 11 Ad. & El., 273, the warrant did not set out the particulars of the contempt of the House of Commons, but the court held the warrant good. The same principle is held in *Burdett* v. *Abbott* (*supra*), and *Gosset* v. *Howard* (*supra*).

In the case now under consideration, all the defendants except Thompson, who was the Sergeant-at-Arms, were members of the House, and took no part in the proceedings against the plaintiff or in his arrest, except in making their report to the House, and in voting on the same and the resolutions adopted by the House. If they are liable for these votes, then every member of the House, who voted in the same way, is equally liable, and the provision of the Constitution that "For any speech or debate in either House, they shall not be questioned in any other place" is of no avail. (Art. 1, sec. 6.)

In thus casting their votes, they were acting as members of a court of judicature, over a subject of which they had jurisdiction, and therefore, were not liable to a private action.

Randall v. *Brigham*, 7 Wall., 523 (74 U. S., XIX., 285); *Bradley* v. *Fisher*, 13 Wall., 335 (80 U. S., XX., 646).

III. What protection the law gives to officers of the House of Representatives who execute its commands.

This is a case in which the House had jurisdiction, for it is well settled that a person is bound to obey the subpœna of the House and appear before its committees.

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Wickelhausen v. *Willett* (*supra*); *Burnham* v. *Morrissey*, 14 Gray, 226; *Emery's Case*, 107 Mass., 180.

It was a complete protection to him upon the principle determined in *Erskine* v. *Hohnbach*, 14 Wall., 613 (81 U.S., XX., 745); *Savacool* v. *Boughton*, 5 Wend., 171; *Earl* v. *Camp*, 16 Wend., 563; *Chegaray* v. *Jenkins*, 5 N. Y., 376; *Sprague* v. *Birchard*, 1 Wis., 457.

In *Haffin* v. *Mason*, 15 Wall., 671 (82 U. S., XXI., 196), the same doctrine was maintained.

Punishment of an indictable act for contempt does not bar a prosecution for the crime.

Rex v. *Offulston*, 2 Str., 1107; *King* v. *Pierson*, Andrews, 310; *State* v. *Yancy*, Car. L. Repos., 519; *State* v. *Woodfin*, 5 Ired., 199; *State* v. *Williams*, 2 Speer (S. C.), 26.

In *Ex parte Brounsall*, 2 Cowp., 829, Lord Mansfield held that an attorney who had been convicted of stealing a guinea and had been burnt in the hand therefor, should be stricken from the roll of attorneys.

See, *Vertner* v. *Martin*, 10 Sm. & M., 103; *Foster* v. *Com.*, 8 Watts & S., 77; *In re King*, 8 Q. B., 129; *In re Wright*, 1 Exch., 658; *Regina* v. *Martin*, 5 Cox (C. C.), 356; *People* v. *Sterns*, 13 Wend., 341; *Levy* v. *State*, 6 Ind., 281; *Waldo* v. *Wallace*, 12 Ind., 569; *Phillips* v. *People*, 55 Ill., 429; 2 Bishop, Cr. L., 6th ed., sec. 264; *Moore* v. *People*, 14 How., 13.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the District of Columbia.

The plaintiff in error sued the defendants in that court in an action of trespass for false imprisonment, charging them with taking him from his house with force and arms, and detaining him as a prisoner in the common jail of the District for forty-five days, without any reasonable or probable cause, contrary to law, and against his will.

Michael C. Kerr, who was also sued as one of the defendants, died before service of process, and the suit abated as to him.

John G. Thompson pleaded separately: first, the general issue; and, second, a special plea of justification, which will be more fully considered, founded on the fact that in what he did he acted as Sergeant-at-Arms of the House of Representatives of the Congress of the United States, and under its orders.

The other defendants pleaded jointly the general issue, and a plea of justification similar to Thompson's, except that they alleged themselves to have been members of the House of Representatives, and members of a committee of that House, and that what they did was in that capacity, and was warranted by the circumstances, which they fully set out in the plea.

To both these special pleas the plaintiff demurred, and his demurrer being overruled, a judgment was rendered for the defendants. The case, therefore, stands before us as it did in the Supreme Court of the District, on the sufficiency of these special pleas. They are somewhat long, are very full in their statement of the facts which are supposed to justify the imprisonment of the plaintiff, and relying as they do on the privileges of the House of Representatives, they present a question or rather questions, of serious importance for our consideration.

As the plea of Mr. Thompson sets out the facts on which all the defendants rely, with such slight exceptions as will be noticed specifically in regard to the other defendants, we will here give the substance of it. He alleges that the Congress of the United States was in session at Washington during the time of the trespasses with which defendants are charged: That Michael C. Kerr was Speaker of the House of Representatives, George M. Adams was Clerk, and he, the defendant, was Sergeant-at-Arms of that body, duly authorized and required to execute the commands of said House, together with all such process issued by authority thereof as should be directed to him by the Speaker. The plea then states that the House being in session on the 24th day of January, A. D., 1876, adopted the following Preamble and Resolution:

"Whereas, the Government of the United States is a creditor of the firm of Jay Cooke & Co., now in bankruptcy, by order and decree of the District Court of the United States in and for the Eastern District of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of the said house of Jay Cooke & Co., of the public moneys; and whereas, the matter known as the real-estate pool was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia, in which Jay Cooke & Co. had a large and valuable interest; and whereas, Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cooke & Co., has recently made a settlement of the interest of the estate of Jay Cooke & Co. with the associates of said firm of Jay Cooke & Co., to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the Government of the United States; and whereas, the courts are now powerless, by reason of said settlement, to afford adequate redress to said creditors:

Resolved, That a special committee of five members of this House, to be selected by the Speaker, be appointed to inquire into the nature and history of said real-estate pool, and the character of said settlement, with the amount of property involved, in which Jay Cooke & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers, and report to this House."

The plea then alleges the appointment of the other defendants as such committee, with one Platt, who is not sued, and their entry upon the performance of the duties imposed by the resolution.

It is set out that in the progress of this inquiry the plaintiff was duly subpœnaed, and came before them, and being questioned as to the members of the real-estate pool, refused to answer the following question on that subject: "Will you state where each of the five members reside, and will you please state their names?"

The plea then further alleges that "The said Hallet Kilbourn, although ordered and commanded by the said subpœna to bring with him and produce before the said committee certain records, papers and maps relating to said inquiry, still when asked the following

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question by the said committee, 'Mr. Kilbourn, are you now prepared to produce, in obedience to the *subpœna duces tecum*, the records which you have been required by the committee to produce?' which records, papers and maps were pertinent to the question of inquiry, the said Hallet Kilbourn knowingly and wilfully refused to produce said records."

It is then shown that the committee reported the matter to the House, and further reported that "The committee are of opinion and report that it is necessary for the efficient prosecution of the inquiry ordered by the House that the said Hallet Kilbourn should be required to respond to the *subpœna duces tecum* and answer the questions which he has refused to answer; and that there is no sufficient reason why the witness should not obey said *subpœna duces tecum* and answer the questions which he has refused to answer; and that his refusal as aforesaid is in contempt of this House."

Mr. Kilbourn was then, as the plea states, arrested on the Speaker's warrant on a charge of contempt and brought before the House, and still refusing to answer the same questions when propounded to him by the Speaker and to produce the papers demanded of him by the order of the committee, the House passed the following resolution:

[174] "*Resolved*, That Hallet Kilbourn having been heard by the House, pursuant to the order heretofore made requiring him to show cause why he should not answer questions propounded to him by a committee and respond to the *subpœna duces tecum* by obeying the same, and having failed to show sufficient cause why he should not answer said questions and obey said *subpœna duces tecum*, be, and is, therefore, considered in contempt of said House because of said failure.

[175] 1. *Resolved*, That in purging himself of the contempt for which Hallet Kilbourn is now in custody, the said Kilbourn shall be required to state to the House whether he is now willing to appear before the committee of the House to whom he has hitherto declined to obey a certain *subpœna duces tecum*, and to answer certain questions and obey said *subpœna duces tecum*, and answer said questions; and if he answers that he is ready to appear before said committee and obey said *subpœna duces tecum*, and answer said questions, then said witness shall have the privilege to so appear and obey and answer forthwith, or so soon as said committee can be convened, and that in the meantime the witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said *subpœna duces tecum*, and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of said contempt, and that such custody shall continue until the said witness shall communicate to this House through said committee that he is ready to appear before said committee and make such answer and obey said *subpœna duces tecum*; and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia."

The Speaker thereupon issued to the defendant, Thompson, as Sergeant-at-Arms of the House, his writ, with the seal of the House and the Speaker's name duly affixed to it, which writ, after reciting the foregoing resolutions in *hæc verba*, adds: "Now, therefore, you are hereby commanded to execute the same accordingly."

The plea then avers that, under the authority of this writ, the defendant Thompson did arrest said Kilbourn, using no more force than was necessary, and kept him in custody in the common jail until he was released by a writ of *habeas corpus* issued by the Hon. David K. Cartter, *Chief Justice* of the Supreme Court of the District of Columbia, which are the same trespasses complained of, and none other.

The other defendants, after pleading the same matters set out in Thompson's plea, add the following, pertinent to themselves and not to him:

"And these defendants state that they did not, in any manner, assist in the last mentioned arrest and imprisonment of the said Hallett Kilbourn, nor were they in any way concerned in the same, nor did they order or direct the same, save and except by their votes in favor of the last above mentioned resolutions and order commanding the Speaker to issue his warrant for said arrest and imprisonment, and (save and except) by their participation as members in the introduction of and assent to said official acts and proceedings of said House, which these defendants did and performed as members of the said House of Representatives in the due discharge of their duties as members of said House, and not otherwise.

Which are the same several supposed trespasses whereof the said Hallet Kilbourn hath above in his said declaration complained against these defendants, and not other or different, with this, that these defendants do aver that the said Hallett Kilbourn, the now plaintiff, and the said Hallet Kilbourn in the said resolutions, orders and warrants respectively mentioned, was and is one and the same person, and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said Congress of the United States was assembled, and sitting, to wit: at Washington aforesaid, in the county aforesaid, and these defendants were and are members of the House of Representatives, one of the Houses of said Congress, and as such members, in said participation in the action of the House as above set forth, voted in favor of said resolutions and orders as above set forth, and saving and excepting said participation in the action of the House as set forth in the body of this plea, they had no concern or connection in any manner or way with said supposed trespasses complained of against them by the plaintiff; and this these defendants are ready to verify." [178]

The argument before us has assumed a very wide range, and includes the discussion of almost every suggestion that can well be conceived on the subject. The two extremes of the controversy are: the proposition on the part of the plaintiff, that the House of Representatives has no power whatever to punish for a contempt of its authority; and on the part of defendants, that such power undoubtedly exists, and when that body has formally exercised it, it must be presumed that it was rightfully exercised. [181]

This latter proposition assumes the form of expression sometimes used with reference to courts of justice of general jurisdiction: that

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having the power to punish for contempts, the judgment of the House that a person is guilty of such contempt is conclusive everywhere.

Conceding for the sake of the argument that there are cases in which one of the two bodies, that make together the Congress of the United States, may punish for contempt of its authority, or disregard of its orders, it will scarcely be contended by the most ardent advocate of their power in that respect that it is unlimited. [182]

The power of Congress itself, when acting through the concurrence of both branches, is a power dependent solely on the Constitution. Such powers as are not found in that instrument, either by express grant or by fair implication from what is granted, are "reserved to the States respectively, or to the people." Of course, neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments. No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no "person shall be deprived of life, liberty or property, without due process of law," the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An Act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each House to punish its own members. The 3d clause of the 15th section of the first article declares that "Each House may determine the rules of its proceedings, punish its members for disorderly behavior and, with the concurrence of two thirds, expel a member." And in the clause just preceding it is said that they "may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide." These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either House of Congress to punish for contempts.

The advocates of this power have, therefore, resorted to an implication of its existence founded on two principal arguments. These are: 1, [183] its exercise by the House of Commons of England, from which country we, it is said, have derived our system of parliamentary law; and, 2, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them.

That the power to punish for contempt has been exercised by the House of Commons in numerous instances is well known to the general student of history, and is authenticated by the rolls of the Parliament. And there is no question but that this has been upheld by the courts of Westminster Hall. Among the most notable of these latter cases are the judgments of the Court of King's Bench, in the case of *Brass Crosby, Lord Mayor of London*, 3 Wils., 188, decided in the year 1771; the case of *Burdett* v. *Abbott*, 14 East, 1, in 1811, in which the opinion was delivered by Lord Ellenborough, and in the case of *Sheriff of Middlesex*, in 11 Ad. & E., 273, in 1840. Opinion by Lord Denman, *Chief Justice*.

It is important, however, to understand on what principle this power in the House of Commons rests, that we may see whether it is applicable to the two Houses of Congress and, if it be, whether there are limitations to its exercise.

While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power, and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament.

They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the King in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the King, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the [184] House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England.

It is upon this idea that the two Houses of Parliament were each courts of judicature originally, which, though devested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority, that the power rests.

In the case of *Burdett* v. *Abbott*, already referred to as sustaining this power in the Commons, *Mr. Justice* Bailey said, in support of the judgment of the Court of King's Bench: "In an early authority upon that subject, in Lord Coke, 4 Inst., 23, it is expressly laid down that the House of Commons has not only a legislative character and authority, but is also a court of judicature; and there are instances put there in which the power of committing to prison for contempts has been exercised by the House of Commons, and this, too, in cases of libel If, then (said he), the House be a court of judicature, it must, as is in a degree admitted by plaintiff's counsel, have the power of supporting its own dignity as essential to itself; and without

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power of commitment for contempts it could not support its dignity." In the opinion of Lord Ellenborough in the same case, after stating that the separation of the two Houses of Parliament seems to have taken place as early as the 49th of Henry III., about the time of the battle of Evesham, he says the separation was probably effected by a formal Act for that purpose by the King and Parliament. He then adds: "The privileges which have since been enjoyed, and the functions which have been uniformly exercised by each branch of the Legislature, with the knowledge and acquiescence of the other House and of the King, must be presumed to be privileges and functions which then, that is, at the [185] very period of separation, were statutably assigned to each." He then asks, "Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging to every superior court of law, of less dignity undoubtedly than itself?" This power is here distinctly placed on the ground of the judicial character of Parliament, which is compared in that respect with the other courts of superior jurisdiction and is said to be of a dignity higher than they.

In the earlier case of *Crosby, Lord Mayor of London*, De Gray, *Chief Justice*, speaking of the House of Commons, which had committed the Lord Mayor to the Tower of London for having arrested by judicial process one of its messengers, says: "Such an assembly must certainly have such authority, and it is legal because necessary. Lord Coke says they have a judicial power; each member has a judicial seat in the House; he speaks of matters of judicature of the House of Commons." *Mr. Justice* Blackstone, in concurring in the judgment, said: "The House of Commons is a supreme court, and they are judges of their own privileges and contempts, more especially with reference to their own members." *Mr. Justice* Gould also laid stress upon the fact that the "House of Commons may be properly called judges," and cites 4 Coke's Inst., 47, to show that an alien cannot be elected to Parliament, *because such a person can hold no place of judicature.*"

In the celebrated case of *Stockdale* v. *Hansard*, 9 Ad. & Ell., 1, decided in 1838, this doctrine of the omnipotence of the House of Commons in the assertion of its privileges received its first serious check in a court of law. The House of Commons had ordered the printing and publishing of a report of one of its committees, which was done by Hansard, the official printer of the body. This report contained matter on which Stockdale sued Hansard for libel. Hansard pleaded the privilege of the House, under whose orders he acted, and the question on demurrer was: assuming the matter published to be libelous in its character, did the order of the House protect the publication?

Sir John Campbell, Attorney-General, in an [186] exhaustive argument in defense of the prerogative of the House, bases it upon two principal propositions, namely: that the House of Commons is a court of judicature, possessing the same right to punish for contempt that other courts have, and that its powers and privileges rest upon the *lex parliamenti*, the laws and customs of Parliament. These, he says, and cites authorities to show it, are unknown to the judges and lawyers of the common law courts, and rest exclusively in the knowledge and memory of the members of the two Houses. He argues, therefore, that their judgments and orders on matters pertaining to these privileges are conclusive, and cannot be disputed or reviewed by the ordinary courts of judicature.

Lord Denman, in a masterly opinion, concurred in by the other Judges of the King's Bench, ridicules the idea of the existence of a body of laws and customs of Parliament unknown and unknowable to anybody else but the members of the two Houses, and holds with an incontrovertible logic that when the rights of the citizen are at stake in a court of justice, it must, if these privileges are set up to his prejudice, examine for itself into the nature and character of those laws, and decide upon their extent and effect upon the rights of the parties before the court. While admitting, as he does in the subsequent case of *Sheriff of Middlesex* [*supra*], that when a person is committed by the House of Commons for a contempt in regard to a matter of which that House had jurisdiction, no other court can relieve the party from the punishment which it may lawfully inflict, he holds that the question of the jurisdiction of the House is always open to the inquiry of the courts in a case where that question is properly presented.

But perhaps the most satisfactory discussion of this subject, as applicable to the proposition that the two Houses of Congress are invested with the same power of punishing for contempt, and with the same peculiar privileges, and the same power of enforcing them, which belonged by ancient usage to the Houses of the English Parliament, is to be found in some recent decisions of the Privy Council. That body is by its constitution vested with authority to hear and decide appeals from the courts of the Prov- [187] inces and Colonies of the kingdom.

The leading case is that of *Kielley* v. *Carson* and others, 4 Moore (P. C.), 63, decided in 1841. There were present at the hearing, *Lord Chancellor* Lyndhurst, *Lord* Brougham, *Lord* Denman, *Lord* Abinger, *Lord* Cottenham, *Lord* Campbell, *Vice-Chancellor* Shadwell, the *Chief Justice* of the common pleas, *Mr. Justice* Erskine, Dr. Lushington, and *Mr. Baron* Parke, who delivered the opinion, which seems to have received the concurrence of all the eminent Judges named.

Measuring the weight of its authority by the reputation of the Judges who sat in the case and agreed to the opinion, it would be difficult to find one more entitled on that score to be received as conclusive on the points which it decided.

The case was an appeal from the Supreme Court of Judicature of Newfoundland. John Kent, one of the members of the House of Assembly of that island, reported to that body that Kielley, the appellant, had been guilty of a contempt of the privileges of the House in using towards him reproaches, in gross and threatening language, for observations made by Kent in the House; adding, "Your privilege shall not protect you." Keilley was brought before the House and added to his offense by boisterous and violent language, and was finally committed to jail under an order of the House and the warrant of

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the Speaker. The appellant sued Carson, the Speaker, Kent, and other members, and Walsh, the messenger, who pleaded the facts above stated and relied on the authority of the House as sufficient protection. The judgment of the court of Newfoundland was for the defendants, holding the plea good.

This judgment was supported in argument before the Privy Council on the ground that the Legislative Assembly of Newfoundland had the same parliamentary rights and privileges which belonged by usage to the Parliament of England, and that, if this were not so, it was a necessary incident to every body exercising legislative functions to punish for contempt of its authority. The case was twice argued in the Privy Council, on which its previous judgment in the case of *Beaumont* v. *Barrett*, 1 Moore (P.C.), 59, was much urged, in which both those propositions had been asserted in the opinion of *Baron* Parke. Referring to that case as an authority for the proposition that the power to punish for [188] a contempt was incident to every legislative body, the opinion of *Baron* Parke in the later case uses this language: "There is no decision of a court of justice, nor other authority, in favor of the right, except that of the case of *Beaumont* v. *Barrett*, decided by the judicial committee, the members present being *Lord* Brougham, *Mr. Justice* Bosanquet, *Mr. Justice* Erskine, and myself. Their lordships do not consider that case as one by which they ought to be bound in deciding the present question. The opinion of their lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment rested, and, therefore, was, in some degree, extrajudicial; but beside this, it was stated to be founded entirely on the *dictum* of Lord Ellenborough in *Burdett* v. *Abbott*, which *dictum*, we all think, cannot be taken as authority for the abstract proposition that every legislative body has the power of committing for contempt. The observation was made by his lordship with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further. We all, therefore, think that the opinion expressed by myself in *Beaumont* v. *Barrett* ought not to affect our decision in the present case, and, there being no other authority on the subject, we decide according to the principle of the common law, that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the exercise of their functions and duties, but they have not what they erroneously supposed themselves to possess—the same exclusive privileges which the law of England has annexed to the House of Parliament." In another part of the opinion the subject is thus disposed of: "It is said, however, that this power belongs to the House of Commons of England; and this, it is contended, affords us authority for holding that it belongs, as a legal incident by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament be- [189] fore its division, and the House of Lords and Commons since, are invested with many privileges, that of punishment for contempt being one." The opinion also discusses at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and decides against the proposition. But the case before us does not require us to go so far, as we have cited it to show that the powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States, a body which is in no sense a court; which exercises no functions derived from its once having been a part of the highest court of the realm and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members and determining their election. The case, however, which we have just been considering, was followed in the same body by *Fenton* v. *Hampton*, 11 Moore (P.C.), 347, and *Doyle* v. *Falconer*, L. R., 1 P. C., 328, in both of which, on appeals from other Provinces of the Kingdom, the doctrine of the case of *Kielley* v. *Carson*, is fully re-affirmed.

We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or breach of its privileges, can derive no support from the precedents and practices of the two Houses of the English Parliament nor the adjudged cases in which the English courts have upheld these practices. Nor can it be said that, taking what has fallen from the English judges, and especially the later cases on which we have just commented, that much aid is given to the doctrine that this power exists, as one necessary to enable either House of Congress to exercise successfully their function of legislation.

This latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function.

As we have already said, the Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no [190] reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.

So, also, the *penalty* which each House is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.

Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.

The House of Representatives has the sole right to impeach officers of the government,

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and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses and their answer to proper questions, in the same manner and by the use of the same means, that courts of justice can in like cases.

Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.

[191]

This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the President to approve it, by a vote of two thirds of each House of the Legislature.

So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.

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The House of Representatives having the exclusive right to originate bills of revenue, whether by taxation or otherwise; having with the Senate the right to declare war, and to fix the compensation of all officers and servants of the government, and vote the supplies which must pay that compensation; and being also the most numerous body of all those engaged in the exercise of the primary powers of the government, is for these reasons least of all liable to suffer encroachments upon its appropriate domain.

By reason, also, of its popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people, the great source of all power in this country, encroachments by that body on the domain of co-ordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power in any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separate from and independent of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny.

In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial.

The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make, was one that was judicial in its character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it is *not* legislative.

The Preamble to the Resolution recites that the Government of the United States is a cred-

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itor of Jay Cooke & Co., then in bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania.

If the United States is a creditor of any citizen, or of anyone else on whom process can be served, the usual, the only legal mode of enforcing payment of the debt is by a resort to a court of justice. For this purpose, among others, Congress has created Courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts.

The District Court for the Eastern District of Pennsylvania is one of them, and, according to the recital of the Preamble, had taken jurisdiction of the subject-matter of Jay Cooke & Co.'s indebtedness to the United States, and had the whole subject before it for action at the time the proceeding in Congress was initiated. That this indebtedness resulted, as the preamble states, from the improvidence of a Secretary of the Navy does not change the nature of the suit in the court nor vary the remedies by which the debt is to be recovered. If, indeed, any purpose had been avowed to impeach the Secretary, the whole aspect of the case would have been changed. But no such purpose is disclosed. None can be inferred from this preamble, and the characterization of the conduct of the Secretary by the term improvident, and the absence of any words implying suspicion of criminality repel the idea of such purpose, for the Secretary could only be impeached for "high crimes and misdemeanors."

194] The preamble then refers to "the real-estate pool," in which it is said Jay Cooke & Co. had a large interest, as something well known and understood, and which had been the subject of a partial investigation by the previous Congress, and alleges that the trustee in bankruptcy of Jay Cooke & Co. had made a settlement of the interest of Jay Cooke & Co. with the associates of the firm of Jay Cooke & Co., to the disadvantage and loss of their numerous creditors, including the Government of the United States, by reason of which the courts are powerless to afford adequate redress to said creditors.

Several very pertinent inquiries suggest themselves as arising out of this short preamble:

How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction? Again; what inadequacy of power existed in the court, or, as the preamble assumes, in all courts, to give redress which could lawfully be supplied by an investigation by a committee of one House of Congress, or by any Act or Resolution of Congress on the subject? The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative. If the settlement to which the preamble refers as the principal reason why the courts are rendered powerless, was obtained by fraud, or was without authority, or for any conceivable reason could be set aside or avoided, it should be done by some appropriate proceeding in the court which had the whole matter before it, and which had all the power in that case proper to be intrusted to any body, and not by Congress or by any power to be conferred on a committee of one of the two Houses.

The resolution adopted as a sequence of this preamble contains no hint of any intention of final action by Congress on the subject. In all the argument of the case, no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors [195] of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By fruitless we mean that it could result in no valid legislation on the subject to which the inquiry referred.

What was this committee charged to do?

To inquire into the nature and history of the real estate pool. How indefinite! What was the real estate pool? Is it charged with any crime or offense? If so, the courts alone can punish the members of it. Is it charged with a fraud against the government? Here, again, the courts, and they alone, can afford a remedy. Was it a corporation whose powers Congress could repeal? There is no suggestion of the kind. The word pool, in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic, and the *gravamen* of the whole proceeding is that a debtor of the United States may be found to have an interest in the pool. Can the rights of the pool, or of its members, and the rights of the debtor, and of the creditor of the debtor, be determined by the report of a committee or by an Act of Congress? If they cannot, what authority has the House to enter upon this investigation into the private affairs of individuals who hold no office under the government.

The Court of Exchequer of England was originally organized solely to entertain suits of the King against the debtors of the Crown. But after a while, when the other courts of Westminster Hall became overcrowded with business, and it became desirable to open the Court of Exchequer to the general administration of justice, a party was allowed to bring any common law action in that court, on an allegation that the plaintiff was debtor to the King, and the recovery in the action would enable him to respond to the King's debt. After a while the court refused to allow this allegation to be controverted, and so, by this fiction, the court came [196] from a very limited to be one of general jurisdiction. Such an enlargement of jurisdiction would not now be tolerated in England, and it is hoped not in this country of written constitutions and laws; but it looks very like it when, upon the allegation that the United States is a creditor of a man who has an interest in some other man's business, the affairs of the latter can be subjected to the unlimited scrutiny or investigation of a congressional committee.

We are of opinion, for these reasons, that the Resolution of the House of Representatives au-

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thorizing the investigation, was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Mr. Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the Speaker, under which Mr. Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.

At this point of the inquiry we are met by the case of *Anderson* v. *Dunn*, decided by this court in 1821, reported in 6 Wheaton, 204, and in many respects analogous to the one now under consideration. In that case, Anderson sued Dunn for false imprisonment, and Dunn justified under a warrant of the House of Representatives directed to him as Sergeant-at-Arms of that body. The warrant recited that Anderson had been found by the House "guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same." The warrant directed the Sergeant-at-Arms to bring him before the House, when, by its order, he was reprimanded by the Speaker. Neither the warrant nor the plea described nor gave any clue to the nature of the act which was held by the House to be a contempt. Nor can it be clearly ascertained from the report of the case what it was, though a slight inference may be derived from something in one of the arguments of counsel, that it was an attempt to bribe a member.

But, however that may be, the defense of the Sergeant-at-Arms rested on the broad ground that the House, having found the plaintiff guilty [197] of a contempt, and the Speaker, under the order of the House, having issued a warrant for his arrest, that alone was sufficient authority for defendant to take him into custody, and this court held the plea good.

It may be said that since the order of the House and the warrant of the Speaker, and the plea of the Seargent-at-Arms, do not disclose the ground on which the plaintiff was held guilty of a contempt, but state the finding of the House in general terms as a judgment of guilty, and as the court placed its decision on the ground that such a judgment was conclusive in the action against the officer who executed the warrant, it is no precedent for a case where the plea establishes, as we have shown it does in this case by its recital of the facts, that the House has exceeded its authority.

This is in fact a substantial difference. But the court in its reasoning goes beyond this, and though the grounds of the decision are not very clearly stated, we take it to be this: that there is in some cases a power in each House of Congress to punish for contempt; that this power is analogous to that exercised by courts of justice, and that it being the well established doctrine that when it appears that a prisoner is held under order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment. That this is the general rule, though somewhat modified since that case was decided, as regards the relations of one court to another, must be conceded.

But we do not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is, to the doctrine that *the jurisdiction* of a court or [198] other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See, *Williamson* v. *Berry*, 8 How., 495; *Thompson* v. *Whitman*, 18 Wall., 457 [85 U. S., XXI., 897]; *Knowles* v. *Gas-Light & Coke Co.*, 19 Wall., 58 [86 U. S., XXII., 70]; *Pennoyer* v. *Neff*, 95 U. S., 714 [XXIV., 565].

The case of *Anderson* v. *Dunn*, was decided before the case of *Stockdale* v. *Hansard*, and the more recent cases in the Privy Council to which we have referred. It was decided as a case of the first impression in this court, and undoubtedly under pressure of the strong rulings of the English courts, in favor of the privileges of the two Houses of Parliament. Such is not the doctrine, however, of the English courts to-day. In the case of *Stockdale* v. *Hansard*, 9 Ad. & El., 1, *Lord* Denman says: "The House (of Commons) is not a court of law at all in the sense in which that term can alone be properly applied here. Neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power; power of inquiry and accusation it has, but it decides nothing judicially, except when it is itself a party, in cases of contempt. * * * Considered merely as resolutions or acts, I have yet to learn that this court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, when the rights of third persons in litigation before us depend upon it." Again, he says: "Let me suppose, by way of illustration, an extreme case: the House of Commons resolves that anyone wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. In such a case the plaintiff's counsel would insist on the distinction between privilege and power, and no lawyer can seriously doubt that it exists; but the argument confounds them and forbids us to inquire into any particular case, whether it ranges under the one or the other. I can find no principle which sustains this."

The case of *Kielley* v. *Carson*, in 4 Moore (P.C.), 63, from which we have before quoted so large- [199] ly, held that the order of the assembly, finding the plaintiff guilty of a contempt, was no

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defense to the action for imprisonment. And it is to be observed that the case of *Anderson* v. *Dunn*, was cited there in argument.

But we have found no better expression of the true principle on this subject than the language of *Mr. Justice* Hoar, in the Supreme Court of Massachusetts, reported in 14 Gray, 226, in the case of *Burnham* v. *Morrissey*. That was a case in which the plaintiff was imprisoned under an order of the House of Representatives of the Massachusetts Legislature for refusing to answer certain questions as a witness, and to produce certain books and papers. The opinion, or statement rather, was concurred in by all the court, including the venerable *Chief Justice* Shaw:

"The House of Representatives (says the court) is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the Legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. The House of Representatives has the power under the Constitution to imprison for contempt, and the power is limited to the cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from these constitutional functions and to the proper performance of which it is essential."

In this statement of the law, and in the principles there laid down, we fully concur.

We must, therefore, hold, notwithstanding what is said in the case of *Anderson* v. *Dunn*, [200] that the Resolution of the House of Representatives finding Mr. Kilbourn guilty of contempt, and the warrant of its Speaker for his commitment to prison, are not conclusive in this case, and in fact, are no justification, because, as the whole plea shows, the House was without authority in the matter.

It remains to consider the matter special to the other defendants set out in their plea, which claims the protection due to their character as members of the House of Representatives. In support of this defense they allege that they did not in any manner assist in the arrest of Kilbourn or his imprisonment, nor did they order or direct the same, except by their votes and by their participation as members in the introduction of and assent to the official acts and proceedings of the House, which they did and performed as members of the House in the due discharge of their duties, and not otherwise.

As these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him, they can only be held liable on the charge made against them as persons who had ordered or directed in the matter, so as to become responsible for the acts which they directed.

The general doctrine that the person who procures the arrest of another by judicial process, by instituting and conducting the proceedings, is liable to an action for false imprisonment, where he acts without probable cause, is not to be controverted. Nor can it be denied that he who assumes the authority to order the imprisonment of another is responsible for the acts of the person to whom such order is given, when the arrest is without justification. The plea of these defendants shows that it was they who initiated the proceedings under which plaintiff was arrested. It was they who reported to the House his refusal to answer the questions which they had put to him, and to produce the books and papers which they had demanded of him. They expressed the opinion in that report that plaintiff was guilty of a contempt of the authority of the House in so acting. It is a fair inference from this plea, that they were the active parties in setting on foot the proceeding by which he was adjudged guilty of a contempt, and in procuring the passage of that Resolution.

If they had done this in any ordinary tribunal, without probable cause, they would have [201] been liable for the action which they had thus promoted.

The House of Representatives is *not* an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that the Senators and Representatives "Shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place."

Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member, speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the House, of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet, if a report, or a resolution, or a vote, is not speech or debate, of what value is the constitutional protection?

We may, perhaps, find some aid in ascertaining the meaning of this provision, if we can find out its source and, fortunately, in this there is no difficulty. For while the framers of the Constitution did not adopt the *lex et consuetudo* of the English Parliament as a whole, they did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress. Some of these we have already referred to, as the right to make rules of procedure, to determine the election and qualification of its members, to preserve order, etc. In the sentence we have just cited, another part of the privileges o

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Parliament are made privileges of Congress. The freedom from arrest and freedom of speech in the two Houses of Parliament were long subjects of contest between the Tudor and Stuart [202] Kings and the House of Commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty, many of these questions were settled by a bill of rights, formally declared by the Parliament and assented to by the Crown. (1 William & Mary, 2 Statute, ch. 2.) One of these declarations is "that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

In the case of *Stockdale* v. *Hansard*, 9 Ad. & Ell., 1, Lord Denman, speaking on this subject, says:

"The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member, to the prejudice of any other person or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibilities on the publisher. So if the Speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles' warrant for levying ship-money could justify his revenue officer."

Taking this to be a sound statement of the legal effect of the bill of rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.

Many of the colonies, which afterwards became States in our Union, had similar provisions in their charters or in bills of rights, which were part of their fundamental laws, and the general idea in all of them, however expressed, must have been the same, and must have been [203] in the minds of the members of the Constitutional Convention. In the Constitution of the State of Massachusetts of 1780, adopted during the war of the Revolution, the 21st article of the Bill of Rights embodies the principle in the following language:

"The freedom of deliberation, speech and debate in either House of the Legislature is so essential to the rights of the People, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."

This article received a construction as early as 1808, in the Supreme Court of that State, in the case of *Coffin* v. *Coffin*, 4 Mass., 1, in which *Chief Justice* Parsons delivered the opinion. The case was an action for slander, the offensive language being used in a conversation in the House of Representatives of the Massachusetts Legislature. The words were not delivered in the course of a regular address or speech, though on the floor of the House while in session, but were used in a conversation between three of the members, when neither of them were addressing the chair. It had relation, however, to a matter which had a few moments before been under discussion. The court, speaking of this article of the Bill of Rights, the protection of which had been invoked in the plea, said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the right of the People; by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore, think (said the *Chief Justice*) that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against those rules. I do not con- [204] fine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the Representatives' Chamber."

The report states that the other Judges, namely: Sedgwick, Sewall, Thacher and Parker, concurred in the opinion.

This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight. We have been unable to find any decision of a federal court on this clause of the section 6 of Article I., though the previous clause of the same section concerning exemption from arrest has been often construed.

Mr. Justice Story, section 866 of his Commentaries on the Constitution, says: "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also (he says) is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right."

It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to

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things generally done in a session of the House by one of its members in relation to the business before it.

It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the Nation, or to follow the example [205] of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the House is a good defense, *and the judgment of the court overruling the demurrer to it and giving judgment for those defendants is affirmed.* As to Thompson, *the judgment is reversed and the case remanded for further proceedings.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

Cited—106 U. S., 220; 16 N. W. Rep., 739; 32 Hun, 572, 596; 66 How. Pr., 494, 499.

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[238] *Ex parte* IN THE MATTER OF JOHN H. BURTIS AND JOHN M. GRAFF, Petitioners.

(See S. C., 13 Otto, 228.)

Mandamus, *when issued.*

A writ of *mandamus* may be used to compel an inferior tribunal to act on a matter within its jurisdiction but not to control its discretion while acting nor reverse its decisions when made.

[No. 5 Orig.]

Argued Jan. 24, 1881. Decided Feb. 28, 1881.

APPLICATION for a *mandamus.*

The case is fully stated by the court.

Mr. **Andrew J. Todd,** for petitioners.

No counsel appeared for respondent.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application for a *mandamus* requiring the District Judge for the Eastern District of New York to compel one Eliza M. Shepherd to obey the command of a *subpœna duces tecum,* and produce before a special examiner certain iron patterns of an old fire-place heater, that testimony might be taken respecting them, to be certified and used on the hearing of an equity cause pending in the Circuit Court for the Southern District of New York. From the application it appears that the Judge has already acted on the identical showing made to us, and for reasons assigned in writing denied a motion for an attachment against the person named, for refusing to obey the subpœna.

A writ of *mandamus* may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, *Ex parte Railroad Co.,* 101 U. S., 720 [XXV., 875], or to reverse its decisions when made. *Ex parte Flippin,* 94 U. S., 348 [XXIV., 194]. Both these rules are elementary and are fatal to this application. The District Judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism, but we cannot, by *mandamus,* compel him to undo what he has thus done in the exercise of his legitimate jurisdiction. He was asked to punish a person for contempt in disobeying the process of the court. He decided not to do so. This action of his is beyond the reach of a writ of *mandamus.*

The application is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM WEIGHTMAN ET AL., *Appts.,* [256]
v.
WILLIAM C. CLARK ET AL.

(See S. C., 13 Otto, 256-261.)

Illinois Constitution—state decisions—congressional township.

1. Article 9, section 5, of the Constitution of Illinois, is a limitation on the power of the Legislature to authorize taxation, by public corporations or the political subdivisions of the State.
2. This court treats the construction which the highest court of a State has given to a state statute as part of the statute itself, except when, by giving such construction a retroactive effect, it will invalidate contracts lawfully made.
3. A congressional township in Illinois is a public school corporation, and in the absence of legislative power it cannot, under the State Constitution, tax the people to build railroads or issue bonds for that purpose.

[No. 194.]

Argued Jan. 11, 1881. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Messrs. R. J. C. Walker and **Henry Flanders,** for appellants.

Mr **John I. Rinaker,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court: [257]

By the Constitution of Illinois, adopted in 1848, counties were recognized as existing political subdivisions of the State, and the General Assembly was authorized to provide by a general law for a township organization, under which any county might come, whenever a majority of the voters should, at any general election, so determine. If a county did adopt a township organization, the management of its fiscal affairs by the county court might be dispensed with, and the business of the county transacted in such manner as the General Assembly should provide. Art. VII. sec. 6. Under the authority of this provision of the Constitution, an Act was passed by the General Assembly authorizing such an organization, by which townships could be established and made bodies corporate, with certain defined governmental powers. Gross, Stat. 1869, p. 741.

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By another statute each congressional township in the State was "established a township for school purposes." (*Ib.*, p. 691.) The business of such a township was to be done by three trustees, to be elected from time to time by the legal voters of the township, and who were made "a body politic and corporate, by the name and style of 'trustees of schools of township ———, range ———,' according to the number." The powers of these trustees related exclusively to the business of the public schools in the township. They had authority to lay off the township into school districts and apportion the school funds, and were charged with certain other duties connected with school affairs and school lands within their jurisdiction. They had no power to levy taxes. That was to be done by the directors of the several school districts which should be created.

Article IX., section 5, of the Constitution of 1848 is as follows:

"The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law." [258]

The Illinois Farmers' Railroad Company was incorporated February 28, 1867, and by an amendment to its charter, passed April 15, 1869, the following provisions were made:

"§ 2. It shall be lawful for the corporate authorities of the towns, townships, cities and counties through which said road shall pass, to take stock in the said company; and shall also be empowered to make assessments, levy taxes, and collect the same in the manner in which the said several towns, townships, cities and counties assess and collect taxes, for the purpose of paying the said assessments on the subscriptions to the said stock or the interest accruing thereon, and the said towns, townships, cities and counties may issue bonds, bearing interest, at any point they may designate, either within or without the State of Illinois, at a rate not exceeding ten per cent per annum, payable annually or semi-annually, as they may elect; *Provided*, That the said townships, cities or towns shall not subscribe to the stock of the said company without submitting the said proposed subscription to a vote of the legal voters of their respective towns, townships or cities, thirty days' notice of which shall be given, elections held and returns made as provided by the general election laws of this State; *And provided further*, That no such bonds shall issue, nor shall any interest be payable thereon or accrue, until said road is completed through the said town, township, city or county; *And provided further*, That the subscriptions on the part of the said counties shall not be for a sum exceeding two thousand dollars per mile of the line of the said road in the said counties.

§ 3. In counties not under township organization it shall be lawful for the trustees of schools to make subscriptions for their respective townships, and issue bonds as provided in the preceding section; and for the purpose of paying the said subscriptions or bonds, or the interest thereon, shall levy a tax, not exceeding the rate of one per cent per annum, upon the taxable property of their respective townships, and shall, through their treasurer, certify the said assessment to the clerk of the county court of their respective counties, and it shall be the duty of the said clerk of the county court to carry out the tax so assessed upon the collector's book; and the amount so raised by taxation shall remain in the hands of the treasurer of the proper county, and shall be employed by him in paying, first, the interest due on the said bonds, and then the principal, if any funds shall remain in his hands, and for no other purpose." [259]

The County of Morgan, through which the road of this company passed, was not under township organization, and on the first of February, 1870, at an election called, the voters of congressional township No. 14 N., of range 9 W. of the third principal meridian, within that county, voted to subscribe to the stock of the company in accordance with the provisions of section 3 of the amended charter. Upon the authority of this vote the trustees of schools of the township made the subscription and issued thirty-two bonds of one thousand dollars each, bearing date October 1, 1870, to make the required payment. These bonds were afterwards registered with the auditor of public accounts, and, upon his certificate to the clerk of the County Court of Morgan County, taxes were levied on the taxable property in the township to meet the interest as it fell due. In this way the interest for the years 1871, 1872, 1873 and 1874 was paid, but in 1875 the tax payers of the township commenced this suit in a state court to enjoin any further taxation to meet the bonds, on the ground that there was no authority in law either for the subscription or the issue of the bonds. That suit was transferred by the bondholders from the state court to the Circuit Court of the United States for the Southern District of Illinois, where, on final hearing, the prayer of the tax payers, complainants, was granted. To reverse that decree this appeal was taken.

It is clear that Art. IX., sec. 5, of the Constitution is a limitation on the power of the Legislature to authorize taxation by public corporations or the political subdivisions of the State. The Supreme Court of the State has uniformly so decided. *Johnson* v. *Campbell*, 49 Ill., 316; *Howard* v. *St. Clair Drain Co.*, 51 Ill., 130; *Madison Co.* v. *People*, 58 Ill., 456. The same court also decided, in *Trustees, etc.*, v. *People*, 63 Ill., 299; *People* v. *Dupuyt*, 71 Ill., 651; and *People* v. *Trustees of Schools*, 78 Ill., 136, that statutes substantially like the one now under consideration were unconstitutional and, consequently, void, because the tax required was not for a corporate purpose. It is conceded that if these decisions are to be followed the judgment below was right.

The first of these cases was decided at the January Term, 1872, and the court then took occasion to say it was the first instance in which the right of the trustees of schools to embark in railroad enterprises had been brought to their attention. The law then under consideration, like the one here, was not passed until 1869, and we infer from this and other circumstances, that such legislation had not been common in [260]

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the State before that time. The decisions since on the same question have all been one way, and this of itself would make it highly improper for us to depart from them unless they were clearly wrong. As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which in our opinion were lawfully made, that we disregard them. Here, however, we find nothing of the kind. Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain kind of tax is within or without this limitation, but we think it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created.) Such we understand to be the effect of the Illinois decisions which are collected and commented on in *Hackett* v. *Ottawa*, 99 U. S., 86 [XXV., 363]. A congressional township is one of the principal subdivisions which Congress has provided for in the survey of the public lands of the United States for the purposes of entry and sale. It is not necessarily a political subdivision of a State or of a county. When Illinois was admitted into the Union, section numbered sixteen in every surveyed township, or its equivalent, if the section had before that time been sold or otherwise disposed of, was granted the State "For the use of the inhabitants of such township, for the use of schools." 3 Stat. at L., 430, ch. 67, sec. 6. It was eminently proper, therefore, that the State should make these donations the points around which the public school system should be organized. Hence the congressional or original surveyed townships were made public corporations for that purpose, and apparently for that alone. Taxation for school purposes only would be germane to such corporations, and no one would or could reasonably suppose that they were created for managing the general [261] affairs of a political subdivision of the State. As was very properly said in *People* v. *Trustees of Schools* [*supra*], "Their creation is purely to aid in the great scheme of accomplishing universal education." They are pre-eminently public school corporations, and in the absence of legislative power under the Constitution, can no more tax the people to build railroads than an ordinary school district or an incorporated academy can use its funds in that way. A railroad may help the people in a school district, but it can hardly be said that the construction of a railroad is a school purpose. The existence of railroads may and undoubtedly will make schools more necessary, and school property more valuable, but the construction of railroads is not necessary either to the establishment or maintenance of schools. Railroads are the effect rather than the cause of schools.

Congressional townships under the name of the "trustees of schools" were incorporated for "school purposes" only. So the Act of incorporation in terms declares. Taxation, by the corporate authorities, therefore, on persons and property within the jurisdiction of such a township, to build railroads, is not taxation for a corporate purpose, and the decree below, which followed the decisions of the state court, was consequently right.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 6; 108 U. S., 121.

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[301]

HENRY MOYER ET AL., Impleaded with CLINTON ELDREDGE, *Plffs. in Err.*,

v.

JAMES E. DEWEY ET AL.

(See S. C., 13 Otto, 301-304.)

Discharge in bankruptcy—right of action for fraudulent conveyance.

1. The effect of a discharge in bankruptcy is personal to the bankrupt, and does not avail to release others.
2. The right to bring an action for property fraudulently conveyed by the bankrupt is vested in his assignee alone, and his failure to sue within the two years allowed by the bankrupt law does not transfer this right of action to a creditor of the bankrupt.

[No. 191.]

Argued Jan. 11, 12, 1881. Decided Feb. 28, 1881.

IN ERROR to the Court of Appeals of the State of New York.

The case is fully stated by the court

Messrs. Matthew Hale and **Samuel Hand**, for plaintiffs in error.

Mr. **James E. Dewey**, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Court of Appeals of New York.

The complaint filed by defendants in error in the Supreme Court of the State is in the nature of a bill in chancery against the plaintiffs in error and Clinton Eldredge. It charges that the complainants have severally recovered judgments in the proper courts against said Eldridge, on which executions have been issued and returned *nulla bona*. The complaint then charges, with details of the transaction, that the defendants held certain real estate, the title of which was conveyed to them by Eldridge, without consideration and with intent to defraud his creditors. The defendants answer separately and deny the fraud. They also attempt to protect themselves under the discharge of Eldredge in bankruptcy, and as the only question cognizable in this court turns upon this part of the defense, which is more fully set up in the answer of Betsey Moyer than in that of Henry, so much of the answer as refers to this matter is here given *verbatim:*

"And the said defendant, upon her information and belief, alleges that on or about the 17th day of August, 1868, at Buffalo, in the State of New York, the United States District Court held in and for the Northern District of the State of New York duly made an order and a decree discharging the defendant Clinton Eldredge of and from all his debts, of all of which proceedings in [302] the said court in bankruptcy for such discharge the said plaintiffs and their said assignors, and each of them, had due notice; that the pretended

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indebtedness, if any such existed or ever did accrue, accrued prior to the filing of the petition of the said Clinton Eldredge for his discharge from such debts in the said United States District Court, and prior to the granting of such discharge, and that the said indebtedness and the said several claims, if any such exist or ever existed, were such as were provable against the estate of the defendant Clinton Eldredge in the proceedings in which said discharge was granted, and were not, nor was any part thereof, created in consequence of any defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, and he is, therefore, discharged therefrom, and from all liability thereon, and the said plaintiffs are precluded and debarred from enforcing or attempting to enforce the same."

It will be observed that nothing is here said of an assignee in bankruptcy, nor of the right of the assignee, if one existed, to the property conveyed by Eldredge to the defendants in fraud of his creditors. The obvious purpose of this plea is to show that Eldredge's debts to plaintiffs were discharged, and that they could not, therefore, maintain this suit on such indebtedness. Nor does it appear in any part of the record that the assignee's rights were considered by either plaintiffs or defendants, nor was he made a party to the suit.

The case was sent, under the practice of the New York courts, to a referee, and on his report a judgment was rendered in favor of the complainants, which was affirmed in the Court of Appeals. With the general question of fraud in the matter this court can have nothing to do. It appears by the report of the referee that the transaction was fraudulent as charged. It also appears that, although the judgments against Eldredge set up as the foundation of this suit were founded on debts existing prior to his discharge in bankruptcy, these judgments were confessed by him after that discharge, and that, though a defendant in this suit, he, by failing to answer, waives the benefit of the discharge. Under these circumstances, we concur with the opinion of the Court of Appeals, that so far as the discharge itself is concerned, its only effect [303] is personal to him, and does not avail to release the defendants in this suit from liability for the fraud committed by them.

But we have decided at this Term, in the case of *Trimble* v. *Woodhead* [*ante*, 290], a case very similar in some of its aspects to this, that the right to bring such an action as this—the right to the property so fraudulently conveyed—is vested in the assignee alone, and that his failure to sue within the two years allowed by the bankrupt law does not transfer this right of property or right of action to a creditor of the bankrupt.

If, therefore, in the present case it had been made to appear by the record properly before the Court of Appeals, that an assignee had been appointed, and he had properly qualified and accepted such appointment, we do not see how complainants could have recovered judgment for the value of the property.

The Court of Appeals of New York take the ground, in their opinion, distinctly, that neither the appointment of an assignee in bankruptcy, nor the existence of any rights in such assignee, nor any defense having reference to such rights, is set up in the answer. And in this opinion we concur.

When the case went to the referee the defendants offered certified transcripts of the proceedings in the District Court, which showed the appointment of the assignee, the assignment to him made by the register, and the discharge of Eldredge. The plaintiffs objected to the admission of these papers in evidence, on the ground that they were not set up in the answer, either according to the statute or in pursuance of the common law rule.

The referee, while he admitted the papers in evidence, did not, among his finding of facts, which were thirty-four in number, find that the assignee had been appointed, or an act of appointment made by the register. He did, however, find that Eldredge had been duly discharged of his debts. It is probable that he received the transcript objected to as evidence of the validity of Eldredge's discharge, but not as evidence of the assignment, which was not set out in the pleading.

The question whether the assignment, and the rights of the assignee under it, were so set up in the answer as to admit the evidence of them, or whether, on the other hand, the defendants relying, as they seem to have done, solely on the principle that Eldredge's discharge inured to the benefit of the defendants, can now avail themselves of the transcripts, is one de- [304] pendent very largely on the practice of the courts of the State. The Court of Appeals rests its decision on the ground that the pleading does not set out or rely on the assignment or on the rights vested by it in the assignee, and it says very justly that if any such issue had been made, the plaintiffs might have had a sufficient reply, which they were not called on to produce as the pleadings stand.

As we concur with that court in holding that the existence of an assignee, or of any right of such assignee to the property or the claims asserted in this suit, is not raised by this record, its judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

UNITED STATES, *ex rel.* REBECCA W. WOLFF, *Plff. in Err.*, [358]

v.

MAYOR AND ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

(See S. C., 13 Otto, 358-369.)

Powers of municipal corporation—impairing contracts—constitutional provision—void legislation—Louisiana Act—case distinguished.

1. A Legislature may, at any time, restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, provided its action in that respect shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement.

2. Legislation producing this latter result directly by operating upon those means, is prohibited by the Constitution, and must be disregarded.

NOTE.—Mandamus *to compel city, town or county to levy taxes to pay bonds or interest on bonds.* See *note* to The Mayor v. U. S., 76 U. S., XIX., 704.

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3. The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals.

4. The courts treating as void the legislation abrogating or restricting the power of taxation delegated to a municipality, upon the faith of which contracts were made with it, and upon the continuance of which alone they can be enforced, can proceed and by *mandamus* compel, at the instance of parties interested, the exercise of that power, as if no such legislation had ever been attempted.

5. The Louisiana Act of Mar. 6, 1876, is invalid so far as it limits the power which the City of New Orleans possessed, when the bonds were issued upon which the judgment in this action was recovered, to levy a tax for their payment.

Meriwether v. Garrett, *ante*, distinguished.

[No. 206.]

Submitted Jan. 26, 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **Geo. S. Lacey** and *A. Pitot*, for plaintiff in error.

Messrs. **B. F. Jonas,** *E. H. McCaleb* and **Henry C. Miller,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

In March, 1876, the relator, Rebecca W. Wolff, recovered a judgment in the Circuit Court of the United States for the District of Louisiana against the City of New Orleans, for the sum of $13,000. Execution was issued upon it and returned unsatisfied. She thereupon caused the judgment to be registered, under the Act of the Legislature of the State of 1870, known as Act No. 5, of the extra session of that year, to the provisions of which we shall hereafter refer; and then called upon the Mayor and Administrators of the City to pay it out of the contingent fund of the corporation, or, if it could not be paid in that way, to levy a special tax for its payment. The authorities having failed to comply with this request, she applied for a *mandamus* to compel them to pay it out of that fund or to levy a tax for that purpose, setting forth in her petition the recovery of the judgment, the issue of execution thereon, its return unsatisfied, and the refusal of the city authorities, as stated. An alternative writ was accordingly issued.

To this writ the city authorities appeared, and filed an answer to the petition, in which they admitted the recovery of the judgment, the issue of the execution, and its return unsatisfied, and set up that the judgment was recovered on bonds of the city issued to the New Orleans, Jackson and Great Northern Railroad Company, under the Act of the Legislature of the State approved on the 15th of March, 1854; that no tax for the payment of the principal of those bonds was directed to be levied by that Act or any other Act of the State; that there was no contingent fund of the city out of which the judgment could be paid; and that there were no moneys to the credit of the fund for current expenses, not otherwise appropriated; and that for these reasons they had not budgeted the judgment nor levied a tax for its payment and could not levy a special tax for that purpose. In an amended answer, they further set up that at the time the bonds, upon which the judgment was recovered, were issued, a general statute of the State prohibited municipal corporations from incurring any debt or liability unless in the ordinance creating the same, full provision was made for the payment of the principal and interest; and that a special statute prescribing the form of the ordinance by which a particular debt could be created, declared that such ordinance should be submitted to the legal voters of the corporation, and that the assent of the majority of them should be a condition of its validity; that the ordinance thus submitted providing for the issue of the bonds, contained no provision for levying a tax to pay the principal of them, but contained another provision deemed ample for that purpose; and that, therefore, it was the evident intention of the Legislature that the principal debt should be thus paid and not by means of taxation.

[359]

The relator demurred to the return of the respondents, but it would seem that when the demurrer was called, the case was submitted upon the pleadings and certain proofs which had been filed. The court decreed that the city authorities, exercising the discretion vested in them according to section 3 of Act No. 5, of the extra session of 1870, should appropriate, from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum of money to pay the judgment, but that if no appropriation be made by the common council of the city, the judgment should be paid according to its priority of filing and registry in the office of the controller, from the first money in the next annual estimate set apart for that purpose. The decree was accompanied by a provision that nothing therein should require the common council to assess or levy any tax upon the city for the payment of the judgment, until the Legislature of the State should authorize the same, thus assuming that existing legislation did not permit any such tax. To reverse this decree, the relator has brought the case to this court.

[360]

The Act which authorized the issue of the bonds, upon which the relator recovered judgment, provided that the railroad company should issue to the city certificates of stock equal in amount to the bonds received, and declared that the stock should remain "forever pledged for the redemption of said bonds." It made no other provision for the ultimate payment of the principal, but provided that a special tax should be levied each year to pay the annual interest. It is contended that only to the stock thus pledged and the income from it were the bondholders to look for the payment of the principal. The same position was urged in *U. S.* v. *New Orleans*, on the application by the relator in that case for a *mandamus* to compel the city authorities to levy a tax to pay judgments recovered upon similar bonds, and was adjudged to be untenable. (98 U. S., 381 [XXV., 225].) The court held that the indebtedness of the city was conclusively established by the judgments recovered against it, and that their payment was not restricted to any species of property or revenues, or subject to any conditions. If there were any limitations upon the means by which payment of the bonds was to be had, they should have been insisted upon when the suits were pending, and have been continued in the judgments. The fact, that no such limitations were there found, was conclusive that none existed.

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The court also held that if the question were an open one its conclusion would be the same; that the declaration of the Act, that the stock which the city was to receive from the railroad company should remain "forever pledged for the redemption of said bonds," only created a statutory pledge by way of collateral security for their payment, and did not release the city from its primary liabilty; and, that the bondholder was not bound to look to that security but could proceed directly against the city without regard to it.

The court further held that the statutes of the State restraining municipal corporations from [361] creating any indebtedness without providing at the same time for the payment of the principal and interest, were not limitations upon the power of the Legislature to authorize the creation of debts by such corporations upon other conditions; and though as a general rule it was deemed expedient to prohibit cities from incurring debts on their own motion, without making provision for their payment, it did not follow that the Legislature might not authorize the incurring of a particular obligation without such provision; and, in the instance mentioned, the statute prescribed the details of the ordinance to be passed by the city in execution of the authority conferred.

The views thus expressed dispose of the objections to the *mandamus* in this case, founded upon what is contained in the railroad Act as well as what is omitted from it. Nothing new has been presented to our consideration to lead us to doubt the correctness of our conclusions. There is no occasion, therefore, to repeat the reasons upon which they were founded.

But counsel also urge in their argument against the granting of the *mandamus*, that the power of the city to levy a tax upon property for all purposes, judgments included, is limited by Acts of the Legislature to one dollar and fifty cents on every one hundred dollars of valuation, and that the amount thus raised is insufficient to meet the current expenses of the city, and pay previous judgments of other parties. They repeat the averments of the answer, that there was no contingent fund of the city out of which the judgment of the relator could be paid, nor moneys to the credit of the fund for current expenses not otherwise appropriated. They cite the charter of 1870, which requires a budget to be made in December of each year, exhibiting the various items of liability and expenditure for the ensuing year, and the Act of March 6, 1876, which limits the right of taxation upon property by the city to one dollar and fifty cents on every one hundred dollars of its assessed value. They also insist that the conditions on which judgments against the city are to be paid are prescribed in Act No. 5 of the extra session of 1870.

This last Act provides that no writ of execution or *fieri facias* shall issue from any of the [362] courts of the State to enforce the payment of any judgment for money against the city of New Orleans, but that such judgment, when the same shall have became executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it, with his petition and the defendant's answer, and the clerk's certificate that it has become executory, to be filed in the office of the controller of the city, and that thereupon it shall be the duty of the controller or auditing officer to cause the same to be registered and to issue a warrant upon the treasurer or disbursing officer of the corporation for the amount, without any special appropriation of money therefor, "Provided always that there be sufficient money in the treasury to pay such judgment, specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditure required to be made "by section 124 of the Act of March 20, 1856, amending the city charter, or by subsequent legislation.

The Act further provides that in case the amount designated in the annual budget for the payment of judgments against the city shall have been exhausted, the "common council shall have power, *if they deem it proper*, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum of money to pay said judgment or judgments, but if no such appropriation be made by the common council, then all judgments shall be paid, in the order in which they shall be filed and registered in the office of controller, from the first money *next annually set apart for that purpose*."

The respondents contend that, under these provisions, no judgment creditor can claim that his judgment shall be paid absolutely, for its payment is made to depend upon the conditions stated; or insist upon an appropriation in the budget for any fixed sum, for this is controlled by the limit of taxation and the amount of necessary expenditures to sustain the government of the city. The amount for judgments to be provided annually, they say, is to be fixed by the discretion of the common council in framing the budget; and this discretion is, to be guided by the limit of taxation for all purposes, and the amount required for police, lights, pav- [363] ing streets, public schools and other necessary expenses of the city. These expenditures have heretofore exhausted and, if the limit of taxation prescribed by the Act of March 6, 1876, be enforced, will hereafter continue to exhaust nearly all the funds raised. The balance remaining is and, with that limit of taxation, always will be, insufficient to pay any considerable portion of the earliest judgments against the city. So the relator must wait for an indefinite period—perhaps until the statute has barred her claim—and take the uncertain chance of obtaining from the city in the distant future any portion of the sum due to her.

The Act of March 6, 1876, giving effect to what is known as the "*premium bond plan*," does not hold out to the bondholder the delusive hope of payment in the distant future, which flitters around Act No. 5 of 1870; it cuts him off absolutely, unless he will accept the conditions of the proposed plan. It recites in its preamble that the total debt of the city, bonded and floating, exceeds $23,000,000; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent per annum to liquidate the debt; that a tax so exorbitant will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay, would lead to a further destruction of the assessable property of the city and to ultimate

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bankruptcy, and, that the city has adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, "obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor."

The plan proposed was an exchange of outstanding bonds for premium bonds; the latter to be of the denomination of twenty dollars each, bearing five per cent interest from September 1, 1875, payable at no designated period, the interest and principal to be paid at the same time and not separately, and the maturity of the bonds, principal and interest, to be determined by chance in the drawing of a lottery. One million of these bonds is to be divided into ten thousand series of one hundred bonds each. The ten thousand series are to be placed in a wheel and, in April and October of each year, as many series are to be drawn as are to be re-
[364] deemed, according to a certain schedule adopted. The bonds composing the series thus drawn are to be entered for payment three months thereafter, principal and interest, and are to be receivable for all taxes, licenses and other obligations of the city. At the expiration of the three months the bond numbers of the drawn series are to be placed in a wheel and 1,176 prizes, amounting to $50,000, are to be drawn and distributed. Under this plan, the city is released from payment of the principal or interest of its debt, except such portion as may be drawn from the lottery each year. As justly observed by counsel in one of the cases before us, under this arrangement whether a creditor will be paid in one or in fifty years, will depend upon the turn of a wheel and the drawing of a lucky number. Of course this plan disregards all the terms upon which the outstanding bonds of the city—and, among others, those held by the relator—were issued, and postpones indefinitely the payment of both their principal and interest. To induce its adoption by the city's creditors, the Act, in its 7th section, provides that no tax for the payment of the principal or interest of other than the premium bonds shall thereafter be levied; repeals all laws requiring or authorizing the city to pay any such tax, and declares that it shall be incompetent for any court to issue a *mandamus* to the officers of the city to levy and collect any interest tax other than on the premium bonds.

For the interest on the premium bonds and other purposes of the city, the Act provides that a tax of only one and one half per cent per annum shall be levied; and this limitation of the taxable power of the corporation is "declared to be a contract not only with the holder of said premium bonds, but also with all residents and tax payers of said city, so as to authorize any holder of said premium bonds to legally object to any rate of taxation in excess of the rate herein limited."

It is plain that if the provisions of this Act can be sustained as a valid exercise of legislative power, the judgment of the relator is practically annulled or rendered so uncertain of payment as to be of little value.

When the bonds were issued, upon which the judgment was recovered, the city was by its
[365] charter invested with "All the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same;" and it could have provided the means, by taxation, for their payment when they became due. As we said in the case already cited, "The power of taxation is an incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the Legislature empowers the corporation to do is presumably for its benefit and may, in 'the proper government of the same,' be done." Besides the power thus existing at the time the bonds were issued, the Act providing for their issue directed, as already stated, a special tax to be levied each year to meet the annual interest on them. Such being the case, the question is whether the city has been devested of its power by the Act of 1876, which we have mentioned.

The argument in support of the Act is substantially this: that the taxing power belongs exclusively to the legislative department of the government, and when delegated to a municipal corporation may, equally with other powers of the corporation, be revoked or restricted at the pleasure of the Legislature.

It is true that the power of taxation belongs exclusively to the legislative department, and that the Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution and must be disregarded, treated as if never enacted, by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, [366]
and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the Legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment. However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts.

The case of *Von Hoffman* v. *Quincy*, reported in 4th Wallace, 535 [71 U. S., XVIII., 403], is a leading one on this subject. There the Legislature of Illinois had in 1851, 1853 and 1857 passed Acts authorizing that city to subscribe for stock of certain railroad companies and in payment thereof to issue its bonds with coupons for interest annexed. Those Acts authorized the city to levy a special annual tax upon the property therein, real and personal, to pay

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the annual interest upon the bonds, and required that the tax when collected should be set aside as a special fund for that purpose. The city failed to pay the coupons held by the relator for a long time after they became due, and refused to levy the tax necessary for that purpose. The relator thereupon sued the city and recovered judgment. Execution issued thereon being returned unsatisfied, he applied to the Circuit Court of the United States for the Southern District of Illinois, for a *mandamus* to compel the authorities of the city to apply to the payment of the judgment any unappropriated funds they had; or, if they had no such funds, to levy a tax under the Acts mentioned sufficient for that purpose. The court issued an alternative writ, to which the city authorities answered setting up an Act of the Legislature of the State, of November, 1863, authorizing the city council to levy a tax for certain special purposes, such as lighting the streets and erecting buildings for schools, and also a tax on all real and personal property to pay the debts and meet the general expenses of the city, not exceeding fifty cents on each one hundred dollars of the annual assessed value thereof, and repealing all other laws touching taxes except such as related to their collection, or to streets, alleys and licenses. And they alleged that the [367] full amount of taxes thus authorized was in process of collection; that the power of the city in that respect was exhausted, and that the fifty cents on the one hundred dollars, when collected, would not be sufficient to pay the annual expenses for the year 1864, and the debts of the city. The relator demurred to the answer and judgment was given against him, but the case being brought to this court, the judgment was reversed. In delivering the unanimous opinion of the court, *Mr. Justice* Swayne said:

"It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State, and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The Act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that Act had not been passed. A different result would leave nothing of the contract but an abstract right, of no practical value, and render the protection of the Constitution a shadow and a delusion." 4 Wall., 554 and 555 [71 U. S., XVIII., 410].

The prohibition of the Constitution against the passage of laws impairing the obligation of contracts, applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means. As observed by the court in the case cited, "Without the remedy the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class [368] of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the Constitution. The obligation of the contract is the law which binds the parties to perform their agreement."

The restraint upon the Legislature, to the extent mentioned, by the contract clause of the Constitution, against revoking or limiting the power of taxation delegated by it to municipal bodies as the means of carrying out the purposes of their incorporation or purposes designed for their benefit, is a different matter from that of exempting property from taxation; and even in the latter case it has been adjudged in repeated instances, that one Legislature can bind its successors. The restraint in no respect impairs the taxing power of the existing Legislature or of its successors, nor removes any property from its reach.

These views are not inconsistent with the doctrine declared by the decision of the court in the recent case of *Meriwether* v. *Garrett* [*ante*, 197]. There the charter of the City of Memphis had been repealed, and the State had taken the control and custody of her public property, and assumed the collection of the taxes previously levied, and their application to the payment of her indebtedness. The city with all her officers having thus gone out of existence, there was no organization left, no machinery, upon which the courts could act by *mandamus* for the enforcement of her obligations to creditors. The question considered, therefore, was whether the taxes levied before the repeal of the charter, but not paid, were assets which the court could collect through a receiver and apply upon judgments against the city.

Here, the municipal body that created the obligations upon which the judgment of the relator was recovered, existing with her organization complete, having officers for the assessment and collection of taxes, there are parties upon whom the courts can act. The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, [369] and upon the continuance of which alone they can be enforced, can proceed and by *mandamus* compel, at the instance of parties interested, the exercise of that power as if no such legislation had ever been attempted. And that the relator seeks to have done here.

Following the doctrine of *Von Hoffman* v. *Quincy*, we are of opinion that the Act of March 6, 1876, the provisions of which we have stated, is invalid so far as it limits the power which the city possessed, when the bonds upon which the relator has recovered judgment were issued, to levy a tax for their payment. In thus limiting the power without providing other adequate means of payment of the bonds, the Legislature

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has impaired the obligation of the contract between her and the city.

The judgment of the court below must, therefore, be reversed and the cause remanded, with directions to issue the writ as prayed in the petition of the relator; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** delivered the following concurring opinion:

I concur in the opinion just delivered, except the paragraph in which reference is made to *Meriwether* v. *Garrett* [*ante*, 197]. The present case does not require us to determine any question as to the effect which the repeal of a municipal charter may have upon the rights of existing creditors. Nor do I wish to be understood as assenting to the correctness of the statement in the opinion as to what was involved and decided in *Meriwether* v. *Garrett*.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 300; 107 U. S., 750, 734, 808; 109 U. S., 290.

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[409] THOMAS B. CODDINGTON, *Appt.*,
v.
PENSACOLA AND GEORGIA RAILROAD COMPANY, GEORGE F. DREW, Governor, etc., ET AL., Trustees of the INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA.

(See S. C., 13 Otto, 409–412.)

Florida statute of limitations—demurrer.

1. In Florida, an action brought for relief on the ground of fraud eight years after knowledge of the fraud by plaintiff, is barred by the state Statute of Limitations.
2. A demurrer to a bill in equity, on the ground of the Statute of Limitations and laches, sustained.

[No. 207.]

Submitted Jan. 26, 1881. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

The case is fully stated by the court.

Mr. **D. P. Holland**, for appellant.

Messrs. **C. W. Jones** and *James M. Baker*, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Florida, dismissing the plaintiff's bill on demurrer.

The allegations of the bill show that prior to to 1866, plaintiff was the owner of two hundred and fifty-two first-mortgage bonds of the defendant Railroad Company, with several overdue coupons of interest attached. That, in 1866, the president of the Company induced him to exchange these coupons for certificates of preferred stock of the Company, and that he afterwards bought of other persons similar certificates, which had, in like manner, been received in exchange for unpaid coupons, so that in 1869 he was the owner of $64,085 of these certificates. [410]

He alleges that the surrender of the coupons in exchange for the stock certificates was a fraud upon him by the president of the Company, upon whose representations he relied.

In what this fraud consisted is nowhere stated, except that the Company had no authority under its charter to issue such stock, and that if it had, the certificates were invalid for want of the common seal of the Company to them.

We do not think it necessary to decide either of these questions. They depend upon the law of Florida, either its general statutory law or the charter of the Company, and of both of these the complainant must be presumed to have notice. If he had notice of the law he was certainly bound to know that the certificates which he received were without the seal of the Company.

There is no allegation of any other fraud, nor any allegation of the time of discovery of any fraud.

The Statute of Limitations of Florida enacts that all actions, except those for recovery of real estate, must be commenced within three years after the right accrues, but in an action for relief on the ground of fraud, the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

All the facts now alleged to constitute the fraud in this case were as well known to complainant at the time of the transaction as now.

The Trustees of the Internal Improvement Fund, under the authority vested in them by law, sold out the Railroad Company, its property and franchises, by way of foreclosure of the mortgage which secured the bonds and coupons of plaintiff and others, in 1869, for the sum of $1,220,000. The bill alleges that this was without authority of law, but no sufficient reason for the latter allegation is given.

There is no allegation that complainant ever made any demand upon these trustees for the share of this money due him on account of these coupons, or notified them of his intention to rescind the contract, nor that he ever did anything of the kind to the Railroad Company. As far as this bill shows, his first action or notice of intention to rescind the contract or to assert rights to or under the coupons in this suit, brought in 1877, eight years after the railroad and the franchises of the Company had passed to purchasers under that sale. [411]

An attempt to evade the Statute of Limitations and the doctrine of laches is made by the following allegations:

"Your orator further alleges and charges that, by the said act of the said trustees, he has been unable to follow said property, except without setting aside said sale and title to the said property. That the president of said Company shortly afterwards moved out of the State of Florida and has since died; that the secretary of the Company turned over all the books and papers to some parties to your orator unknown, and that the said secretary, F. H. Flagg, has since died; that your orator has not been able to find any board of directors of said Company since A. D. 1869."

"That your orator is informed and believes that there has been no president or secretary elected by the stockholders or others, and no

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board of directors, since 1869; that he has failed to get any relief, nor can he find any board of directors to whom to apply for relief since 1869."

The act of the Trustees here referred to was the sale of the road for the foreclosure of the mortgage. All the practical relief which plaintiff can obtain by this bill is against the fund arising from the sale in the hands of the Trustees of the Improvement Fund. This relief could better have been had immediately after the sale than now. There has been during all this time no obstruction to a suit against them. The Railroad Company became of no consequence, had no property and no interest in this litigation after the sale.

It is by no means evident that if they were liable to a suit, that some one could not have been found on whom service could have been made. There was, during all this time, the same means of serving process on the Company that existed when the present suit was brought.

The marshal in this suit returns a service on D.W. George, one of the directors of the Company in Florida, and he was probably a resident director during all that time. Upon this service the Railroad Company appeared by counsel and demurred.

[412] *We are of opinion that both by reason of the Statute of Limitations and the general doctrine of laches, in failing to tender his certificates in due time and assert a rescission of the contract, the demurrer was well taken, and the judgment of the Circuit Court is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[417] JAMES H. WILSON, Receiver of the ST. LOUIS AND SOUTHWESTERN RAILWAY COMPANY, *Plff. in Err.*,

v.

JAMES L. GAINES, Comptroller of the Treasury of the STATE OF TENNESSEE.

(See S. C., 13 Otto, 417-422.)

Immunity from taxation—judicial sale.

1. A judicial sale of the property of a railroad company under a lien does not necessarily carry with it to the purchaser any immunity from taxation, which the property enjoyed in the hands of the original company.

2. Mere general words of description are not sufficient to extend a sale beyond the subject-matter of the lien, as defined by the statute, which lies at the foundation of the entire proceeding.

[No. 142.]

Argued Dec. 15, 1880. Decided Feb. 28, 1881.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is fully stated by the court.

Mr. **Ed. Baxter,** for plaintiff in error.

Mr. Abram L. De Moss, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a bill in equity filed in the Chancery Court of Nashville, Tennessee, to enjoin the collection of taxes upon that part of the railroad of the St. Louis and Southwestern Railway Company which was originally owned by Edgefield and Kentucky Railroad Company. The facts are these:

On the 11th of December, 1845, the General Assembly of Tennessee chartered the Nashville [418 and Chattanooga Railroad Company for the purpose of building a railroad from Nashville to Chattanooga. The 38th section of that charter was as follows:

"Sec. 38. The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

On the first of January, 1852, the Nashville and Southern Railroad Company was incorporated to construct another line of road, and was to "Have all the rights, powers and privileges, and be subject to all the liabilities and restrictions prescribed in the charter of the Nashville and Chattanooga Railroad Company," with a single exception, which is unimportant for any of the purposes of this case.

On the 13th of February, 1852, the Edgefield and Kentucky Railroad Company was incorporated to build a road from Nashville to the Kentucky state line, with the following as the sixth section of its charter:

"Sec. 6. *Be it enacted,* That the company hereby incorporated is invested, for the purpose of making and using said road, with all the powers, rights and privileges, and subject to all the liabilities and restrictions that are conferred and imposed on the Nashville and Chattanooga Railroad Company by an Act passed on the 11th of December, 1845, so far as the same are not inconsistent with the provisions of this Act."

By an Act of the General Assembly of the State passed February 11, 1852, entitled "An Act to Establish a System of Internal Improvement in This State," the Governor was authorized to issue under certain circumstances to certain railroad companies the bonds of the State for the purpose of aiding in the completion of their respective roads, and it was further provided that upon such issue and the completion of the road the State should "be invested with a lien, without a deed from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs and the whole superstructure and equipments, and all the property owned by the [419 company as incident to or necessary for its business, and all depots and depot stations, for the payment of all said bonds issued to said company as provided in this Act, and for the interest accruing on said bonds." Acts of 1851-2, ch. 151, secs. 1, 4, pp. 204-206. On the 8th of February, 1854, the privileges of this Act were extended to the Edgefield and Kentucky Railroad Company. Acts of 1853-4, ch. 131, sec. 1, p. 205.

Afterwards, on the 15th of December, 1855, the charter of the Edgefield and Kentucky Company was amended, and the following is section 2 of that amendment:

"Sec. 2. *Be it enacted,* That the said company shall be entitled to all the rights and privileges that were conferred upon the Nashville and Southern Railroad Company, by an Act of the General Assembly of the State of Tennessee,

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passed January 1, 1852, entitled "An Act to Charter the Nashville and Southern Railroad Company."

The company availed itself of the privileges of the internal improvement Act and subjected its property to the statutory lien therein provided for.

Default having been made by many of the railroad companies in meeting their obligations for the bonds of the State issued to them, several attempts were made to enforce the liens on some of the roads without success, and on the 22d of December, 1870, the Legislature passed an Act, sections 1 and 10 of which are as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That a bill shall be immediately filed in the Chancery Court of Nashville in the name and behalf of the State, to which all the delinquent companies, the respective stockholders, holders of the bonds, creditors, and all persons interested in the said several roads, shall be made parties defendant, and shall be brought before the court in the mode prescribed by the rules of practice in chancery established in the State, except as otherwise herein provided. And said court is hereby invested with exclusive jurisdiction to hear, adjudicate and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen or that may arise touching the rights and interest of the State, and also of the stockholders, bondholders, creditors and others in said roads; and to make all such rules, orders and decrees, interlocutory and final, as may be deemed necessary in order to a final and proper adjustment [420] of the rights of all the parties, preliminary to a sale of the interest of the State in said road. Also to declare the exact amount of indebtedness of each of said companies to the State; and likewise to define, as may be thought proper, what shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders, and others respectively, as against said purchasers after such sale, under the existing laws of this State."

"Sec. 10. *Be it further enacted,* That upon the sale of any of the franchises of either of the railroad companies by the commissioners under the provisions of this Act, all the rights, privileges and immunities appertaining to the franchise so sold under its Act of Incorporation and the amendments thereto, and the general improvement law of the State and Acts amendatory thereof, shall be transferred to and vest in such purchaser, and the purchaser shall hold said franchise subject to all liens and liabilities in favor of the State, as now provided by law against the railroad companies."

The Edgefield and Kentucky Company was one of the companies in default, and it is averred in the present bill that, "Under a bill filed to foreclose the State's statutory lien upon the road and superstructure, equipments and stock, and the property owned by the company as incident to or necessary for its business, etc., * * the road its franchises, property, rights, privileges, immunities, etc., were sold," and the St. Louis and Southwestern Company by sundry *mesne* conveyances invested with the title. It is now contended that, under these circumstances, the road of the Edgefield and Kentucky Company, in the hands of the St. Louis and Southwestern, is exempt from taxation until the expiration of twenty years from its completion. The Supreme Court of the State dismissed the bill, holding that the exemption from taxation which was granted to the Nashville and Chattanooga Company was not one of the privileges of that company which passed to the Edgefield and Kentucky Company, either by its original or amended charter. To reverse that decree the case has been brought here by writ of error.

In the view we take of this case, it is unnecessary to determine the question on which the decision seems to have turned in the court below, for, as we think, it has not been shown [421] that if the property in the hands of the original company was exempt from taxation, that exemption passed to the purchasers at the sale to foreclose the State's statutory lien, under which the complainant claims. In *Morgan* v. *Louisiana,* 93 U. S., 217 [XXIII., 860], we distinctly held that immunity from taxation was a personal privilege and not transferable, except with the consent or under the authority of the Legislature which granted the exemption, or some succeeding Legislature, and that such an exemption does not necessarily attach to or run with the property after it passes from the owner in whose favor the exemption was granted. In that case the property in the hands of the original company was exempt from taxation. The company mortgaged its property and franchises, and under that mortgage the property and franchises were sold, pursuant to the terms of a judicial decree, but we held that by such a sale only such franchises passed as were necessary to the operation of the company, and without which its road and works would be of little value, and that consequently the property in the hands of the purchasers was subject to taxation.

In the present case the lien of the State was put by the statute only on the property of the company. It did not even in express terms include the franchises which were necessary to the operation of the road. Under such circumstances, if there were nothing more, it would seem to be clear beyond all question that a sale under the lien would not necessarily carry with it any immunity from taxation which the property enjoyed in the hands of the original company.

But it is contended that, as the case stands on demurrer to a bill which contains the distinct averment that "The road, its franchises, property, rights, privileges, immunities, etc.," were sold, it must be assumed as an admitted fact that any immunity from taxation which the old company had, passed to the purchasers and their grantees. This averment must be taken in connection with the further equally distinct statement in the bill that the sale took place under proceedings instituted in the Chancery Court of Nashville "to foreclose the State's statutory lien," and as that lien was confined to the "property owned by the company, or incident [4 to, or necessary for, its business," we will not, in the absence of a particular and positive allegation to the contrary, presume that more was sold than the lien covered. Mere general words

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of description are not sufficient to extend a sale beyond the subject-matter of the lien, as defined by the statute which lies at the foundation of the entire proceeding.

We are told that a contrary doctrine is established by the case of *R. R. Co.* v. *Hicks*, decided by the Supreme Court of Tennessee at the September term, 1877, and not yet reported, so far as we are advised, in any of the volumes of the regular series of the reports of the court. We do not so understand that case. There it was "distinctly adjudged," by the Chancery Court of Nashville, in the proceedings to enforce the statutory lien under which the sale was made, "That not only the property of the old company, but all its rights, franchises, privileges and immunities, as defined by the charter and laws, and the decree in the cause, passed to and vested in the new company," which was the purchaser. Nothing of the kind is found in this case. It is nowhere stated what the decree of the court was, but only what was sold, and inasmuch as the jurisdiction of the court was, by the terms of the Act of 1870, expressly confined to an adjudication of matters of controversy "Touching the rights and interest of the State, and also of stockholders, bondholders, creditors and others in said roads," and to defining "What shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads, * * and what shall be the reserved rights of said companies, stockholders, and others respectively, as against such purchasers after such sale, under the existing laws of the State," it would be against all the settled rules of construction to hold, upon the face of the statute alone, that more was sold than the lien to be adjudicated upon implied.

We are all of opinion, therefore, without deciding whether the property in the hands of the Edgefield and Kentucky Company was exempt, that the decree below dismissing the bill should be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 252, 253; 112 U. S., 617.

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[442] HARVEY TERRY, *Appt.*,

v

JOHN J. McLURE, Receiver of the BANK OF CHESTER, ET AL.

(See S. C., 13 Otto, 442, 443.)

Amended bill, when disregarded—Statute of Limitations.

1. An amended bill, filed, without leave of the court, eight years after the original bill was filed must be disregarded.
2. The four years Statute of Limitations of South Carolina, bars the right of recovery on the statutory liability of stockholders of a bank.

[No. 190.]

Argued Jan. 24, 1881. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The case is stated by the court.

Mr. **Harvey Terry**, for appellant.

Messrs. Edward McCrady, Jr., **James Lowndes**, *James H. Rion* and **William E. Earle**, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This suit was brought originally by the appellant as a bill in chancery in the Circuit Court for the District of South Carolina, against McLure, as Receiver of the Bank of Chester, and certain officers of the bank and one or two stockholders. The main purpose of the bill was to obtain a discovery of the names of the stockholders at the date of the failure of the bank, and when discovered to make them liable for the amount of the circulating notes of the bank held by plaintiff. It would be a useless task to trace here the interminable amendments to this bill, none of which varied essentially its character, though some of the later amendments attempted to set up fraud in the stockholders in receiving dividends declared and paid while the bank, as alleged by appellant, was in a state of insolvency. It is enough to say of all these that no sufficient statement of the names of the stockholders who received such dividends, and of the amounts received by each, nor of the circumstances under which the dividends were declared or received is found, in any or all of these amended bills, to charge any one stockholder, except it be the last amendment found in the record.

This amended bill gives the names of a large number of stockholders, with a statement of the sum received by each, and is full of the general allegations that the money so received ought to have gone to the payment of the debts of the bank, was a trust fund for the payment of those [443] debts, and was diverted by the dividends paid from its proper use.

This amended bill, however, was filed on the 6th day of May, 1878, which was eight years after the original bill was filed. It does not appear that any leave of the court was obtained to file it, though some four or five other amended bills show in every instance that they were filed with the leave of the court. It is a fair inference that what counsel on the other side say in their briefs is true, namely: that it was filed without the leave of the court and was disregarded by the court. In fact the record shows that the original bill was dismissed on its merits after hearing on the pleadings, testimony and argument of counsel, on the same day that this last amended bill was filed. Whether before or after the decree of the court was rendered is not shown. Nor is it material, as it must be understood that however it got to be filed in court, it was done without consent of the court or of counsel for the defendants. It must be disregarded, therefore, in the consideration of the case here.

As regards the statutory liability of the stockholders, the allegations of the bill, the answers of the defendants, and the evidence taken in the case all show that the suspension of specie payments took place on the 27th day of November, 1860, and that the Statute of Limitations of four years of the State of South Carolina, applicable to such cases, bars the plaintiff's right of recovery.

This point was adjudged in this court against the present plaintiff in the case of *Godfrey* v. *Terry*, 97 U. S., 171 [XXIV., 944]; see, also,

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Carrol v. *Greene*, 92 U. S., 509 [XXIII., 788].

The decree of the Circuit Court is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[444] STEPHEN E. JONES, Assignee in Bankruptcy of W. H. WALKER & Co., Composed of FREDERICK K. WALKER ET AL., *Appt.*,

v.

FREDERICK K. WALKER, MARY D. WALKER AND JAMES E. BREED, Exrs. of WILLIAM H. WALKER, Deceased, ET AL.

(See S. C., 13 Otto, 444-447.)

Continuance of partnership business by executor —dividends of profits.

1. Where a testator in his will declares that his capital and interest in a partnership concern shall be continued therein after his death, and shall be chargeable for its debts and liabilities, but his other property shall not be so chargeable, such other property is not chargeable with the partnership debts subsequently incurred.

2. If dividends of profits out of the partnership business are honestly and fairly made after the testator's death, the persons receiving them under the will cannot be called on to refund them, to pay debts owing by the firm contracted subsequently to the payment of the dividends.

[No. 542.]

Submitted Jan. 6, 1881. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The case is fully stated by the court.

Messrs. **Bijur** & *Davie*, *Geo. Weissinger*, **W. O. & J. L Dodd** and *W. O. Harris*, for appellant.

Mr. **John Mason Brown**, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

W. H. Walker, who was a large dealer in liquors in partnership with his son Frederick, made his will in July, 1870. One of the clauses of the will provided for the continuance of the partnership and the conduct of this business after his death.

It is in this language:

"It is my wish that my son Frederick carry on the business of W. H. Walker & Co. in that name and style, and in my storehouse where it is now carried on, giving him power to change the place until my youngest child living to be twenty-one years of age arrives at that age, or for a shorter time, if he does not find it profitable. To that end all my capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but my other property shall not be so chargeable while Frederick carries on said business; my share shall pay the salary of an efficient man to aid him therein, or he shall have compensation for his services as to and from my share. Agents and *employés* of the concern are to be paid by it. Frederick is not to be charged with $5,000 advanced by me to him on his coming of age, and he is to have the privilege to purchase, at a fair valuation and upon reasonable time, such portion of my share in said concern and its good will as will makes his share equal to one half. What he may so pay is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained and declared in the first of January after my death, and annually thereafter, shall be divided between my wife and children, or their descendants, and others. As my personalty is to be divided among them when my youngest child living to be twenty-one years of age arrives at that age, or at the death of my son Frederick before that time, or when he discontinues the business, my interest in the concern and its good will shall be sold as my executors may direct, and the proceeds divided, as the profits thereof are to be divided, with an obligation, if possible, that the business may be carried on under the old name and style."

[445]

The testator died in 1872, and the business was conducted as directed in the will until February 27, 1877, when the firm, on the petition of its members, was declared bankrupt in the proper court.

The appellant, Jones, was made assignee, and very shortly afterwards filed the bill in the present case in the Circuit Court of the United States for the District of Kentucky against the devisees of W. H. Walker's will.

The object of the bill is two-fold, namely: to subject the property of the deceased, which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts, and to recover from the defendants money which they had received as dividends out of the profits of the business after the death of the testator.

In the recent case of *Smith* v. *Ayer*, 101 U. S., 320 [XXV., 955], the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held that a testator might authorize the continuance of a partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it; and that, unless he had expressly placed the whole, or some other part of his estate, under the operation of the partnership, it would not be presumed that he had so intended. See, also, *Burwell* v. *Mandeville*, 2 How., 560, and *Ex parte Garland*, 10 Ves., 100. In the case before us the testator declares, in express terms, that "His capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but his other property shall not be so chargeable."

[446]

We see no reason in the present case for departing from the principle adopted in *Smith* v. *Ayer* after much consideration.

As regards the dividends of profits out of the partnership business, if they were honestly and fairly made, and when paid did not diminish the capital of the concern, nor withdraw from the business what was necessary to the payment of its debts, we see no reason why the persons receiving dividends should now be called on to refund them.

The will of the testator has a clause authorizing these dividends. The partnership had a long time to run and had a large part of his capital engaged in the business. There were children to be reared and educated, and it would

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have been very unreasonable that all the profits should be continually converted into capital, and neither these children, or Frederick, the other partner, should be permitted to receive dividends of profits, except on the condition of a liability to that extent for any future transactions of the partnership through a period of fifteen or twenty years.

If these dividends had been declared in bad faith; if they had never been really earned; if they had diminished the capital; if when made debts had existed which would have been left without means of payment, the persons sharing in the dividends would probably have been liable to these creditors to the extent of the money so received.

But we are satisfied that none of these conditions existed.

The case is mainly one of facts, and the testimony is very full. We do not think its discussion here profitable or useful. It is sufficient to say that we are satisfied that at the time the last dividend was made the capital of the company was undiminished, the firm was amply able to pay its debts, and that its misfortunes followed after this.

It very fully appears that the insolvency was brought about by accommodation indorsements [447] for others, made after the last dividend was paid; that the firm, but for this, would have remained solvent, and that, in regard to this, none of the defendants were to blame except Frederick, who, being a full partner, is liable personally for all the debts of the firm.

An important matter in the case is a stipulation by the parties to the suit that all the debts owing by the firm were contracted subsequent to the declaration and payment of all the dividends, and none of the debts of the firm were in existence at the time these profits were declared and paid.

No creditor whose debt was in existence when these dividends were made was injured. All the debts then existing have been paid. What right had subsequent creditors to reclaim these dividends, who had no interest in the matter when they were paid? These defendants, except Frederick, were not partners. Their money was in the concern and they received dividends instead of interest.

We repeat that there is no evidence of fraud or intentional wrong, and *we affirm the decree of the Circuit Court dismissing the bill.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[447]

TOWN OF UNITY, *Plff. in Err.*,
v.
ALVAH A. BURRAGE, HENRY G. CROWELL AND ALPHONSO J. ROBINSON, AS Receivers of the MERCANTILE INSTITUTION FOR SAVINGS.

(See S. C., 13 Otto, 447-460.)

Public Act, what is—amendment to—Illinois Constitution.

1. A state Act which makes valid elections held by the people of a county on the question of issuing the negotiable bonds of the county in aid of certain railroad companies, and authorizes townships to subscribe to the stock of a company and issue their negotiable coupon bonds in payment thereof, is a public Act, of which the courts are bound to take judicial notice, and it need not be specially pleaded.

2. Such an Act is not obnoxious to the provision of the Illinois Constitution in relation to the subject and title of local Acts.

3. Where an Act is declared in its express terms to be a public one, another which supplements and amends it and thereby becomes a part of it, is a public Act.

[No. 903.]

Submitted Jan. 18, 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case fully appears in the opinion of the court.

Mr. **W. J. Henry,** for plaintiff in error.

Mr. **James Dinsmoor,** for defendants in error.

Mr. Justice **Woods** delivered the opinion of the court:

On February 8, 1853, an Act of the Legislature of Illinois was approved, entitled "An Act to Incorporate the Decatur & Indianapolis Railroad Company." It incorporated the company named for the purpose of "constructing, completing and operating a railroad from the town of Decatur, in Marion County, in the State of Illinois, and thence in a direct line, upon the most eligible route, to the east line of the State of Illinois." [448]

The 3d section of the Act was as follows:

"Said company is hereby authorized and empowered to unite and form a junction with the Indiana & Illinois Central Railway Company, or any other company which is or may hereafter be organized in the State of Indiana terminating on said line; and also, to unite and consolidate with the said Indiana & Illinois Central Railway Company, upon such terms and conditions as the directors shall mutually agree upon; and in the event that said companies shall consolidate, then and in that case there shall be but thirteen directors on the whole line of road so consolidated, and the number to reside in each State shall be determined as in the case of consolidation."

Afterwards, on February 20, 1854, an Act of the same Legislature was approved, entitled "An Act to Amend the Act Entitled 'An Act to Incorporate the Decatur & Indianapolis Railroad Company, approved February 8, 1853.'"

The preamble and 1st section of this Act were as follows:

"*Whereas*, under and in pursuance of the authority conferred in the above named Act, the said Decatur & Indianapolis Railroad Company, after their organization, united, consolidated and merged their stock with the stock of the Indiana & Illinois Central Railway Company, forming a single corporation by means of such consolidation under the name and style of the 'Indiana & Illinois Central Railway Company,' therefore,

SECTION 1. *Be it enacted, etc.*, That the said Indiana & Illinois Central Railway Company, as existing under the said consolidation, is hereby declared to be entitled to hold, enjoy and possess all the property, rights, franchises and powers held, enjoyed and possessed by either of said original corporations prior to their said consolidation, fully and effectually, to all intents and purposes, and to be entitled to have

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and hold all the rights, powers and privileges conferred, or to be hereafter conferred, by law upon railroad corporations, organized under the [449] Act entitled 'An Act to Provide for a General System of Railroad Incorporations,' approved November 5, 1849."

The 5th and last section of this Act read as follows: "This Act shall be deemed and taken to be a public Act, and shall be liberally construed in all courts of justice, and shall take effect and be in force from and after its passage."

On March 27, 1869, an Act supplementary and amendatory of the above mentioned Act was passed. It was entitled "An Act Supplementary to and Amending an Act Entitled 'An Act to Incorporate the Decatur & Indianapolis Railroad Company,' approved February 8, 1853."

On February 22, 1861, an Act was passed entitled "An Act to Extend the Time for Completing the Indiana & Illinois Central Railway Company." The preamble of this Act was as follows:

"*Whereas*, the Decatur & Indianapolis Railroad Company were legally incorporated under an Act entitled 'An Act to Provide for a General System of Railroad Incorporations,' in force November 5, 1849; and whereas, said Decatur & Indianapolis Railroad Company afterwards united and consolidated with the Indiana & Illinois Central Railway Company, on the 4th day of May, A. D. 1853, in compliance with the provisions of an Act entitled 'An Act to Incorporate the Decatur & Indianapolis Railroad Company,' in force February 8th, 1853, and of An Act entitled 'An Act to Amend an Act to Incorporate the Decatur & Indianapolis Railroad Company,' in force February 12th, 1854, whereby said Decatur & Indianapolis Railroad Company became and was named and styled 'The Indiana & Illinois Central Railway Company,' and whereas said Indiana and Illinois Central Railway Company, in compliance with the provisions of the 44th section of an Act entitled 'An Act to Provide for a General System of Railroad Incorporations,' in force November 5, 1849, began the construction of its road and expended thereon ten per cent on the amount of its capital within five years after its incorporation."

The body of the Act extended for ten years, from and after April 26, 1863, the time for putting in full operation the Indiana & Illinois Central Railway.

The 44th section of an Act entitled "An Act to Provide for a General System of Railroad Incorporations," in force November 5, 1849, was as follows: "If any such corporation shall not, within five years after its incorporation, begin the construction of its road, and expend [450] thereon ten per cent on the amount of its capital, and finish the road and put it in full operation in ten years thereafter, its Act of incorporation shall become void."

On March 27, 1869, an Act was passed supplementary and amendatory of the Act of February 20, 1854, above mentioned, entitled "An Act Supplementary to and Amending an Act Entitled 'An Act to Incorporate the Decatur & Indianapolis Railroad Company,' approved February 8, 1853."

This Act legalized an election held by the voters of Macon County in favor of the issuing of bonds of said county, to the amount of $60,000, to aid in building the Indiana and Illinois Central Railway, and an election subsequently held by the voters of the same county in favor of a subscription by the county of $40,000 to the capital stock of the said railroad company, and of the issuing of the bonds of the county to pay for said stock, and in favor of subscriptions by said county to three other railroad companies therein named, and the issuing of the bonds of the county to pay therefor.

Section 2 of said Act provided as follows:

"The several townships in counties where township organization has been adopted, lying on or near to the line of said railroad, are hereby authorized to subscribe to and to take stock in the said Indiana & Illinois Central Railway Company. Elections may be held in any such township upon the question whether such township shall subscribe for any specified amount of stock of said county, not exceeding $100,000, whenever a petition for that purpose shall be presented, as hereinafter specified."

The subsequent sections of this Act prescribed the mode of holding elections mentioned in the 2d section, and the levy and collection of a tax by the township authorities of the townships which voted to take stock in said railroad company, to pay the interest and principal on the bonds issued in payment thereof.

The last section extended the time for the completion of the railroad of the said Indiana & Illinois Central Railway Company to July 1, 1875.

On April 16, 1869, the Legislature passed an Act entitled "An Act to Fund and Provide for Paying the Railroad Debts of Counties, Town- [451] ships, Cities and Towns." This Act provided for the registration, in the office of the auditor of public accounts of the State, of bonds issued by counties, townships, etc., in aid of or to pay for stock in railroad companies.

Afterwards, on September 13, 1869, and, as it was claimed, in pursuance of the authority conferred by the Act of March 27, 1869, at a special election held on that day, a majority of the legal voters of Unity Township, in the County of Piatt, voted in favor of a subscription of $14,000 to the stock of the Indiana & Illinois Central Railway Company, and an issue of the bonds of the Township sufficient to pay for such stock.

Pursuant to this vote, fourteen bonds of the Township, for $1,000 each, all dated May 12, 1873, with interest coupons attached, were duly executed by the officers of the Township.

The bonds, principal and interest, were made payable to the Indiana & Illinois Central Railway Company, or bearer, at the American Exchange National Bank, New York.

They contained the following recital:

"This bond is one of a series of fourteen bonds, of $1,000 each, numbered from one to fourteen, inclusive, issued under and by virtue of the Acts of the General Assembly of the State of Illinois, entitled 'An Act Supplementary to and Amending an Act Entitled 'An Act to Amend the Act Entitled an Act to Incorporate the Decatur & Indianapolis Railroad Company,' approved February 8, 1853, in force March 27, 1869, and an Act entitled 'An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns,' in force 16th

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April, 1869, and in accordance with the vote of the electors of said Township of Unity, at a special election held in said Township on the 13th day of September, A. D. 1869, under the provisions of said Acts, and in accordance therewith, and the faith of said Township is hereby pledged for the payment of said principal sum and interest as aforesaid."

The plaintiffs, being the holders of these bonds, brought this suit on coupons, which fell due May 12, 1878, and May 12, 1879.

The declaration having averred the execution of the bonds (designating them as promissory notes), with the interest coupons attached, proceeded as follows:

[452] "And each of said promissory notes recites that it is issued under and by virtue of a law of the State of Illinois, Entitled 'An Act Supplementary to and Amending an Act Entitled, 'An Act to Amend the Act Entitled an Act to Incorporate the Decatur & Indianapolis Railroad Company,' approved February 8, 1853,' in force March 27, 1869.

And under a law of the State of Illinois entitled 'An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities, and Towns,' in force 16th April, 1869. And in accordance with the vote of the electors of said Township of Unity, at a special election held in said Township on the 15th day of September, A. D. 1869, under the provisions of said Acts and in accordance therewith.

And the plaintiffs further aver, that said promissory notes have been duly registered in the office of the auditor of public accounts of the State of Illinois, pursuant to said Act of April 13, 1869, as from the certificate of said auditor of public accounts attached to each of said promissory notes will more fully appear.

That the plaintiffs are the bearers of the coupons for interest on said promissory notes which fell due on the 12th day of May, A. D. 1878, being seven coupons of one hundred dollars each. And also of the fourteen coupons annexed to said promissory notes and of even number therewith, each of which said coupons became due and payable on the 12th day of May, A. D. 1879, making in all the sum of twenty-one hundred dollars.

And the said defendant has failed to provide funds for the payment of said instruments of interest at the American Exchange National Bank, New York; and has utterly neglected to pay the same, although thereunto often requested."

The defendant filed a general demurrer to the declaration, which was overruled by the court, and electing to stand by its demurrer and refusing to plead, judgment was rendered against the defendant, which, by agreement of parties, was for the principal of the bonds and the interest up to June 10, 1880, amounting in all to $17,816.

This writ of error is prosecuted to reverse that judgment.

[454] The plaintiff in error alleges that the Act of March 27, 1869, by authority of which the bonds sued on were issued, is a private Act, and should have been specially recited in the declaration; and as the declaration contains no such recital, it is bad on general demurrer. The defendants in error deny that the Act is a private Act.

Private Acts are thus defined by Blackstone: "Special or private Acts are rather exceptions than rules, being those which operate only upon particular persons and private concerns, such as the Romans entitled *senatûs decreta*, in contradistinction to the *senatûs consulta*, which regarded the whole community, and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the statute 13 Eliz., ch. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or their lives, is a public Act, being a rule prescribed to the whole body of spiritual persons in the Nation; but an Act to enable the Bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors, and is, therefore, a private Act." Wendell's Blackstone, Vol. 1, 86.

Tested by this definition it is clear that the Act under consideration is a public and not a private Act. It legalizes and makes valid elections held by the people of Macon County, Illinois, on the question of issuing the negotiable bonds of the county in aid of certain railroad companies therein named, and authorizes all the townships in the counties where township organization had been adopted, lying on or near to the line of the Indiana & Illinois Central Railway Company, on certain conditions therein named, to subscribe to the stock of said railroad company, and issue their negotiable coupon bonds in payment thereof. This statute affects not only the people of the County of Macon, and of many of the townships of all the counties lying on or near the line of the railroad designated, but also all persons to whose hands the bonds issued by the county and Township mentioned, may come. [455]

Some cases throwing light upon the question will be cited.

An Act passed by the Legislature of Indiana, February 14, 1848, to incorporate the Ohio & Mississippi Railroad Company, provided for subscriptions to the stock of said company by the commissioners of any county through which its road might pass, and an issue of the bonds of the county to pay for the same. This Act was declared a public Act by this court in the case of *Comrs. of Knox Co.* v. *Aspinwall*, 21 How., 539 [62 U. S., XVI., 208].

In *State* v. *Lean*, 9 Wis., 279, it was held that a law providing for the location of a county seat is a general law. The Supreme Court of Indiana, in the case of *West* v. *Blake*, 4 Blackf., 234, held that an Act authorizing an agent of the State to lay off and sell lots in a particular town, it being the seat of government, was a public Act. The court said, "Statutes incorporating counties, fixing their boundaries, establishing court-houses, canals, turnpikes, railroads, etc., for public uses, all operate upon local subjects. They are not for that reason special or private Acts. In this country the disposition has been on the whole to enlarge the limits of this class of public Acts, and to bring within it all enactments of a general character, or which in any way affect the community at large."

On the same subject see the case of *Pierce* v. *Kimball*, 9 Me., 54; *New Portland* v. *New Vineyard*, 16 Me., 69; *Gorham* v. *Springfield*, 21 Me., 58. On these, and many other authori-

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[456] ties which might be cited, we think the Act by which the issue of the bonds sued on was authorized is a public Act, of which the courts are bound to take judicial notice, and that it need not be specially pleaded.

But independent of authority there is a conclusive answer to this claim of the plaintiffs in error.

The Act of February 24, 1854, to which the Act of March 27, 1869, is supplementary and amendatory, is declared in express terms by its 5th section to be a public Act. It cannot, therefore, be said that the Act which supplements and amends it, and thereby becomes a part of it, is a private Act. If one is public both must be.

The plaintiff in error next claims that the Decatur & Indianapolis Railroad Company and the Indiana and Illinois Central Railway Company were consolidated; that the effect of the consolidation was to destroy the old corporations and create a new one, and, therefore, when the Act of March 27, 1869, was passed, which was entitled "An Act Supplementary to and Amending an Act Entitled 'An Act to Amend the Act Entitled an Act to Incorporate the Decatur & Indianapolis Railroad Company,' approved February 8, 1853," and which authorized certain townships to subscribe to the capital stock of the Indiana & Illinois Central Railway Company, the charter of the Decatur & Indianapolis Railroad Company had been surrendered and that company had ceased to exist, and there was no corporation in existence to which the Act of March 27, 1869, could apply, and it was, therefore, of no effect.

This seems to be an attempt to overturn by argument and inference a deliberate enactment of the Legislature and erase it bodily from the statute-book.

Let it be conceded that the effect of the consolidation of the two companies was to create a new corporation under the name of the Indiana & Illinois Central Railway Company. It was perfectly competent for the Legislature to authorize townships to subscribe to the stock of the new company, and issue their bonds in payment thereof. This was what the Act under consideration did. The Act which it purported to amend, after reciting in its preamble the fact of the consolidation of the Decatur & Indianapolis Railroad Company with the Indiana & Illinois Central Railway Company, con-
[457] ferred on the latter company, "As existing under the consolidation, all the property, rights, franchises and powers held, enjoyed and possessed by either of said original corporations prior to their said consolidation."

The Act under consideration authorized certain townships to subscribe stock to this corporation thus formed, and to issue their bonds in payment therefor. It might fairly be entitled an Act to amend an Act, by authority of which the company existed.

The new company, existing by recognition of the Act of February 20, 1854, had the capacity to accept this amendment, and did accept it, for it received and put in circulation the bonds issued under its authority.

There is no ground for the theory that the Act of March 27, 1869, is inoperative. We are bound, if possible, to give it effect, *ut res magis valeat quam pereat.* So far from its binding force being a matter of doubt, we see no difficulty, based on the reasons advanced by the plaintiff in error, in the way of giving it full and complete effect.

It is next said by the plaintiff in error that the Act is unconstitutional and, therefore, void and of no force.

The ground of its unconstitutionality is alleged to be that it does not conform to section 23 of article 3 of the Constitution of Illinois of 1868, which provides that "No private or local law which may be passed by the General Assembly, shall embrace more than one subject, and that shall be expressed in the title."

Assuming the Act in question to be a local law, is it open to the objection urged against it? It legalizes two elections held by the people of Macon County; the first to decide whether the county should issue its bonds to the amount of sixty thousand dollars to aid in building the Indiana & Illinois Central Railway, and the second to decide whether the county should subscribe $40,000 to the stock of said Railway Company and issue its bonds for that amount in payment thereof, and declares valid and binding any bonds of the county issued or to be issued in pursuance of said elections, and it authorized certain townships on conditions prescribed to subscribe to the stock of said Railway Company, and issue their bonds in payment thereof.

This Act is entitled an Act "Supplementary [458]
to and Amending" the Act conferring corporate powers on the Indiana & Illinois Central Railroad Company.

The question whether such an Act is obnoxious to the provision of the Illinois Constitution in relation to the subject and title of local Acts, has been substantially decided in the negative by this court in the case of *San Antonio* v. *Mehaffy*, 96 U. S., 312 [XXIV., 816], from the Western District of Texas.

The Constitution of Texas declares, that "Every law enacted by the Legislature shall contain but one object, and that shall be expressed in the title." The Act of the Legislature of Texas, said to be in violation of this provision was entitled "An Act to Incorporate the San Antonio Railroad Company." Among other provisions, it authorized the City of San Antonio to take stock in that company, and issue bonds to pay for the same. This law was decided to have but one object, and that that object was expressed in the title.

The Supreme Court of Illinois, in the case of *Belleville R. R. Co.* v. *Gregory*, 15 Ill., 20, has decided that an Act whose title was "An Act to incorporate the Belleville & Illinois Railroad Company," and which contained a section which authorized the City of Belleville and the County of St. Clair to subscribe for stock in said company, was not in violation of the section of the State Constitution under consideration. See, also, *Fireman's Benev. Asso.* v. *Lounsbury*, 21 Ill., 511; *Supervisors* v. *People*, 25 Ill., 181; *O'Leary* v. *Cook Co.*, 28 Ill., 534; *Erlinger* v. *Boneau*, 51 Ill., 94; *People* v. *Brislin*, 80 Ill., 423; *Binz* v. *Weber*, 81 Ill., 288. The Act cannot, therefore, be held to be open to the constitutional objection under consideration.

But it is insisted that the second election ratified by the Act under consideration, not only had reference to subscriptions of stock and the

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issue of bonds in aid of the Indiana & Illinois Railway Company, but also of three other railroad companies, and the Act, therefore, contained more than one object, and the latter object was not expressed in the title.

In such a case the provisions of the law touching the object, which is expressed in the title, must stand. Those relating to the other objects, [459] not expressed in the title, alone fall. By such a construction the purpose of the constitutional provision is fully accomplished.

All the provisions of the law under consideration which have reference to the Indiana & Illinois Central Railway Company constitute but one object; this, as we have seen, is expressed in the title; the other matters constitute other objects, which are not expressed in the title, and are so entirely disconnected with the object which is expressed, that they can be eliminated from the Act and leave the latter in full force. *Packet Co.* v. *Keokuk*, 95 U. S., 80 [XXIV., 377].

We are of opinion, therefore, that so much of the Act of March 27, 1869, as authorizes the issue of the bonds sued on, was fairly expressed in the title, and is constitutional and valid.

It is next alleged by the plaintiff in error that the Decatur & Indianapolis Railroad Company was incorporated under the general law of Illinois "To provide for a general system of railroad incorporations," and not under the special Act to incorporate the Decatur & Indianapolis Railroad, of February 8, 1853. And it is insisted that the Act of March 27, 1869, under authority of which the bonds in suit were issued, was an attempt by special Act to add to the powers conferred upon the company by a general law.

Conceding the premises, we do not think the conclusion follows. There is nothing in the Constitution of Illinois, nor in the unwritten restraints upon legislative power which forbids such an enactment. We can see no reason, either in the Constitution of the State or in public policy, to restrain the Legislature of Illinois from declaring that certain townships may subscribe to the stock of a particular Railroad Company, organized under a general law, and issue their bonds to pay for the same.

But the premises which we have conceded are not true. The Decatur & Indianapolis Railroad Company was organized under the special authority of the Act to incorporate that Company upon compliance with the requirements of the general law.

The Indiana & Illinois Central Railway Company, in whose behalf the Act of March 27, 1869, was passed, derived its corporate existence and power from a consolidation between a com- [460] pany of that name and the Decatur & Indianapolis Railroad Company, made by authority of the law under which the latter Company was organized, and of the Act of February 20, 1854, which recognized the consolidation and confirmed to the new Company "All the property, rights, franchises and powers held and enjoyed by either of said original corporations."

The Indiana & Illinois Central Railroad Company derived its existence from special laws and not from the Act to provide for a general system of railroad incorporations. There is, therefore, no ground for the objection under consideration to stand on.

The case is a clear one, and it is unnecessary to devote further space to its discussion. There was in existence, by virtue of the legislation of the State of Illinois, a corporation known as the Indiana & Illinois Central Railway Company. By a perfectly valid and constitutional Act certain townships, among them the plaintiff in error, were authorized, upon a vote of a majority of their legal voters, to subscribe stock in the railway company mentioned, and issue their bonds to pay for it. The election was held under this law in the Township of Unity. A majority of its legal voters at that election decided in favor of subscribing to the stock of the railroad company, and issuing the bonds of the Township in payment thereof. The stock was accordingly subscribed, and the bonds issued and sold. The railroad has been built and is in full use as one of the post-roads of the United States. The bonds were issued by authority of law. The holders of them are entitled to their money, and there is no legal obstacle in the way of a judgment therefor in their favor.

The judgment of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S. 692.

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[461]

WILLIAM WICKE, *Appt.*,
v.
HENRY P. OSTRUM.

(See S. C., 13 Otto, 461-470.)

Patentable machine—mechanical equivalents—infringement—machine for driving nails.

1. A new combination of old elements, so as to produce a useful machine, is patentable.
2. The patentee is entitled to the benefit of all the mechanical equivalents of his several elements, known at the time of his invention, if used in the same combination.
3. A combination of other elements, not the equivalents of his, would be a different machine, and consequently not an infringement.
4. A patent for a machine for driving nails vertically is not infringed by one for driving nails horizontally, which leaves out two of the elements of the former.

[No. 165.]

Argued Dec. 21, 1880. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Mr. **Arthur V. Briesen,** for appellant.

Messrs. William T. Birdsall and **N. A. Calkins,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The patent sued on in this case is for a machine for nailing boxes, invented by George Wicke. Before this invention nails were driv- [468] en singly and by hand. By the machine more than one could be driven at the same time.

In the description of the invention which accompanied the application for the patent, the inventor said, in effect, that it consisted in the employment of grooved spring jaws for the purpose of holding the nails and guiding them to

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their places, combined with a corresponding number of rising and falling plungers for driving each nail singly and at the same time. The plungers were made with globe or disk-shaped collars, so adjusted or arranged that they would spread the spring jaws at the proper moment to allow the heads of the nails to pass. To depress the plungers, he arranged a cam, so formed and fitted as to have spent its force when the nail was driven to its place. "Finally," he said his invention consisted "in the general arrangement and combination of all its parts, so that the plungers and jaws, as well as the table which supports the boards, can be adjusted according to the different sizes of the boxes to be nailed." He then described the construction of the different parts of the machine and the manner of its operation, from which, and the drawings and models, it appears that the machine was an upright one, by means of which the nails were to be driven vertically.

With such a machine the nails must necessarily be held in place by some mechanical device until they were guided to and fastened in the board. A nail implies a head larger than its point and, if it is to be driven vertically, some provision must be made for directing the point carefully to its proper place, and then letting the head pass without obstruction as it is driven. Such clearly was the office of the "grooved spring jaws" and the "globe or disk-shaped collars" of the plungers in this machine.

Having described his invention, the inventor stated what he claimed as new, and desired to secure by his letters patent, as follows:

"1. The employment of the grooved spring jaws H substantially as described, for the purpose of receiving the nails and to guide them to their proper places.

2. The combination with the spring jaws H, of the rising and falling plungers E, constructed and operating substantially as and for the purpose described.

3. Arranging the plunger E with a disk-shaped collar *i* or its equivalent, to operate in combination with the spring jaws H, substantially as and for the purpose specified.

4. The arrangement of the circular portion *e f* on the cam C, to operate in combination with the gate B and treadle *d*, substantially as and for the purpose set forth.

5. The arrangement and combination of one or more adjustable carriages F, table J, and slide L, constructed and operating in the manner and for the purpose substantially as specified."

To make this claim intelligible it must be read in connection with the specifications to which it relates, and in this way it becomes apparent that the object of the inventor was to secure a patent for a new combination of old elements. Grooved spring jaws were confessedly very old. So were rods of iron with curvilinear projections, like those called plungers, and cams, of almost any shape, and treadles, and levers, and adjustable carriages, tables and slides. The use of these things separately could not be patented. But the combination of them so as to produce a machine useful for driving nails was new. This the inventor might claim, and so far as anything appears, he was entitled to a patent for the employment of spring jaws in the combination and for the purpose, [469] described in his specifications; for the combination of his peculiarly shaped plungers with spring jaws for the purposes of such a machine; for the use of the cam he described in combination with the gate and treadle to drive his machine, and for the adjustable carriage, table and slide when used on such a machine as his. He was entitled also to the benefit of all the mechanical equivalents of his several elements, known at the time of his invention, if used in the same combination.

As has already been seen, Wicke made an upright machine. For such a machine the combination of all his several elements was necessary. If any one, or its mechanical equivalent, was left out, an upright machine like this could not be operated successfully. A combination of other elements, not the equivalents of his, would be a different machine and, consequently, not an infringement. From the evidence, it is clear he was the first to put into practical use the idea of driving more than one nail at the same time in the manufacture of boxes by the use of machinery. The idea he could not patent, but his contrivance to make it practically useful he could. By his patent he appropriated to himself only so much of the field of invention which his idea embraced, as the machine he described in his specification and claimed in his application covered.

The defendant conceived the idea of driving nails horizontally instead of vertically, and made a machine for that purpose, which he patented. He does not use the spring jaws or the peculiar shaped plungers of the Wicke machine, because he does not need them. As his object is to drive the nails horizontally, they can be laid in a groove and held there by gravity until forced into the board. Having no spring jaws to be opened, he need not shape his plunger or driver so as to effect that object. He thus has been enabled to dispense with two elements of Wicke's combination, in the absence of which that machine could not be successfully worked. Neither has he substituted any mechanical [470] equivalent for what he has thus put aside. By changing the form of the machine and the manner of its operation, he has no need of any such contrivances. He may use the equivalent of one half of the spring jaw of Wicke's machine, but the other half he does not want, nor anything else in its place, as the nail will lie where it is put until driven into the board. He accomplishes by natural causes what Wicke required a mechanical contrivance to do. His machine will not do the work of Wicke's, that is to say, drive a nail vertically, nor will Wicke's do that of his, and drive horizontally. The truth is, the two machines are entirely unlike, and while they both drive more nails than one at the same time, they do it in different ways. That of Wicke, operating vertically, requires all the elements of his combination, while that of the defendant, doing its work in another way, is made by leaving out two elements which are indispensable to Wicke.

The fair construction of the fourth and fifth claims is that they are for the combination of the cam, gate and treadle, or the adjustable carriage, table and slide, with the elements of the other claims. It is possible that if there had been nothing more done by the defendant than to put into the machine of Wicke his rock shaft

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and attachments in the place of the cam, the shaft would be considered as the equivalent of that element in Wicke's device. So, too, the bed, slides and gauges of the defendant's machine, if used in that of Wicke, might be considered the same in effect as the adjustable carriage, table and slide which he contrived. But these contrivances of the defendant are not used in combination with any of the other devices of Wicke and, therefore, they do not infringe his claims.

On the whole, we are clearly of the opinion that the court below was right in holding, as it did, that no infringement had been proven. The decree is, consequently, affirmed.

True copy. Test:

James H. McKenney, Clerk Sup. Court, U. S.

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[562] TOWNSHIP OF HARTER, *Appt.*,

v.

JOHN A. KERNOCHAN

(See S. C., 13 Otto, 562-574.)

Removal of cause—petition when filed—estoppel by recitals in bonds—state Act—estoppel of town.

1. Where an Illinois town and two of its tax payers filed a bill in a court of that State, against officers of the State, county and town and the unknown holders of the bonds of the town, for a perpetual injunction against the payment of such bonds, and the unknown holders were proceeded against by publication, and a final decree was entered giving relief to the full extent prayed for, and a citizen of Massachusetts, owner of all the bonds, procured the decree to be opened, he may remove the cause to the U. S. Circuit Court.

2. The first term after the opening of the decree at which the cause could have been tried, upon the merits, as to him, was the Term at which, within the meaning of the Act he should file his petition for removal.

3. Recitals in the bonds, which import a compliance with all the provisions of the state Acts under which they were issued, estop the town from denying that they were complied with.

4. The state Acts of Feb. 25, 1867, and Feb. 24, 1869, authorizing the issue of the bonds, are not in violation of the Constitution of the State.

5. Where the donation was originally voted to a railway company which was subsequently consolidated with another one, forming a new company, and the records of the town show that the bonds were directed to be issued and delivered to the new one, it is estopped to say, as against a *bona fide* purchaser for value, that the bonds are invalid.

[No. 996.]

Submitted Jan. 6, 1881. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is fully stated by the court.

Messrs. **W. J. Henry** and **G. A. Hoff**, for appellant.

Messrs. **George A. Sanders** and *A. L. Knapp*, for appellee.

[563] *Mr. Justice* **Harlan** delivered the opinion of the court:

This suit involves the liability of the Township of Harter, in the County of Clay, State of Illinois, upon certain bonds, signed by its supervisor, countersigned by its clerk and issued in its name, under date of April 1, 1870. They were made payable to the Illinois Southeastern Railway Company or bearer, thirty years after date, with interest at the rate of ten per cent per annum; the right, however, being reserved to the Township to make payment at any time after five years from date of issue. Each bond recites that it is one of a series "Issued by said Township to aid in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an Act of the General Assembly of the State of Illinois, entitled 'An Act to Incorporate the Illinois Southeastern Railway Company,' approved February 25, 1867, and an Act amendatory thereof, approved February 24, 1869, and an election of the legal voters of the aforesaid Township, held on the 10th day of November, 1868, under the provisions of said Act." Upon each bond also appears the certificate of the State auditor, stating that it had been registered in his office, pursuant to the provisions of the Act entitled "An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns," in force April 16, 1869.

The bill was filed in the year 1877, in the Circuit Court for Clay County, by the Township of Harter and two of its resident tax payers—the latter suing in behalf of themselves and all other tax payers of the Township—against the state treasurer and auditor, the county clerk and treasurer, the township collector, supervisor and clerk, and two justices of the Township; and also against the unknown owners and holders of such bonds with their coupons, who are alleged to be residents and citizens of States other than Illinois. It proceeded upon the ground that the bonds were issued without authority of law and, consequently, were not binding upon the Township. The prayer of the bill was that such a decree, with perpetual injunction, be rendered as would prevent the state, county and township officers from taking any steps towards the assessment and collection of taxes to meet the bonds or any installment of interest thereon; that the holders and owners of the bonds and coupons, their agents and attorneys, be required to bring the same into court for cancellation; and that the state and county treasurers be ordered to pay over to the Township any money in their hands, which had been raised by taxation for the payment of the bonds or their coupons. The officers who were sued, although duly served with process, made no defense. The unknown holders and owners of the bonds and coupons were proceeded against by publication in the manner authorized by the state law. A final decree was entered on the first day of May, 1879, giving relief to the full extent prayed for. [564]

On the 17th day of April, 1880, Kernochan, the defendant in error, and the owner of all the bonds and coupons issued by Harter Township—having, it is conceded, acquired them before due, paying value therefor, and without notice of any defense except that appearing in the law and upon the face of the bonds themselves—presented to the state court a petition stating that he had neither been summoned nor served with a copy of the bill, nor received any notice of the pendency of the suit. Upon that petition he based a motion to re-docket the cause and open the decree, to the end that he might be heard touching the matters of such suit. His application was granted, and upon the same day he filed another petition, accompanied by bond in the required form, asking

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the removal of the cause to the Circuit Court of the United States, upon the ground that the controversy was between citizens of different States, and that he was then, as well as at the commencement of the suit, a citizen of Massachusetts, while the complainants, during the same period, were citizens of Illinois.

The state court approved the bond and ordered the cause to be certified to the Federal court, with all the papers pertaining thereto.

In the Circuit Court complainants entered a motion to remand the cause to the state court. That motion was overruled. Kernochan answered to the merits, and to that answer a general replication was filed. Upon final hearing, the bill was dismissed and the injunction, [565] granted by the state court, dissolved.

Preliminary to any consideration of the questions involving the validity of the bonds, as obligations of Harter Township, it is proper that we should notice, briefly, some remarks made by counsel for appellants, in reference as well to the proceedings in the state court after the appearance of Kernochan, as to the removal of the suit into the Federal Court.

We perceive nothing irregular or erroneous in the action of the state court, whereby the cause was re-docketed and the decree opened. By the statutes of the State, when a final decree is entered against a defendant who has not been summoned or served with a copy of the bill, or received the notice required to be sent to him by mail, and such person, his heirs, devisees, executors, administrators or other legal representatives, as the case may require, shall, within one year after notice in writing is given him of such decree, or, in the absence of such notice, within three years after such decree, appear in open court and petition to be heard touching the matters of such decree, and shall pay such costs as the court shall deem reasonable in that behalf, "The person so petitioning may appear and answer the complainant's bill; and, thereupon, such proceedings shall be had as if the defendants had appeared in due season and no decree had been made. And if it shall appear, upon the hearing that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended, as shall appear just; otherwise, the same shall be ordered to stand confirmed against said defendant." *Hurd's Stat. Ill.*, 1880, p. 189, sec. 19. Kernochan appeared within one year after the decree had been passed. He was, therefore, entitled, according to any reasonable construction of the statute, to be heard touching the matters of the decree, as if no decree had been made. When the order was made opening the decree, he acquired a position in which he could take any step that might have been taken had he appeared in due season in obedience to a summons. The court was at liberty to proceed as if no decree had been madeagainst him. He could have demurred, pleaded or answered, or, the suit being removable into the Circuit Court of [566] the United States, have filed a petition and bond as required by law in such cases. The contention of counsel for appellants is, in effect, that, until Kernochan answered the bill, the state court was without jurisdiction to proceed as if he had "appeared in due season and no decree had been made." But such a construction of the statute is too technical and is scarcely admissible where the party appearing, and who has been proceeded against by publication only, is a citizen of another State, entitled under the Constitution and laws of the United States to remove the cause from the state court. The utmost which could be claimed in such cases (and we do not say that such a claim could be sustained) is, that the state court might, in its discretion, decline to open the decree, or to hear the defendant, unless he presented an answer to the bill. In this case, the motion of Kernochan to re-docket the cause and open the decree was granted, without requiring him to file an answer, disclosing his defense to the suit. We are not prepared to say that the state court erred in its ruling. We should, under the circumstances, assume that the state court correctly interpreted the local statute. If, therefore, the suit was removable, the Federal Court, upon its removal, and, after the pleadings were made up, and proofs taken upon the issues made by Kernochan, had the power to set aside, alter or amend the decree as might be just, or adjudge that it stand confirmed as entered in the state court. Upon his appearance in the state court the suit became, as to him, for all practical purposes, a new suit, to be conducted, however, subject to the authority of the court to confirm the former, instead of entering a new, decree.

We do not doubt that the suit was one which the defendant was entitled, under the Act of March 3, 1875, 18 Stat. at L., 470, to remove from the state court. Disregarding, as we may do, the particular position, whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of Harter Township upon the bonds described in the bill; that upon one side of that dispute are all of the state, county and township officers and tax payers, who are made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He alone, of all the parties, is, in a legal sense, interested in the enforcement of liability upon the Township. It is, therefore, a suit in which [567] there is a single controversy, embracing the whole suit, between citizens of different States, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois. *Removal Cases*, 100 U. S., 457 [XXV., 593].

But it is contended that the petition of Kernochan, for the removal of the suit, was not filed within the time prescribed by the Act of March 3, 1875, that is, at the term at which the cause could be first tried. The argument is, that Kernochan, although not advised, in any legal mode, of the pendency of the suit, was at liberty to appear therein before the decree was entered and, consequently, that he did not seek its removal at or before the term at which the cause could have been first tried; that his appearance, and filing his petition praying to be heard touching the matters of the decree, have relation to the time when he *should* have appeared in court, *had* he been duly summoned. The bare statement of this proposition suggests its refutation. When the defendant would have been summoned had he been within the local jurisdiction of the state court, we are not informed; and, consequently, it is difficult to ascertain, upon the theory of appellant's counsel,

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when he should have appeared in court. It is sufficient to say that the defendant, within the period fixed by the statute, appeared and secured the opening of the decree. The first term thereafter, at which the cause could properly have been tried, upon the merits, as to him, was the term at which, within the meaning of the Act of March 3, 1875, he should have filed his petition for removal. And it was so filed.

We come now to the consideration of questions involving the merits of the cause.

We have seen that the bonds recite that they were issued in pursuance as well of the authority conferred by the Act of February 25, 1867, incorporating the Illinois Southeastern Railway Company, and the Act of February 25, 1869, amendatory thereof, as of an election of the legal voters of the Township, held on the 10th day of November, 1868.

[568] The first of those Acts conferred authority upon townships to donate to the railway company any amount not exceeding $30,000. That authority was not, however, to be exercised until after a proposition by the railroad company to the Township, nor unless the donation was sanctioned by a majority of legal votes, cast at an election duly called and held to consider the question of donation, upon the terms proposed. It appears, from the record, that the company made to Harter Township a proposition which contemplated a donation of $20,000, payable in three installments, to be raised by a special tax, to be assessed and collected in 1869, 1870 and 1871; and which also *bound the company to accept township bonds* in lieu of the special tax, in the event legislation could be obtained, giving authority to issue bonds. An election was held, on the day stated in the bonds, and the donation, upon the terms set forth in the company's proposition, was approved by a vote of three hundred, out of a total vote of three hundred and forty-two.

The 5th section of the amendatory Act of February 24th, 1869, is in these words: "And whereas, certain townships in Wayne and Clay Counties have voted donations to said railway company, said townships are hereby authorized and empowered to issue township bonds for the amount so donated, without submitting the proposition again to be voted upon; said bonds to be issued in sums not less than $100 nor more than $1,000 each, with interest coupons attached, drawing interest at the rate of ten per cent per annum, payable semi-annually at the county treasurer's office, in each county where such townships are located; said bonds to be payable in five years or any time thereafter, not exceeding twenty years, at the option of the townships; and said bonds to be signed by the supervisors thereof or by the supervisor or supervisors of the district wherein such township is located, and to be countersigned by the township clerk of the respective townships; and said bonds to be delivered, properly executed, to the president of said railway company, when the conditions are complied with as contained in election notices and propositions submitted to and voted upon by the people of said townships; and said townships shall each, by its proper corporate authorities, provide, in due time, by a levy and a collection each year of a sufficient tax on its assessed property to pay the interest on its bonds, as it accrues half-yearly, as aforesaid, and ultimately to provide for the principal of said bonds at maturity; *Provided*, That said bonds shall be placed in the hands of a trustee, on the demand of said railway company, as hereinafter provided; *and, also, provided*, that *such townships may determine by a vote of their electors, at any regular or special town meeting or election, whether they will issue bonds or not in payment of the donations heretofore voted to said company.*" Private Laws Ill., Vol. 3, p. 310. [569]

In conformity with the provisions of that Act, a special town meeting of Harter Township was duly called and held on the 20th day of May, 1870, at which the electors present voted unanimously in favor of an issue of bonds, in payment of the donation previously voted, rather than proceed with the levy and collection of a special tax, as contemplated by the original proposition of the company. A few days thereafter, to wit, May 27, 1870, as appears from the records of the Township, the bonds, amounting to $20,000, were delivered by the township officers to the Springfield and Illinois Southeastern Railway Company, a corporation which had been formed on the 3d of December, 1869, in accordance with the laws of Illinois, by the consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield and Northwestern Railway Company. The bonds were transmitted by the township supervisor to the state auditor for registration, under the provisions of the Funding Act, in force April 16, 1869. He certified, under oath, that they had been issued under the said Acts of February 25, 1867, and February 24, 1869, and that all the preliminary conditions required, in the Act of April 16, 1869, to be performed before such registration, and to entitle them to the benefits of that Act, had been, to the best of his knowledge and belief, fully complied with. It may also be stated that taxes were annually levied, collected and applied, by the Township, in payments of interest on the bonds up to the commencement of this suit in 1877.

In view of these facts, it is difficult to perceive upon what just ground the Township can escape liability. In the first place, the bonds were issued in pursuance of a popular vote in favor of a donation to be met by a special tax, and also of a vote, at a subsequent special election, in favor of an issue of bonds in payment of that donation. In the next place, and as conclusive against the Township, the recitals in the bonds import a compliance with all of the provisions of the Acts of Assembly under which they were issued. It is true that the bonds do not, in express words, refer to the special election of May 20, 1870; but, since the amendatory Act authorized the Township, upon a vote of the electors, at a regular or special town meeting or election, to issue bonds in payment of the donation previously voted, the recitals in the bonds fairly import that such an election was, in fact, held before the bonds were issued. [570]

If those Acts are not repugnant to the Constitution of the State, it results, that, according to repeated adjudications of this court, the Township is estopped, by the recitals in the bonds, to assert that their provisions were not complied with. The Constitution of Illinois, in force when these Acts were passed, declared

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that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes. It is the settled law of the State, as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised; and that the Legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns and villages, or for any other than corporate purposes. *Livingston Co.* v. *Darlington*, 101 U. S., 411 [XXV., 1017]. Our attention is called to several cases in the Supreme Court of the State, in which it has been held that the Legislature could not, constitutionally, require a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose. Some of those cases turn upon the inquiry as to who are, in the sense of the Constitution, corporate authorities of counties, cities, towns, etc., and what are corporate purposes. A leading case is *Williams* v. *Town of Roberts*, 88 Ill., 11, where the court, speaking by *Chief Justice* Scholfield, said that, under the system of township organization existing in Illinois, the electors alone represented he corporate authority of the town, and without their consent, expressed at town meetings [71] or town elections, no debt for a merely local corporate purpose could be imposed upon the township.

But neither that, nor any other decision by the state court cited by counsel, distinctly meets the precise point now before us, or would justify us in holding (as we ought not to do except in a clear case) that the General Assembly of the State had transcended its constitutional powers. The Act of February 27, 1867, did not assume to impose a debt upon the Township without the consent of the electors. It expressly required an election to be held, at which the legal voters could determine the question of donation for themselves. The election was held, and a donation voted to aid in the construction of a railroad. That, it must be conceded, was a corporate purpose, within the meaning of the Constitution as interpreted by the state court. But it is contended that the amendatory Act authorized the township officers, without the assent of the voters, to impose a burden or create a debt wholly different from that to which the voters, at the election on the 10th of November, 1868, gave their assent. Counsel overlook or fail to give proper force to the proviso in that Act authorizing the electors at a regular or special town meeting to determine whether they would issue bonds in payment of the donation previously voted to the company. And there was, as we have seen, a special town meeting, duly called for the specific purpose of determining that question, and the decision was unanimous in favor of issuing bonds to pay off the donation.

It is urged in this connection, that the Supreme Court of the State, in the recent case of *Schaeffer* v. *Bonham*, 95 Ill., 378, decided in 1880, has ruled that the 5th section of the amendatory Act of February 24, 1869, was in violation of the Constitution of the State, and that it was the duty of this court to accept that decision as conclusive. That case in many respects resembles this one, but, upon the particular point arising here, it is materially different. It was submitted upon an agreed statement of facts, from which it appears that a certain township had, in 1868, voted a donation to the Illinois Southeastern Railway Company, to be raised by special tax, under the authority conferred in the Act of February 25, 1867. But it did not appear, from the evidence in that case, that an election had been held, as authorized by the 5th section of the Act of February [572] 24, 1869, to determine whether the donation should be paid by township bonds rather than by a special tax for a limited period. We infer from the agreed statement of facts in that case, as well as from the remarks of the court, that no opportunity was, in fact, given to the voters to determine the question of issuing bonds. The court said that the charter authorizing townships to vote donations did not contemplate and, consequently, did not provide, for issuing bonds; that it only intended a donation to be paid by the levy of a tax, and the payment of the money, when thus collected, to the railroad company; that the Legislature could not confer upon the township officers, without a vote of the people, authority to make such a radical change in the proposition upon which the people voted, as would occur, if, instead of a special tax, during a limited period, to meet the donation, township interest bearing bonds should be issued, running from five to twenty years.

The state court, in referring to the 5th section of the Act of February 24, 1869, states that it "Authorizes and empowers townships in Wayne and Clay Counties, that had voted donations to the road, *without submitting the question to a vote*, to issue bonds," etc. We are unable to concur in that construction of the Act, since that section, after authorizing townships in Wayne and Clay Counties, which had voted donations to the railway company, "To issue township bonds for the amount so donated, without submitting *the proposition* (for a *donation*) *again* to be voted upon," expressly declares that "such townships may determine by a vote of their electors, at any regular or special town meeting or election, whether they will issue bonds or not, in payment of the donations heretofore voted to said company." The purpose of the 5th section was to dispense, as to certain townships, with a second vote upon the general question of donation, and to confer authority to issue township bonds in payment of such donation, when, and only when, the electors so voted at a regular or special town meeting or election. In *Schaeffer* v. *Bonham* it did not appear that the voters were consulted as to whether bonds should be substituted in lieu of the special tax previously voted. The parties there sought the opinion of the court upon an agreed statement of facts, which, in effect, conceded that no such election was held. Here it is shown that the bonds in suit were issued in [573] pursuance of the vote of the electors at a special town meeting called to determine the question whether the donation previously voted should be paid in that mode. It is clear that *Schaeffar* v. *Bonham* proceeds upon the ground, in part, that the bonds there in suit were issued in payment of the donation, without any submission of the question to the voters.

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In another portion of its opinion, after stating that the assessment of taxes to pay off the donation was the imposition of a *debt* upon the Township, the state court said: "Had the Township voted to incur a debt, and the bonds had been issued by a person named by the General Assembly, different from the corporate authorities, then payment of interest and acquiescence for such a length of time might have operated as an estoppel. In such a case, the vote to create the debt, if authorized by law and had in pursuance of law, would have been the essential act to create the debt, and the mere signing and delivering the evidence of the debt would have been valid if done by a person specified by the General Assembly, whether named before or after the vote was had. But such is not the case here. No debt was voted, and the Legislature was powerless to authorize any but the corporate authorities to create a debt." 95 Ill., 381. If, as held by the state court, the issuing of bonds, in payment of the donation previously voted, was incurring a debt and if such a debt could not be incurred without a direct vote of the electors, it is sufficient to say that such a vote was had in reference to the bonds here in suit.

For the reasons stated, we are of opinion that the Acts of February 25, 1867, and February 24, 1869, are not in violation of the Constitution of the State; and in so holding we do not, we think, come in conflict with any decision of the state court in which the precise question here presented has been passed upon.

It remains for us to consider whether the Township can avoid liability upon the bonds by reason of the fact that they were delivered to the Springfield and Illinois Southeastern Railway Company, the donation having been originally voted to the Illinois Southeastern Railway Company.

[574] We are of opinion that there is nothing of substance in this objection. The Act incorporating the Illinois Southeastern Railway Company, the Act amendatory thereof, and the Act in relation to the Pana, Springfield and Northwestern Railway Company (even if the general statutes of the State were not sufficient for the purpose), fully authorized the consolidation between those two companies, and upon such consolidation the new company succeeded to all the rights, franchises and powers of the constituent companies. The power in the Township to make a donation to aid in the construction of the Illinois Southeastern Railway was also a privilege of the latter corporation, and that privilege, upon the consolidation, passed to the new company. The donation was voted before the consolidation took effect, and since the consolidated or new company did not propose to apply such donation to purposes materially different from those for which the people voted it in 1868, its right to receive the donation, at least when the Township assented, cannot be doubted. The records of the Township show that the bonds were directed to be issued and delivered to the new company, and it will not, under the circumstances, be allowed to say, as against a *bona fide* purchaser for value, that the bonds are invalid. There is, consequently, no pretext for saying that a burden was imposed upon the people to which they had never given their consent in the mode prescribed by law.

Other questions are discussed, but we do not deem it necessary to refer to them.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 649; 104 U. S., 470; 105 U. S., 76; 107 U. S., 529, 532, 538; 10 Biss., 321, n.

WILLIAM ASHBURNER, *Plff. in Err.*,

v. [575]

PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C., 13 Otto, 575-579.)

Commissioners of Yosemite Valley.

The United States granted to the State of California, the Yosemite Valley and the Mariposa Big Tree Grove, to be managed by the Governor of the State and eight other Commissioners, who were to be appointed by the Executive of California. Held, that a law of the State which limits the term of office of a commissioner under one appointment to a reasonable time is not repugnant to the Act of Congress, and may be followed by the Governor in making his appointments.

[No. 928.]

Submitted Dec. 3, 1880. Decided Feb. 28, 1881.

IN ERROR to the Supreme Court of the State of California.

An action was brought in the Superior Court of California, County of Sacramento, against the plaintiff in error, for an alleged usurpation of the office of member of the Board of Commissioners to manage the Yosemite Valley and Mariposa Big Tree Grove. The Governor, pursuant to authority of the Legislature (Stats. of Cal., 1880, pp. 44, 240,) had appointed a new Board of Commissioners. The plaintiff in error refused to give up his office, upon demand, on the ground that the office was not subject to the control of the state authorities. Judgment was given in favor of the defendant, but the Supreme Court of the State, upon appeal reversed this, and gave judgment in favor of the People; whereupon the defendant sued out this writ of error.

The case is further stated by the court.

Mr. **Alfred Barstow,** for plaintiff in error:

The Act of Congress created a trust; the State being created the trustee of the title, and the commissioners the trustees for the management of the property.

The *Yosemite Valley Case*, 15 Wall., 94 (82 U. S., XXI., 87).

The Act of Congress and the state Statute of 1866, created a contract between the United States and the State; and one party, the State, had no power thereafter to alter or add to the terms of the contract.

Fletcher v. *Peck*, 6 Cranch, 133; *Terrett* v. *Taylor*, 9 Cranch 43; *Green* v. *Biddle*, 8 Wheat., 1; Cooley, Const. Lim., 274, and cases cited.

The trust created by the grant, and its acceptance by the State, is a charitable trust.

Price v. *Maxwell*, 28 Pa. St. 35; *Jones* v. *Williams*, Amb., 652; Boyle, Charities, 51;

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McDonogh v. *Murdoch*, 15 How., 400; *Mitford* v. *Reynolds*, 1 Phil., 185; Perry, Trusts, secs. 707, 730.

The Crown, the State, a municipal corporation, a county, etc., may be a trustee.

Perry, Trusts, secs. 40, 41; *Mitford* v. *Reynolds* (*supra*); Hill, Trust. 52; *Webb* v. *Neal*, 5 Allen, 575.

A city may be; *Coggeshall* v. *Pelton*, 7 Johns. Ch., 292.

A city created trustee; Amb., 422; Boyle, Char., 52–54.

A grant from the Crown, of land to a town; *McDonogh* v. *Murdoch* (*supra*).

The commissioners appointed under the Act of Congress are not officers, but are trustees.

Inglis v. *Trustees of Sailors' Snug Harbor*, 3 Pet., 99; *Nightingale* v. *Goulbourne*, 2 Phill., 594; *New* v. *Bonaker*, L. R., 4 Eq., Cas., 655; see *McDonogh* v. *Murdoch* (*supra*); Perry, Trusts, sec. 308; *Osgood* v. *Franklin*, 2 Johns. Ch., 18.

The commissioners, as trustees, are subject to the control of the court of equity.

Boyle, Char., 12–14; 2 Perry, Trusts, sec. 692.

The Governor has no power of removal.

The Legislature has no power to fix the period during which the commissioners shall act as such.

If the commissioners are in any sense officers, they are federal and not state officers.

The state courts, in naturalization proceedings, act under the authority of Congress, and are, for that purpose, Federal Courts.

Matter of Ramsden, 13 How. Pr., 429; *People* v. *Sweetman*, 3 Parker, Cr., 358.

Messrs. **J. H. McKune** and **A P. Catlin**, for defendants in error:

The position of commissioner is an office within the meaning and intent of the statutes of this State, and of the provisions of the State Constitution limiting the duration of the terms of those officers whose terms are not otherwise limited. Section 343 of the Political Code, in the enumeration of the civil executive officers of the State, mentions the "Nine Commissioners of the Yosemite Valley and Mariposa Big Tree Grove."

Political Code, Cal., secs. 343, 357.

The Act of Congress vested in the State of California the title to the said valley and grove, subject only to be defeated by the breach of certain conditions subsequent, mentioned and specified in the Act.

U. S. Stat. at L., 1863–4, p. 325.

By the statute accepting the grant, the duties and powers of the commissioners were prescribed, and in them was vested the power and authority to make rules, regulations and by-laws for their own government and the government of said premises.

Stat. of Cal., 1865–6, p. 710.

"When an individual has been appointed or elected in the manner provided by law, and exercises functions affecting the public, assigned to him by law, he must be regarded as a public officer."

Bradford v. *Justices*, 33 Ga., 332; *Leach* v. *Cassidy*, 23 Ind., 449; *Waldo* v. *Wallace*, 12 Ind., 569; *Smith* v. *Mayor, etc.*, 37 N. Y., 518.

Abbott says: "The most frequent occasions to use the word "office" arise with reference to a duty and power conferred by the government; and when this is the connection, "public office" is the usual and most discriminating expression."

Abb., L. Dic., 200; *People* v. *Hayes*, 7 How. Pr., 248; *People* v. *Bedell*, 2 Hill., 196.

These commissioners are officers of the State, and not of the Federal Government.

They are all the agents of the State; their duties and powers are defined and fixed by a law of the State and are confined to the management of the property of the State; their traveling expenses are paid out of funds provided by the State; and they have the power to appoint and fix the compensation of a guardian, whose compensation is paid out of the State Treasury.

It would seem clear, therefore, that said commissioners are all state officers.

The terms of those officers are limited to four years from the date of appointment, by the State Constitution.

The terms of these officers, not being fixed by the Constitution, expired long prior to the appointment of the new commissioners, and the Governor, under the Act of Apr. 15, 1880, had the right to appoint the new board.

Stat. Cal., 1880, pp. 44, 240.

Mr. Chief Justice **Waite** delivered the opinion of the court: [577]

In 1864 the United States granted to the State of California the Yosemite Valley and the Mariposa Big Tree Grove, "With the stipulation, nevertheless, that the State shall accept this grant upon the express condition that the premises shall be held for public use, resort and recreation, and shall be inalienable for all time; * * * the premises to be managed by the Governor of the State and eight other Commissioners, to be appointed by the Executive of California, who shall receive no compensation for their services." 13 Stat. at L., 325, ch. 184. In 1866 the State of California, by an Act of the Legislature, accepted this grant "Upon the conditions, reservations and stipulations contained in the Act of Congress." There cannot be a doubt that, in this way, these interesting localities were by the joint Act of the United States and California, devoted to a special public use. The title was transferred to California for the benefit of the public as a place of resort and recreation. Without the consent of Congress the property can never be put to any other use and the State cannot part with the ownership. It may be called a trust, but only in the sense that all public property held by public corporations for public uses is a trust. It must be kept for the use to which it was by the terms [578] of the grant appropriated. If it shall ever be in any respect diverted from this use, the United States may be called on to determine whether proceedings shall be instituted in some appropriate form to enforce the performance of the conditions contained in the Act of Congress, or to vacate the grant. So long as the State keeps the property it must abide by the stipulation, on the faith of which the transfer of title was made.

The management of the property was intrusted by the United States to the Governor of the State and eight other Commissioners, to be appointed by the Executive. This is one of the conditions contained in the Act of Congress to which the State gave its assent when it accepted the grant. The State cannot commit the

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management to any other Board than this; neither can it control the discretion of the Executive in making the appointments; but we see no reason why the State may not set a reasonable limitation on the time a commissioner shall hold his place when appointed. This would be really nothing more than directing that the Executive revise his appointments at stated periods. He will be left free to select whom he pleases, and by re-appointments to continue old incumbents in their places if so inclined. His discretion in this respect would be in no manner interfered with. This, in our opinion, is all that was done by the Act of April 15, 1880. The term of the office of a Commissioner was fixed at four years, but the power of appointment was left exclusively with the Governor, in whom, under the Constitution, is vested the supreme executive power of the State. The length of the term is that prescribed by the Constitution for state offices, and is certainly not unreasonable.

That Congress expected the State would, by appropriate legislation, aid the Commissioners in the performance of their duties, and prescribe reasonable rules and regulations, not inconsistent with the general purposes of the grant, for their government in the administration of the trust, is abundantly shown by the fact that the acceptance of the grant was considered sufficient, notwithstanding the Act of the Legislature by which it was done contained various provisions of such a character. Among other things it was enacted that the Commissioners should be known in law as "The Commissioners to manage the Yosemite Valley and [579] the Mariposa Big Tree Grove," and by that name they and their successors might sue and be sued; that they should have power to make and adopt all rules, regulations and by-laws for their own government and the government, improvement and preservation of the property, not inconsistent with the Constitution of the United States or of California, or of [with] the Act making the grant, or any law of Congress or the Legislature; that they should hold their first meeting at such time and place as should be designated by the Governor; that a majority should constitute a quorum for the transaction of business; that they should appoint a president and secretary as well as a guardian of the property, and that they should report through the Governor to the Legislature at every regular session. All this was consistent with the conditions and reservations of the grant and evidently in aid of what Congress intended should be done. So, too, in our opinion, is the Act of 1880. If, as is contended here, and was held by the dissenting Judge below, when the Commissioners were once appointed, the power of the Governor over appointments was exhausted, until a vacancy occurred by death or resignation, and neither he nor the Legislature could remove a Commissioner for cause or otherwise, it is easy to see that unless some provision was made to guard against the accidents of disabilities incident to a life tenure of office, great embarrassments might arise in the management of this important public property. It is entirely unnecessary to decide whether these Commissioners are state officers or state Commissioners within the meaning of those terms as used in the Constitutions of the State adopted in 1848 and 1879, and, therefore, within the constitutional provision limiting the terms of such offices, but we are of the opinion and decide that a law of the State which limits the term of office of a Commissioner under one appointment to a reasonable time is not repugnant to the Act of Congress and may be followed by the Governor in making his appointments. The plaintiff in error had been in office longer than the limited period, when the Governor, in the exercise of his discretion, appointed another person in his place. Upon this appointment he should have surrendered his office. *It follows that the judgment of the court below was right and it is, consequently, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MILWAUKEE NATIONAL BANK OF WISCONSIN, *Plff. in Err.*, [668
v.
CITY BANK.

(See S. C., 13 Otto, 668–673.)

Bank, when agent—instructions—question for jury.

1. A bank which receives from another bank drafts with bills of lading of wheat, with instructions to deliver the wheat to another on payment of the drafts and acknowledging the receipt of the drafts, becomes the agent of the transmitting bank in the business which it had undertaken.
2. The instructions implied that the bank, which by the bill of lading was invested with the full right to the possession of the wheat, should not deliver it, except upon payment of all the drafts drawn against each cargo of wheat.
3. Whether the defendant bank did exercise due care and diligence, in storing the wheat in the elevator of the acceptors of the draft and in performing its duty as such agent, was a question of fact for the jury, and in taking it from them the court erred.

[No. 198.]

Argued Jan. 10, 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **H. M. Finch,** for plaintiff in error.

Mr. **Albertus Perry,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

A. F. Smith & Co. were the owners of the Corn Exchange Elevator of Oswego, New York, in which they were engaged in the general business of elevating and storing grain for the public. They were also large dealers in grain on their own account. In September, 1869, Mower, Church & Bell, who were commission merchants in Milwaukee, received orders from Smith & Co. to purchase for them two cargoes of wheat, and to draw on them for the purchase money against each cargo. The cargoes were bought and sight drafts for part of the purchase money and time drafts for the other part were, [669] in each instance, drawn on A. F. Smith & Co.

These drafts were purchased by the Milwaukee Bank, the plaintiff in error, which received also the bills of lading for the wheat. These bills describe Mower, Church & Bell as the shippers and, by their terms, the cargo, in each

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case, is to be delivered at Oswego to the account or order of T. L. Baker, Cashier of the Milwaukee Bank, care of the City Bank of Oswego.

The Milwaukee Bank inclosed the drafts and the accompanying bills of lading to the City Bank of Oswego, with instructions about insurance, and added, "On payment of the drafts you will deliver the cargo to the order of Messrs. Smith & Co. If not paid, please hold and advise by telegraph. Messrs. Smith & Co. will pay all expenses."

The letter and inclosures were duly received and acknowledged by the City Bank, and on presentation to A. F. Smith & Co. they paid the sight drafts and accepted the time drafts.

When the vessels arrived at Oswego, the masters promptly reported to Mannering, the Cashier of the City Bank, who made the following indorsement on each bill of lading held by the masters:

"Deliver to the Corn Exchange Elevator, for account of T. L. Baker, Cashier, Milwaukee, subject to order of the City Bank, Oswego.

Oct. 9, 1869. D. MANNERING, *Cashier*."

A. F. Smith &. Co. sold and shipped off the wheat after it had been put in their elevator, and failed before the time drafts fell due, which were duly protested for non-payment, and have never been paid.

The Milwaukee Bank sued the City Bank to recover their loss on the drafts on the ground that the City Bank had delivered the wheat to Smith & Co. before the drafts were paid, contrary to the instructions which accompanied the drafts and the bills of lading. The case was tried before a jury, and all the evidence is embodied in the bill of exceptions, and on the case, as there made, the court instructed the jury to find a verdict for defendant, which was done. It is this instruction which is assigned for error.

[670] The City Bank, in receiving the drafts and bills of lading in letters which instructed it to deliver the wheat to A. F. Smith & Co., on payment of the drafts, and acknowledging the receipt of these drafts, became the agent of the Milwaukee Bank in the business which it had undertaken. Whatever obligation might, under other circumstances, be imposed on the Bank by its consent to receive the drafts and bills of lading, it, in the present case, received them with instructions which the bills of lading empowered it to execute, namely: to control the possession of the wheat until the drafts on Smith & Co. were paid. In acknowledging the receipt of these papers the cashier says: "We prefer, *after this*, not to receive B. L. (meaning bill of lading) when we have to look after the property." This is an implied admission that they were to look after the property, and would do so in the case to which the letters related. The Bank also undertook to discharge this duty when the masters of the vessels, presenting themselves and cargo to the cashier of that Bank for delivery, were directed by him in writing to deliver to the Corn Exchange Elevator. It, therefore, undertook to discharge a duty as agent of the Milwaukee Bank in regard to the custody of the wheat, under instructions that it should deliver it to Smith & Co. on payment of the drafts. There is evidence tending to show that the Oswego Bank, in its account with the Milwaukee Bank, made an additional charge or percentage for its trouble beyond the customary charge for collecting and remitting proceeds of the drafts. So that it undertook a duty for which it received and intended to exact compensation.

What, then, is the measure of its obligation as such agent to the plaintiff Bank?

We suppose that there can be no question that it should use due care and diligence in performing the task which it had set itself to do.

One of the clear duties of an agent, under such circumstances, is to obey instructions, if they can be obeyed by a reasonable exercise of diligence and care.

We think the instructions in this case very clearly implied that the Bank, which by the bill of lading was invested with the full right to the possession of the wheat, should not de- [671] liver it to A. F. Smith & Co., except upon payment of the drafts; that is, of all the drafts drawn against each cargo of wheat. The reasons for this are very plain. The wheat had been bought by Mower, Church & Bell, in Milwaukee, for A. F. Smith & Co., but they had to raise the money to pay for it by drafts on the latter. These drafts could only be negotiated by placing the control of the wheat in the hands of the purchasers of the drafts as security for their payment. The sight drafts were paid by Smith & Co. when the wheat arrived in Oswego. They had thus paid that much money on the purchase. They were to pay all expenses. There remained unpaid, however, the time drafts; and the instruction of the Milwaukee Bank to its agent, the City Bank, was not to part with the possession and control of this wheat to Smith & Co. until those drafts were paid. It was the only security the Bank had for its payment, and it was ample.

As we have already said, A. F. Smith & Co. were the owners and managers of the Corn Exchange Elevator. It is proved that the officers of the Bank knew this. The cashier of the City Bank, therefore, knew that when he made the order on the bills of lading for the delivery of the wheat to the Corn Exchange Elevator, he was ordering its delivery to A. F. Smith & Co. It was by reason of this delivery and the failure of Smith & Co. that the amount of the drafts was lost to plaintiff.

Did the defendant Bank, therefore, under the circumstances of the case, exercise due care and diligence in storing this wheat in the Corn Exchange Elevator?

The Judge took this question from the jury and decided it in favor of defendant. We are of opinion that in this the court erred. We do not decide here that the defendant Bank was negligent. We think there was evidence on which that question should have been left to the jury. We think it should still be left to a jury.

It was said, in answer to this view of the subject, that the Bank had no warehouse or other place of its own in which to store the wheat, and that this was known to the Milwaukee Bank, which must, therefore, have known that the City Bank would be compelled to store it with some one until the drafts, which had some time to run, should be paid. That Smith & Co. [672] were supposed to be safe and solvent men engaged in that business, of good reputation, and that all wheat received under such circumstances in Oswego was deposited in elevators. These are circumstances for the jury to consider,

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On the other hand, it is to be said that there were other elevators in Oswego, not owned by Smith & Co., ready to receive the wheat. To some of these it could have been delivered without danger of complicating the possession as bailee, with possession under claim of ownership. And this is important, for there are laws making the embezzlement of property, when held as bailee by warehousemen and elevators, a criminal offense. It would be more difficult to convict Smith & Co. of embezzlement for selling this wheat when it had been bought for them, part of the money paid for it by them and when they had accepted negotiable drafts for the remainder of the purchase money, and when, in fact, it was their property, subject only to the payment of their outstanding drafts.

Was it acting with ordinary prudence to hazard the security which possession of the wheat gave, by delivering it to the very party to whom his principal had directed him *not* to deliver it? It further appears that the defendant Bank took no receipt from Smith & Co., showing that they held it as bailees, but left that to stand on the indorsement they made on the bills of lading in the hands of the masters of the vessels, and a simple acknowledgment of the receipt of the wheat by A. F. Smith & Co. on the same bills of lading. One of the firm of Smith & Co. swears that no warehouse receipt was given.

There was a plain course to be pursued, which involved no difficulty or trouble, namely: storing the wheat in some other elevator or warehouse until A. F. Smith & Co., on payment of the acceptances, should call for it. This course would not have involved a departure from their instruction not to deliver to Smith & Co. until the drafts were paid, and would have saved all parties from loss.

Some question is made in the argument as to the effect of proceedings taken by plaintiff to recover the wheat or its value of parties who bought or received it from A. F. Smith & Co. It is only necessary to say, if the jury shall be of opinion that defendant was negligent in delivering the wheat to A. F. Smith & Co., it is responsible to plaintiff for the amount of the [673] unpaid drafts, less any sum not actually recovered from others.

Without further comment, we are of opinion that there was evidence of negligence or want of due care on the part of defendant, which, taken in connection with the positive instruction of the plaintiff, should have been submitted to the jury. *The judgment of the Circuit Court is, therefore, reversed, with instructions to grant a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[721] PACIFIC MAIL STEAMSHIP COMPANY,
Appt.
v.
UNITED STATES.

UNITED STATES, *Appt.*
v.
PACIFIC MAIL STEAMSHIP COMPANY.

(See S. C., 13 Otto, 721-730.)

Contract for carrying mails—repeal of statute.

1. In construing a contract for carrying the mail from San Francisco to certain Asiatic ports, made by a steamship company with the United States, this court holds that such company can only recover on the contract for the service rendered by vessels which had been accepted by the Postmaster-General, and that it cannot recover on the contract for mails carried in vessels which had not been accepted under the contract. As to the latter, the sea postages offered by the Postmaster-General must be, as it was before the making of the contract, the only compensation.

2. Where a vessel had been accepted by the Postmaster-General, and had started on the round trip ten or twelve days before Congress passed the statute annulling the contract, and she carried the mails under that contract on the voyage out and return, the repeal of the statute and the annulment of the contract did not operate on that voyage.

[Nos. 201, 202.]

Argued Jan. 25, 1881. Decided Feb. 28, 1881.

CROSS appeals from the Court of Claims.

The case is fully stated by the court.

Messrs. **John F. Farnsworth, William E. Chandler, Roscoe Conkling, Philip Phillips** and *H. C. Cady*, for The Pacific M. S. Co.

Messrs. **S. F. Phillips,** *Solicitor-Gen.*, and **Edwin B. Smith,** *Asst. Atty-Gen.*, for The United States.

Mr. Justice **Miller** delivered the opinion of the court:

These are cross appeals from a judgment of the Court of Claims. The Steamship Company asserted in that court a claim for $531,666.66, and recovered a judgment for $41,666.66. The United States desire to reverse this latter judgment. The Steamship Company seeks to recover here the full sum claimed below.

The suit grows out of a contract for carrying the mail from San Francisco to certain Asiatic ports. The facts, as found by the Court of Claims, and so far as is necessary to our decision, will be stated as we proceed.

The Steamship Company entered, on the 16th of October, 1866, into a contract with the United States to carry a monthly mail from San Francisco to China and Japan, *via* the Sandwich Islands, for the sum of $500,000 per annum, for a period of ten years.

These mails were to be carried in first-class American sea-going side-wheel vessels of from 3,500 to 4,000 tons burden, to be inspected and [722] accepted by the Postmaster-General. The Company, in due time, entered upon the discharge of this duty, and the steamships Colorado, Great Republic, China, Japan, America and Alaska, were duly inspected and were accepted by the Government for that service, and had been in actual use in performing the contract for several years, when Congress in the appropriation bill of June 1, 1872, 17 Stat. at L., 199, for the service of the Post-Office Department for the next year, enacted as follows:

"SEC. 3. For steamship service between San Francisco, Japan and China, $500,000; and the Postmaster-General is hereby authorized to contract with the lowest bidder, within three months after the passage of this Act, after 60 days' public notice, for a term of ten years, from and after the first of October, 1873, for the conveyance of an additional monthly mail, on the said route, at a compensation not to ex-

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ceed the rate per voyage now paid, under the existing contracts, and upon the same conditions and limitations as prescribed by existing Acts of Congress in reference thereto, and the respective contracts made in pursuance thereof; and the contractors, under the provisions of this section, shall be required to carry the United States mails during the existence of their contracts without additional charge, on all the steamers they may run upon said line, or any part of it, or any branch or extension thereof; *Provided*, That all steamships hereafter accepted for said service shall be of not less than four thousand tons register each, and shall be built of iron, and, with their engines and machinery, shall be wholly of American construction; and shall be so constructed as to be readily adapted to the armed naval service of the United States, in case of war; and, before acceptance, the officers by whom they are inspected shall report to the Secretary of the Navy and the Postmaster-General whether this condition has been complied with. * * * And the Government of the United States shall have the right, in the case of war, to take for the use of the United States any of the steamers of said line, and, in such case, pay a reasonable compensation therefor; *Provided*, The price paid shall in no case exceed the original cost of the vessel so taken; and the provision shall extend to and be applicable to the steamers of the Brazilian line hereinafter provided for."

[723] "SEC. 6. That if the contract for the increase of the mail service between San Francisco and China and Japan to a semi-monthly service shall be made with the Pacific Mail Steamship Company, or shall be performed in said Company's ships, or the ships of its successors in interest, the moneys payable under such contract shall be paid while the said Company, or its successors in interest, shall maintain and run the line of steamships for the transportation of freight and passengers, at present run between New York and San Francisco, *via* the Isthmus of Panama, by the said Pacific Mail Steamship Company, and no longer; *Provided*, That said requirements shall, in all respects, apply to any party contracting for the mail service between San Francisco and China and Japan, as well as to the Pacific Mail Steamship Company."

After advertising for bids for this service and receiving a bid from the Pacific Mail Company, a contract was signed by the Postmaster-General and the Company, which is too long to be copied here in full. On the part of the Company, after reciting the times of departure and places of delivery of the mails which they bound themselves to carry for the period of ten years, commencing on the first day of October, 1873, there occurs this sentence, on the construction of which the present controversy hinges: "And the said contractors do further covenant and agree with the United States, and do bind themselves, that the steamships hereafter offered for the service shall be of not less than four thousand tons register each, and shall be built of iron and, with their engines and machinery, shall be wholly of American construction, of the best materials and after approved models, and shall be so constructed as to be readily adapted to the armed naval service of the United States in case of war; and before acceptance, the officers by whom they are inspected shall report to the Secretary of the Navy and the Postmaster-General whether this condition has been complied with; and, further, that the said steamships, after acceptance by the Postmaster-General, and during the period they may be employed in conveying the mails, shall be kept up by alterations, repairs and additions, as the exigency may require, fully equal to the best state of steamship improvement attained; and if not so kept up and maintained, they may be rejected by the Postmaster-General of the United States, as not meeting the requirements of the Act of Congress authorizing the additional [724] monthly service, and other satisfactory steamships required in their place." And the question is whether the Company was bound by this contract to carry this additional semi-monthly mail in vessels of the class here described and no others, or whether, while exercising due diligence, to have so many of that kind of vessels as was necessary, in addition to those which had been accepted under the first contract, they were at liberty to use these last in performing the contract. Counsel for the Government maintain that, inasmuch as but one trip was made under this contract by a vessel of the class here described, the service which was rendered by other vessels which had been accepted by the Postmaster-General before this contract was made, was not a service in compliance with the contract for which they are entitled to receive the $41,666.66 per trip, while the contention of the Company is, that it was at liberty to use ships already accepted for this service, being the same service which they were then performing under the former contract, except that it had now become a semi-monthly instead of a monthly mail, and that by the use of the word *hereafter*, in the new contract, reference was had to such new vessels as it might become necessary to introduce into that service.

It will be observed that the same word hereafter, occurs in the Act of 1872, under which the contract was made, and in the same connection. It is a word which has no sense either in the statute or in the contract, unless there is an implied reference to vessels already accepted.

If we suppose that while Congress required the contract to be let, after public notice, to the lowest bidder, but at no higher rate than $500,000 per annum, it also had in mind the great probability that the Company which was performing the contract for a monthly mail at that price would obtain the contract for the additional service, we can readily understand the use of the word hereafter, both in the statute and in the contract. It being understood that six vessels of that Company had already been inspected and accepted by the Postmaster-General for that service, and were then engaged in it, the only reasonable use of the agreement that "steamships hereafter offered" should be of the new class, is that those already accepted might be used under this contract for the same service, [725] but that such other vessels as the service should require must be of the higher class described in the statute.

There are many reasons to believe that, while Congress observed its uniform policy of letting such contracts to the lowest bidder, thus inviting competition, it felt reasonably sure that in the present case the Pacific Mail Company would get it, if let at all; for the *maximum* of

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$500,000 per annum left an alternative that no contract might be made.

One of these considerations is, that the Company had for some time been making semi-monthly trips on the same route in pursuit of their general business as carriers, and had carried the mail every trip, receiving for the trip, for which they had no contract, what is called the sea postages, a phrase not explained in the record, but understood to mean the postage received by the United States for the mail matter actually carried. If the Company was doing this already for such a small sum, generally less than $1,000 per round trip, it was to be supposed they could underbid anyone else. Besides, it was well known that no one else was prepared to perform the service, or could afford to put in a competing line for such service. That Congress contemplated the taking of the contract by this Company as extremely probable is shown by the provisions of the 6th section of the Act, that if the contract was made with that company *or performed in its ships* the money should only be paid so long as that Company should continue its line from New York to San Francisco by way of Panama. We have here not only the probability that the Company would get this contract which already was running a line of steamers from New York to San Francisco and was doing the work from San Francisco to Asia, which was now to be doubled, but we have the one made to depend on the performance of the other, and the distinct intimation that the new service might be performed in the ships of that Company. Now, though this does not necessarily mean ships then in existence, when taken in connection with the use of the word hereafter, as we have suggested, it adds to the force of the implication that ships of that Company which had already been accepted might still be used for a service not new, [726] but increased in the frequency of voyages, if the contract was awarded to the Company then performing the service.

The construction of this contract was referred by the Postmaster-General to the Attorney-General in the summer of 1874, the question being whether the contract had been forfeited or was liable to be declared so by reason of the fact that while the new service was to commence October 1, 1873, no vessel of the higher class described in the contract had been offered.

The Solicitor-General in a very careful opinion held that while the literal terms of the contract might be held to mean that the additional service should be wholly performed in the higher class of vessels, that the Act of Congress under which the contract was made clearly did not require this.

He says: "It seems to me plain that the Act of 1872 did not require such additional mail service in steamships of the new class, unless such became necessary." And while he is of opinion that the literal language of the contract does require this, it is an immaterial part of the agreement, and the failure to provide the new vessels when the work was as well done in those already accepted did not authorize a forfeiture of the contract.

The Attorney-General also gave an opinion, in which, while he declines to adopt all of the Solicitor-General's views, he says: "I am of opinion that it was not an essential part of the contract that the new iron steamships should be furnished by the first of October, 1873, if at that time it satisfactorily appeared that they would be furnished within a reasonable time thereafter." [Pacif. M. S. S. Contract.] 14 Ops. Attys-Gen., 674. It does not appear to us that there is such a discrepancy between the language of the statute and the language of the contract as is suggested by the Solicitor-General, and if there were, the following words found in the contract would make the statute govern the case: "This contract shall in all its parts be subject to and in all respects governed by the requirements and provisions of the 3d and 6th sections of the Act of Congress approved June 1, 1872." These are the sections we have copied, and which the Solicitor-General construes as we do, not to require the steamships of the new class until other vessels became necessary besides those already accepted.

That such was the understanding of the parties to this contract receives strong confirmation [727] from language found in the bid or offer of the Company, which was accepted without qualification by the Postmaster-General. It is this: "We are now building two iron propellers of about 4,500 tons register, capable of steaming twelve knots, and propose, as soon as practicable, with the limited facilities now available in America, to build two more steamers of like construction, but larger and of higher speed, all of which we shall offer for the service in question. Until they can be put into commission, and afterwards, whenever circumstances may require us to relieve them temporarily, we propose to perform the service with one of the steamships heretofore accepted for the China mail service, *viz.*: America, Japan, China, Great Republic, Alaska and Colorado, or in case of need with the Constitution, heretofore accepted as a spare steamer for said service."

It does not appear that this was objected to, and the finding of the Court of Claims is that the proposal was accepted as made, and if there be any difficulty in construing the language of the contract, it is fair to presume that it was not intended to conflict directly with such an important part of the proposal, after it had been accepted without objection.

Two acts of the claimant are much relied on, to sustain the construction of the contract now asserted by the Government's counsel; and it must be confessed that they tend to show that, about the time the performance of the contract should have commenced, some of the officers of the Steamship Company entertained the view that all the additional service was to be performed in the new class of vessels.

The first of these is a letter written in behalf of the Steamship Company by S. K. Holman, vice-president, in answer to one from the Post-Office Department. This latter letter is dated October 24, 1873, and is addressed to George H. Bradbury, president of the Company, and requests him to put in writing, for the use of the department, the explanation which he had, in a recent personal interview with the Postmaster-General, given for failing to commence the additional service on the first of October, as required by law and contract.

To this Mr. Holman says:

"SIR:—In the matter of the contract between [728] the Postmaster-General and the Pacific Mail

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Steamship Company for an additional semi-monthly mail service between San Francisco, Japan and China, said service to be performed with American-built iron steamships of not less than 4,000 tons register, and to have been commenced on October 1, 1873, we beg to submit the following, which will explain the reason of our failure to have placed the ships on the line as per contract."

He then proceeds at length to explain the difficulties they had encountered in the construction of the two ships City of Pekin and City of Tokio, which had prevented them from placing any vessel of that class in the line in time. It must be conceded that this language and the whole tenor of the letter is an implied admission that it was their duty under the contract to furnish the new class of vessels at once.

This is further confirmed by the fact that while the mails were carried twice a month from October 1, to December 31, on vessels already accepted under the old contract, the sea postage for this service was paid to the Company on the 11th day of February, 1874, amounting to $1,510.81, and that this was done at the request of the claimant.

But immediately thereafter the Company refused to receive any more of the sea postage, though warrants for it to the amount of $5,105.41 were tendered them and they continued to perform the additional service, and to demand the contract price for it, until Congress, by the Act of March 3, 1875, 18 Stat. at L., 340, exercised the power which it had reserved in the Act of June 1, 1872, and repealed that Act and annulled the contract.

But the question to be decided is, not what one or more of the officers of the Steamship Company may have thought it to mean several months after it had been made, but what did Congress mean, when it enacted this particular proviso, and was the intention of the parties who made the contract the same? We have already said that the just construction of the contract is the same as the statute, and that the latter did not require the additional service to be performed exclusively in the new class of vessels. We have shown that, when bidding for the contract, the Company guarded this point by expressly stating they should use the old vessels.

Is all this to be overcome by the use of language by a single officer of the Company, and [729] that not the highest, and whose authority in the Company is not shown? There is no evidence that the president of the Company, or its board of directors, held these views.

So the receipt of the sea postage for three months may have been by the mistaken action of some inferior officer of the Company. Long before the new contract was to begin, the Company had been performing this additional service and receiving the sea postage as compensation for it, and it may have been that some officer, unaware of the new contract, had continued to ask for and receive these postages after the new contract went into effect. We do not think these acts are sufficient to overcome the construction of the contract arising from the statute and the language of the instrument, and they certainly do not estop the Company from asserting the rights which the true construction of it gives them.

The Court of Claims finds that the additional mail service was performed by twelve round trips, beginning October 17, 1873, and terminating January 16, 1875, and that of these voyages six were made by ships which had been accepted under the first contract, and six by vessels which had never been accepted by the Postmaster-General. We are of opinion that claimant can only recover on this contract for the service rendered by vessels which had been accepted, and that it cannot recover on the contract for mails carried in vessels which had not been accepted under the contract. As to these, the sea postages offered by the Postmaster-General must be, as it was before the making of the contract, the only compensation. There may be deductions for non-performance of duty, or other matters provided in the contract, in regard to which no finding is made by the Court of Claims, but which will be open to inquiry on the return of the case to that court.

As regards the sum allowed claimant for the voyage of The City of Pekin, we think the Court of Claims was clearly right. That vessel had been examined and accepted by the Postmaster-General, as one of the new and higher class of vessels, and the mails had been delivered to her at San Francisco, on the 20th of February, 1875, and she had started on the round trip ten or twelve days before Congress passed [730] the statute annulling the contract, and she carried the mails under that contract on the voyage out and the return voyage. We are of opinion that the repeal of the statute and the annulment of the contract were not designed to operate on that voyage, and that in that respect the judgment of the Court of Claims was right.

Its judgment in regard to the other trips is reversed, and the case is remanded to it with instructions to render a judgment in conformity to this opinion.

Dissenting, *Mr. Chief Justice* **Waite.**

True copy. Test:
James H. McKenney Clerk, Sup. Court, U. S.

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[745]

COUNTY OF JASPER, *Plff. in Err.*,

v.

GEORGE WILLIAM BALLOU.

(See S. C., 13 Otto, 745-753.)

Settlement for county bonds.

Where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as properly authorized by law, for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended.

[No. 1063.]

Submitted Jan. 5. 1881. Decided Feb. 28, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is fully stated by the court.

Mr. **John M. Palmer,** for plaintiff in error:

It would seem a very clear proposition, that the proper authorities of the County had no

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power to fund any bonds or other evidences of indebtedness, unless the same were (now) "binding or subsisting legal obligations" against it, and which were (are) properly authorized by law. That the bonds whose coupons are in controversy were issued to fund other bonds issued as a subscription to the stock of the Grayville & Mattoon Railroad Company, is admitted by the demurrer, and fully proven on the trial. Two questions are then presented:

1. Was the original issue of bonds to the Grayville & Mattoon Railroad Company valid, and the "binding, subsisting, legal obligations" of the County and "properly authorized by law?"

2. If not, is it in the power of the board of supervisors of the County, by recitals in its funding bonds, to legalize such indebtedness or estop the County from denying its legality?

By an unbroken line of decisions since 1860, the Supreme Court of Illinois has held that where power to make subscriptions or issue bonds has been conferred upon one body or functionary, no other body or individual could act, simply for want of power; and that bonds issued under such circumstances were void in the hands of an innocent purchaser.

Supervisors of Schuyler Co. v. *People*, 25 Ill., 181; *Marshall Co.* v. *Cook*, 38 Ill., 45; *Clarke* v. *Hancock Co.*, 27 Ill., 305; *Force* v. *Batavia*, 61 Ill., 105.

The construction which prevails in the state courts at the time bonds are issued upon questions touching their validity, enter into and form a part of the law of these contracts. *Elmwood* v. *Marcy*, 92 U. S., 290 (XXIII., 710).

The Supreme Court of Illinois has since decided that similar bonds issued under like circumstances and as subscriptions to the same company, were void in the hands of purchasers without notice. *Gaddis* v. *Richland Co.*, 92 Ill. 119.

The Supreme Court of Illinois, at the time of the passage of this Act (*People* v. *Mayor of Chic.*, 51 Ill., 80), and by an unbroken line of decisions between that time and the issue of the original bonds had held that the Legislature had no power under the Constitution to impose upon municipalities such indebtedness.

Harward v. *St. Clair Drain Co.*, 51 Ill., 130; *Hessler* v. *Drain Com.*, 53 Ill., 110; *Lovingston* v. *Wider*, 53 Ill., 302.

The same court likewise, by a line of decisions of settled uniformity long before the original bonds were issued, had held that all curative Acts of the kind of 1869, were unconstitutional.

Marshall v. *Silliman*, 61 Ill., 223; *Wiley* v. *Silliman*, 62 Ill., 170.

This court, before the issue of the original bonds, followed the decisions of the Supreme Court of Illinois upon this question.

Elmwood v. *Marcy* (*supra*).

The Supreme Court of Illinois has since held this same Act unconstitutional.

Gaddis v. *Richland Co.* (*supra*).

It would, therefore, appear to be conclusive that the original bonds were absolutely null and the indebtedness secured thereby, void, not from any irregularity, but because the Board of Supervisors had no power to incur the indebtedness, to issue the bonds to provide for their payment, or in any way recognize their validity. Neither had they power, directly or indirectly, to treat the illegal subscriptions of the stock of the company as creating a binding or legal indebtedness against the County. The second question is: has the board of supervisors any power to fund these original bonds, or by so doing could it estop the County from setting up their illegality?

It must be remembered that, under the funding law, all bonds must show on their face that they were issued under that Act. The purchaser of any funded bond would be apprised by the recitals in the bond itself:

1. That it was issued under the funding Act of 1872, as amended by the Act of 1875.

2. That it was issued for the purpose of funding outstanding bonds.

3. Under the decisions of this court that the preliminary conditions of fact, whether *in pais* or of record, such as the calling of the election, the result of the vote and the surrender of the old bonds, had been complied with.

See, Dill. Mun. Bonds, 50.

The indebtedness funded by these bonds was void. The act of funding, if the funded bonds are void, was to create a debt. No Act of the Legislature could, directly or indirectly, confer power upon the County to incur indebtedness prohibited by the Constitution, whether by the form of funding or otherwise.

Law v. *People*, 87 Ill., 392.

As these bonds do not contain any recital that their issue was within the constitutional or statutory limit, they come under the rule laid down in *Buchanan* v. *Litchfield*, decided at this Term of this court (*ante*, 138). There is no inherent authority in a municipal corporation to fund its debt in negotiable instruments. The funding must stand on the Constitution and the law of the State authorizing it.

Police Jury v. *Britton*, 15 Wall., 566 (82 U. S., XXI., 252).

There could be no ratification of bonds or indebtedness that were void, nor can the County be estopped by anything done in attempts to legalize the void acts of its agents.

Marsh v. *Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040); *Marshall Co.* v. *Cook*, 38 Ill., 58.

Messrs. Hay, Greene & Littler, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Constitution of Illinois, which went into effect April 1, 1848, contained the following: [746]
Art. VII. sec. 6. "The General Assembly shall provide by a general law, for township organization, under which any county may organize whenever a majority of the voters of such county, at any general election, shall so determine, and whenever any county shall adopt a township organization, so much of this Constitution as provides for the management of the fiscal concerns of the said county by the county court may be dispensed with, and the affairs of the said county may be transacted in such manner as the General Assembly may provide." Accordingly, in February, 1849, a law was passed authorizing the township organization of counties, and directing that when such an organization was adopted, the affairs of the county should be conducted by a board of supervisors. Counties not under township organization were managed by county courts.

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The Grayville and Mattoon Railroad Company was incorporated February 6, 1857, and on the first of March, 1867, its charter was amended so as to allow counties to subscribe to the stock and issue bonds in payment, if a majority of the voters of the county, at an election called by the *county court*, should vote in favor of such a subscription. The County of Jasper, through which the road of the company ran, was under township organization, and its *board of supervisors* called upon the voters of the County to vote at an election to be held on the 7th of April, 1868, whether a subscription of $100,000 should be made to the stock of the company by the County, payable in bonds of the county, to be issued as the work progressed, one-sixth of which were to fall due annually from the time they were put out. The election was held and resulted in a majority in favor of the subscription. At a meeting of the board of supervisors, January 23, 1863, the chairman was authorized to subscribe the stock as soon as it might legally be done. An Act of the General Assembly of the State, approved March 27, 1869 (Acts of 1869, Vol. 3, p. 360), relating to this company, and to votes which had been taken for subscriptions to its stock, contained the following as section 3:

"That all elections held for the purpose of voting said stock, and the manner in which said stock was voted, are hereby legalized in all respects, and the stock to be subscribed in the manner the same was voted."

[747] On the authority of these several Acts and this election, the board of supervisors issued one hundred bonds of $1,000 each, in the following form:

"Know all men by these presents, that the County of Jasper, State of Illinois, acknowledges itself to be indebted in the sum of $1,000 lawful money of the United States of America, which said sum of money the said County promises to pay the Grayville and Mattoon Railroad Company or bearer, at the office of the county treasurer of said County, on the first day of.....in the year of our Lord one thousand eight hundred and.....with interest at the rate of ten per centum per annum, which interest shall be payable on the first day of each year, at the office of the treasurer of said County, on the presentation and delivery of the coupons severally hereto annexed.

This bond is issued under and by virtue of a law of the State of Illinois, entitled an Act to incorporate the Grayville and Mattoon Railroad Company, passed February 6, 1857, and amendatory Acts thereto in force March 1st, 1867, and March 27, 1869, in compliance with a vote of the electors of said County at an election held April 7, 1868, in accordance with said Acts.

This bond is one of a series limited to one hundred thousand dollars, one-sixth of the amount made payable annually, at ten per centum per annum, issued for stock in the Grayville and Mattoon Railroad Company by the County of Jasper, and placed in trust for delivery only by the trustee herein named, to wit:..... of the County of Jasper, which shall not become obligatory unless the certificate indorsed hereon be signed by said trustee.

The faith of the County of Jasper is hereby pledged for the payment of the principal sum and interest aforesaid.

In testimony whereof, the County of Jasper by its chairman of the board of supervisors of said County and the clerk of the county court as *ex-officio* clerk of said board of supervisors, have subscribed this bond this....day of.....A. D. 187..,

County Clerk.

Chairman of the Board of Supervisors.

I hereby certify that this bond is one of a series of bonds held by me as trustee of the County of Jasper, to be delivered to the Grayville and Mattoon Railroad Company as per order of the board as stated therein. *Trustee.*"

The bonds fell due, some in 1877 and others [748] in each year thereafter, until and including the year 1883. It nowhere appears when the bonds were put in the hands of the trustee, but none of them bore date prior to October 19, 1876.

At all the times when these several things were done there was in the County of Jasper a county court as well as a board of supervisors.

On the 14th of April, 1875, the General Assembly passed an Act, the material part of which is as follows:

"Sec. 1. That in all cases where any county, city, town, township, school district or other municipal corporation have issued bonds or other evidences of indebtedness for money on account of any subscription to the capital stock of any railroad company, or on account of or in aid of any public buildings or other public improvement, or for any other purposes which are now binding or subsisting legal obligations against any county, city, town, township, school district or other municipal corporations, and remain outstanding and which are properly authorized by law, the proper authorities of any such county, city, town, township, school district or other municipal corporation may upon the surrender of any such bonds or other evidences of indebtedness, or any number thereof, issue in place or in lieu thereof to the holders or owners of the same new bonds, etc. * * * And such new bonds or other evidences of indebtedness so issued shall show on their face that they are issued under this Act; *Provided*, That the issue of such new bonds in lieu of such indebtedness shall first be authorized by a vote of a majority of the legal voters of such county, city, town, township, school district or other municipal corporation, voting either at some annual or special election of such municipal corporation; *And provided further*, That such bonds or other evidences of indebtedness, shall not be issued so as to increase the aggregate indebtedness of such municipal corporation beyond five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes prior to the issuing of such bonds or other evidences of indebtedness." Acts of 1875, p. 68.

Under the authority of this Act the board of supervisors called an election of the voters of the County, to be held on the 3d day of April 1877, for the purpose of voting for or against funding the "bonds issued to the Grayville & Mattoon Railroad Company for the sum of one hundred thousand dollars, drawing ten per cent interest; said hundred bonds to be due in twen- [749] ty years, and payable at the option of the County in ten years: said bonds to draw interest not to exceed seven per cent per annum, said interest to be payable semi-annually at the treas-

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urer's office in Jasper County." At this election a majority of the voters were found to be in favor of the measure. Afterwards funding bonds were issued in exchange for old bonds in the following form:

"For value received, the County of Jasper, in the State of Illinois, promises to pay the bearer one thousand dollars on the first day of May, A. D. 1897, with interest from date, payable on the first days of May and November in each year (on surrender of the annexed coupons), at the rate of seven per cent per annum, until the principal sum shall be paid.

Principal and interest payable at the county treasurer's office, in the Town of Newton, in said County. The County of Jasper reserve the right to pay this bond on or at any time after May 1, 1887, upon giving at said place of payment, and also by an advertisement in some New York City daily newspaper at least six (6) months' notice of such intention, and interest shall cease from the day on which this bond is by such notice made payable.

This bond is one of a series of bonds numbered from 1 to 100, inclusive, amounting in all to one hundred thousand dollars, issued by said County of Jasper, for the purpose of funding legally incurred indebtedness of the County and under and in accordance with an Act of the General Assembly of the State of Illinois, approved April 14th, 1875, entitled 'An Act to amend an Act entitled 'An Act to Enable Counties, Cities, Townships, school districts and other municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness, and fund the same,' approved and in force March 26, 1872, all provisions of which Act have been duly complied with.

In testimony whereof, we, the undersigned, officers of Jasper County, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures and affixed the county seal this....day of May, A. D. 1877.

[SEAL.] *County Clerk.*
Chairman."

After these bonds were put out the indebtedness of the County exceeded somewhat five per centum of the value of the taxable property as [750] ascertained by the last preceding assessment. The plaintiff below, and defendant in error here, being the owner of coupons cut from some of the funding bonds falling due in May and November, 1878 and 1879, which were unpaid, brought this suit to recover them. He was the holder and in possession of a part or the whole of the original bonds when the funding took place, and took the funding bonds in exchange for such of the original bonds as he then held.

Upon this state of facts the court below gave judgment against the County. The case is now here by writ of error, and the single question is presented, whether the County made out a valid defense to the coupons sued out.

In our opinion, the County is estopped from setting up the alleged invalidity of the original bonds as a defense in this action. It is true the funding law only authorized the funding of "binding and subsisting legal obligations," "properly authorized by law," but no new bonds could be issued in lieu of old ones except on a vote of the people. All outstanding bonds were not to be taken up in this way, but only such as were recognized by the people, acting together in their political capacity at an election for that purpose, as binding and subsisting legal obligations. After such a recognition the corporate authorities could make the exchanges, but not before.

The law under which the original bonds were put out was sufficient. No complaint is made of any illegality in its provisions. The only objection is that there was a mistake in carrying it into execution. The election was called by the wrong corporate agency. The county court should have brought the people together and not the board of supervisors. This, if there had been nothing more, would, under the rulings of the highest court of the State, made long before the vote was taken, render the bonds invalid. *Schuyler County* v. *People*, 25 Ill., 181. It was for this reason undoubtedly that the board of supervisors, at their meeting after the election, authorized the subscription to be made and the bonds delivered in payment *as soon as it might lawfully be done*, and that the Act to legalize the election was passed in 1869. We have not had our attention called to any case in which the courts of the State had decided, before this funding took place, that, under the Constitution of 1848, an Act which simply le- [751] galized an invalid or irregular election for a subscription, and left the corporate authorities free to make the subscription at their option, would not cure any defect there may have been in the election, and empower the proper authorities to bind the County by anything that might be done under it and within its scope. It had been decided more than once that the Legislature could not *compel* a municipal corporation to incur a debt without the consent of the corporate authorities. *Harward* v. *Drainage Co.*, 51 Ill., 130; *Hessler* v. *Drainage Co.*, 53 Ill., 105; *Marshall* v. *Silliman*, 61 Ill., 218. But under the Constitution of 1848 a vote of the people was not essential to the validity of a municipal subscription to the stock of a railroad company. The Legislature could authorize the corporate authorities, whoever they might be, to act in such a matter without the express direction of the people. What it could not do, was to make it mandatory on them to subscribe without a vote. This we understand to have been the extent of the decisions, and in this way it was that, if with the legalization of the vote there was coupled a command on the corporate authorities to subscribe, or a confirmation of a subscription already made, the curative statutes were held to be inoperative. It had never been held that language, such as was employed in this curative Act, was compulsory, or that it did more than legalize the election, leaving it for the board of supervisors to determine whether they would subscribe or not. That was an open question in the state courts until the case of *Gaddis* v. *Richland Co.*, 92 Ill., 119, not decided until June 1879, two years and more after the bonds now in question were out.

When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: a valid law authorizing the subscription and an issue of the bonds had been passed. The people at an election which had been irregularly called had voted to make the subscription and issue bonds bearing ten per cent interest,

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and all payable within six years. An Act had been passed to legalize the election, and under it the subscription which had been voted was made and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these [752] bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the County, in a manner authorized by law, whether they would recognize these bonds as "binding and subsisting legal obligations" and issue in lieu of them other bonds having twenty years to run and bearing seven per cent interest instead of ten, and they by their vote said they would. There is no complaint of any illegality in this election or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the County. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then was the time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders if their proposition was accepted no question of illegality would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *Keithsburg* v. *Frick*, 34 Ill., 405. As was very properly said below by the learned Circuit Judge, "There must be an end of these contests and defenses some time or other." There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as "properly authorized by law" for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended.

This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as [753] binding. The issue of the funding bonds did not increase the aggregate of the indebtedness of the Corporation, but only changed its form.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[797]

GEORGE CROUCH, *Appt.*,
v.
WILLIAM ROEMER.

(See S. C., 13 Otto, 797-799.)

Invalid letters patent.

Re-issued letters patent No. 4289, granted Mar. 7, 1871, to George Crouch for an improvement in straps for shawls, are invalid.

[No. 196.]

Argued Jan. 11, 1881. Decided Feb. 28, 1881.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

The case is fully stated by the court.

Mr. **E. B. Barnum,** for appellant.

Mr. **Arthur V. Briesen,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The appellant in this case, complainant below, in describing his invention, when he applied for his patent, said that before his invention "Straps had been used to confine a shawl or similar article, in a bundle, and a leather cross-piece, with loops at the ends, had extended from one strap to the other; and above and [798] attached to this leather cross-piece was a handle." He then said: "My invention consists of a rigid cross-bar beneath the handle, combined with straps that are passed around the shawl or bundle, such straps passing through loops at the ends of the handle." This was because the "leather cross-piece or connecting strap" was "liable to bend and allow the straps to be drawn toward each other by the handle in sustaining the weight; * * hence the handle is inconvenient to grasp. From this, as it seems to us, the *rigid* cross-bar was, from the beginning, the controlling idea of the inventor. His object clearly was, not to bind and hold the bundle, but to keep the handle which the holder was to grasp from pressing the sides of the hand. Hence, he says: "I claim as my invention: 1. The rigid cross-bar, connecting the ends of the handle, and provided with loops for the straps, substantially as and for the purposes set forth;" that is to say, to bind and hold the bundle to be carried. The drawings which accompany this application show that the inventor had in his mind straps which were to pass over the rigid bar crosswise, but there is nothing to indicate that they might not pass over the ends or through openings in the bar itself. Next he claims, "Loops made of the leather of the handle, and secured to the rigid cross-bar," and then, "the rigid cross-bar for a shawl strap made of sheet metal, corrugated and covered with leather."

Clearly the defendant, appellee, could not have infringed any other than the first claim. He did have a rigid cross-bar connecting the ends of a handle provided with openings, which were undoubtedly the equivalent of loops through which the straps to hold the bundle could pass, but he had no loops made of the leather of the handles, and no cross-bar made of sheet metal corrugated and covered with leather. Our inquiries are, therefore, confined to the validity of the first claim in the complainant's patent.

It is conceded in the patent itself that shawl straps with handles attached to a leather cross-piece having loops at the ends, were old. Eustace, one of the witnesses for the complainant, says he made his goods with a cross-piece of the firmest leather he could get, doubled and stitched, so as to render it firmer still. His ob- [799] ject clearly was to keep the weight of the bundle from drawing the ends of the handle

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together so as to press against the sides of the hand.

The testimony leaves no doubt on our minds that handles fastened on rigid cross-bars and used to carry bundles were known long before the complainant's invention. Possibly in adjusting them to use, though this is by no means certain, the straps to bind the bundle were not passed through loops across the bar; yet it is clear, beyond all question, that the handle, rigid cross-bar, loops or their equivalent, and straps, or equivalents, were used in combination to keep together and carry one or more articles in a package made by piling or rolling the articles together. Under these circumstances, it was no invention to stiffen by artificial means the leather cross-piece which had before been made as rigid as it could be by thickness, doubling and stitching. All that was done by this inventor was to add to the degree of rigidity which had been used before. The addition of metal or other substance as a stiffner of the known cross-piece, which had already been made rigid in a degree, was not invention. The substantial elements of a well known structure were thus, in no patentable way, changed.

This view of the case makes it unnecessary to follow counsel in their efforts to break down or sustain the testimony of individual witnesses. The thing which the complainant claims to have patented was substantially made and used long before his invention. All he did was, by the use of known equivalents for some of the elements of former structures, to make it somewhat better than it was ever made before. This is not patentable.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN S. FARLOW, Receiver, etc., *Appt.*, *v.* SYLVANUS KELLY.

131 US cci Appx.

1. An appeal by a receiver will not be dismissed because he did not first obtain leave of the court. The allowance of the appeal is equivalent to leave of the court to take it.

2. To what extent the final judgment or decree, in the suit instituted against the receiver by permission of the court, is reviewable here, in this form of proceeding, will be for determination when the case is heard on the merits.

[No. 795.]

Submitted Feb. 28, 1881. Decided Mar. 14, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

Motion to dismiss.

In this case an appeal was taken by the receiver without first obtaining leave of the court.

The case is sufficiently stated by the court.

Messrs. **R. P. Buckland** and *J. Warren Keifer*, for appellee.

Mr. S. A. Bowman, for appellant.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The allowance of the appeal by the Circuit Justice is equivalent to leave by the court to the Receiver to take an appeal. The order appealed from finally disposed of the suit, which was instituted against the Receiver by permission of the court under date of November 13, 1878. It was the final judgment or decree in that matter. To what excent it may be reviewable here, in this form of proceeding, will be for determination when the case is heard on its merits.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF LOUISIANA *ex rel.*, FOLSOM ET AL. *v.* MAYOR AND ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

131 US cci. Appx.

Where a cause has been submitted in briefs, and it involves a constitutional question on which the judges differ in opinion, the submission will be set aside and an oral argument ordered, and the cause restored to its place on the calendar.

[No. 810.]

Decided Mar. 14, 1881.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. **D. D. Labat**, for plaintiff in error.

Mr. **E. Howard Caleb**, for defendant in error.

Order for reargument announced by *Mr. Justice* **Field:**

The relators are the holders of two judgments against the City of New Orleans, one for $26,850, the other for $2,000. Both were recovered in the courts of Louisiana; the first in June, 1877, by the relators; the second in June, 1874, by parties who assigned it to them. Both judgments were for damages caused to the property of the plaintiffs therein by a mob or riotous assemblage of people, in the year 1873. A statute of the State made municipal corporations liable for damages thus caused within their limits. R. S. of 1870, sec, 2,453.

The judgments were duly registered in the office of the controller of the city, pursuant to the provisions of the Act known as No. 5, of the extra session of 1870, and the present proceeding was taken by the relators to compel the authorities of the city to provide for their payment.

At the time the injuries complained of were committed, and one of the judgments was recovered, the City of New Orleans was authorized to levy and collect a tax upon property within its limits, of $1.75 upon every $100 of its assessed value. At the time the other judgment was recovered, this limit of taxation had been reduced to $1.50 on every $100 of the assessed value of the property. By the Constitution of the State adopted in 1879, the power of the city to impose taxes on property in its limits was further restricted to ten mills on the dollar of its valuation.

The effect of this last limitation is to prevent the relators, they not being allowed to issue executions against the city, from collecting their judgments; as the funds receivable from the tax thus authorized to be levied are exhaust-

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ed by the current expenses of the city, which are to be first met.

The question is therefore raised by the relators whether the limitation of the taxing power of the city by the State Constitution of 1879, does not conflict, so far as it applies to their judgments, with the clause of the 14th Amendment of the Constitution of the United States which forbids the State to deprive any person of property, without due process of law; their contention being that the judgments are property, and the restriction of the power of taxation of the City of New Orleans to its present limit, since they were recovered, renders it impossible to collect them and thus they are practically destroyed.

Upon the question thus presented the Judges differ in opinion. The court, therefore, orders an oral argument upon it.

The submission on briefs is, accordingly, set aside and the cause restored to its place on the calendar.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[66] JOHN W. STOUT ET AL., *Appts.*,
v.
FRANCIS J. LYE, PHILIP WALSH, FIRST NATIONAL BANK OF DELPHOS ET AL.

(See S. C., 13 Otto, 66-71.)

Judgment, when a bar—judgment creditor when barred—mortgage foreclosure.

1. Where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the others.
2. A creditor who obtains a judgment against a mortgagor, pending a foreclosure suit, is barred by a decree against the mortgagor, although not a party to the foreclosure.
3. Where the mortgagor did not set up certain defenses in the foreclosure suit, to which he was entitled, he is concluded by the decree in such suit as to all such defenses, and so are his privies, including such judgment creditor.

[No. 211.]

Submitted Jan. 26, 1881. Decided Mar. 14, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The case is stated by the court.

Mr. **John Hutchins,** for appellants:

When this suit was instituted in the Circuit Court, Feb. 23, 1876, all the parties to the suit in said Court of Common Pleas were made parties defendants herein, and duly served with process, Feb. 25, 1876.

But before this date, *viz.*: Jan. 31, 1876, an execution issued out of said circuit court, on the judgment rendered against said Lye & Walsh, as aforesaid, which execution was duly levied upon the said premises described in said bill and mortgage, Feb. 1, 1876. Thus, said circuit court first acquired jurisdiction over the subject-matter by the judgment rendered in the case of complainants against Lye & Walsh, Jan. 31, 1876, and by the levy of the execution on said judgment, Feb. 1, 1876, on said premises.

We maintain as a legal proposition, that, "A court of competent jurisdiction over the subject-matter, by judgment and levy, withdraws the property from the jurisdiction or the reach of the process of any other court."

Fox v. *R. R. Co.*, 2 Abb. U. S., 154.

The said circuit court acquired jurisdiction over the property in question, the subject-matter, by levy, Feb. 1, 1876.

The jurisdiction of said Court of Common Pleas did not attach until Mar. 7, 1876.

Buck v. *Colbath*, 3 Wall., 335 (70 U. S., XVIII., 257); *Hatch* v. *Preston*, 1 Biss., 19; *Putnam* v. *New Albany*, 4 Biss., 365; *Watson* v. *Jones*, 13 Wall., 679 (80 U. S., XX., 666).

The complainants, then, with all confidence, claim that the said Circuit Court of the United States has full and undoubted jurisdiction over all the parties and the subject-matter of this case, and is competent to try and determine all the issues raised therein.

First. Because it first acquired jurisdiction over the property in question by said judgment, which was a lien on said real estate from Jan. 4, and by said levy, made Feb. 1, 1876.

Second. Because they were not made parties to the said proceedings instituted in said Court of Common Pleas of Allen County.

Mr. **John E. Richie,** for appellees:

The claim that the jurisdiction over the land attached to the Court of Common Pleas, only upon the entry of the judgment and decree of foreclosure on Mar. 7, 1876, is to confound the *exercise of jurisdiction, with that jurisdiction*, that the right to make an order did not exist until the order was actually made.

Can it be possible that jurisdiction, the right to hear and determine, did not exist, until the matter was heard and determined?

That the Court of Common Pleas had jurisdiction at some point cannot be denied, and if it cannot be postponed to the date of judgment, it must have attached on Jan. 20, 1876, upon filing of petition and service of summons on Lye; which was eleven days before the complainants had a judgment which could be a lien, twelve days before levy of execution and thirty-six days before this action was commenced.

An action is commenced upon the filing of a bill or petition and the service of summons thereunder.

Bell v. *Life and Trust Co.*, 1 Biss., 260; *State* v. *Bryce*, 7 Ohio, pt., 2, p. 82; *Jencks* v. *Phelps*, 4 Conn., 149; *Daniels* v. *Stevens*, 19 Ohio, 222; Rule 16, U. S. Sup. Ct. (Book XX).

McLean, *Judge* in deciding the case of *Bell* v. *Life and Trust Co.*, says:

"The power to hear and determine a case is jurisdiction; it is *coram judice*, when a case is pending which brings this power into action; if the petitioner presents such a case in his petition, that on demurrer the court would render a judgment in his favor, it is a case of undoubted jurisdiction. * * * * The established rule is, that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree, and *lis pendens* begins from the service of the subpœna after the bill is filed."

See, *Peck* v. *Jenness*, 7 How., 624; *Ruggles* v. *Simonton*, 3 Biss., 325; *Freeman* v. *Howe*, 24 How., 450 (65 U. S., XVI., 749); *Wallace* v. *McConnell*, 13 Pet., 136.

That the complainants were not made parties to the action in the Court of Common Pleas of

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Allen County, would confer no right to prosecute their case in the circuit court, for two reasons:

1. They could not have been made parties at the filing of respondents' petition in that court, for they had no judgment or lien upon the mortgaged premises.

2. That court having jurisdiction of the only party necessary to a final disposition of the action of the plaintiff therein, the complainants must seek redress in that court. Upon this proposition, the case of *Freeman* v. *Howe* (*supra*), is relied upon as conclusive authority, supported as it is by *Hagan* v. *Lucas*, 10 Pet., 400; *Slocum* v. *Mayberry*, 2 Wheat., 2; *Fox* v. *R. R. Co.*, 2 Abb. U. S., 151.

[67] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The facts disclosed by this record are as follows: on the 10th of November, 1873, Francis J. Lye executed to the First National Bank of Delphos, a mortgage on certain real estate in the village of Delphos, Allen County, and within the Northern Judicial District of the United States in the State of Ohio, to secure his note to the Bank for $6,000, dated November 1, 1873, and payable January 1, 1874. The note was given to take up in part an old note of Lye to the Bank which was then past due, and the mortgage was duly recorded in the records of the county, November 10, at which time, under the laws of the State, it took effect. R.S. Ohio, 1880, sec. 4133.

On the 29th of December, 1875, the present appellants, John W. and Jacob O. Stout, sued Lye and Philip Walsh, who were partners, in the Circuit Court of the United States, for the Northern District of Ohio, to recover a judgment for $5,106.36 and interest. The first day of the January Term, 1876, of that court, was January 4, and process was served on Lye & Walsh, in the suit of the Stouts, January 3. On the 15th of January, 1876, the Bank commenced suit against Lye in the Court of Common Pleas of Allen County to foreclose its mortgage. Process was served on Lye in that action January 20. The Stouts were not made parties, the Bank having then no actual notice of the pendency of their suit in the circuit court.

On the 31st of January, the Stouts recovered judgment in their action in the circuit court against Lye & Walsh for the full amount of their claim and costs, and on the same day caused an execution to be issued, which was, on the first day of February, duly levied on the lands covered by the bank mortgage. The effect of the judgment, without this levy, was to bind the lands of the defendant for the satisfaction thereof from the first day of the Term of the court at which it was rendered, January 4. R. S., Ohio, 1880, sec. 5375. On the 23d of February, the Stouts commenced this suit in the Circuit Court of the United States for the Northern District of Ohio, making the Bank a defendant, in which they sought to set aside the [68] mortgage as illegal for want of authority to take it; or if that could not be done, to have certain alleged payments of usurious interest applied to reduce the debt. The Bank was served with subpœna on the 25th of February, and was required to appear on the first Monday in April.

The February Term of the Court of Common Pleas of Allen County began on the 7th of February, and on the 7th of March, during that Term, a judgment was rendered in the suit of the *Bank* against *Lye* for the full amount of his note and interest, and for a foreclosure of the mortgage by a sale of the mortgaged property. The Bank answered the suit of the Stouts, setting up the foregoing facts, which being proved by the agreed statement of the parties, the bill was dismissed. From that decree this appeal was taken.

The first question to be decided is whether the appellants are concluded by the judgment of the state court finding the amount due the Bank and establishing the lien of its mortgage. If they are, they concede the decree below was right.

There cannot be a doubt that the state court had jurisdiction of the suit instituted by the Bank, and, as was said by *Mr. Justice* Grier, speaking for the court in *Peck* v. *Jenness*, 7 How., 624, "It is a doctrine of law too long established to require the citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." The mere fact, therefore, that the Stouts commenced this suit in the circuit court before judgment was rendered in the state court in favor of the Bank is of no importance. The point to be decided is, whether the judgment in the state court binds the Stouts, they not having been parties to the suit in which it was rendered. The rule is, that where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the others.

It is also an elementary rule that "If, pending a suit by a mortgagee to foreclose the equity of [69] redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee or assignee of the equity of redemption." Mitf. Pl., 73; Story's Eq. Pl., sec. 351. Acting on this rule in *Eyster* v. *Gaff*, 91 U. S., 521 [XXIII., 403], we held that an assignee in bankruptcy appointed pending a foreclosure suit, was barred by a decree against the mortgagor. In this we may have gone somewhat beyond the rulings of the English courts, and of *Chancellor* Walworth in an anonymous case, 10 Paige, 20, but to our minds, under the late bankrupt law, an assignee stands as any other grantee of the mortgagor would stand who acquired title after the suit to foreclose the mortgage was begun.

That the suit of the Bank was one to foreclose a mortgage, and that it was actually pending when the judgment lien of the Stouts was acquired are conceded facts. When the suit was begun, Lye, the mortgagor, represented the entire equity of redemption. He had parted with no portion of it voluntarily, and if the Stouts had failed to get their judgment during the Jan-

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uary Term, 1876, of the circuit court, no one would claim they were not bound by the decree of foreclosure, although not parties to the suit. Neither could it with any propriety be claimed, we think, that they would not be bound if their lien had only taken effect from the date of their judgment. It is true, the lien followed by operation of law from a judgment in an adversary proceeding against the mortgagor, and was not created directly by his own voluntary act, but it was the legitimate result of his failure to pay a debt he had incurred, and reached only the equity of redemption that was being foreclosed in the pending suit. It was, in legal effect, no more and no less than an incumbrance of the equity of redemption by the mortgagor under the operation of the judicial proceedings which had been instituted against him to enforce the payment of a debt he owed. As this incumbrance was created *pendente lite*, there can be no question that it comes within the rule just stated as governing such transfers, unless the rights of the parties are changed because the lien, when created, bound the property from January 4 as against other liens and conveyances made by the mortgagor. The inquiry is [70] not as to the extent or validity of the lien, but whether the holder is any less an incumbrancer *pendente lite*, because, although his incumbrance was actually created while the suit was pending, it bound the land, for certain purposes, from an earlier date. Confessedly the lien of the Bank, if its mortgage was valid, was in any event superior to that of the judgment. The only point in controversy is as to the necessity of making such an incumbrancer a party to a pending suit, in order to cut off, by a foreclosure, his interest thus acquired in an equity of redemption. No doubt the Stouts, as soon as their judgment was got, had a lien on the mortgaged property, which for some purposes antedated the foreclosure suit, but until they had secured their lien they would not have been heard to contest the validity of the Bank's mortgage, or the amount that was due on the mortgage debt. If they had been made parties when the suit was begun, they could have done nothing by way of defense to the action until they had acquired some specific interest in the mortgaged property. As creditors at large they were powerless in respect to the foreclosure proceedings, but when they got their judgment, not before, they were in a position to contest in all legitimate ways the validity and extent of the superior lien which the Bank asserted on the property, in which, by the judgment, they had acquired a specific interest. They might have appeared in the common pleas and asked to be admitted to defend the Bank's suit, or for some other appropriate relief, or they might do what they in fact did, commence this suit in the circuit court in aid of their execution. By this suit, however, they could not deprive the common pleas of the jurisdiction it had acquired in the Bank's suit, nor take away from the Bank its right to prosecute that suit to the end. The two suits were in fact pending at the same time, in the two courts of concurrent jurisdiction, in relation to the same subject-matter. The parties also were in legal effect the same, because in the state court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring the separate suit, the Stouts voluntarily took the risk of getting a decision in the circuit court before the state court settled the rights of the parties by a judgment in the suit which was pending there. Failing in [71] this, they must submit to the same judgment that has already been rendered against their representative in the state court. That was a judgment on the merits of the identical matter now in question and concluded the "Parties and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim, but as to any other matter which might have been offered for that purpose." *Cromwell* v. *Sac. Co.*, 94 U. S., 352 [XXIV., 197]. It is true the mortgagor did not set up as a defense that the Bank had no right to take the mortgage, nor that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so, he is now concluded as to all such defenses and so are his privies.

It follows that the decree must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—98 Ind., 261.

CHARLES L. WALL, *Plf. in Err.*, [74]

v.

MONROE COUNTY.

(See S. C., 13 Otto, 74-79.)

County warrants, not negotiable—estoppel.

1. County warrants, although in form negotiable, are not negotiable in the sense of the law merchant, so as to shut out, in the hands of a *bona fide* purchaser, inquiries as to their validity, or preclude defenses or set-offs which could be made to them in the hands of the original parties.

2. The cancellation of warrants originally issued and the substitution of others in their place does not change their character. Neither that proceeding nor the original auditing of the claims for which they were issued, has the force of a judicial determination.

[No. 829.]

Submitted Jan. 3, 1881. Decided Mar. 14, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

Statement of the case, by *Mr. Justice* **Field:**

This is an action upon warrants of the County of Monroe of Arkansas, which were drawn by the clerk of the County upon its treasurer, in [75] favor of one Frank Gallagher, and transferred by him to the plaintiff.

The following is a copy of one of them. The others are of like tenor and effect though some of them are for only $20:

$50. No. 804.

The treasurer of the County of Monroe will pay to Frank Gallagher or bearer the sum of fifty dollars, out of any money in the treasury for general county purposes and not otherwise appropriated.

Given under my hand, at office, in Clarendon, Ark., this 15th day of September, 1875.

W. S. DUNLAP, *Clerk.*

They were renewal warrants, drawn in lieu of others which, under the laws of Arkansas, had been called in by the county court for ex-

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amination, registration and re-issue. The called in warrants having been found to be just and legal claims against the County, were canceled by order of the court, and the clerk was directed to issue new warrents in lieu thereof to the original payee, Frank Gallagher.

The new warrants were purchased by the plaintiff in good faith for a valuable consideration, and payment of them having been refused upon demand upon the treasurer, he instituted this action. The answer sets up as a defense that Frank Gallagher was, at the time the warrants were issued to him, indebted to the County as surety on the official bond of one Ambrose Gallagher, tax collector of the County, in a sum larger that the amount sued for; that since then the County, has recovered a judgment against the said Gallaghar for a much larrer amount than the warrants in suit; that the judgment was recovered before the transfer of the warrants to the plaintiff, and has not been reversed or modified, and is still in full force and unsatisfied; and it asks that the judgment may be set off against the warrants. The plaintiff demurred to the answer, alleging as the cause of demurrer that its allegations were not sufficient to constitute a defense at law,

Upon the argument of the demurrer the following questions arose:

First. Is the defendant estopped by the re-
[76] issue of the warrants to set up a defense known to have been existing at the time they were reissued in lieu of the original warrants surrendered to the county court and by its order canceled?

Second. Can the claim set up in the answer, if held by the County against the original payee, when the warrants were issued or while they were still in his possession, be set up as defense or set-off in a suit by a holder of them for value, who had no notice of such defense when he acquired them?

On which questions the opinions of the Judges were opposed, and the demurrer having been overruled, final judgment was rendered for the defendant.

Whereupon, on motion of the plaintiff, the points on which the disagreement happened were stated under the direction of the Judges, and certified to this court for final decision.

Mr. **M. T. Sanders,** for plaintiff in error:

The Supreme Court of Arkansas at an early day, 1847, settled the question as to the *status* of county warrants drawn in conformity with the statute.

The court says:

"The statute authorizing the issuing of warrants in favor of persons having claims against the County, prescribed the form thereof, and under that form there can be no doubt but that they were endowed with properties of negotiable instruments."

Crawford Co. v. *Wilson*, 7 Ark., 219.

If county warrants could have been mere choses in action, no suit could, under the laws of Arkansas as then in force, have been instituted by the assignee thereof, without joining the assignor.

In the case of *Carnal* v. *Crawford Co.*, 11 Ark. (6 Eng.), 604, *Mr. Justice* Scott, who delivered the opinion of the Supreme Court, says:

"The subject-matter of an allowance, in the sense of the statute, must necessarily then embrace within its scope what may be the subject-matter of a judgment as to the fiscal affairs committed to the jurisdiction of the county court, and in doing so seems inevitably to embrace all judgments, that presuppose and include any action of the court granting or refusing an allowance against the revenue or the treasury; and this seems to exclude the idea that in such cases separate appeals would lie as to each item allowed or disallowed in the investigation and judicial adjustment of matters, that would result in aggregate balance, and be the foundation of a judgment."

It will then be seen that the allowance or refusal of a claim of the County court under the Statute of Arkansas is considered by the Supreme Court of the State as a judicial adjustment or judgment.

This construction, by the highest court of the State, of one of its statutes is conclusive on this court, and should be followed.

Bk. v. *Dudley*, 2 Pet., 524; *Elmendorf* v. *Taylor*, 10 Wheat., 159; *Greene* v. *Neal*, 6 Pet., 298; *Miles* v. *Caldwell*, 2 Wall., 35 (69 U. S., XVII., 755); High, Extraordinary Legal Remedies, sec. 346, and authorities there cited.

To the same effect are the decisions of the Supreme Court of Arkansas.

Gunn v. *Pulaski Co.*, 3 Ark., 427; *Brem* v. *Arkansas Co.*, 9 Ark., 240.

There can be no doubt that if the money to pay these warrants had been in the Treasury, the Treasurer would have been bound to pay the warrants, when presented, or otherwise he would, under the laws of this State, have forfeited to the holder of the warrants fourfold the amounts thereof.

Section 1037, R. S. of Ark., 1874.

Thus a treasurer will be compelled by *mandamus* to make payment of warrants drawn upon him by the proper officers, the warrants giving the persons holding them a clear right to the amounts indicated.

Ex parte Selma & G. R. R. Co., 46 Ala., 423; *Hommerich* v. *Hunter*, 14 La. Ann., 221.

The act of the county courts making an allowance, is merely a judicial act.

That the county courts are not merely ministerial bodies, but judicial, we refer to the Constitution of the State, art. 7., sec. 1, which reads as follows:

"The judicial power of the State shall be vested in one Supreme Court, in Circuit Courts, in County and Probate Courts and in justices of the peace," etc.

The fact that it has a clerk and seal, is *prima facie* evidence that it is a court of record.

Adamson v. *Adamson*, 9 Ark., 26; *Steamboat* v. *Erskine*, 7 Mo., 216.

That the orders of the county court are regarded as judgments and subject to the same rules as a judgment of other courts, we refer to.

Reiff v. *Conner*, 10 Ark. (5 Eng.), 241, where it was held that, after a lapse of the term at which a judgment is rendered, the court court loses its power over them and cannot set them aside at a subsequent term.

And that an allowance is a judicial act, we refer to *Brem* v. *County Court*, 9 Ark. (4 Eng.), 241; *Jefferson Co.* v. *Hudson*, 22 Ark., 595; where it was held: "The allowance by the county court of a claim against the County in favor of the claimant is in the nature of the judgment."

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If the allowance of a claim by the county court is a judgment, it must be considered as a new debt which can in no manner be affected by the character of the old one, and the original claim and all equities existing between the parties at that time, are merged in the judgment.

Ault v. *Zehering*, 38 Ind., 433; *Noble* v. *Merrill*, 48 Me., 140; *Guinard* v. *Heysinger*, 15 Ill., 288; *Flint* v. *Sheldon*, 13 Mass., 443; *Ellis* v. *Clarke*, 19 Ark., 420.

And it has been held that where an officer or board is clothed with authority to audit and settle a claim, such decision is conclusive as to the amount of the claim, but reviewable as to whether the claim was within the jurisdiction of the board or officers.

Kendall v. *U. S.*, 12 Pet., 524.

In this case the county court was authorized to examine all warrants presented, and reject the same, if the County is not legally or justly bound to pay the same.

The county court having passed upon the legality and validity of the claim once, its judgment cannot now be collaterally attacked.

Carroll v. *Board of Police, etc.*, 28 Miss., 38, which is exactly in point.

Mr. **A. H. Garland**, for defendant in error.

[77] *Mr. Justice* **Field** delivered the opinion of the court:

The warrants in suit are evidences of indebtedness by the County of Monroe, issued by that branch of its government to which is intrusted, by the laws of the State, the examination and approval of claims against the County. They are orders upon the treasurer of the County to pay out of its funds for county purposes, not otherwise appropriated, the amounts specified. They establish, *prima facie*, the validity of the claims allowed, and authorize their payment. But they have no other effect. Their issue determined nothing as to other demands of the payee against the County, or of the County against him. Had there been other claims to be adjusted and settled between the parties, these warrants, if lawfully issued, would have been taken as approved items in the account; nothing more.

The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law-merchant, so that, when held by *bona fide* purchasers, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them, in the hands of such payee.

There has been a great number of decisions in the courts of the several States upon instruments of this kind, and there is little diversity [78] of opinion respecting their character. All the courts agree that the instruments are mere *prima facie* and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims; and when this is conceded, the instruments conclude nothing as to other demands between the parties. The cases will be found collected in notes to the 14th chapter of Dillon on Municipal Corporations. The law respecting these instruments is also fully stated by this court in *Mayor* v. *Ray*, reported in the 19th of Wallace, 468 [88 U. S., XXII., 164]. That case was upon warrants of a city and not of a county, a circumstance which does not affect the doctrine. The court, speaking through *Mr. Justice* Bradley, said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregular or fraudulently issued, is an abuse of their true character and purpose." And again: "Every holder of a city order or certificate knows, that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax payers or people. Persons receiving it from them know whether it is issued, and whether they receive it for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are [79] affected by the same defect." These observations apply equally to the county warrants in suit, as to the city warrants there considered. And the same reasons which deny to them negotiability in the sense of the law-merchant, allow any matter of set-off to them which the County held against the original parties.

The case of *Crawford Co.* v. *Wilson* [2 Eng. (Ark.), 214], in the Supreme Court of Arkansas, is cited as showing that a different rule prevails in that State. The language of the opinion, that county warrants are endowed with the properties of negotiable instruments, must be read in connection with the point involved, which was whether county warrants were transferable by mere delivery, so as to vest the legal interest in the holder. To this extent they may be called negotiable, but no court of Arkansas has held that they were negotiable in the sense of the law-merchant, so as to shut out, in the hands of a *bona fide* purchaser, inquiries as to their validity or preclude defenses which could be made to them in the hands of the original parties. The law is not different there from that which obtains in other States.

The cancellation of the warrants originally issued and the substitution of others in their place did not change their character. Neither that proceeding nor the original auditing of the claims of Gallagher had the force of a judicial

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determination, concluding either him or the County. There was no litigation on the subject between adversary parties which could give to the result any greater efficacy than the award of an ordinary board authorized to audit claims against a municipal body. *Shirk* v. *Pulaski Co.*, 4 Dill., 209.

We answer, therefore, the first question certified to us, in the negative, and the second in the affirmative, and accordingly affirm the judgment.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 560; 105 U. S., 345; 111 U. S., 408; 19 Blatchf., 528; 41 Ark., 242; 48 Am. Rep., 39.

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[352] MECHANICS' AND TRADERS' INSURANCE COMPANY, *Plff. in Err.*

v.

BASIL G. KIGER ET AL.

(See S. C., 13 Otto, 352-357.)

Pledge by factor—property taken from bailee by judicial process.

1. A factor cannot pledge for his own debts the property of his principal.
2. Where property is taken from warehousemen by judicial process, this is a substantial compliance with their obligation not to deliver it without a surrender of their receipts.

[No. 215.]

Submitted Jan. 27, 1881. Decided Mar. 14, 1881.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Mr. **Thomas Hunton,** for plaintiff in error.

Messrs. **Thomas J. Semmes, Joseph P. Hornor** and **W. S. Benedict,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 11th of March, 1876, the General Assembly of Louisiana passed an Act, No. 72, entitled "An Act Governing the Manner in Which Cotton Press Receipts, Warehouse Receipts or the Receipts of Other Custodians of Any Property Whatever, Shall be Issued, in All Cases Where Such Receipts Shall or May be Used or Pledged as Collateral Security for Money Advanced or Borrowed on Faith of the Property Therein Specified, and Governing the Delivery and Disposal of the Property for Which Such Receipts May Be Issued." The sections important to this case are as follows:

"Sec. 1. *Be it enacted, etc.*, That no cotton press or other custodian or custodians of produce or property shall issue any receipt or other voucher, for any produce, merchandise or other property, to any person or persons purporting to be the holder, owner or owners thereof, unless such produce, merchandise or other property shall have been actually received into store, or upon the premises of such cotton press or other custodian or custodians, shall be in the store, cotton press or warehouse or on the premises aforesaid or under his or their control at the time of issuing such receipt.

Sec. 2. That any person, firm or association who shall or may be, or in any way become the custodians of any property, goods, products or merchandise whatever, and who may issue receipts therefor, shall not, under any circumstances or upon any order or guaranty whatever, deliver property for which such receipts [353] have been issued, until the party or parties to whom the receipts were issued or the legal holders thereof shall have surrendered the same to said custodians for cancellation; and in default of a strict compliance with the provisions of this section of this Act, they may be held liable by the legal holder or owner of their receipt, for the market value of the property therein described as may be established by the chamber of commerce of the City of New Orleans, or any committee thereof, approved and authenticated by the president or vice-president of said chamber of commerce. All warehouse receipts, intended for pledge, under the provisions of this Act, shall be paraphed, before being issued, as follows: 'for hypothecation in accordance with the provisions of this Act.'

Sec. 4. That parties who may borrow money on the faith of warehouse receipts, representing property in store, shall file their affidavit with the pledgees that such property is theirs, the pledgers', personal property, or that it is the property of some party for whom the pledger is acting as agent, factor, commission merchant, or in any other fiduciary capacity, and that said party is justly and truly indebted to the pledger in an amount equal in value to the value of the property pledged, as specified in the warehouse receipts, for moneys paid to him, or paid by his order and for his account, by the party or

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NOTE.—*Liability of warehousemen for goods delivered to them.*

Warehousemen are only ordinary bailees for hire and are bound only to common care and diligence, and are liable only for want of such diligence or care. Edwards, Bailments, 284; Jones, Bailments, 97; Story, Bailments, sec. 444; Cailiff v. Danvers, Peake, 155; Knapp v. Curtis, 9 Wend., 60; Foote v. Storrs, 2 Barb., 328; Bogert v. Haight, 20 Barb., 251; Titsworth v. Winnegar, 51 Barb., 148; Myers v. Walker, 31 Ill., 353; Buckingham v. Fisher, 70 Ill., 121; Hatchett v. Gibson, 13 Ala., 587; Dimmick v. Mil., etc., R. R. Co., 18 Wis., 471; McCollom v. Porter, 17 La. Ann., 89; Blin v. Mayo, 10 Vt., 56; Taylor v. Secrist, 2 Disney, 299; Cowles v. Pointer, 26 Miss., 253; Rodgers v. Stophel, 32 Pa. St., 111; Ducker v. Barnett, 5 Mo., 97; Holtzclaw v. Duff, 27 Mo., 392.

The keeper of a private bonded warehouse is only liable as an ordinary warehouseman, notwithstanding there is a government store-keeper in charge. Macklin v. Frazier, 9 Bush, 3; Schwerin v. McKie, 5 Rob., 404; S. C., 51 N. Y., 180; S. C., 10 Am. Rep., 581; Claflin v. Meyer, 43 N. Y. Sup. Ct., 1; S. C., 75 N. Y., 260; 31 Am. Rep., 467.

Delivery to a third person, by mistake or negligence, makes a warehouseman liable for conversion. Devereaux v. Barclay, 2 B. & Ald., 702; Jeffersonville R. R. Co. v. White, 6 Bush, 251; Collins v. Burns, 63 N. Y., 1; Willard v. Bridge, 4 Barb., 361; Ala., etc., R. R. Co. v. Kid, 35 Ala., 209.

A failure or refusal, by a warehouseman, to deliver on demand goods entrusted to him, is *prima facie* evidence of negligence, sufficient to cast upon him the burden of accounting for non-delivery. Burnell v. N. Y., etc., R. R. Co., 45 N. Y., 184; S. C., 6 Am. Rep., 61; Coleman v. Livingston, 36 N. Y. Sup. Ct., 32; S. C., 45 How. Pr., 483; Fairfax v. N. Y., etc., R. R. Co., 43 N. Y. Sup. Ct., 18; S. C., 67 N. Y., 11; Schwerin v. McKie, 5 Robt., 404; S. C., 51 N. Y., 180; 10 Am. Rep., 581; Steers v. Liverpool S. S. Co., 57 N. Y., 1; S. C., 15 Am. Rep., 453.

Warehousemen are to be charged only upon proof of their negligence or that of their servants. Aldrich v. Boston & W. R. R. Co., 100 Mass., 31; S. C., 1 Am. Rep., 76; Finucane v. Small, 1 Esp., 315; Gilbert v. Dale, 5 Ad. & El., 543.

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consignee making the pledge. The cashier of a bank, or the secretary of any insurance company, incorporated or working under any law in the United States or of this State, is hereby authorized to administer the oath contemplated under the provisions of this Act. Any deviation therefrom shall render the party or parties so deviating, liable for the value of the property, or any excess in value, over and above the amount for which it may have been pledged, in any manner specified in section one of this Act, and to prosecution for perjury, and also to obtaining money under false pretenses.

Sec. 5. That the vendor's lien of five days' privilege, now allowed in commercial transactions, for the payment of the purchase price, shall not be affected by the provisions of this Act, except in case in which a warehouse receipt has been pledged as collateral for money borrowed. The holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt, and no clause in this Act shall operate to the detriment or injury of the holder of a warehouse receipt, to the extent of the value of the property specified, made, and issued in accordance with, and under the provisions of this Act; *Provided*, That where the factor, agent or pledger may have wrongfully pledged, in violation of this Act, any [354] property, the lien of the owner shall be valid, even against the third holder of the warehouse receipt.

Sec. 8. That all warehouse receipts, as by this Act provided, shall be negotiable by indorsement in blank or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are."

On the 19th of March, 1877, Basil G. Kiger, a planter in Mississippi, consigned to Aiken & Watt, his factors in New Orleans, one hundred and ninety-six bales of cotton, with instructions not to sell, but to hold for further directions and better prices. The cotton reached New Orleans March 21, and was stored by Aiken & Watt in the cotton press of Sam. Boyd & Co. Aiken & Watt had no pecuniary interest whatever in the cotton, and Kiger, the consignor, was not indebted to them. On the contrary, they were largely indebted to him. On the 26th of March, Aiken & Watt borrowed of the Mechanics' and Traders' Insurance Company $4,500, for which they gave their notes to the Company, payable in forty days, at eight per cent interest, secured by a cotton press receipt of Boyd & Co., of which the following is a copy:

"NEW ORLEANS, *March* 26, 1877.

Received from Aiken & Watt the following described property, to wit: one hundred bales cotton, marked <K> ex. Pargoud, March 21, 1877. Shippers' press. (Printed indorsement in the body of the receipt:) 'The within cotton will not be delivered except on the return of this receipt to the press, properly indorsed.' Deliverable to the Mechanics' and Traders' Insurance Co. or order.

SAM. BOYD & CO."

Indorsement on the back of the receipt printed:

"Deliver to ——— or order the within described property. The above order is accepted, and the property is transferred to—

SAM. BOYD & CO."

Afterwards, on the 3d of April, Aiken & Watt borrowed $2,500 more from the Company, and gave a similar press receipt for ninety-six bales as security. The cotton embraced in these receipts was that which belonged to Kiger.

Before the maturity of these notes, Aiken & Watt failed. The notes were protested for non- [355] payment when due, and the makers were adjudicated bankrupts June 16, 1877.

On the 18th of April, 1877, Kiger brought this suit against Boyd & Co., to recover the possession of his cotton, and under the writ which was issued the cotton has been delivered to him, he giving bond according to law to return it in case of judgment against him to that effect. Afterwards the Insurance Company was called into the suit by Boyd & Co., and made a defendant by Kiger. The Insurance Company answered, setting up its claim to the property. Upon the trial, the foregoing facts appearing, the jury were instructed to render a verdict in favor of Kiger and against the Insurance Company.

To reverse a judgment on that verdict the case is now here by writ of error.

There are two questions in this case: 1, whether the Insurance Company can hold the cotton as against Kiger; and 2, whether, if it cannot, Boyd & Co. are liable for the amount for which their receipts were pledged.

1. As to Kiger. Before the Act of 1876 it was settled by numerous decisions in Louisiana that a factor could not pledge for his own debts the property of his principal. *Stetson* v. *Gurney*, 17 La., 166; *Hadwin* v. *Fisk*, 1 La. Ann., 43–74; *Miller* v. *Schneider*, 19 La. Ann., 300; *Young* v. *Scott*, 25 La. Ann., 313. The Act of 1876 does not, as it seems to us, materially enlarge this power, so far as the facts of this case are concerned. It makes warehouse receipts the representatives of property in store and provides for their use to borrow money on; but the implication is clear that their use in that way by a factor for more than the value of his interest in the property would be wrongful and invalid against the owner. This we do not understand to be disputed by the counsel for the plaintiff in error. His claim is, that there was in this case no pledge, but, "as the effect of the stipulation in the press receipts," "An absolute transfer of the legal title to the Insurance Company by parties in possession, having the absolute control of the [356] property, and the security was thus taken to enable the Insurance Company to sell the cotton and re-imburse themselves if the debt was not paid." The transaction between the parties was certainly not a sale, and in the answer of the Company it is distinctly stated that the cotton was delivered into the possession of the Company to be held as security for the payment of the notes given for the money borrowed. Undoubtedly the possession of the receipts was equivalent to the possession of the property, but the title which the Company acquired was such as grew out of its contract with the factors. That clearly was a pledge and nothing more. There was, 1, the cotton; 2, the debt for the money borrowed; and, 3, the delivery of the property into the possession of the creditor, to be held as security for the debt. These are all the elements of a pledge, and fix the rights of the parties. Aiken & Watt were the pledgers, but as they were only factors and had no interest in the property as against Kiger, the owner, their pledge was wrongful and invalid as to him. The pledge was by a factor of the prop-

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erty of his principal, in which he had no interest whatever, as security for his own debt.

2. As to Boyd & Co. They were simply warehousemen. Their duty under the law was not to issue receipts until they had the property actually in store, and not to deliver the property until the receipts were surrendered for cancellation. They did have the property in store when they gave the receipts, and as soon as it was taken from them by judicial process they notified the Insurance Company, and upon that notice the Company is now here asserting its title. This is a substantial compliance with their obligation not to deliver without a surrender of the receipts. There is no pretense of fraud or collusion, and we think it would be a surprise to warehousemen to be told that when they issued their receipts for property in store they became not only responsible as custodians of the property, but guarantors of its title to the assignees of their receipts. Such a rule would make it necessary for a warehouseman, before giving a receipt, not only to ascertain whether he had the property actually in store, but whether the title of the bailor was valid and [357] unencumbered. Certainly this could not have been in contemplation when warehouse receipts were made by statute negotiable and, to some extent, evidence of ownership. The duty of the warehouseman is performed when he gets the property into his own possession before he issues the receipt, and transfers that possession when demanded to the lawful holder of the receipt.

In this case, the liability of Boyd & Co. is just what it would have been if the Company had put the cotton in store and taken a receipt to its own order. The fact that Aiken & Watt originally stored the property, is a matter of no importance so far as Boyd & Co. are concerned. The receipt in the hands of the Company represented the cotton stored by Aiken & Watt, and gave the Company the same rights it would have had if the cotton, instead of the receipt, had been handed over. The Company got by the receipt such interest in the cotton as Aiken & Watt could by their pledge convey, and that is all Boyd & Co. agreed to deliver on the return of their receipt. Boyd & Co. cannot, as against the Company, say they never had the cotton, or that they did not promise to deliver it on the return of their receipt by the lawful holder. They received the actual possession of the property from Aiken & Watt, and that possession they agreed to deliver to the Insurance Company when called on. This, as has just been seen, they have in legal effect done, and the rights of the parties in this case are to be determined precisely as they would be if the Company had got the cotton from Boyd & Co., on the surrender of the receipts, and had afterwards been sued by Kiger for its possession.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[423] TOWN OF SEVEN HICKORY, *Plff. in Errr.*,

v.

GEORGE B. ELLERY.

(See S. C., 13 Otto, 423-426.)

Illinois law—when operative.

A bill passed by the Legislature of Illinois and presented to the Governor before the Legislature adjourns, becomes a law under the Constitution of that State when signed by the Governor after the session of the Legislature has been terminated, but within ten days from its presentation to him.

[No. 1115.]

Submitted Jan. 13, 1881. Decided Mar. 14, 1881.

IN ERROR to the Circuit Court of the United States, for the Southern District of Illinois.

The case is fully stated by the court.

Mr. **John M. Palmer**, for plaintiff in error.

Messrs. **D. T. McIntyre** and *S. M. Callum*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Article IV., section 21 of the Constitution of Illinois is as follows:

"Every bill which shall have passed the Senate and House of Representatives shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it shall have originated; and the said House shall enter the objections at large on their [424] journal, and proceed to reconsider it. If, after such reconsideration, a majority of the members elected shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by a majority of the members elected, it shall become a law, notwithstanding the objections of the Governor; but in all such cases the vote of both Houses shall be determined by yeas and nays, to be entered on the journal of each House, respectively. If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the General Assembly shall, by their adjournment, prevent its return; in which case, the said bill shall be returned on the first day of the meeting of the General Assembly after the expiration of said ten days, or be a law."

The single question we have now to consider is whether a bill passed by both Houses and presented to the Governor before the Legislature adjourns, becomes a law when signed by the Governor after the session of the Legislature has been terminated by an adjournment, but within ten days from its presentation to him. We have no hesitation in saying it does. There is certainly no express provision of the Constitution to the contrary. All that instrument requires is that, before any bill which has passed the two Houses, can become a law, it shall be presented to the Governor. If he approves it, he may sign it. If he does sign it within the time, the bill becomes a law. That is not said in so many words, but is manifestly implied. After a bill has been signed, the Legislature has nothing more to do with it. Undoubtedly, if the Legislature should be in session when the signing is done, it would not be inappropriate for the governor to communicate his approval to one or both the Houses, but there is nothing in the Constitution which requires him to do so. The filing of the bill by the Governor in the office of the secretary of state with his signature of approval on it is just as effectual in giving it [425] validity as a law, as its formal return to the

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Legislature would be. The bill becomes a law when signed. Everything done after that is with a view to preserving the evidence of its passage and approval.

The other parts of the article of the Constitution under consideration relate only to what is to be done if the Governor fails to indicate his approval of the bill by signing it. If the Legislature continues in session and he positively disapproves the bill, he may, within ten days from the time of its presentation to him, return it with his objections to the House in which it originated. Under such circumstances, the bill cannot become a law until it has again passed both Houses, and this time by a majority of all the members elected. Such a second passage, if secured and entered on the journal, makes the bill a law nothwithstanding its disapproval by the Governor. If the Governor remains passive, and neither signs nor returns the bill within ten days, the Legislature being at the time in session, it becomes a law without his approval.

In this way provision is made for every case that can arise, except when the Governor fails to sign the bill and the Legislature adjourns for the session before the expiration of the ten days. To meet such a state of things it was provided that the Governor might return the bill with his objections on the first day of the next session, and that, if he did not, the bill was *then* to become a law. If he did, the bill must again be passed over his objections as in case of a return before an adjournment and within the ten days. If thus passed it became a law, otherwise not. So that, under the Constitution of Illinois, if a bill is passed by both Houses of the Legislature it becomes a law: 1, when approved and signed by the Governor within ten days after its presentation to him; 2, when the Legislature being in session, the Governor fails to sign the bill or return it with his objections to the House in which it originated within the ten days; 3, when, after being returned within the ten days, it is passed by the requisite majorities over his objections; 4, when, if the session of the Legislature terminates by an adjournment before the expiration of the ten days, he fails to return the bill with his objections the first day of the next session; and, 5, when, having returned it with objections on the first day of the next session, it [426] is again passed by the requisite majorities in both Houses. And it becomes a law at the time when the event happens which is to give it validity. In the present case the bill was approved and signed within the ten days and, therefore, as we think, it became a law from the date of the approval, notwithstanding the Legislature was not in session at the time. This is in accordance with the ruling of the Court of Appeals of New York in *People* v. *Bowen*, 21 N. Y., 517; of the Supreme Court of Louisiana in *State* v. *Fagan*, 22 La. Ann., 545, and of the Supreme Court of Georgia in *Solomon* v. *Comrs.*, 41 Ga., 157, upon provisions somewhat similar in the Constitutions of those States. In the last case the decision was put on the ground that the practice of the Governor had been to sign the bills within the limited time, whether the Legislature was in session or not, but not afterwards. The bill of exceptions in the present case shows that the practice in Illinois has been to sign after the Legislature had adjourned.

In every view of the case, we think *the judgment below was right, and it is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Appt.*, [544]
v.
GEORGE P. NELSON, *Admr.* of WILLIAM COOK, Deceased, ET AL.

(See S. C., 13 Otto, 544–549.)

Evidence to impeach mortgage — testimony of mortgagor.

1. When a deed or mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor, is attacked, the evidence to impeach it should be clear and convincing.
2. Where the testimony of the mortgagor, as to the manner in which her signature to the mortgage was obtained, given to impeach the mortgage, is incredible, it is, although positive, entitled to little weight.

[No. 185.]

Argued Jan. 5, 1881. Decided Mar. 14, 1881.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Mr. **D. G. Hooker**, for appellant.

Messrs. W. J. Buchan and **Jno. J. Ingalls**, for appellee.

Mr. Justice **Woods** delivered the opinion of of the court:

The Northwestern Mutual Life Insurance Company, appellant, filed its bill in the court below for the foreclosure of a mortgage on certain lots in the City of Wyandotte, and a tract of land containing sixty acres situate outside that city, all in the County of Wyandotte, in the State of Kansas, alleged to have been executed by William Cook and Jane Cook, his wife, [545] dated December 10, 1874, to secure the bond of William Cook for $5,000.

The city lots were the property of William Cook, but the tract of sixty acres was the separate property of his wife, Jane Cook.

Jane Cook filed her answer, in which she admitted the execution of the bond, but denied the execution of the mortgage as set forth in the bill of complaint. Her account of the execution of the mortgage, as given in her answer, was as follows:

"This defendant alleges that on or about the time mentioned in the plaintiff's bill as the time when said bond and mortgage therein set out were executed, the said William Cook, her husband, requested her (this defendant) to sign a mortgage to the plaintiff as mortgagee, to secure a loan of money to be loaned by the plaintiff to him, said William Cook, her husband, and informed her that such mortgage was upon certain lots of his, in Wyandotte City, and upon this defendant asking him, her said husband, to let her read the said mortgage, he, her said husband, refused to permit this defendant to read the same. This defendant then asked whether said mortgage covered her land outside the city, and was told by her said husband that it did not, but this defendant refused to sign the same, whereupon her said husband

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took hold of this defendant, and by physical force seated this defendant in a chair at the table and put a pen in her hand, and placing his hands on this defendant's shoulder and arm, commanded and compelled her to write her name, which she did and not otherwise, and not of her own free will and accord; but that she was compelled to sign said mortgage by force and threats of her said husband, and that the same was signed under duress, by actual force, physical coercion, and the use of violence and compulsion of her said husband, and through and by such duress, force, physical coercion, and not otherwise, she was made to sign such mortgage, and this defendant avers and alleges that such mortgage is not her deed.

And this defendant further answering, says that afterwards, when Alison Crockett, the officer certifying to the acknowledgment of said mortgage, came into the room where this defendant was, to take such acknowledgment, said Crockett informed defendant that said mortgage was upon some city lots belonging to her [546] husband and did not cover her land. That defendant believed said declaration to be true, that Crockett did not read said mortgage to defendant, or otherwise explain the contents thereof, except as herein stated; that defendant did not read said mortgage, because she believed the declaration of said Crockett to be true, and feared to offend her husband by refusing to acknowledge the signature to said mortgage as hers."

Her answer further alleged as follows:

"The said Alison Crockett was the agent of the plaintiff herein, in loaning money to her said husband, William Cook, and taking said mortgage in security therefor; and when he took said acknowledgment and made the representations aforesaid, that this defendant's land was not included in said mortgage, he was acting as the agent of the plaintiff herein, and that he then had full knowledge and well knew that the land above described (the sixty acre tract) was the property of this defendant and was included in said mortgage."

To this answer the general replication was filed.

William Cook having died before the commencement of the suit, George P. Nelson, administrator of his estate, and other defendants, answered, but their answers are immaterial, as no questions are involved in this appeal except such as arise upon the answer of Jane Cook.

Upon the issue made by the pleadings, proofs were taken, and upon final hearing the court made a decree foreclosing the mortgage upon the city lots, but, as to the sixty acre tract the court found for defendant, Jane Cook, and declared that the mortgage was not a lien thereon, and omitted said tract from the decree of sale.

The Insurance Company, being dissatisfied with the decree of the court below, has brought the case here on appeal.

The defense relied on is, that the signature of Jane Cook to the mortgage was obtained by means of the false representations of her husband and by compulsion through the application of physical force, and that her acknowledgment was obtained by means of the false representations of her husband and the officer before whom she made it, in respect to the contents of the mortgage.

The defense rests mainly upon the answer, [547] and upon the deposition of Mrs. Cook.

There was only one person present besides Mrs. Cook, when the mortgage was signed by her. This was her husband, William Cook. And there were only two persons present besides Mrs. Cook when the acknowledgment of the mortgage was taken. These were William Cook, her husband, and Alison Crockett, Register of Deeds of Wyandotte County, before whom the acknowledgment was made. Of these, both William Cook and Crockett are dead. Jane Cook, is, therefore, the only living witness of what transpired when the mortgage was signed and acknowledged by her.

She admitted her signature to the mortgage, but said it was obtained in the following manner: Cook, her husband, came in and asked her to sign the mortgage. He stated that it covered the town lots in Wyandotte. She declined to sign it. What then took place is thus stated by Mrs. Cook: "He said if I did not sign that mortgage he would come off down town and go to drinking till he killed himself, these are just the words he said, and then from that he said he was going to compel me to sign it, and then as I say he forced me into the chair, he took me and set me in the chair and held me there, and took the pen and put it in my hand and guided my hand and wrote my name there."

In answer to the question, "How is it that your name is so well written on the mortgage?" she said, "After he got through he took the pen and straightened the places."

She further testified as follows:

"After the mortgage was signed, Crockett came in. He asked me 'Where is the papers, are you going to sign?' Mr. Cook spoke up and said 'it is already signed.' He asked me then if I signed it. I did not say anything. Mr. Cook stood between me and Mr. Crockett; he as much as told me to keep my mouth shut by his motions. He looked me right in the face."

She further testified that Crockett did not explain to her the contents of the mortgage before taking her acknowledgment. He simply told her that the mortgage was nothing to injure her, that it was on property down on Minnesota Avenue.

The complainant introduced in evidence the original mortgage and also the original of a draft, which Mrs. Cook testified bore her in- [548] dorsement, and her original deposition in this case bearing her signature. The evidence of three experts in handwriting was also introduced for complainant. They all testified that the signature of Mrs. Cook to the mortgage and deposition and her indorsement of the draft were written by the same person; that the signature to the mortgage appeared to be in the same natural and voluntary hand as the other signatures, and that upon inspection through a glass showed no signs of having been touched up or altered.

The three original signatures were exhibited to the court. An inspection of them with the naked eye satisfies us that Mrs. Cook's statement that her signature to the mortgage was made in the manner described in her deposition cannot be true. It is as free and natural as her signature to her deposition or her indorsement of the draft. It bears no signs of

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constraint, as would inevitably have been the case if she had reluctantly held the pen and it had been guided by another hand and will. It bears no signs of any change or filling up or straightening. On this subject, the inspection of the signatures leaves no doubt in our minds. The narrative of Mrs. Cook in regard to the manner in which her signature to the mortgage was made, is contradicted by the signature itself, and a comparison of it with the others put in evidence. How, then, can we give credence to her testimony, touching the representations of her husband in relation to the contents of the mortgage and her account of the manner in which her acknowledgment was taken?

When a deed or mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor is attacked, the evidence to impeach it should be clear and convincing.

In the case of *Howland* v. *Blake*, 97 U. S., 624 [XXIV., 1027], this court said: "The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs were doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed [549] away by loose and inconclusive testimony." See, also, *Shelburne* v. *Inchiquin*, 1 Bro. Ch., 338, 341; *Henkle* v. *Royal Assur. Co.*, 1 Ves., Sr., 317; *Townshend* v. *Stangroom*, 6 Ves. Jr., 328,338; *Gillespie* v. *Moon*, 2 Johns. Ch., 585; *Lyman* v. *Ins. Co.*, 2 Johns. Ch.,630; *Graves* v. *Ins. Co.*, 2 Cranch, 444.

The acknowledgment of a deed can only be impeached for fraud, and the evidence of fraud must be clear and convincing. *Russell* v. *Bap. Theolog. Union*, 73 Ill., 337.

In this case, the testimony of Mrs. Cook touching the manner in which her signature to the mortgage was obtained, is so incredible that her account of the way in which her acknowledgment was taken is entitled to little weight.

We have not thought it necessary to consider the question whether, under the Statute of Kansas, the communication between herself and her late husband, testified to by Mrs Cook, are admissible in evidence.

It is unnecessary to discuss the other evidence in this case. It is sufficient to say that it is entirely circumstantial, and its weight is decidedly against the defense set up by Mrs. Cook.

We are of opinion that there was no evidence in the case sufficient to overcome the effect of the mortgage and the officer's certificate. The circuit court should, therefore, not have accepted the sixty acre tract from its decree of foreclosure. For this error *the decree must be reversed, and the cause remanded with directions to enter a decree for complainant, in conformity with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 577.

WILLIAM H. SEWARD ET AL., *Appts.*,

v.

JEAN BAPTISTE COMEAU, Sheriff, ET AL.

102 US 161

1. The fact that a sheriff advertised to sell in parcels presents no ground for an injunction.
2. Appellants cannot object to the removal of a cause to the Circuit Court, when it was brought about on their application.

[No. 240.]

Submitted Mar. 3, 1881. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Same case on motion to dismiss, *ante*, 86.

The case is stated by the court.

Messrs. John D. McPherson, Calderon Carlisle, A. Porter Morse and **H. N. Ogden,** for appellants.

Messrs. **Edwin T. Merrick** and **G. W. Race,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We think the court below was right in dissolving the injunction which had been obtained in the state court and dismissing the bill. There cannot be a doubt from the evidence that the Magenta plantation contains in fact the full quantity of land which was guarantied, and that the deficiency, if there is any, arises from a mistake in the description of one of the parcels intended to be conveyed. The grantee was put in actual possession of the whole plantation, and he and those claiming under him, have never been disturbed since. No person has ever set up any adverse claim whatever, either to the possession or the title. The complainants have shown no reason to fear that they will ever be disquieted, and certainly they have not proven that they were in danger of eviction. They have never asked a correction of the mistake in the description, if any there is, and it is by no means certain that the language of the whole deed does not really embrace what it is claimed has been omitted.

What we have thus said applies to all the alleged defects in the title. No adverse claim has been set up by anyone, and, so far as anything appears, there is no danger whatever that the complainants will be disturbed in their possession, either because patents have not been issued, or because Mrs. Delhommer was not authorized by the court to obtain a judicial separation of property.

The fact that the sheriff advertised to sell in parcels, presents no ground for an injunction. As the injunction granted by the state court has been dissolved and the bill dismissed, we need not inquire whether the proceeding by executory process in the state court was removed to the Circuit Court or not. The parties may now proceed with the execution of that process in such manner as they shall be advised is proper. The appellants cannot object to such removal as was actually effected to the Circuit Court, because it was brought about on their application.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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HENRY M. BACON, Assignee of JOSEPH BRUNSWICK ET AL., Bankrupts, *Plff. in Err.*

v.

INTERNATIONAL BANK OF CHICAGO.

Rights of assignee in bankruptcy—right of bank to collateral securities—creditors—effect of pledge.

131 US ccxvi appx

1. An assignee in bankruptcy has only such rights of property as the bankrupt had when the proceedings in bankruptcy were commenced.
2. Where notes were assigned to a bank as collateral security to a debt owing it, the bank had the right to collect the notes as they fell due and apply the proceeds to the payment of the debt.
3. Where this was done more than two months before the proceedings in bankruptcy were begun, and there is no allegation of bad faith, the title of the bank was good as against the creditors of the bankrupt.
4. As the bankrupt cannot call on the bank to return the notes until the debt for which the security was given is paid, the assignee cannot.

[No. 237.]

Argued Mar. 2, 1881. Decided Mar. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. **D. W. Jackson** and *Thomas Dent*, for plaintiff in error.

Mr. A. M. Pence, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts of this case briefly stated are these: In 1876, the firm of Brunswick Brothers, Stephani & Hart Company was engaged in the business of making and selling billiard tables at Chicago and St. Louis. In August or September of that year this firm agreed to sell the J. M. Brunswick & Balke Company the stock and branch of the business at St. Louis, for which the purchasing company was to give, when the stock was transferred, its notes of $1,000 each payable three months from date, and the balance of the invoice when taken was to be divided into monthly notes of $1,000 each, the first to fall due four months from date, and one each month thereafter until the whole price was paid. The three notes due three months after date were to be delivered the selling firm when the transfer of the stock was made, but the others were to be deposited with the International Bank of Chicago, with instructions that they be delivered one month before their maturity.

The invoice when taken amounted to $12,000. The stock was transferred and notes executed according to the agreement, September 9, 1876. The three first to fall due were at once handed over to the selling firm and the others deposited in Bank as agreed. The firm of Brunswick Brothers, Stephani & Hart Company was dissolved in September, 1876, and all its assets passed on the dissolution to the firm of Brunswick, Stephani & Hart, which was its successor in the business.

On the 16th of September the new firm agreed that the Bank might hold the nine notes then in its possession as collateral security for the indebtedness of the firm to the Bank, which then existed or which might thereafter be created. The firm was at the time owing the full amount of the notes, a part, at least, of which was for a debt incurred under a promise to give the notes as collateral when they were obtained.

Proceedings in bankruptcy were instituted against Brunswick, Stephani & Hart, on the 29th of November, 1876, and they were adjudicated bankrupts on the 16th of the following December. On the 3d of February, 1877, the other members of the firm of the Brunswick Brothers, Stephani & Hart Company filed their petition in bankruptcy, and on the same day they were adjudicated bankrupts and made parties to the former proceeding.

The J. M. Brunswick & Balke Company paid the notes to the Bank as they fell due, and the payments as made were applied to the liquidation of the debt for which they were held as collateral. On the 25th of June, 1877, the assignee in bankruptcy of the bankrupt firms commenced this suit in trover against the Bank to recover damages for the unlawful conversion of the notes and the moneys collected thereon.

This statement, which is not disputed, shows clearly, as we think, that the court below committed no error in directing a verdict in favor of the Bank. The makers of the notes do not complain of what was done between the Bank and the payees. They owed the debt represented by the notes and have paid it to the Bank as it fell due. As the payments were made they got up their notes. The rights of the assignee against the Bank are only such as the bankrupts themselves had when the proceedings in bankruptcy were commenced. That the St. Louis firm owed the debt to the Chicago firm, whether the notes were ever delivered by the Bank or not under the terms of the deposit, is conceded. That debt was assigned to the Bank as collateral. Such is the legal effect of the agreement between the Bank and the firm. That gave the Bank the right to collect the notes as they fell due, and apply the proceeds to the discharge of the debt to secure which the transfer was made. This was done more than two months before the proceedings in bankruptcy were begun, and there is no allegation or suspicion of bad faith. This made the title of the Bank good as against the creditors of the bankrupts. Certainly the bankrupts cannot call on the Bank to return the notes until the debt for which the security was given is paid. No more can the assignee.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ELIZA JANE DENNICK, Admrx., etc., of NATHANIEL DENNICK, Deceased, *Plff. in Err.* [11]

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY.

(See S. C., 13 Otto, 11-21.)

Right of action, how enforced—action for death when enforced—distribution.

1. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.

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2. When the statute of a State gives a remedy for the death of a person caused by the negligence of another, and provides that the action shall be brought by the personal representative of such deceased person, held, that the personal representative appointed in a State other than that wherein the death occurred, may bring such action in the courts of the State in which he was so appointed.

3. The courts of the State where the action is brought can compel distribution of the amount received, in the manner prescribed by such statute.

[No. 210.]

Argued Jan. 26, 1881. Decided Mar. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **Amasa J. Parker,** for plaintiff in error:

The New York court, having acquired jurisdiction of the parties, had full power to determine their relative rights and liabilities in this controversy.

"The judiciary power of every government (said Alexander Hamilton) looks beyond its local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than of New York, may furnish the objects of legal discussion to our court."

The Federalist, No. 82; see, Westlake's Private Int. Law, p. 54, sec. 58; p. 105, sec. 120, 3 Steph. Com., 451; 4 Phillim. Int. Law, 648.

Nor was there any distinction in this respect, whether the cause of action was *ex contractu* or *ex delicto*.

Rafael v. *Verelst*, 2 W. Bl., 1055; *Scott* v. *Seymour*, 1 Hurl. & C., 219; *Phillips* v. *Eyre*, L. R. (6 Q. B.), 1, 28-30; *Madrazo* v. *Willes*, 3 B. & Ald., 353; *Mostyn* v. *Fabrigas*, Cowp., 161; 1 Sm. Lead. Cas., 340 (marg.); *De la Vega* v. *Vianna*, 1 B. & Ad., 284.

The same principle has been recognized and applied without qualification in the courts of this country.

(*a*) To cases arising on contracts.

Cox v. *U. S.*, 6 Pet., 172; *Caldwell* v. *Carrington*, 9 Pet., 86; *Green* v. *Van Buskirk*, 7 Wall.; 139 (74 U. S., XIX., 109); *King* v. *Sarria*, 69 N. Y., 24; *Barrell* v. *Benjamin*, 15 Mass., 354; *Roberts* v. *Knights*, 7 Allen (Mass.), 449; *Miller* v. *Black*, 2 Jones, L. (N. C.), 341; *Ruse* v. *Ins. Co.*, 23 N. Y., 516, 521.

(*b*) To personal injuries or torts.

McKenna v. *Fisk*, 1 How., 241; *McCormick* v. *R. R. Co.*, 49 N. Y., 303, 308; *Boynton* v. *Boynton*, 43 How. Pr., 383; *Johnson* v. *Dalton*, 1 Cow. (N. Y.), 543; *Smith* v. *Bull*, 17 Wend. (N. Y.), 323; *Stout* v. *Wood*, 1 Blackf. (Ind.), 71; *Lister* v. *Wright*, 2 Hill (N. Y.), 320; *Gardner* v. *Thomas*, 14 Johns. (N. Y.), 134; *Glen* v. *Hodges*, 9 Johns. (N. Y.), 68; *Smith* v. *Butler*, 1 Daly (N. Y.), 508; *McIvor* v. *McCabe*, 26 How. Pr., 257; *Hull* v. *Vreeland*, 42 Barb. (N. Y.), 543; *Latourette* v. *Clarke*, 45 Barb. (N. Y.), 327; *De Witt* v. *Buchanan*, 54 Barb. (N. Y.), 31; *Newman* v. *Goddard*, 3 Hun (N. Y.), 70; *Watts* v. *Thomas*, 2 Bibb (Ky.), 458; *Wall* v. *Hoskins*, 5 Ired. (N. C.), 177; *Shipp* v. *McCraw*, 3 Murphy (N. C.), 463; *Walters* v. *Breeder*, 3 Jones, L. (N. C.), 64; *R. Co.* v. *Scholl*, 16 Md., 332; *R. Co.* v. *Miller*, 19 Mich., 305; *Ackerson* v. *R. Co.*, 31 N. J. L., 309.

As the rule is founded on the principle of comity, the foreign law will only be recognized and enforced by the *lex fori*, "When not contrary to its own public policy, nor to abstract justice nor pure morals."

King v. *Sarria*, 69 N. Y., 24, 31; *Phillips* v. *Eyre* (*supra*); *Wall* v. *Hoskins* (*supra*).

But it is no objection that all the parties to the suit are aliens or non-residents, and that the cause of action arose abroad.

Rafael v. *Verelst* (*supra*); *Johnson* v. *Dalton* (*supra*); *Mason* v. *The Blaireau*, 2 Cranch, 240, 264; *Barrell* v. *Benjamin* (*supra*); *Roberts* v. *Knights* (*supra*); *Watts* v. *Thomas* (*supra*); *De Witt* v. *Buchanan* (*supra*); *Newman* v. *Goddard* (*supra*); *Latourette* v. *Clarke* (*supra*); *Gardner* v. *Thomas* (*supra*); *Smith* v. *Spinola*, 2 Johns. N. Y., 198; *Smith* v. *Butler* (*supra*); *Melan* v. *Fitzjames*, 1 Bos. & P., 138; *Miller* v. *Black* (*supra*); *McCormick* v. *R. R. Co.* (*supra*); *De La Vega* v. *Vianna* (*supra*); *Walters* v. *Breeder*. (*supra*); *Ruse* v. *Ins. Co.* (*supra*); *Ackerson* v. *R. Co.* (*supra*).

If, however, in this respect the rule as between Nations were otherwise, it would not affect the right of citizens of one State to sue in the courts of another, as under the Federal Constitution, they cannot be regarded as foreigners. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," including the right to pursue the same legal remedies.

Barrell v. *Benjamin* (*supra*); *McIvor* v. *McCabe* (*supra*); *Miller* v. *Black* (*supra*); *Bk.* v. *Earle*, 13 Pet., 520.

The rule has been specially applied to foreign corporations; and actions have been sustained in the courts of one State for injuries to persons and property caused by negligence in operating railways in other States.

Bissell v. *R. R. Co.*, 22 N. Y., 258; *McCormick* v. *Pa. R. R. Co.* (*supra*); *Ins. Co.* v. *R. R. Co.*, 11 Hun (N. Y.), 182.

There is no reason in morals or justice or policy, why the same rule should not be applied to all causes of action of the same class and character (transitory actions for injuries to persons and property), whether they are recognized by the common law or are created by statute to meet new exigencies of modern life. The claim of comity, on which the rule is founded, is as urgent and unanswerable in the one case as in the other.

It is held that the local statutes of the State cannot *ex proprio vigore*, have any extraterritorial application or force, with the single exception that they may extend for the purposes of civil rights and remedies over its citizens on board of their steamers or vessels on the "high seas."

Crapo v. *Kelly*, 16 Wall., 610 (83 U. S., XXI., 430); *Sherlock* v. *Alling*, 93 U. S., 99 (XXIII., 819); *McDonald* v. *Mallory*, 77 N. Y., 547; *Whitford* v. *R. R. Co.*, 23 N. Y., 465; *Vandeventer* v. *R. R. Co.*, 27 Barb. (N. Y.), 244; *Mahler* v. *Trans. Co.*, 35 N. Y., 352; *State* v. *R. Co.*, 45 Md., 41; *R. R. Co.* v. *Miller* (*supra*); *R. R. Co.* v. *Lacy*, 43 Ga., 461; *McCarthy* v. *R. R. Co.*, 18 Kan., 46; *R. R. Co.* v. *Eakin*, 46 Tenn. (6 Cold.), 582.

But nearly all these cases at the same time, expressly recognize the right to a remedy in any State where jurisdiction of the parties is obtained, upon a cause of action accruing in and given by the statute of another State.

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The New York and New Jersey Statutes are clearly remedial, as held by the courts of those States.

Beach v. *Steamboat Co.*, 30 Barb. (N. Y.), 433; *Oldfield* v. *R. R. Co.*, 8 E. D. Smith (N. Y.), 103.

Messrs. Henry G. DeForest and **Robert W. DeForest,** for defendant in error:

The plaintiff, an administratrix deriving her authority only from the local law of New York, has no cause of action conferred upon her by the New Jersey Statute. That Statute has no exterritorial force, and only gives a cause of action to a personal representative appointed under the laws of New Jersey when the death occurred in New Jersey.

Mackay v. *R. R. Co.*, 14 Blatchf., 65; *Whitford* v. *R. R. Co.*, 23 N. Y., 465; *Beach* v. *Steamboat Co.*, 30 Barb., 433; *Woodard* v. *R. R. Co.*, 10 Ohio St., 120; *Richardson* v. *R. R. Co.*, 98 Mass., 85, 1867, the highest courts of other States concur in the principles of the above decisions.

McCarthy v. *R. R. Co.*, 18 Kan., 47, 1877; *State* v. *R. R. Co.*, 45 Md., 41; *Needham* v. *R. R. Co.*, 38 Vt., 294; *R. R. Co.* v. *Cragin*, 71 Ill., 177.

[17] *Mr. Justice* **Miller** delivered the opinion of the court:

The plaintiff in error brought her suit in a state court of New York to recover damages for the death of her husband by an accident on the defendant's railroad.

The Railroad Company entered an appearance and removed the case into the Circuit Court of the United States for the Northern District of New York, on the ground that the plaintiff was a citizen of New York and the defendant a Corporation of the State of New Jersey. The complaint filed in the circuit court alleges that plaintiff was widow and her children were next of kin to the decedent, and that she was administratrix of his estate, appointed by the proper court in New York. Other allegations showed the death of the husband by negligence of the defendant, and claimed $15,000 damages.

The answer of defendant denied the negligence, but admitted the death by the train running off the track in New Jersey, and that there were a widow and next of kin, and that plaintiff had been appointed administratrix by the surrogate of Albany County, New York.

The parties waived a jury, and plaintiff introduced evidence tending to prove the negligence charged, and rested.

Whereupon the court ruled that for the loss of her husband accruing in the State of New Jersey, under the special statute of that State on that subject, plaintiff could not recover in that action, and gave judgment for the defendant, to which this writ of error is prosecuted.

It is understood that this decision rested solely upon the proposition that the liability for the death of a party by a civil action for damages, under the Statute of New Jersey, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of that State. And the soundness or unsoundness of this proposition is what we are called upon to decide. The Statute of New Jersey, under which the action was brought, is as follows:

"Sec. 1. That, whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person."

It must be taken as established by the record that the accident by which plaintiff's husband came to his death, occurred in New Jersey, under circumstances which brought the defendant within the provisions of the 1st section of the Act making the Company liable for damages, notwithstanding the death.

It is scarcely contended that the Act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.

It is, indeed, a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right.

Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. [18]

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the Northern District, were competent to try such a case when the parties were properly before it. See *Mostyn* v. *Fabrigas*, 1 Cowp., 161; *Rafael* v. *Verelst* 2 W. Bl., 983, 1055; *McKenna* v. *Fisk*, 1 How., 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey he

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could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See, *Ex parte Van Riper*, 20 Wend., 614; *Lowry* v. *Inman*, 46 N.Y., 119; *Pickering* v. *Fisk*, 6 Vt., 102; *R. R. Co.* v. *Sprayberry*, 8 Bax. (Tenn.), 341; *R. R. Co.* v. *Miller*, 19 Mich., 305.

But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

The statute does not say this in terms. "Every such action shall be brought by and in the name of the personal representatives of such deceased person." It may be admitted that for [19] the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here also, by construction, "If they reside in the State of New Jersey?"

It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference it is opposed to it. The first section makes the liability of the corporation or person absolute where the leath arises from their negligence. Who shal. say it depends on the appointment of an administrator within the State?

The 2d section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing there might be a question as to the proper person to sue, the Act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this cannot be done.

The suit here was brought by the administratrix in a court of the State which had appointed her, and of course no such objection could be made.

If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by the personal representative of the deceased, and if the plaintiff is the personal representative of the deceased, whom the courts of [20] that State are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey Statute.

But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey Statute, so any court having control of the administratrix can compel distribution of the amount received in the manner prescribed by that statute.

Again, it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, as the amount set apart in most of the States to the family, devises of specific property to individuals, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and the duty of distributing under that law. There can be no doubt that an administrator invested with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay over, to some one who establishes a better right, or that what was so recovered was held in trust for some one not claiming under the will or under the administrator. And so here. The Statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a Statute of New [21] York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in her fiduciary character which both statutes require.

We are aware that the case of *Woodard* v. *R. R. Co.*, 10 Ohio St., 121, asserts a different doctrine, and has been followed by the cases of *Richardson* v. *R. R. Co.*, 98 Mass., 85, and *Mc Carthy* v. *R. R. Co.*, 18 Kan., 46. The reasons which

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support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of *Leonard, Administrator*, v. *The Columbia Steam Navigation Co.* [84 N. Y., 48], not yet reported, but of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action.

The judgment of the Circuit Court is, therefore, reversed, with directions to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 379, 497; 16 N. W. Rep., 415; 18 N. W. Rep., 674; 31 Minn., 11; 47 Am. Rep., 775.

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[99] NATIONAL BANK OF GENESEE, *Plff. in Err.*,

v.

EDWARD M. WHITNEY ET AL.

(See S. C., 13 Otto, 99-104.)

Mortgage to national bank—objections to—priority of mortgage taken without notice.

1. A mortgage to a national bank to secure future advances, so far as subsequent incumbrances are concerned, is a valid security for the future advances to the mortgagor.
2. Any objection there may be to it, as security for such advances from the prohibitory provisions of statute, can only be urged by the government.
3. Where a mortgage was taken without notice to the mortgagee of a prior mortgage which had not then been registered, he has a right to prior payment of his mortgage from, and has a prior lien on, the premises.

[No. 159.]

Argued Dec. 17, 1880. Decided Mar. 21, 1881.

IN ERROR to the Supreme Court of the State of New York.

The case is fully stated by the court.

Mr. **Theodore Bacon,** for plaintiff in error.

Messrs. W. Harris Day and **John Van Voorhis,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

It appears from the record that the defendant Whitney, some time previously to 1871, executed to Maria Crocker a mortgage upon certain real property situated in the County of Genesee, in the State of New York, to secure an indebtedness to her; that in a suit brought for that purpose the mortgage was foreclosed and a decree entered for the sale of the premises; that such sale was had and the amount received satisfied the debt and left a surplus of over $3,800, which was paid into court. The present controversy is between subsequent mortgagees and judgment creditors for this surplus.

On the 12th of January, 1871, Whitney executed a mortgage upon the same premises to the National Bank of Genesee, providing in terms for the payment of $5,000, one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the Bank held at the time against him, and for his other indebtedness then due or thereafter to become due. This mortgage was recorded on the 19th of September, 1872. It subsequently appeared from an examination of the accounts between the parties that his indebtedness at the date of the mortgage was $3,200 and [100] that this was paid before September 16, 1872.

On this last day, Whitney executed two other mortgages upon the same property, one to Homer Bostwick, and the other to Edward McCormick. The one to Bostwick was executed as security for the payment of liabilities and indebtedness which already had been or might thereafter be incurred by him on account of Whitney, either by indorsement or otherwise, to an amount not exceeding $2,500. This mortgage was recorded at noon on the day of its execution. The amount of the liability subsequently incurred by Whitney to Bostwick exceeded the sum named. The mortgage to McCormick was executed as security for similar liabilities and indebtedness which might be incurred by him for Whitney, to an amount not exceeding $1,500, and was recorded at forty-five minutes past one of the day of its execution. The amount of liabilities incurred by McCormick for Whitney exceeded the sum named.

It is unnecessary to give the particulars of other subsequent incumbrances, as under no circumstances could any of the surplus be applied to their discharge. In any view that can be taken of the mortgages mentioned, the surplus

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NOTE.—*Power of national banks to take mortgage security.*

A mortgage to a national bank, to secure notes to be thereafter discounted, is void and will not be enforced. Fowler v. Scully, 72 Pa. St., 456; S. C., 13 Am. Rep., 699.

A national bank may take a chattel mortgage to secure a pre-existing debt. Spafford v. First Nat. Bk. of Tama City, 37 Iowa, 181; S. C., 18 Am. Rep., 6.

A national bank has no authority to take a deed of trust or mortgage on real estate to secure a contemporaneous loan; and a sale under such deed or mortgage will be enjoined. Matthews v. Skinker, 62 Mo., 329; S. C., 21 Am. Rep., 425.

A national bank may sell its real estate and take a mortgage for the purchase money. New Orleans Nat. Bk. v. Raymond, 29 La. Ann., 355; S. C., 29 Am. Rep., 335.

A national bank organized as successor to a state bank may maintain an action to foreclose a mortgage of real estate given to the state bank as security for a note and assigned by it to the national bank on its formation. Scofield v. St. Nat. Bk., 9 Neb., 319; S. C., 31 Am. Rep., 412.

A national bank may loan on security of a mortgage, if not objected to by the United States. An objection to the taking of a mortgage lien by the bank, as security for future advances, can only be made by the United States. Fortier v. New Orleans Bk., 112 U. S., 439 (XXVIII.); Nat. Bk. v. Matthews, 98 U. S., 621 (XXV., 188); Nat. Bk. v. Whitney, *supra*; Swope v. Leffingwell (*post*).

A national bank may take title on a foreclosure sale of property mortgaged to it, and also of other property not mortgaged. "The Sovereign alone can object." Reynolds v. Crawfordsville Bk., 112 U. S., 405 (XXVIII.); R. S., sec. 5137.

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in controversy will be exhausted by them.

The principal question for our determination relates to the validity of the mortgage of Whitney to the National Bank, so far as it applies to future advances to him. His indebtedness existing at the execution of the mortgage has been satisfied. His indebtedness subsequently incurred amounted at the sale of the premises to $5,160. If the mortgage for the future indebtedness can be sustained as a valid instrument for that purpose, the entire surplus will be absorbed for its payment, excepting such portion as may be first payable to McCormick, by reason of the fact that he took his mortgage without notice of the one to the Bank. It is contended that the mortgage to the Bank, so far as it applies to future advances, is invalid, because a mortgage of that character is prohibited by the national banking law. That law, after in terms authorizing every national banking association to loan money on personal security, declares that it "May purchase, hold and convey real estate for the following purposes, and for no [101] others: *first*, such as may be necessary for its immediate accommodation in the transaction of its business; *second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; *fourth*, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts to it."

The question presented is not an open one in this court. It was determined in the case of *Nat. Bk.* v. *Matthews*, 98 U. S., 621 [XXV., 183], at the October Term of 1878. It there appeared that Matthews and another person had given their joint note to a mercantile company for $15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterwards the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at its maturity, and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, and obtained a decree for a perpetual injunction, upon the ground that the loan was made upon real security, which was forbidden by the statute. The Supreme Court of the State affirmed the decree, and the case was brought here, where the decree was reversed and the cause remanded, with directions to the court below to dismiss the bill.

In coming to this conclusion this court considered the transaction in two aspects: first, as not being within the letter of the statute, because the deed of trust was not executed *to* the bank; and, second, as a loan upon real estate security.

Viewed in the first aspect, the court held that as a mortgage the deed of trust was merely an incident to the note, and a right to its benefit, whether it was delivered or not with the note, passed with the transfer of the latter. If the bank had made the loan upon the note alone, the benefit of the deed as a mortgage would have inured to it by operation of law. Of course that which the law would give independently of a direct transfer by the mortgagor the statute did not intend to defeat because such transfer was made.

Viewed in the second aspect, as a loan upon real estate security, the court observed that, so treating it, the consequence insisted upon did [102] not follow; that the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. And after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the government against them, the court held that the prohibitory clauses of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the government. "The impending danger," said the court, "of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

The Construction of the Act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the Legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court, for statutory regulations would operate only in the future.

The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the Bank, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objec- [103] tion there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government. *Fleckner* v. *Bk.*, 8 Wheat., 338-355.

But it appears from the record that the mortgage to McCormick was taken by him without notice of the prior mortgage to the Bank, which had not then been registered. He has, therefore, a right as against the Bank to prior payment of the $1,500 and interest, for which amount his mortgage was a lien upon the premises.

Bostwick took his mortgage with notice of the one to the Bank. He cannot, therefore, claim any of the surplus until the debt of the Bank is paid. The surplus should, therefore, be first applied to McCormick's claim, and the balance to the claim of the Bank.

It follows that the decree of the Supreme Court of New York must be reversed and the case re-

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manded, with directions to enter a decree in conformity with this opinion,

And it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 4; 19 Blatchf., 289; 98 N. Y., 272; 21 N. W. Rep., 850; 131 Mass., 275; 41 Am. Rep., 237.

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[250]

JAMES L. SHARP, *Appt.*,
v.
DOVER STAMPING COMPANY.

(See S. C., 13 Otto, 250-256.)

Patent-right.

The invention of Lazear for an improved apparatus for broiling steak by gas was new and original, and had not been anticipated by the patents of Teller or Shaw, or the gas stove made by Shaw in 1856.

[No. 245.]

Argued Mar. 9, 10, 1881. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is fully stated by the court.

Mr. **Arthur V. Briesen,** for appellant.

Messrs. Thos. Wm. Clarke, **J. L. S. Roberts** and *Geo. L. Roberts,* for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

On July 14, 1868, a patent was granted to one H. Y. Lazear for an improved apparatus for broiling steak by gas. This patent was transferred by the assignment of the patentee to one [251] W. Phillips, who, by another assignment, transferred it to Sharp, the complainant. The invention was represented and described as an upright cylinder or closed casing of sheet metal, with a lid for closing the top, and with an open bottom. The diameter of the open bottom was traversed by a V-shaped horizontal trough, dividing it into two equal openings, through which the flame of a gas stove, over which the apparatus was placed, might enter in two equal sheets. The trough was filled with plaster of Paris or other good non-conductor of heat, and upon this non-conductor the dripping pan was placed for receiving the juices of the meat. The steak was clasped in a wire broiler, which was placed in the cylinder or closed casing in a vertical position, with its lower end resting in the dripping pan, the two flat sides of the meat being equally exposed to the two sheets of flame which entered the lower end of the cylinder in the manner stated. The object was to produce an apparatus in which both sides of the meat might be cooked equally and at the same time, and in which the drippings from the meat might be caught in a pan, where it would be protected from the injurious effects of the heat. The latter object was attained by the non-conductor filling upon which the drip pan rested, and which filled the V-shaped trough. The trough served to contain the filling and support the pan, and to divide the flame into two equal sheets, which ascended along the sides of the steak.

The first and third claims of the patent were thus stated:

1. The V-shaped trough E and the filling E', by which the flame is divided, and the grease protected from burning, and smoke thereby prevented, substantially as described, in combination with a gas steak broiler.

3. An apparatus for broiling steak by gas, whereby the steak is broiled or cooked simultaneously on both sides, or where the sides are equally exposed to the flame and heat, substantially as shown and described.

On May 3, 1876, the bill in this case was filed. The complainant claimed to be the sole owner of the patent issued to Lazear, and charged that the defendant, the Dover Stamping Company, had unlawfully and wrongfully made, used and sold, and was making, using and selling, large quantities of gas-heaters, such [252] as were described and claimed in said letters patent, in violation of the exclusive privilege of the complainant, and in infringement of his letters patent.

The bill prayed that the defendant might be compelled to account for and pay over all gains and profits derived from the infringement of the patent, and for a perpetual injunction restraining it from making, using or vending gas-heaters embodying the invention described in the letters patent claimed by complainant.

Upon final hearing in the Circuit Court the bill was dismissed. The complainant thereupon brought the case here by appeal.

It is conceded by the defendant that the gas-heaters manufactured by it embody the invention claimed in letters patent issued to Lazear. The defense relied on is that Lazear "Was not the original and first inventor of the whole or any substantial or material part of the things set forth and claimed as new in said letters patent, but that prior to said alleged invention thereof the same had been described and set forth in the following specified letters patent of the United States, and known to and used by the several patentees therein named, at the places of their respective residences, that is to say: No. 28781, dated June 19, 1860, and granted to William F. Shaw, of Boston, Massachusetts; No. 38018, dated March 24, 1863, and granted to James M. Dick, of Buffalo, New York; and No. 66911, dated July 16, 1867, and granted to D. C. Teller, of Terre Haute, Indiana."

Dick's patent was not introduced in evidence, but Shaw's and Teller's were.

The apparatus described in the Teller patent was a cylindrical vessel, having a central opening in the bottom, and an annular opening around the central opening, and a series of vertical wires or rods inserted in the annular bottom that intervened between the two openings. An inverted conical deflector was suspended in the central space from above.

The claim of Teller's patent was thus stated:

"The vertical position in which the steaks are placed over the fire, and the arrangement of the vertical rods EE, all substantially enclosed with the cap C, as specified for the purposes in the specifications."

It is clear that this contrivance did not anticipate the invention of Lazear. It had no V-shaped [253] trough, filled with a non-conducting substance, nor the dripping pan referred to and claimed in

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complainant's letters patent, nor anything resembling it. It was not adapted to be used with a removable wire broiler, and did not evenly distribute the flame along the two sides of the steak. In short, it did not in any manner embody or anticipate the first and third claims of complainant's patent.

The Shaw patent shows an apparatus for broiling or roasting by gas. Its character is thus generally described by the inventor in his specification:

"The nature of my invention consists in the arrangement of the steak holder, the heating chambers, and the burner or burners. Also in the arrangement of two deflectors in the heating chamber, and with respect to the burner or burners and the steak holder, when arranged as specified."

It consisted of a heating or broiling chamber, whose front vertical side could be removed, and was constructed as a thin, hollow box attached to a drip pan or gravy receiver. Against and alongside the inner face of the said cover, and within the heating chamber, a steak holder was placed, composed of two wire frames, hinged or connected together at or near one edge of each and furnished with handles. When a steak or other food was to be cooked in the apparatus it was placed in the steak holder. In the bottom of the cooking chamber there was a long opening, under which the gas burners were placed. Over this opening was arranged an inclined deflecting plate, which extended across the heating chamber from end to end.

In the upper part of the heating chamber, and over the deflecting plate above mentioned, was arranged another deflecting plate. By means of thin deflectors and the arrangement of the steak holder, the broiler chamber, and the burners, the inventor claimed to be able to obtain a more equal distribution of the heat within the heating chamber, with less liability of burning the steak and a better chance of collecting the gravy, than when the steak holder was placed horizontally over the burners.

The claims of the inventor were thus stated:

[254] "I claim the arrangement of the steak holder, the broiling chamber, and the burner or burners.

Also, the arrangement of the two deflectors within the heating chamber, and with respect to the burner or burners and the steak holder when arranged as specified.

Also the combination of the closed air chamber or space in the cover with the steak holder and heating chamber arranged as specified.

Also the combination of the vertical side or cover with the steak holder and drip pan, said side or cover having a closed air chamber or space, as specified and shown in drawings."

It requires no discussion to show that this is not an anticipation of the Lazear patent. The Shaw patent does not describe or claim what is shown and claimed in the first and third claims of the Lazear patent.

It has no V-shaped trough, filled with plaster of Paris or other non-conductor of heat, by which the flame is divided and the grease protected from burning.

It is not an apparatus for dividing the flame so that the sides of the steak may be equally exposed thereto, and the steak thus broiled simultaneously and equally on both sides. On the contrary, the flame is not divided at all, and whatever flame reaches the side of the steak next to the removable vertical cover, does so by impinging against the upper deflector, and then passing over the top of the steak holder and descending between the steak and the removable vertical cover.

The evidence makes it clear that this contrivance is not capable of broiling a steak equally and simultaneously on both sides, the lower deflector causing the lower part of the steak to remain raw while the upper part is burned, and the side next the removable vertical cover is left raw.

We can find nothing in this invention which anticipates the claims of the Lazear patent.

To sustain the averment in the answer, of want of novelty in the apparatus described in the Lazear patent, the defendant has introduced an apparatus called Shaw's cooker, which he alleges was designed and manufactured and sold by Shaw as early as 1856.

This consisted of an upright cylindrical heating chamber with a round hole in the bottom. [255] Under this hole the gas burners were placed. To direct the flames the hole was partially filled by a cone shaped disc, which filling the central portions of the hole left an annular open space next its outer edge through which the flames could enter the heating chamber. The flames, therefore, entered the heating chamber in the form of a cylinder. The steak or other meat to be cooked was suspended from hooks fastened to the cover of the cooking chamber.

The cone shaped disc which partially occupied the opening in the bottom of the cooking chamber was filled with plaster of Paris and hard coal ashes. The drip pan was placed over the disc on legs or supports which allowed a passage of air under the drip pan. The meats were suspended over the pan.

This apparatus was not contrived to accomplish the ends which Lazear's patent had in view, nor was it an equivalent of Lazear's apparatus. Instead of dividing the volume of flame into two sheets, by which a steak could be broiled simultaneously on both sides, both sides being equally exposed to the flame and heat, it admitted the flames to the cooking chamber in the form of a hollow cylinder. The steak, therefore, suspended from the top of the cooking chamber would not be equally exposed to the flame and heat. The edge of the steak would be cooked more rapidly than the other portions.

It is evident, and the testimony sustains this view, that Shaw's contrivance was a gas cooking stove for cooking food of various kinds, particularly joints of meat and fowls. It was not specially intended or adapted for cooking steaks in the way in which that process was accomplished by Lazear's apparatus.

Nor was the dripping pan contrived to secure the ends for which the Lazear patent was designed. The dripping pan being elevated on legs or supports above the disc, left a space underneath, which the flames would fill, and thus allow the juices of the meats to be burned, a result which was averted by the Lazear patent. [256] That left no space between the drip pan and the V-shaped trough filled with plaster of Paris or other non-conductor of heat. The fact that its bottom rested upon the plaster of Paris pro-

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tected the juices of the meat from the action of the flames.

Upon a consideration of all the evidence we are satisfied that the invention of Lazear was new and original and had not been anticipated by the patents of Teller or Shaw or the gas stove made by Shaw in 1856.

The invention, it is admitted, has been infringed by the defendant. The evidence places its utility beyond question. Being novel and useful and protected by the letters patent issued to Lazear, the defendant should account to the complainant for the gains and profits derived by it from the infringement of the Lazear patent.

As the Circuit Court dismissed the bill, its decree must be reversed and the cause remanded for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[278] ELLA FELIX WALKER BONDURANT, EXIX. of WALTER E. BONDURANT and Tutrix, etc., *Plff. in Err.*,

v.

FRANK WATSON.

(See S. C., 13 Otto, 278-280.)

Writ of error, when necessary—insufficient writ—amendment.

1. This court has no jurisdiction of a case, in which no writ of error has ever been issued from this court.
2. A writ which is in the name of the Chief Justice of the Supreme Court of the State of Louisiana, and bears the test of that Chief Justice, and was signed by the clerk, and sealed by the seal of that court, is not a writ of this court.
3. Where there is nothing which even purports to be a writ from this court, there is nothing to amend.

[No. 216.]

Submitted Jan. 27, 1881. Decided Mar. 21, 1881.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is fully stated by the court.

Mr. **Samuel R. Walker,** for plaintiff in error.

Messrs. **Edwin T. Merrick** and **George W. Race,** for defendant in error.

[279] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

We have no jurisdiction in this case, as no writ of error has ever been issued. *Mussina* v. *Cavazos*, 6 Wall., 355 [78 U. S., XVIII., 810]. By the 9th section of the Act of May 8, 1792, 1 Stat. at L., 278, ch. 36, it was made the duty of the clerk of this court to transmit to the clerks of the several courts the form of a writ of error approved by two of the Justices of this court. This was done, and the form adopted required the writ to be issued in the name of the President of the United States, and have the *teste* of the *Chief Justice* of this court. Sec. 1004 of the Revised Statutes is as follows:

"Writs of error returnable to the Supreme Court may be issued as well by the clerks of the circuit courts under the seals thereof, as by the clerk of the Supreme Court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error [280] transmitted to the clerks of the several circuit courts by the clerk of the Supreme Court, in pursuance of sec. 9 of the Act of May 8, 1792, sec. 36."

The writ in this case was in the name of the *Chief Justice* of the Supreme Court of the State of Louisiana. It bore the *teste* of that *Chief Justice*, and was signed by the clerk, and sealed with the seal of that court. It had not a single requisite of a writ of this court. Had it been even colorably issued from this court it might have been amended under section 1005 of the Revised Statutes, which is certainly very liberal and as follows:

"The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the date of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; provided the defect has not prejudiced and the amendment will not injure the defendant in error."

But here there is nothing which even purports to be a writ from this court, and there is, therefore, nothing to amend. If we should permit the parties to change the seal, or the title, or to do everything else which this section allows, there would still be no writ, for nothing has been done either in the name of the President or under the authority of the United States. The Supreme Court of the State has directed that its record be certified here for examination and review, but no writ to that effect, either in form or substance, has ever issued from this court.

As such a writ is necessary to our jurisdiction, the suit is dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 285; 111 U. S., 487.

ELLA F. W. BONDURANT, EXIX. of WALTER E. BONDURANT, Deceased, and Tutrix of Her Minor Child, *Appt.*, [281]

v.

FRANK WATSON.

(See S. C., 13 Otto, 281-289.)

Petition for removal of case—suit in equity—Act of 1875—Louisiana law—state decisions.

1. The petition for the removal of a case need not aver that, at the commencement of the suit, defendant was a citizen of another State than that in which the suit was brought, provided the fact is shown to exist by any part of the record.
2. A suit of a civil nature in equity, in which the matter in dispute, exclusive of costs, exceeds the sum or value of $500, and in which there is a contro

NOTE.—*Title and transfer of lands by deed and devise governed by* lex loci rei sitæ. See, *note* to Clark v. Graham, 19 U. S. (6 Wheat.), 577; *note* to Elmendorf v. Taylor, 23 U. S. (10 Wheat.), 152; *note* to Darby v. Mayer, 23 U. S. (10 Wheat.), 465; *note* to Jackson v. Chew, 25 U. S. (12 Wheat.), 153.

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versy between citizens of different States, may be removed to the U. S. Circuit Court.

3. The Act of Mar. 3, 1875, provides for removals, without making any exception of cases in which an injunction has already been allowed to stay proceedings in a state court.

4. Under the law of Louisiana, except in the case of a minor's mortgage on the property of his tutor, every mortgage ceases to have effect, except as to the parties to it, unless re-inscribed within ten years from the date of its original inscription.

5. Decisions establishing a rule of real property in a State are binding on this court.

[No. 217.]

Submitted Jan. 27, 1881. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Mr. **Samuel R. Walker,** for appellant.

Messrs. **Edwin T. Merrick** and **George W. Race,** for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

Daniel Bondurant died seised of a large plantation in the Parish of Tensas, in the State of Louisiana. His estate descended to his three sons, Albert, Horace and John, and to Walter Bondurant, his infant grandson.

In 1852, upon petition of the sons for a partition of the plantation, a decree of sale was made, under which it was sold, and struck off to them for the price of $150,000. Of this sum Walter Bondurant, the grandson, was entitled to one fourth, namely: $37,500.

[282] The sheriff, on December 4, 1858, executed a deed to the sons, reserving therein a special mortgage and privilege on the lands in favor of Walter Bondurant, for his share of the purchase money.

In the act of sale, which was executed both by the sheriff and the purchasers, the latter bound themselves not to alienate, deteriorate nor incumber the property to the prejudice of the mortgage, an agreement known in the local jurisprudence of Louisiana as the pact *de non alienando*. The mortgage was recorded December 6, 1852. The law of Louisiana required it to be re-inscribed within ten years from that date. It was not re-inscribed until September, 1865. The three sons of Daniel Bondurant divided the plantation between them. The part which is in controversy in this suit was setoff to John Bondurant, who, in 1854, conveyed it to one Augustus C. Watson, Sr.

On January 30, 1866, Walter Bondurant began an action against his uncles, Albert, Horace and John Bondurant, in the District Court for the Parish of Tensas, to recover judgment against them for his part of the purchase price of said plantation, and to enforce his mortgage and privilege thereon. The court rendered a judgment in his favor for the said sum of $37,500, with interest, and ordered, adjudged and decreed that the authentic act of mortgage, which was the basis of the action, should be and the same was thereby rendered executory and ordered to be executed, and that the land described therein should be seized and sold to satisfy said judgment.

Upon this judgment a *fieri facias* was issued, directed to the sheriff of the parish. By virtue thereof he advertised for sale the said, the plantation described in the mortgage, and struck off and sold it to Walter Bondurant, and executed to him a deed therefor.

Walter Bondurant thereupon brought an action in the United States Circuit Court for the District of Louisiana against Augustus C. Watson, Sr., to recover possession of that part of the plantation which had been sold to him by John Bondurant.

He recovered judgment for the land against Watson. That judgment was taken, by writ of error, to the Supreme Court of the United [283] States, where it was reversed on the sole ground that there had been no actual seizure of the premises by the sheriff before the sale. See *Watson* v. *Bondurant*, 21 Wall., 123 [88 U. S., XXII., 569].

In the meantime Walter Bondurant died. The judgment in his favor in the District Court for the Parish of Tensas was revived in the name of his widow, Ella F. Bondurant, his testamentary executrix and the tutrix of his minor child, Walter E. Bondurant.

At her instance another *fieri facias* was issued on the judgment of the District Court for the Parish of Tensas, and placed in the hands of the sheriff of that parish. By virtue of the writ he seized that part of the plantation which had been sold to Augustus C. Watson, Sr., and advertised the same for sale. Thereupon Frank Watson, the appellee, on June 25, 1875, filed his petition in the District Court for the Parish of Tensas against the sheriff and Ella F. Bondurant, executrix and tutrix. He averred that his "immediate author," Augustus C. Watson, Sr., acquired the land in question by a good and valid title translative of property from John Bondurant, on November 30, 1854; that said Augustus C. Watson, Sr., held said lands by notorious public and uninterrupted possession, in good faith as owner, from November 30, 1854, until August 5, 1872, when he transferred his title and possession, by deed of that date, to the petitioner, Frank Watson, and his brother, A. C. Watson, Jr., and that by deed dated February 6, 1875, A. C. Watson, Jr., conveyed all his estate in said land to the petitioner, Frank Watson.

He further averred that the sheriff of Tensas Parish, acting under a writ of *alias fi. fa.* issued on the said judgment recovered by Walter Bondurant against Albert, John and Horace Bondurant in the district court of said parish, had illegally seized the tract of land which was held and claimed by the petitioner under the deeds of conveyance already mentioned, and would advertise and sell the same unless restrained by injunction.

The petition further alleged that said Act of December 4, 1854, which reserved the mortgage and privilege on said plantation in favor of Walter Bondurant for $37,500 had not been re-inscribed within ten years from the date of its original registry in the mortgage records, and it had, therefore, ceased to have any force or effect as a mort- [284] gage and privilege on said tract of land; that at the time of the institution of the suit of Walter Bondurant and others, in which the judgment was recovered by virtue of which said *fieri facias* was issued, said Augustus C. Watson, Sr., was and for many years previous had been in public possession of said property as owner, yet he was not made a party to said suit, which was *via ordinaria*, nor were any demands or notices given him as third possessor.

The petition, therefore, claimed that the seizure of the property by the sheriff was illegal,

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and prayed an injunction against Ella F. Bondurant, executrix and tutrix, and against the sheriff, restraining them from proceeding any further with the said writ of *fieri facias*, so far as it related to the lands claimed by the petitioner.

The injunction prayed for was granted by the court in which the petition was filed, after notice to the sheriff and Mrs. Bondurant.

Thereupon, on October 18, 1875, Mrs Bondurant filed her petition, verified by her oath, in which she prayed for a removal of the cause to the United States Circuit Court for the District of Louisiana. In her petition she averred that she was a citizen of the State of Mississippi, and was, in her capacity as tutrix and executrix, defendant in a civil suit pending in that court, in which the matter in dispute exceeded, exclusive of costs, the sum of $500, and in which Frank Watson, who was a citizen of Louisiana, was plaintiff.

This petition was accompanied by a bond in the penal sum of $250, conditioned according to law and executed by the petitioner and two sureties.

The petition for removal was denied by the state court. Nevertheless, Mrs. Bondurant, within the time required by law, filed in the United States Circuit Court a transcript of the proceedings of the state court, beginning with the issuing of the *fieri facias*, which the petition of Watson was filed to enjoin.

The circuit court took jurisdiction of the case and directed it to be placed on the equity side of the docket. Thereupon Mrs. Bondurant filed her answer and amended answer, to which the petitioner, Watson, filed his replication. Upon the issue thus made, voluminous proofs were [285] taken, and upon final hearing the circuit court made perpetual the injunction which had been granted by the state court. That decree is now here on appeal taken by the defendant, Mrs. Bondurant.

The District Court for the Parish of Tensas, claiming that the cause still remained in that court, notwithstanding the attempt of the defendant to remove it to the United States Circuit Court, proceeded with the cause to final hearing, and also made perpetual the injunction which it had granted. This decree was affirmed on appeal by the Supreme Court of Louisiana. See, *Watson* v. *Bondurant*, 30 La. Ann., 1.

The defendant brought up that decree also by writ of error to this court.

By agreement of counsel, the records in both cases have been submitted and argued together. Watson, the complainant in both cases, claimed that the suit was not a removable one, and that there was no effectual removal thereof to the circuit court, and that the state courts alone had jurisdiction. The defendant denied the jurisdiction of the state court, and insisted that the case was a removable one, and had been removed to the circuit court, which thereafter alone had jurisdiction. The case brought here from the State Supreme Court having been dismissed for want of a writ of error, see, *Bondurant* v. *Watson* [*ante*, 447], it becomes necessary to decide the question of jurisdiction.

On this question the first contention of Watson, the complainant, is that the petition of Mrs. Bondurant for the removal of the case, which was filed October 18, 1875, does not aver that at the commencement of the suit, which was June 25, 1875, she was a citizen of the State of Mississippi.

Whether, under the Act of March 3, 1875, 18 Stat at L., 470, to regulate the removal of causes from the State Courts, such an averment is necessary, is a question which was expressly reserved by this court in the case of *Ins. Co.* v. *Pechner*, 95 U. S., 183 [XXIV., 427], and which it has never decided. We do not find it necessary to decide it now, for the evidence in the record satisfies us that Mrs. Bondurant was a citizen of Mississippi on June 25, 1875, when the proceeding against her was begun by Watson. Whether his petition avers the fact or not is immaterial, provided the fact is shown to exist by any part of the record. *Gold-Washing and Water Co.* v. *Keyes*, 96 U. S., [286] 199 [XXIV., 656]; *Briges* v. *Sperry*, 95 U. S., 401 [XXIV., 390]; *Robertson* v. *Cease*, 97 U. S., 646 [XXIV., 1057].

The record shows that her husband, of whose will she was the executrix, was at the time of his death, and for many years before had been a citizen of the State of Mississippi, residing at Natchez. She was, therefore, a citizen of Mississippi at the time of her husband's death, which took place before the filing by Watson of the petition in this case, on June 25, 1875. In October, 1875, she swears that she was then a citizen of Mississippi. At and before that time she had been sojourning with her father in New Orleans, but, as the record indicates, her residence there was transient and temporary and with a purpose, declared at the time, of retaining her citizenship in Mississippi. She could not lose her citizenship in Mississippi without a change of residence *animo manendi*, and her purpose was better known to herself than to any one else.

The fact that she took out letters testamentary on the will of her husband in the Parish of Tensas without giving bond, as she would have been required to do had she been a non-resident of the State, does not, in our judgment, overcome the affidavit of Mrs. Bondurant that she was a citizen of Mississippi, and the presumption that, having once been a citizen of that State, her citizenship continued. The proceedings in the Probate Court of Tensas Parish were conducted entirely by her attorney, and their details were not necessarily known to her.

We think the fact of her citizenship in Mississippi, at the time of the commencement of Watson's suit against her, sufficiently appears by the record, and this supplies the want of an averment of the fact in his petition for the removal of the case.

The next claim of Watson is, that the suit removed was merely auxiliary and incidental to the original case of *Walter Bondurant* v. *Albert Bondurant*, and was not, therefore, removable.

In this view we do not concur. The case which was removed had all the elements of a suit in equity. The petition filed in the state court sought equitable relief, which no court strictly a court of law could grant. Citations were issued and served upon the defendants. When the case was transferred to the circuit court, it was placed on the equity side of the docket. An answer and replication were filed, testimony [287] taken, and a decree made upon final hearing according to the equity practice. The controversy in the original cause between Walter Bondu.

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rant and Albert Bondurant and others had been ended by a final judgment. The case between Watson and Mrs. Bondurant had its origin in that judgment, but it was a new and independent suit between other parties and upon new issues.

It was a suit in which the plaintiff sought to be protected against a judgment, to which he was not a party, by which his property had been specifically condemned to be sold to satisfy a claim against others, and not against him.

He insisted that the mortgage on which the judgment was founded was not a lien on the property claimed by him. To prevent being turned out of possession of his own land, and a cloud being cast on his title by a seizure and sale under the judgment of the state court was the purpose of his suit. It could not be called incidental or auxiliary to the original case. It was a new and independent controversy between other parties.

It filled all the requisites of the law for the removal of causes. It was a suit of a civil nature in equity, in which the matter in dispute, exclusive of costs, exceeded the sum or value of $500, and in which there was a controversy between citizens of different States.

No reason is perceived why a party to such a controversy should not enjoy his constitutional right of having his case tried by a court of the United States.

The case of *Bank* v. *Turnbull*, 16 Wall., 190 [83 U. S., XXI., 296], relied on by the appellee, is not in point. That was a statutory proceeding to try in a summary way the title to personal property seized in execution. It was nothing more than a method prescribed by the law to enable the court to direct and control its own process and, as decided by this court, was merely auxiliary to and a graft upon the original action.

It is next claimed that the case was not removable because its purpose was to obtain the writ of injunction to stay proceedings in a state court, which a court of the United States is forbidden to grant by section 720 of the Revised Statutes.

It is to be observed that the injunction had
288] already been granted by the state court before the application for removal was made. The interest and purpose of Mrs. Bondurant, who asked for the removal, was to get the injunction dissolved. If Watson had filed his petition for injunction in the state court, and before it was allowed had petitioned for a removal of the cause to the circuit court, with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute. But that is not this case.

The Act of March 3, 1875, 18 Stat. at L., 470, provides that all injunctions had in the suit before its removal, shall remain in full force and effect until dissolved or modified by the court to which the suit shall be removed. It provides for removals, without making any exception, of cases in which an injunction has already been allowed to stay proceedings in a state court. It would not be according to the well settled rules of statutory construction to import an exception into this statute from a prior one on a different subject.

We are of opinion, therefore, that the case was one removable under the Act of March 3, 1875, and that the circuit court obtained jurisdiction by the proceedings for its removal.

The merits of the case have been conclusively settled by the Supreme Court of Louisiana.

Watson, the plaintiff, claimed that the parcel of land conveyed to him by John Bondurant was freed from the lien of the mortgage to Walter Bondurant, by the failure of the latter to have it re-inscribed within the ten years from the date of its original registry.

The contention of the defendant, Mrs. Bondurant, is that re-inscription was not necessary to preserve the lien of the mortgage on Watson's land, because he was charged with notice by the *pact de non alienando* contained in the mortgage, and because the mortgagee, Walter Bondurant, being a minor, the mortgage to him did not require re-inscription to preserve its lien.

These questions have been settled against the appellant by the Supreme Court of Louisiana.

That court has decided that, under the positive law of Louisiana, as contained in the code and statutes, nothing supplies the place of reg- [289]
istry nor dispenses with it, so far as those are concerned who are not parties to the mortgage, and that when ten years have elapsed from the date of inscription without re-inscription, the mortgage is without effect as to all persons whomsoever who are not parties to the mortgage. *Adams* v. *Daunis*, 29 La. Ann., 815, and cases there cited.

In the case of *Watson* v. *Bondurant*, 30 La. Ann., 1, the same court held that no mortgage has any effect as to third persons unless recorded; and, save in the single case of a minor's mortgage on the property of his tutor, every mortgage ceases to have effect, except as to the parties to it, unless re-inscribed within ten years from the date of its original inscription, and that neither the existence of the *pact de non alienando* in a mortgage, nor the pendency of a suit to foreclose the same, obviates the necessity of its inscription or re-inscription.

Whether a mortgage binds the heir of the mortgagor without inscription or re-inscription, it is not necessary to decide in this case, and we do not decide it.

The decisions above cited, establishing as they do a rule of real property in the State of Louisiana, are binding on this court, and are conclusive of this case. *Suydam* v. *Williamson*, 24 How., 427 [65 U. S., XVI., 742]; *Jackson* v. *Chew*, 12 Wheat., 162; *Beauregard* v. *New Orleans*, 18 How., 497 [59 U. S., XV., 469].

The decree of the Circuit Court must, therefore, be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE STEAMBOAT SABINE, ETC., PIERRE [540]
S. WILTZ, Public Admr. of SARAH C. SHIRLEY, Deceased, ET AL., *Appts.*,

v.

THE STEAMBOAT RICHMOND, ETC., NATHANIEL S. GREEN ET AL.

(See S. C., "*The Richmond*," 13 Otto, 540-544.)

Decree, when not reversed on questions of fact—exceptions to report—finding of facts.

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1. When both courts below have concurred in the decision of questions of fact, this court will not reverse a decree by raising a doubt founded on the number or credibility of witnesses.
2. This court will not consider exceptions to the report of a commissioner presented after the Law of 1875 went into effect, which relate only to questions of fact, where the court omitted to find the facts.
3. If the appellants desired to press their exceptions, they should have got a finding of the facts so as to present questions of law alone.

[No. 85.]

Petition filed Dec. 13, 1880. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On petition for a re-hearing. Same case, *ante*, 313.

The case is fully stated by the court.

Messrs. **Bentinck Egan, R. H. Marr** and **Charles B. Singleton**, for appellants.

Mr. Given Campbell, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[542] We are asked to rehear this case on two grounds: 1, because on the evidence the decree below should have been reversed; and, 2, because the exceptions to the commissioner's report were not considered.

Notwithstanding what has been said in the briefs filed with this application, we still think the question of the liability of The Richmond is one of fact *only*. She was not a carrier of The Sabine's cargo, and consequently not liable in any respect as such. If not at fault for the collision, she is no more liable for damages to the cargo of The Sabine than she is for the damages to The Sabine, on which the cargo was carried.

So far as The Sabine or her cargo, therefore, is concerned, the only question presented on this application is whether, *in law*, The Richmond was in fault for the collision, and that depends *on the fact* whether The Sabine had "fled to the wall," and for that purpose had gone closer to the left hand shore than her pilot had ever seen a boat before, and The Richmond followed her. On that question of fact the case [543] hinges, for if The Richmond did what is thus claimed against her, the law clearly charges her with fault. As to the fact the testimony is voluminous and conflicting. Two courts have already, on the same testimony, decided against The Sabine and the insurers of her cargo. As long ago as 1861, we said, speaking through *Mr. Justice* Grier, in the case of *The Marcellus*, 1 Black, 417 [66 U. S., XVII., 218]: "We have had occasion to remark more than once that when both courts below have concurred in the decision of questions of fact, * * * parties ought not to expect this court to reverse such a decree by raising a doubt founded on the number or credibility of witnesses. The appellant in such a case has all presumptions against him, and the burden is cast on him to prove affirmatively some mistake made by the judge below in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered." This rule, thus stated from the preceding cases, was uniformly followed afterwards until the Act of 1875. 18 Stat. at L., 315, chapter 77, relieved us from the labor of weighing evidence. *Newell* v. *Norton and Ship*, 3 Wall., 267 [70 U. S., XVII., 273]; *The Hypodame*, 6 Wall., 223 [73 U. S., XVIII., 796]; *The S. B. Wheeler*, 20 Wall., 386 [87 U. S., XXII., 385]; *The Lady Pike*, 21 Wall., 9 [88 U. S., XXIII., 502]. It is true that, notwithstanding this rule, we were required "to re-examine the facts as well as the law of the case," *The Baltimore*, 8 Wall., 382 [75 U. S., XIX., 464], but we did not reverse except in a clear case. Such was the well established rule of decision.

The decree on the merits was rendered April 19, 1875, a few days before the Act of 1875 took effect. We were, therefore, as we thought at the hearing, compelled to consider and weigh the evidence on the questions involved when *that* decree was rendered. We are clear now, as we were on the first hearing, that the presumptions in favor of the correctness of the two decrees below have not been overcome. If one set of witnesses are to be believed, the decree is right; if the other, it is wrong. There is, to say the least, no such preponderance in favor of the appellants as to justify us in overruling the decisions of the two courts below.

2. As to the exceptions to the report of the [544] commissioner. The report of the commissioner was presented June 4, 1875, after the Law of 1875 went into effect. The exceptions were filed the next day. All the exceptions that were argued in the court below or here relate only to questions of fact, depending on the weight of evidence. The court omitted to find the facts, and the case comes here on the evidence. This, since the Act of 1875, we are not bound to consider. If the appellants had desired to press their exceptions, they should have got a finding of the facts, so as to present questions of law alone. The case on its merits came up under the old law, and we were compelled to consider the testimony, but on the master's report the Act of 1875 was applicable, and our review is confined to questions of law.

The petition for rehearing is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD BONHAM ET AL., *Appts*, [648]
v.
THOMAS B. NEEDLES, Auditor, and JOHN C. SMITH, Treasurer, OF ILLINOIS, ET AL.

(See S. C., 13 Otto, 648–651.)

Case followed—estoppel, by recitals in bonds.

1. *Harter* v. *Kernochan*, *ante*, followed.
2. Where a statute conferred ample authority upon a township to issue its bonds, and the bonds recite that they were issued in pursuance of the authority thus conferred, such recitals import a compliance with the statute, and the township is estopped to assert, as against a *bona fide* holder for value, that such recitals are untrue.

[No. 1096.]

Submitted Jan. 13, 1881. Decided Mar. 21. 1881,

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is fully stated by the court.

Mr. **Thomas J. Henderson**, for appellants.

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Messrs. **George A. Sanders** and *A. L. Knapp*, for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit in equity was commenced in the Circuit Court for Wayne County, Illinois, and was thence removed into the Circuit Court of the United States for the Southern District of Illinois. The complainants are certain tax payers and real estate owners suing in behalf of themselves and all other like persons in the Big Mound Township of Wayne County. The original defendants were the Auditor and Treasurer of State, the clerk and treasurer of the county, the collector of the township, the First National Bank of Springfield, and the unknown holders and owners of certain bonds with their coupons—five in number and of $1,000 each— [649] issued, under date of April 1, 1870, in the name of the township, and made payable, twenty years after date, to the Illinois Southeastern Railway Company, or bearer, with interest at the rate of ten per cent per annum. The bonds purport to have been issued "by the township to aid in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an Act of the General Assembly of the State of Illinois, entitled 'An Act to Incorporate the Illinois Southeastern Railway Company', approved February 25, 1867, and an Act amendatory thereof, approved February 24 1869, and an election of the legal voters of the aforesaid township, held on the 10th day of November, 1868, under the provisions of said Act." Upon each bond was indorsed, under date of April 21, 1870, a guaranty of payment by the Springfield and Illinois Southeastern Railway Company, and the certificate of the state Auditor, under date of July 19, 1870, stating that it was that day registered in his office pursuant to the provisions of "An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns, in force April 16, 1869.

After the township had for nearly ten years regularly, by an annual levy and collection of a tax for that purpose, paid the interest on the bonds as the same became due—the order for such being made by the auditor of State—the present bill was filed. It questioned the validity of the bonds, and asked a decree restraining the officers, who were made defendants, from the assessment or collection of taxes to meet them. Kernochan, the appellee, a citizen of Massachusetts, and the owner, by purchase in good faith, for value, of all the bonds, appeared in the state court, and upon his petition and bond the cause was removed to the Circuit Court of the United States for the Southern District of Illinois, where, after issue joined and proof taken, the bill was dismissed.

The controlling questions in the case have already been determined in *Harter* v. *Kernochan* [*ante*, 411]. It was there ruled that the Acts of Assembly, recited in the bonds whose validity is here involved, were not repugnant to the Constitution of Illinois, adopted in 1848. We also held that the 5th section of the Act of [650] February 24, 1869, conferred upon such townships in Wayne and Clay Counties as had previously voted donations to the Illinois Southeastern Railway Company, the qualified voters of such townships assenting thereto at a regular or special town meeting or election, authority to issue bonds in payment of such donations. The Township of Big Mound, on 10th November, 1868, voted a donation of $5,000 to the railroad company, one third to be levied and collected by special tax and paid to the railway company, in each of the years 1869, 1870 and 1871; in lieu of which, however, the company bound itself to take township bonds if requisite authority to issue them could be obtained by further legislation. So far this case resembles, in its essential features, *Harter* v. *Kernochan*. The chief difference between that case and the present one is, that in the former the recorded proceedings of the township distinctly showed that the bonds were voted at a special town meeting, duly called and held to consider the question of their issue; while in this case, the records of the township contain no evidence of a township meeting at which the qualified voters assented to the issue of bonds in payment of the donation voted on 10th November, 1868, except a certificate of Wm. Book, claiming to be deputy clerk of Big Mound Town. In that certificate he states that "At an election held at the Yates school-house, on the 28th day of August, that the majority of the voters present voted in favor of giving bonds to the Southeastern Railway Company for the bonus. This August 28th, 1869." Several witnesses testify that an election was held. But the correctness of the decree and the validity of the bonds in the hands of a *bona fide* purchaser, do not depend upon proof, in this suit, that such an election was, in fact, duly called and held, at which the qualified voters assented to an issue of bonds in payment of the donation previously voted.

The statutes to which we have referred conferred, as we have shown in *Harter* v. *Kernochan*, ample authority upon the township to issue bonds in payment of the donation voted, the qualified electors assenting thereto at a regular or special town meeting. The bonds recite that they were issued *in pursuance of the authority* conferred by those statutes. Such recitals import a compliance with the statute, and the township, according to the uniform decisions of this court, is estopped to assert, [651] as against a *bona fide* holder for value, that such recitals are untrue. *Buchanan* v. *City of Litchfield, and authorities there cited, decided at present Term* [*ante*, 138].

There are other questions in the case which counsel have pressed upon our consideration. None of them are, in our judgment, vital to the merits of the case, and we do not stop to comment upon them.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THEODORE YATES, *Plff. in Err.*,
v. [674]
NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

(See S. C., 13 Otto, 674-677.)

Compensation of officer.

The building committee of the Branch Asylum

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for Disabled Soldiers in Milwaukee, had no authority to contract with an officer of the Institution that he should receive compensation or pecuniary advantages, beyond his salary, for services.

[No. 224.]

Submitted Feb. 28. 1881. Decided Mar. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is fully stated by the court.

Mr. **Luther S. Dixon,** for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

By an Act of Congress, approved March 21, 1866, the President of the United States, Secretary of War, Chief Justice of the United States, and such other persons as might thereafter be associated with them, according to the provisions of that Act, were constituted a board of managers of an establishment for the care and relief the disabled volunteers of the United States Army, by the name of the National Asylum for Disabled Volunteer Soldiers; with power to take, hold and convey real and personal property, and to make by-laws, rules and regulations, not inconsistent with the laws of the United States, for carrying on the business and government of the asylum.

The board of managers, consisting of twelve persons, were given authority to procure, at suitable places, sites, and to have the necessary buildings erected for military asylums for all persons serving in the Army of the United States at any time in the war of the rebellion, who were not provided for by existing laws and who had or might thereafter become disqualified from procuring their own maintenance and support by reason of wounds received or sickness contracted while in the line of their duty during the rebellion. The Act further provided that the officers of the asylum should consist of governor, deputy governor, secretary, treasurer and such other officers as the board of managers may deem necessary, to be appointed from disabled officers serving as before mentioned, and [675] removable by the board from time to time as the interests of the institution may require.

At a meeting of the board of managers held on 12th April, 1867, E. B. Wolcott and John S. Cavender, two of their number were appointed a committee to select a plan for asylum buildings at Milwaukee; to make and accept proposals for the same; to superintend the construction, and to put the building then owned by the asylum in condition for immediate use. At the January meeting, the president of the board was added to the committee. Shortly thereafter several building contracts were entered into, and the work of construction commenced.

On the 28th December, 1868, the plaintiff in error, a disabled officer who had served in the Union army and who was deputy governor of the branch asylum at Milwaukee, addressed a communication to Messrs. Cavender and Wolcott, from which it appears that he had theretofore purchased the materials, employed the labor and directed the work, in connection with the new building, not included in the special contracts with mason, tin and iron workers. Up to that date his time and services had been given gratuitously but, in consequence of the action of the board, whereby his duties and responsibilities were increased and his pay reduced, he gave notice, in the same communication, that he would not assume nor take any further responsibility for anything connected with the construction of the new building, unless the asylum, in consideration of his perfecting the plans, directing the work, employing the labor, purchasing materials, and putting the institution in proper working order, would pay him five per cent on all purchases and disbursements that had been or might be made by him or under his direction, outside of contracts for masons, roofers and steam heater's works, until completion of the building. Upon that communication, containing these propositions, Cavender and Wolcott, as "Building Com. Nat. Asylum," in good faith, we doubt not, but without any action upon the part of the board of managers, made and signed this indorsement. "Col. Theo. Yates will complete the work as proposed, and will be paid in the manner and to the amount herein named."

The plaintiff in error claims in this action the [676] sum of $8,414.96 for services performed by him under that agreement.

The court below gave a peremptory instruction to the jury to find for the defendant, which was done.

We have not been favored with a brief on behalf of the defendant, but are informed by counsel for plaintiff that the court below was of opinion that Col. Yates was prohibited by the by-laws of the institution, of which he was an officer, from contracting for or receiving compensation for the services by him rendered. In that view we concur. One of the by-laws in force when the agreement was made provides that "The board shall fix such stated and sufficient salaries to any officer or agent of the establishment, payable in money, as they shall deem proper, which shall be in full for the services of the officer or agent, and not to be diminished during his term of office. No perquisites, *fees, allowances or advantages*, other than his salary or stated pay, shall be permitted to *any* officer, agent or *employé* of the establishment, *under any pretense whatsoever*." Another by-law declared that "The president of the board shall * * * approve all contracts, make and sign all requisitions," etc. If the appointment of Wolcott and Cavender as a committee, with power to make and accept proposals for the new building, and to superintend its construction, authorized them, without consulting the board or without the concurrence of its president, to make all contracts pertaining to the erection of that building, it by no means follows that they could make a binding contract with an officer of the institution, in conflict with its by-laws and whereby he could receive, in addition to his salary or stated pay, "perquisites, fees, allowances or advantages." The manifest object of the by-law in question was to remove from the officers of the asylum, charged with the immediate conduct of its affairs, all possible temptation to so manage the institution as to derive pecuniary advantage therefrom beyond their respective salaries or stated pay.

It is contended that plaintiff in error was not bound, in his capacity as deputy governor, to perform any services whatever in connection

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[677] with the construction of the new building. Were this conceded, as, perhaps, it must be, the plaintiff is confronted not only with the fact that he was an officer of the asylum, with a stated salary, but with an express prohibition, in the by-laws of the institution, against his receiving, under any pretense whatsoever, perquisites, fees, allowances or advantages other than his salary or stated pay. The evidence furnishes no reason to suppose that the board of managers were aware of, or ever recognized or approved the agreement which the building committee made with plaintiff for compensation for the special services rendered by him. The sole question, therefore, is, whether the building committee had authority to contract with an officer of the institution, that he should receive compensation or pecuniary advantages, beyond his salary, for the services in question. They clearly had not, and without considering other questions argued by counsel, we approve, for the reasons given, the instruction to find for the defendant.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK, *Plff. in Err.*,
v.
MAX JACOBY ET AL.

(See S. C., 13 Otto, 677-679.)

Duty Act—instruction to jury.

1. Pictures painted by hand on porcelain are dutiable at ten per cent *ad valorem* only.
2. In a case where, if the jury had found a verdict in favor of the defendant, the court should have set it aside as against what is admitted to have been proved, a judgment will not be reversed on account of a positive instruction to find for the plaintiff.

[No. 238.]

Argued Mar. 3, 1881. Decided Mar. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Edwin B. Smith,** *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. **Lewis Sanders,** *John S. Van Santvoord* and *George N. Sanders*, for defendants in error.

[678] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This was a suit to recover back duties paid under protest. The bill of exceptions stated it was proven at the trial that all the goods charged with the duties were "Pictures painted by hand; and their value depended on the skill of the particular artist who painted them, and the porcelain ground on which they were painted was only used to obtain a good surface on which to paint, and was entirely obscured from view when framed or set in any manner, and formed no material part of the value of said painting on porcelain, and did not in itself constitute an article of china ware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings." The Collector exacted a duty of fifty per centum *ad valorem* under the clause in schedule B, section 2504, Revised Statutes, relating to "china, porcelain and parian ware, gilded, ornamented or decorated in any manner," while the importer claims they were dutiable at ten per centum *ad valorem* only, under the clause in schedule M, which embraces "paintings and statuary not otherwise provided for." In other words; the Collector claimed they were decorated china or porcelain ware, and the importer that they were paintings on china or porcelain. The evidence seems to have left no doubt on this subject, for it is expressly stated in the bill of exceptions to have been *proved* that the porcelain ground on which the painting was done "did not in itself constitute an article of china ware." Such being the case, the painting which was done on it did not make it *decorated* china ware. Confessedly, the goods were paintings done by hand, and as it is not claimed they were "otherwise provided for" than as china ware, decorated, it follows the court was right in directing a verdict in favor of the importer for the difference between ten and fifty per cent. It is a matter of no importance in this case, that the colors used were metallic, and that the pictures were baked to make the colors more firm. If the jury had found a verdict in favor of the defendant, the court should have set it aside as against what is admitted to have been proved. Under such circumstances a judgment will not be reversed on account of a positive instruction to find for the plaintiff.

Pleasants v. *Fant*, 22 Wall., 116 [89 U. S., XXII., 780].

As the bill of exceptions states that the facts [679] on which the case depends were *proved*, we cannot say that the admission in evidence of samples of "similar" importations on which duties had been paid at ten per centum, could have prejudiced the Collector's case. The question which the court decided was, that the goods were not china ware, but paintings.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PHILADELPHIA AND BALTIMORE CENTRAL RAILROAD COMPANY, *Appt.*, [703]
v.
UNITED STATES.

(See S. C., 13 Otto, 703-705.)

Contract for carrying mails.

Where a railroad company contracted to carry the mails over a route which included another railroad, and the latter road performed part of the service, and brought an action against the Government for such service; held, that having stood by contentedly and seen the money, which it now claims, paid to the other company, and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover, and thus make the Government pay twice.

[No. 242.]

Argued Mar. 8, 1881. Decided Mar. 21, 1881.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Mr. **John F. Farnsworth,** for appellant.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellee.

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Mr. Justice **Miller** delivered the opinion of the court:

The appellant brought suit in the Court of Claims for the amount which it asserted to be due for carrying the mail between the City of Philadelphia and Chester, from July 1, 1873, until March 31, 1877, and recovered a judgment for what was claimed as to all the time mentioned except the period between July 1, 1873, and December, 1875.

The service was rendered under a contract to carry the mails from Philadelphia to Port Deposit, in the State of Maryland, by rail, and [704] part of the road over which it was carried was that part of the Philadelphia, Wilmington and Baltimore railroad which lies between the City of Philadelphia and Chester. This latter company also carried mails over its own road between these points and continuously to Baltimore.

The Postmaster-General, after the Act of March 3, 1873, required all the mails carried over these routes to be weighed, and made repeated adjustments of the sums due to each company, and the amounts so found were paid, and received without objection or protest from July 1, 1873, to December 4, 1875. At that date, the appellant notified the Postmaster-General that he had not been paying them enough, in fact, had only been paying them for the distance between Chester and Port Deposit. It turned out that the Philadelphia, Wilmington and Baltimore Company had been receiving the compensation for all the mails carried over its road between Philadelphia and Chester, though the appellant Company had the contract for so much of that mail as went from Philadelphia to Port Deposit and intermediate points. The Postmaster-General insisted that he was right, and refused to pay claimant, though the mail was still carried under the existing contracts until March 31, 1877.

The Court of Claims found in favor of the claimant Company, and rendered judgment for the sum due after the notification and demand of December 4, 1875, but held the Company estopped by its acquiescence in the adjustments and the payments it had received without objection or protest, from July 1, 1873, to that period.

In this, we think the Court of Claims was right. It must be held to have known on what basis of weight and distance these adjustments were made. They were made frequently, and the sums which, by those adjustments, were due to each company were paid monthly or quarterly.

If the claimant, during all this time, stood by contentedly and saw the money, which it now claims, paid to the other company, and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover, and thus make the Government pay it twice. For the time the mail was car- [705] ried after this notice or assertion of the present claim it has recovered judgment, and the Government has not appealed. For what it lost by its neglect in making claim on these settlements when receiving payment, it must submit to loss.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

DISTRICT OF COLUMBIA, *Plff. in Err.*,

v.

ADOLF CLUSS, For the use of JOHN A. J. CRESWELL ET AL., Commissioners of the FREEDMAN'S SAVINGS AND TRUST COMPANY.

(See S. C., 13 Otto, 705, 706.)

District of Columbia—board of audit—new corporation.

1. The Board of Trustees of Colored Schools for the District of Columbia, which employed the plaintiff, an architect by profession, to prepare the plans and specifications for a school-house in Washington, and to superintend its construction, could bind the District for the services rendered by him.

2. The disallowance of the claim by the board of audit did not conclude the plaintiff.

3. By the Act creating the District into one municipal Corporation, the new Corporation succeeded to the property of the two former ones, and also to their liabilities.

[No. 243.]

Argued Mar. 8, 9, 1881. Decided Mar. 21, 1881.

IN ERROR to the Circuit Court of the District of Columbia.

The case is fully stated by the court:

Mr. **Albert G. Riddle,** for plaintiff in error.

Mr. **Enoch Totten,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

In 1870 the Board of Trustees of Colored Schools for the District of Columbia employed the plaintiff, who is an architect by profession, to prepare the plans and specifications for a school-house in Washington, and to superintend its construction, agreeing to give him for his services five per cent on the cost of the building. This was the ordinary rate of charge as compensation for similar services in the District. In 1872 the building was constructed, and cost about $66,000. The Board of Trustees approved of the work, and paid the plaintiff $1,100 in cash and gave him a voucher for $2,155 more, being for the balance due, and also the sum of $255 for services in superintending repairs upon other buildings. This voucher the plaintiff sold [706] and delivered to the Freedman's Savings and Trust Company, for whose benefit this action is brought.

The Board of Trustees of Colored Schools has since been abolished and a new board organized to take charge of all the public schools, whether of white or colored children. But when the original board existed it was the agent of the District for the purposes intrusted to it, and could bind the District for the services rendered by the plaintiff. The building constructed and the other buildings upon which the repairs were made under his superintendence belong to the District and are used by it for colored schools, yet the amount due him for which the voucher was given has never been paid. The jury were of opinion that the District should pay it, and we agree with them.

The disallowance of the claim by the Board of Audit, if such had been allowed to be proved, would not have concluded the plaintiff. That board was not a judicial body, whose action was final; it exercised little more than the functions of an accountant. A claim allowed by it was

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not necessarily a valid one; a claim disallowed was not, therefore, illegal. Its action either way left the matter open to contestation in the courts.

Though the contract of the plaintiff with the Board of Trustees was made before the Act creating the District into one municipal Corporation, the work was not completed until afterwards, when it was accepted and approved. The new Corporation succeeded to the property of the two former ones, and also to their liabilities.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[736] GEORGE P. HUMPHREY, *Appt.*,

v.

SANFORD BAKER.

(See S. C., 13 Otto, 736, 737.)

Decree entered on mandate.

This court will not entertain an appeal from a decree, entered in exact accordance with its mandate on a former appeal.

[No. 1069.]

Submitted Feb. 28, 1881. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

On motion to dismiss.

The case is fully stated by the court.

Messrs. **Theodore Romeyn** and **H. H. Wells**, for appellee, for motion.

Mr. **John Atkinson**, for appellant.

Mr. Chief Justice **Waite** delivered the opinion of the court:

At the last Term, on a former appeal in this case, *Baker* v. *Humphrey*, 101 U. S., 494 [XXV., 1065], we decided "That the complainant, Baker, deposit in the clerk's office for the use of the defendant, George P. Humphrey, the sum of $25, and that Humphrey thereupon convey to Baker the premises described in the bill, and that the deed contain a covenant against the grantor's own acts, and the demands of all other persons claiming under him." A mandate was thereupon issued to the circuit court, to enter a decree in accordance with this decision, and carry it into effect. Pursuant to this mandate, a decree was entered, of which no complaint is made. The money was deposited with the clerk at or before the time of the decree, and immediately thereafter a deed in all respects appropriate in form was prepared and presented to Humphrey for execution. This he neglected to do, and he was ordered to show cause why he should not be attached for contempt on that account. In obedience to this order he appeared and for cause showed:

"1. That before said decree was entered the circuit court gave him leave to file, and he did file, a bill of supplement and review to obtain re-imbursement for taxes and improvements paid and made upon the premises in question.

2. That said bill was duly filed before said decree was entered and the complainant, who is the defendant therein, has appeared and demurred thereto, and the same is now pending and undetermined.

3. That this defendant has been advised and [737] verily believes that no process would issue against him to compel him to sign the deed in question, until the questions presented by his said bill were disposed of."

Upon the hearing Humphrey was adjudged to be in contempt, and it was decreed that he stand committed to the Detroit House of Correction until he executed the deed, unless sooner discharged by the court.

From this order of commitment, the present appeal has been taken, which the appellee now moves to dismiss.

In *Stewart* v. *Salamon*, 97 U. S., 361 [XXIV., 1044], we decided that we would not entertain an appeal from a decree entered in exact accordance with our mandate on a former appeal, and that when such an appeal was taken we would on application examine the decree and, if it conformed to the mandate, dismiss the case with costs. If it did not, we would remand the case with appropriate directions for the correction of the errors. The decree entered below, in the present case, followed the mandate in every particular and was, in legal effect, ours. It commanded Humphrey to convey, and the proceedings in which the order now appealed from was entered, were for the purpose of compelling him to do what we said must be done. Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the circuit court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express directions, and may with propriety be considered part of our decree. It was the appropriate way of getting the conveyance which we said must be made. If in the end it shall appear that Humphrey is entitled to the relief he asks, in what he denominates his "bill of supplement and review," the appropriate decree to that end will be made in that proceeding. The decree we directed is the final decree in the original suit, and the court below had nothing to do but to carry it into execution. *Under the rule established in* Stewart *v.* Salamon, *therefore, the suit is dismissed with costs.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE W. GRINNELL ET AL., *Plffs. in Errr.*, [739]

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY ET AL.

(See S. C., 13 Otto, 739-744.)

Railroad land grant to Iowa—change of route—right of settler.

1. The Act of Congress of May 15, 1856, granting lands to Iowa for railroad purposes, is a grant *in præsenti*. Whenever the identity of the lands granted is ascertained, the title relates back to the date of the grant.

2. Where a railroad company of that State had acquired full legal title to lands under that Act, the construction of its road on a new line under the Act of June 2, 1864, did not annul or defeat, without further action on the part of the United States, the title thus vested.

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3. The assertion of a right by the United States to the lands in controversy, is wholly a matter between the government and the railroad company. One who settles on these lands cannot set up a title, which the government itself can only assert by some direct proceeding.

[No. 683.]

Submitted Jan. 21, 1881. Decided Mar. 21, 1881.

IN ERROR to the Supreme Court of the State of Iowa.

The case is stated by the court.

Messrs. **S. S. Henkle** and **John S. Hauke,** for plaintiffs in error.

Mr. **Thomas F. Withrow,** for defendants in error.

[740] *Mr. Justice* **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa.

Actions in the nature of ejectment were brought by the Railroad Company against numerous persons in different courts of the State of Iowa, which, on appeals to the Supreme Court, were heard and decided together by stipulation, and the judgments in the lower courts in favor of plaintiff were affirmed.

The plaintiff asserted title under the Act of Congress of May 15, 1856, 11 Stat. at L., 9, granting lands to the State of Iowa for railroad purposes; and the counsel of plaintiffs in error correctly states in his brief that the only question presented by the record is, whether the Railroad Company has, under that grant, acquired title to any lands within the old fifteen mile limits of the Mississippi & Missouri Railroad Company, certified to the State under the grant by the Department of the Interior for the benefit of that company, but which were left outside of the new twenty mile limit by a change of location of the old line, made by the present Company under the Act of Congress of June 2, 1864, 13 Stat. at L., 95, amendatory of the Act of May 15, 1856.

The material facts on which the decision of this question depends may be thus succinctly stated: by the Act of May 15, 1856, Congress made a grant to the State of Iowa for the purpose of aiding in the construction of four railroads across the State from points on the Mississippi River to points on the Missouri River. One of these was a road from Davenport to Council Bluffs. The grant was of every alternate section of land designated by odd numbers, for six sections in width, on each side of said roads; and in case it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any sections or parts of sections granted as aforesaid, or the right of preemption had attached to the same, then the State by its agent or agents might select other odd sections in lieu of those thus deficient, within a limit of fifteen miles on each side of said roads.

The State of Iowa, by an Act of its Legislature approved July 14, 1856, granted to the Mississippi & Missouri Railroad Company the lands which were by the Act of Congress ap-
[741] propriated to the construction of the road from Davenport to Council Bluffs. That company accepted the grant, and on the 11th day of September, 1856, filed in the General Land-Office at Washington a map showing the route which it had adopted for its road, some unimportant corrections of which were made by another map filed April 1, 1857.

On the 4th September, 1858, the agent of the Company and the State reported to the General Land-Office the selection of lands in lieu of those which had been sold or were otherwise deficient, and on the 27th of December, 1858, the lands thus selected, and those which were in place, were certified to the State of Iowa by the Commissioner of the General Land-Office. These lands in place, and lands selected and certified to the State under the Act of 1856 include all the lands in controversy in this suit.

By an Act approved July 2, 1864, 13 Stat. at L., 95, Congress authorized a change of location of this road in the uncompleted part thereof, so as to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacific Railroad, and the plaintiff Corporation, which had succeeded to all the rights of the Mississippi & Missouri Railroad Company, availed itself of the privilege thus conferred, and so changed the route as to place it at some points south of the fifteen mile limit of the grant, as ascertained by the first location, and the road was completed on this location to Council Bluffs in 1869. After all this, the plaintiffs in error, who were defendants below, settled upon the lands in controversy, which were within the limits of the location made in 1856, and without the twenty mile limit of the amendatory Act of 1864, which will be presently noticed, and proceeded by the appropriate steps to assert rights under the homestead and preemption laws of the United States. The officers of the land department refused to recognize their right to do so, but being in possession, and sued for it by the Railroad Company, they say the Company has no title; because it lost whatever right it had to the lands by the change of the location, and because locating the road as now completed does not bring these lands within the limit of either the original grant or the amendatory Act of 1864.

Two inquiries are thus suggested, namely: had the Railroad Company acquired title or a vested right to the lands in controversy before [742] the Act of 1864, and before the change of location; and if it had, what was the effect of that change on the right of the Company to the land left by the change outside of the limits prescribed by both Acts?

The grant under the Act of 1856 was, as has been often said, a grant *in præsenti*, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done, so that a surveyor or the officers of the land department can protract the line of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant.

So far as lands are found in place when this is done, not coming within the exceptions as sold or held under preemption, the title, or at least the right to this land in place, is at once vested in the State or in the company to which

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the State has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer.

None of these difficulties arise in the present case. The location was made and the map filed in the land-office; the selection of lieu lands was made and the selection approved, and the entire list was regularly certified to the State of Iowa as early as December, 1858, and with this certificate the last Act of the United States which could in any event be held necessary to passing the title was performed, and either the State of Iowa or the Railroad Company—it is immaterial which for the purposes of this suit—had become invested with the full legal title to the lands so certified.

In this condition of affairs, the Mississippi & Missouri R. R. Co. made a mortgage on its road [743] and franchises, which also included the lands granted by Congress to the State and by the State to that company to obtain money to build its road. It commenced at Davenport, on the Missouri, and had constructed the road westwardly 130 miles when the Act of 1864 was passed. In 1866 the mortgage above mentioned was foreclosed, and the Chicago, Rock Island & Pacific Company, under sale at this foreclosure proceeding, and by subsequent consolidation, became the owner of the road, the franchises, and the lands of the Mississippi & Missouri Co.

The entire legal title, therefore, to their land had passed, for a valuable consideration, to this Company.

Did their construction of the road on the new line annul or defeat, without further action on the part of the United States, the title thus vested? It would have been competent for Congress to have made it a condition of the change of location, that the lands within the six miles, or the fifteen mile limit of the old line, and not within the twenty mile limit of the new line, should revert to the United States, so far as the title of the Company was concerned. But it did not make any such condition. If no law had been passed authorizing the change of route, it is possible the government might have reclaimed these lands as forfeited by reason of the change, to which it had not consented. But Congress did consent to the change without any declaration affecting the title already vested in the Company.

The 2d section of the Act of 1864 provided for a grant of land on each side of the new location, and for lieu lands when those could not be found to an amount equal to that granted by the original Act of 1856, and it extended the limit for selecting lieu lands to twenty instead of fifteen miles.

It is argued that the lands thus granted were intended as a substitute for those accruing to the Company under the first location; and that the latter, necessarily, reverted to the grantor. That it was the policy of the government that the lands granted should be alongside of the road, and that the lands retained by the government should thereby be enhanced in value. We are not prepared to deny that if the Railroad Company had accepted or received lands under the Act of 1864, and the case was unem- [744] barrassed by the rights of subsequent purchasers or mortgagees, the United States could, by a judicial proceeding, enforce the principle that an exchange of lands was intended.

But this would arise from no express language of the Act of Congress, or agreement with the Company, but as a just and proper inference from the whole transaction.

There is, however, no evidence that the Company ever received any land under the Act of 1864, or asserted a claim to such land. It appears affirmatively that it never filed with the General Land-Office a map of its new route until 1870, a year after the road was completed, and it is fair to presume that if it intended to assert a claim to land under the changed location, it would have filed its map when the change was made or determined on We do not think the Act can be construed to forfeit the lands to which they had title when they claimed none under the Act of 1864.

Another point equally fatal to plaintiffs in error is, that the assertion of a right by the United States to the lands in controversy was wholly a matter between the government and the railroad company, or its grantors. The *legal title* remains where it was placed before the Act of 1864. If the government desires to be re-invested with it, it must be done by some judicial proceeding, or by some act of the government asserting its right. It does not lie in the mouth of everyone who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding.

These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the government. Then the land would be subject to homestead or preemption rights. But the legal title is not in the government; and as we have already shown, the equity is more than doubtful. *Schulenberg* v. *Harriman*, 21 Wall., 44 [88 U. S., XXII., 551]; *Tucker* v. *Ferguson*, 22 Wall., 527 [89 U. S., XXII., 805].

The judgment of the Supreme Court of Iowa is affirmed.

Dissenting, *Mr. Justice* **Bradley.**

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 38; 112 U. S., 726, 731: 12 N. W. Rep., 565.

FRANCIS E. HINCKLEY, *Appt.*, [764]

v.

LEVI P. MORTON ET AL.

(See S. C., 13 Otto, 764, 765.)

Second appeals—compensation of receiver.

1. Second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself.

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2. Where the compensation of a receiver, so far as the fund in the circuit court is concerned, was settled on the former appeal, a larger compensation to him subsequently ordered by the state court cannot be paid to him out of it.

[No. 895.]

Submitted Jan. 31, 1881. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

On motion to dismiss with which is united a motion to affirm.

Mr. **R. Biddle Roberts,** for appellees, in support of motion.

Messrs. George W. Cothran, **Leonard Swett** and **Philip Phillips,** for appellant.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Our jurisdiction of this case is clear. The appeal is not from the decree entered on our mandate from the last Term, in *Hinckley* v. *R. R. Co.*, 100 U. S., 153 [XXV., 591]. On the contrary, that decree has been satisfied by an actual payment of the amount found due. The case does not, therefore, come within the rule laid down in *Stewart* v. *Salamon*, 97 U. S., 361 [XXIV., 1044], where we held that an appeal would not be entertained from a decree in the court below in accordance with a mandate from here on a previous appeal. The record now presented shows that after our decision at the last Term, in which, among other things, Hinckley, the appellant, was allowed $10,000 for his services as receiver from the time of his appointment in the Kelly suit, he went into the state court and had that suit re-instated. He then applied to that court to fix his compensation as receiver. That was done, and resulted in an allowance to him of something more than $24,000. As soon as that order in his favor was made he filed an intervening petition in the circuit court, asking that the amount so allowed him might be paid out of the fund in the circuit court belonging to the Morton suit. [785] This was refused, and from the order to that effect, which was a final decree on the intervening petition, this appeal was taken. Second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself. *Supervisors* v. *Kennicott*, 94 U. S., 498 [XXIV., 260]; *Tyler* v. *Maguire*, 17 Wall., 253 [84 U. S., XXI., 576]. *This case comes clearly within that rule, and the motion to dismiss is, therefore, denied.*

But we think the motion to affirm should be granted. The question of compensation to the receiver, so far as the fund in the circuit court is concerned, was settled on the former appeal. The allowance then made was for the entire services of the receiver from the date of his original appointment in the Kelly suit. The value of the services was made, by the exceptions to the master's report, a matter of special inquiry, and the result is indicated in the judgment which was then given. If the state court has funds in its hands out of which its judgment can be paid, it has full power to order the payment, but the liability of the fund in the circuit court to the receiver has already been fully discharged. The court below was right, therefore, in refusing the prayer of the appellant in his intervening petition, and its order to that effect is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CENTRAL NATIONAL BANK OF BALTIMORE, *Plff. in Err.*, [783]
v.
ROYAL INSURANCE COMPANY.

(See S. C., 13 Otto, 783-786.)

When court may direct verdict.

Where, on the undisputed facts, defendant is entitled to a verdict in his favor, the court may direct such a verdict.

[No. 232.]

Argued Mar. 2, 1881. Decided Mar. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Messrs. **George Bliss** and *Robert N. Willson,* for plaintiff in error.

Messrs. William D. Shipman and **Joseph Larocque,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The assignment or errors in this case presents the single question whether on the undisputed facts the court below was right in directing a verdict in favor of the Insurance Company. The facts were as follows:

John James Jackson was the agent at Baltimore of the Royal Insurance Company, a British Corporation. His appointment was in writing and filed in the office of the Insurance Commissioner of Maryland, in compliance with the laws of the State. His powers were ample for the issuing of policies, collection of premiums, and the adjustment and payment of losses. No authority was given him, however, to borrow money on the credit of the Company, and he had never in a single instance done so, except by the negotiation of bills drawn by him as agent on the Company to pay losses. He was at the same time the agent of other insurance companies and of a number of private persons. He was introduced to the Central National Bank of Baltimore, in 1870 or 1871, as the agent of the Royal Insurance Company, and opened an account in the name of J. J. Jackson, agent. The name of the Insurance Company did not [784] appear. All his deposits were made to the credit of this account and all his checks were drawn against it. The account was a large one and included moneys which came into his hands from all sources. As he wanted money, he checked on this account, signing the checks in the name of J. J. Jackson, agent. His remittances to the Company were made by bills, on London, purchased from Alexander Brown & Sons, dealers in foreign exchange at Baltimore, with checks on the Bank payable to that firm. This was known to and understood by the Bank. His checks showed that very large sums of

NOTE.—*When a verdict may be directed by the court.* See *note* to Grand Chute v. Winegar, 82 U. S. XXI., 174.

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money, credited to his account as agent, were used in other ways than for the benefit of the Company.

In the summer of 1878 he was behind in his accounts with the Company and a special agent was sent to Baltimore to get a settlement. For the convenience of adjustment the accounts were divided into three classes and each class examined separately. On the 9th of July, upon a statement of one part of the account as classified, a balance of $12,572.52 was found due from him to the Company. He had at the time not more than five or six thousand dollars to his credit in bank, and to meet this payment asked permission of the president of the Bank to overdraw his account, saying that his agents were behind in their remittances, but he would hurry them up and soon make the deficit good. Getting the consent of the Bank he made his check in favor of Alexander Brown & Sons for the amount due from him, and bought a bill on London which was remitted the Company and afterwards paid by the drawees in the ordinary course of business.

On the 19th of July, upon the completion of the adjustment of another part of the account, a further amount was found due from Jackson to the Company of $5,520.48. He then drew another check in favor of Alexander Brown & Sons for this amount, and asked again for permission to overdraw, at the same time showing the check. After a repetition of substantially the same statements he had made on the former occasion, this check was certified by the direction of the president and handed back to him. He took it to Brown & Sons and bought another bill, which was sent forward to the Company [785] and paid in London. Before the remainder of his accounts were adjusted he left Baltimore, and his agency was revoked on 24th or 25th of July. The Bank then called on the Company to repay the overdraft, claiming that the money advanced was in fact a loan to the Company. The Company declined to recognize any liability, and this suit was brought to recover the balance that was due as for money loaned.

These facts are undisputed, and we think it clear if the jury had been permitted to pass on the evidence, and had found against the Company, their verdict should have been promptly set aside by the court. In point of fact the money was borrowed by Jackson to pay what he owed the Company. His application was not made in the name of the Company, and although his account was kept in his name as agent, it was, in reality, his individual account and not that of the Company. That the money was borrowed to remit the Company, must have been understood by the Bank. The checks were in the form that had been used for a long time in making such remittances; and when money had been borrowed before to pay losses, it had always been done on the bills of Jackson drawn on the Company in London. The form, then, which the transaction assumed, as claimed by the Bank, is that of an application by a large foreign Insurance Company, through one of its agents in this country, for the privilege of overdrawing its bank account at the agency, so that funds might be remitted to the home office abroad a few days in advance of anticipated receipts from current business. So unusual and improbable a thing as this can hardly be presumed from the single fact that the agent of the Company, who was also agent of other parties, saw fit to keep his bank account in his name as agent without indicating for whom. The natural inference, from the facts presented to the Bank, certainly is, as the truth was, that the agent wanted the accommodation to enable him to meet his own obligations to the Company in anticipation of the remittances of his subagents. Such a borrowing does not charge the Company as a borrower. True, the Company has saved what the Bank has lost, but not in a way to make itself liable to restore what it has got. The Bank trusted the agent, not the Company. No other reasonable construction can be put on the acts of the parties at the time. A borrowing by an insurance agent to enable him to re- [786] mit his company the proceeds of his business is *prima facie* the borrowing of the agent himself rather than the company, and will be so treated unless the contrary is shown. Any other rule would be dangerous in the extreme. There is here no question of ratification. This can only arise where the borrowing is by the agent for the company without authority, and the company adopts by its acts what was done by the agent. Here the borrowing was by the agent for himself and not the Company. It was clearly right, therefore, for the court to tell the jury, in advance of the verdict, that upon the evidence they must find for the Company. *Pleasants* v. *Fant*, 22 Wall., 116 [89 U.S., XXII., 780].

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 66; 28 Kan., 419.

WILLIAM H. COOK, *Appt.*, [792]
v.
CHARLES LILLO.

(See S. C., 13 Otto, 792-794.)

Note when not payable in confederate money—Louisiana usury law.

1. Notes, given during the war, at New Orleans, on which payments to a large amount, both of principal and interest, have been made, and always in lawful money or its equivalent, where no claim was ever made that the notes called for confederate dollars until about the time of the commencement of this suit, which was fifteen years after the notes were given, and after thousands of dollars had been paid and many extensions of time secured, will be held to be payable in lawful money and not in confederate dollars.

2. In Louisiana, a reclamation of interest cannot be made, nor the usurious interest imputed to the principal, unless the suit for the recovery is begun, or plea of usury set up to the claim, within twelve months after the payment is made.

[No. 212.]

Submitted Jan. 26, 1881. Decided Mar. 21, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. **Charles B. Singleton, Richard H. Browne** and **John A. Campbell,** for appellant.

Messrs. **C. E. Schmidt** and **Thomas J. Semmes,** for appellee.

NOTE.—*Contracts payable in confederate notes; tender of.* See *note* to Thorington v. Smith, 75 U. S., XIX., 361.

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Mr. Chief Justice **Waite** delivered the opinion of the court:

It has long been settled in this court that transactions in confederate money during the late civil war between the inhabitants of the Confederate States within the confederate lines, not intended to promote the ends of the Confederate Government, could be enforced in the Courts of the United States, after the restoration of peace, to the extent of their just obligation. *Thorington* v. *Smith*, 8 Wall., 1 [75 U. S., XIX., 361]. It is equally well settled that if a contract entered into under such circumstances, payable in dollars, was, according to the understanding of the parties, to be paid in confederate dollars, upon proof of that fact the party entitled to the payment can only recover the value of confederate dollars in the lawful money of the United States. *Idem.*

[793] The loan for which the notes sued on in this case were given was made by a check on one of the New Orleans banks. The business of the banks was at that time done in confederate currency. That kind of money was received and paid out in ordinary transactions, but the evidence fails entirely to satisfy us that the dollars called for in the notes were, by the agreement or understanding of the parties, Confederate dollars. Cook owed a debt of $10,000, payable in lawful money of the United States, and bearing interest at the rate of ten per cent per annum. He borrowed of the Sonlies $10,000 at a reduced rate of interest to pay that debt. It is fair to presume from the evidence that the dollars he borrowed paid the dollars he owed. He says himself his only object in the transaction was to carry his debt at less interest. It is no where intimated that the dollars he expected to pay on his loan were other or different from those he owed on his old debt. Not long after the notes were given, New Orleans was taken possession of by the military forces of the United States, and was never afterwards within the confederate lines. Payments to a large amount, both of principal and interest, have been made, and always in lawful money or its equivalent. So far as we can discover from the evidence, no claim was ever made that the notes called for confederate dollars until about the time of the commencement of this suit, which was fifteen years after the notes were given, and after thousands of dollars had been paid and many extensions of time secured. The court below was clearly right, therefore, in giving judgment without any deduction for the depreciated value of confederate dollars.

It is not denied that Lillo, the complainant below, was an alien when the suit was begun. He could, therefore, sue in the Courts of the United States. He is the holder of the notes sued on, and there is nothing in the evidence to show that he has not the right to maintain this action. The notes in his hands are subject to the same defenses they would be in the hands of the Sonlies, because, confessedly, they were transferred to him long after they had become due.

[794] By a Statute of Louisiana, if a person pays on a contract a higher rate of interest than eight per cent, it may be sued for and recovered back within twelve months from the time of the payment. R. S., 1870, sec. 1855. Before this statute, which was first enacted in 1844, it had been decided by the highest court of the State in several cases that money paid for usurious interest could not be reclaimed or imputed to the capital. *Perrillat* v. *Puech*, 8 Mart. (N. S.), 671; *Millaudon* v. *Arnous*, 3 Mart. (N. S.), 596; *Poydras* v. *Turgeau*, 14 La., 37; *Bk.* v. *Gove*, 15 La., 378; *Coxe* v. *Rowley*, 12 Rob. (La.), 273. Since the statute, it has been held that a reclamation cannot be made nor the usurious interest imputed to the principal, unless the suit for the recovery is begun or plea of usury set up to the claim, within twelve months after the payment is made. *Cox* v. *McIntyre*, 6 La. Ann., 470; *Weaver* v. *Maillot*, 15 La. Ann., 395. In view of these decisions, the appellant was not entitled to any credit on the principal of his debt by reason of usurious interest paid, because his last payment of interest was made in March, 1875, and this suit was not begun until January 11, 1877, more than twelve months afterwards.

This disposes of all the errors assigned, and the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 37; 112 U. S., 484.

Ex parte DES MOINES AND MINNEAPOLIS RAILROAD COMPANY, *Petitioner.*

(See S. C., 13 Otto, 794-797.)

Mandamus—*attachment, when issuable.*

1. The writ of *mandamus* cannot be used as a writ of error, to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit.
2. Where a person is not suable in the Circuit Court of a District, no attachment can issue from that court against his property.

[No. 6, Orig.]

Submitted Mar. 14, 1881. Decided Mar. 21, 1881.

APPLICATION for a rule on the Circuit Court of the United States for the District of Iowa, Northern Division, to show cause why a writ of *mandamus* should not issue.

The case fully appears in the opinion of the court.

Mr. **Fillmore Beall**, for petitioner.

No counsel appeared in opposition.

Mr. Chief Justice **Waite** delivered the opinion of the court: [796]

This application is denied, 1, because it is an attempt to use the writ of *mandamus* as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit; and 2, because, if a writ of *mandamus* could be used for such a purpose the judgment below was clearly right. Under section 739 of the Revised Statutes, no civil suit, not local in its nature, can be brought in the Circuit Court of the United States, against an inhabitant of the United States, by original process, in any other State than that of which he is an inhabitant, or in which he is found at the time of serving the writ. It is conceded that the person against whom this suit was brought in the Circuit Court, was an inhabitant of the State of Massachusetts, and was not found in nor served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District

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of Iowa, and unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall. The Act "Providing the times and places of holding the Circuit Courts of the United States in the District of Iowa," 21 Stat. at L., 155, ch., 120, divides that district into four divisions, and requires suits against an inhabitant of the district to be brought in the division in which he resides. The provision that, "Where the defendant is not a resident of the district, suit may be brought in any division where property or the defendant is found" (sec. 2), applies only to suits which may be properly 797] brought in the district against a non-resident. Such a suit, if not local, must be in the division where the defendant is found when served with process; if local, in the division where the property, which is the subject-matter of the action, is situated. There is not manifested anywhere in this Act an intention of repealing section 739, so far as it affects the Iowa district.

Denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 567.

227] CHARLES M. BLAKE, *Appt.*,
v.
UNITED STATES.

(See S. C., 13 Otto, 227-237.)

President's power to remove an officer—Act construed.

*1. The true construction of the 5th section of the Army Appropriation Act of July 17, 1866, 14 Stat. at L., 92, is, that, whereas, under the Act of July 17, 1862, 12 Stat. at L., 596, as before its passage the President alone had the power to dismiss an officer in the military or naval service for any cause which in his judgment either rendered the officer unsuitable for, or whose dismissal would promote the public service, *he* alone, shall not thereafter in time of peace exercise such power of dismissal except in pursuance of a court-martial sentence to that effect, or in commutation thereof.

2. Congress did not intend by the Act of July 17, 1866, to deny or restrict the power of the President, *with the concurrence of the Senate*, to displace officers in the army or navy, by the appointment of others in their places.

[No. 778.]

Submitted Jan. 19, 1881. Decided Mar. 30, 1881.

APPEAL from the Court of Claims.

Statement of the case by *Mr. Justice* **Harlan:**

From the finding of facts, in the Court of Claims, it appears that appellant, a post chaplain in the Army of the United States, stationed at Camp McDowell, in the Territory of Arizona, addressed to the Secretary of War, under date of December 24, 1868, a communication in which he complained of unjust treatment to which, during several years, he had been subjected by various officers. He asked for the fullest and most thorough investigation of the facts, and concluded: "But if this cannot be done, then I wish to tender to the Honorable, the Secretary of War, my resignation as a chaplain of the army, and to lay the facts, which I have for years been accumulating with the greatest care, before the church and the country at large." After this letter came to the hands of the post commandant, his attention was called to the mental condition of the chaplain, and it was suggested that the latter was not responsible for his act in writing the foregoing letter. The letter was retained until 31st December, 1868, for the purpose, perhaps, of ascertaining his condition, and then forwarded by the commandant with an indorsement recommending an acceptance of the resignation and saying, among other things, that "The tenor of this and other communications forwarded will, no doubt, convince the department commander of his utter uselessness in the position he holds."

The letter of December 24, 1868, was forwarded through the district and department headquarters, and, finally, through the headquarters of the military division of the Pacific, to the Secretary of War, by whom it was transmitted to the President, who accepted the resignation, to take effect March 17, 1869. Each of the com- [228] manding officers through whose office the letter passed, recommended an acceptance of the resignation.

On the 28th of March, 1869, Blake telegraphed to the delegate in Congress from the Territory of Arizona, stating that he did not intend to resign, and that if his letter was construed as a resignation, to withdraw it immediately. When the Secretary of War was informed of that telegram, he stated that Blake's resignation had been accepted and was beyond recall.

Blake, having received official notice of such acceptance, addressed the following letter to the Secretary of War:

"NAPA CITY, CAL., Ap'l 27th, 1869.

HON. JOHN A. RAWLINS,
Secretary of War, Washington, D. C.:

DEAR SIR: To my great surprise I was yesterday informed, thro' H'd Q'rs Dep't of California, that my 'resignation' as post chaplain, U. S. Army, 'had been accepted by the President,' 'to take effect March 17th, 1869.'

As I am not aware of having at any time resigned my commission, and as I am now in a state of feeble health, caused by efficient services in the line of duty in 1863, 1864 and since, I beg that the favorable reconsideration of the President may be given to my case, and that I may be ordered before a retiring board for examination, and to duty if fit for it.

Justice to the service, no less than to myself and family, after eight years of devoted labors, will not permit me to be silent in view of the wrongs done me at Camp McDowell, A.T., and I am confident that you will not allow me to suffer wrongfully.

I have the honor to remain, with great respect, your ob'd't servant,

(Signed) CHARLES M. BLAKE,
(*Late*) *Post Chaplain, U. S. A.*"

This letter was referred to the Adjutant-General, who returned it with this indorsement: "Respectfully returned to the Secretary of War with the paper on which the resignation of Chaplain Blake was accepted. Chaplain Blake appears not to be of sane mind. E. D. Townsend, Adjt-Genl."

On the 7th July, 1870, President Grant nominated to the Senate six persons to be post chap-

*Head notes by *Mr. Justice* HARLAN.

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[229] lains in the army, to rank from July 2, 1870, among whom was "Alexander Gilmore, of New Jersey, *vice Blake, resigned.*" Gilmore's nomination was confirmed on the 12th July, 1870, and on the 14th of the same month, he was commissioned, as post chaplain, to rank as such from July 2, 1870. He has since regularly received his salary and performed his duties as such post chaplain.

It is found, as a fact, by the Court of Claims, that for some time prior to, and on, the 24th of December, 1868, Blake had been suffering from physical disease, and from mental prostration; that in the light of subsequent events, 'there can be no doubt he was then insane,' that he was, at times, irritable and incoherent, manifesting egotism and suspicion of his superiors; that not until after the above date were these symptoms developed to such an extent as necessarily to induce persons who came in contact with him to believe he was mentally incapable of acting with sound reasoning purpose; also that, at the date of the telegram to the delegate from Arizona he was "totally unqualified for business," and, at the date of the letter of April 27, 1869, "he was not of sound mind."

It is also found as a fact that the insanity of Blake continued until about the year 1874.

On the 28th of September, 1878, President Hayes made the following order:

"EXECUTIVE MANSION,
September 28, 1878.

It appearing from the evidence, and from the reports of the surgeon-general of the army and the superintendent of the government hospital for the insane, that Chaplain Blake was insane at the time he tendered his resignation, it is held that said resignation was and is void, and the acceptance thereof is set aside. Chaplain Blake will be ordered to duty, and paid from the date of the resignation of Post Chaplain Preston Nash, to wit: May 14th, 1878, by which resignation a vacancy was created, which has not been filled. The claim of Chaplain Blake for pay from the date of his resignation to May 14th, 1878, during which his successor held the office, discharged its duties, and received pay is not decided, but is left for the decision of the court, where it is understood to be now pending.

R. B. HAYES."

On the 2d October, 1878, the following order was issued by direction of the General of [230] the Army:

"HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, October 2, 1878.

1. It appearing from the evidence presented, and from the reports of the surgeon-general of the army and the superintendent of the government hospital for the insane, that Post Chaplain Charles M. Blake, U. S. Army, was insane at the time he tendered his resignation, December 24, 1868, said resignation is, by direction of the President, declared void, and the acceptance of the same in letter from this office, dated March 17, 1869, as announced in Special Orders No. 62, March 17, 1869, from this office, is set aside.

Chaplain Blake is restored to the list of post chaplains of the army with his original date of rank, and with pay from May 14, 1878, since which date a vacancy in that grade has existed. He will report in person to the commanding officer, department of Arizona, for assignment to duty.

* * * * * * * *

By command of General Sherman.
(Signed.) E. D. TOWNSEND,
Adjutant-General."

Messrs. **George H. Williams** and **R. P. Lowe,** for appellant.

Messrs. **Charles Devens**, *Atty-Gen.* and *John S. Blair*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

The present action was instituted by Blake to recover the amount due him, by way of salary as post chaplain, from the 28th of April, 1869, to the 14th of May, 1878. The claim is placed upon the ground that before, at the date of, and subsequent to the letter addressed to the Secretary of War, which was treated as his resignation, he was insane in a sense that rendered him irresponsible for his acts and, consequently, that his supposed resignation was inoperative and did not have the effect to vacate his office His petition was dismissed, and from the judgment of dismissal this appeal is prosecuted. Did the appointment of Gilmore, by and with the advice and consent of the Senate, to the post chaplaincy held by Blake, operate *proprio vigore*, to discharge the latter from the service, and invest the former with the rights and privileges belonging to that office? If this question be answered in the affirmative, it will not be necessary to inquire whether Blake was, at the date of the letter of December 24, 1868, in such condition of mind as to enable him to perform, in [231] a legal sense, the act of resigning his office; or, whether the acceptance of his resignation, followed by the appointment of his successor, by the President, by and with the consent of the Senate, is not, in view of the relations of the several departments of government to each other, conclusive, in this collateral proceeding, as to the fact of a valid effectual resignation.

From the organization of the Government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss an officer of the army or navy from the service was unquestioned in any adjudged case, or by any department of the Government

Upon the general question of the right of removal from office, as incident to the power of appointment, the case of *Ex Parte Hennen*, 13 Pet., 259, is instructive. That case involved the authority of a district judge of the United States to remove a clerk and appoint some one in his place.

The court, among other things, said: "All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or, which is the same thing in contemplation of law, during the life of the incumbent, or must be held at the will and discretion of some department of the Government, and subject to removal at pleasure.

It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional pro-

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vision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this Government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. [232] No one denied the power of the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution." 1 Kent, 309 *et seq.*; 2 Story, Const., 4th ed., secs. 1527-1540, and *notes*; 2 Marshall, Life of Washington, 162; Sergeant, Const. L., 372; Rawle, Const., ch. 14.

During the administration of President Tyler, the question was propounded by the Secretary of the Navy to Attorney-General Legare, whether the President could strike an officer from the rolls, without a trial by a court-martial, after a decision in that officer's favor by a court of inquiry ordered for the investigation of his conduct. His response was: "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituents) for a breach of such a vast and solemn trust. 3 Story, Com. Const., 397, sec. 1538. It is obvious that if necessity is a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments. * * * I have no doubt, therefore, that the President had the constitutional power to do what he did, and that the officer in question is not in the service of the United States." The same views were expressed by subsequent Attorneys-General. [Power of Pres. to dismiss, etc.] 4 Ops. Attys-Gen., 1; [Military Storekeeper, Remov. etc.] 6 Ops. Attys-Gen., 4; [Navy Efficiency Acct.] 8 Ops. Attys-Gen., 233; [Case of *Col. Belger*] 12 Ops. Attys-Gen., 424; 15 Ops. Attys-Gen., 421.

In *Du Barry's Case*, 4 Ops. Attys-Gen., 612, Attorney-General Clifford said that the attempt to limit the exercise of the power of removal to the executive officers in the civil service found no support in the language of the Constitution nor in any judicial decision; that there was no foundation in the Constitution for any distinction in this regard between civil and military officers.

[233] In *Lansing's Case*, 6 Ops. Attys-Gen., 4, the question arose as to the power of the President, in his discretion, to remove a military storekeeper. Attorney-General Cushing said: "Conceding, however, that military storekeepers are officers or, at least, *quasi* officers, of the army, it does not follow that they are not subject to be deprived of their commission at the will of the President.

I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the Government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way as it is to civil officers, but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired in both cases alike the whole constitutional power of the President.

It seems unnecessary in this case to recapitulate in detail the elements of constitutional construction and historical induction by which this doctrine has been established as the public law of the United States. I observe only that, so far as regards the question of abstract power, I know of nothing essential in the grounds of legal conclusion, which have been so thoroughly explored at different times in respect of civil officers, which does not apply to officers of the army."

The same officer, subsequently, when required to consider this question, said that "The power has been exercised in many cases with approbation, express or implied, of the Senate, and without challenge by any legislative Act of Congress. And it is expressly reserved in every commission of the officers, both of the navy and army." [Navy Efficiency Act] 8 Ops. Attys-Gen., 231.

Such was the established practice in the Executive Department and such the recognized power of the President up to the passage of the Act of July 17, 1862, 12 Stat. at L., 596, entitled [234] "An Act to Define the Pay and Emoluments of certain Officers of the Army, and for Other Purposes," the 17th section of which provides that "The President of the United States be and hereby is authorized and *requested* to dismiss and discharge from the military service, either in the army, navy, marine corps or volunteer force, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."

In reference to that Act, Attorney-General Devens, 15 Ops. Attys-Gen., 421 said, with much reason, that so far as it "gives authority to the President, it is simply declaratory of the long established law. It is probable that the force of the Act is to be found in the word *requested*, by which it was intended to re-inforce strongly this power in the hands of the President at a great crisis of the State."

A subsequent statute, passed March 3, 1865, 13 Stat. at L., 489, provides that, in case any officer of the military or naval service, thereafter dismissed by the authority of the President, shall make application in writing for a trial, setting forth, under oath, that he has been wrongfully and unjustly dismissed, "The President

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shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charge on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And, if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

Thus, so far as legislative enactments are concerned, stood the law in reference to dismissals, of army or naval officers, by the President, until the passage of the Army Appropriation Act of July 13, 1866, 14 Stat. at L., 92, the 5th section of which is as follows: "That section 17 of an Act, entitled 'An Act to Define the Pay and Emoluments of Certain Officers of the Army,' approved July 17, 1862, and a Resolution, entitled 'A Resolution to Authorize the President to Assign the Command of Troops in the Same Field or Department, to Officers of the Same Grade, without Regard to [235] Seniority,' approved April 4, 1862, be and the same are hereby repealed. And no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

Two constructions may be placed upon the last clause of that section without doing violence to the words used. Giving them a literal interpretation, it may be construed to mean that, although the tenure of army and naval officers is not fixed by the Constitution, they shall not, in time of peace, be dismissed from the service, under any circumstances or for any cause or by any authority whatever, except in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. Or, in view of the connection in which the clause appears—following, as it does, one in the same section repealing provisions touching the dismissal of officers by the President, alone, and to assignments by him of the command of troops, without regard to seniority of officers—it may be held to mean that, whereas, under the Act of July 17, 1862, 12 Stat. at L., 596, as well as before its passage, the President, alone, was authorized to dismiss an army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, *he*, alone, shall not, thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof. Although this question is not free from difficulty, we are of opinion that the latter is the true construction of the Act. That section originated in the Senate as an amendment of the Army Appropriation Bill which had previously passed the House of Representatives. Cong. Globe, 39th Cong., pp. 3254, 3405, 3575, 3589. It is supposed to have been suggested by the serious differences existing or which were apprehended between the legislative and executive branches of the Government in reference to the enforcement, in the States lately in rebellion, of the Reconstruction Acts of Congress. Most, if not all, of the senior officers of the army, enjoyed, as we may know from the public history of that period, the confidence of the political organization then controlling the legislative branch of the Gov- [236] ernment. It was believed that, within the limits of the authority conferred by statute, they would carry out the policy of Congress, as indicated in the Reconstruction Acts, and suppress all attempts to treat them as unconstitutional and void, or overthrow them by force. Hence, by way of preparation for the conflict, then apprehended between the executive and legislative departments as to the enforcement of those Acts, Congress, by the 5th section of the Act of July 13, 1866, repealed not only the 17th section of the Act of July 17, 1862, but also the Resolution of April 4, 1862, which authorized the President, whenever military operations required the presence of two or more officers of the same grade, in the same field or department, to assign the command without regard to seniority of rank. In furtherance, as we suppose, of the objects of that legislation, was the 2d section of the Army Appropriation Act of March 2, 1867, establishing the headquarters of the General of the Army at Washington, requiring all orders and instructions relating to military operations issued by the President, or Secretary of War, to be issued through that officer, and in case of his inability, through the next in rank, and declaring that the General of the Army "Shall not be removed, suspended or relieved from command or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate, and any orders or instructions relating to military operations, issued contrary to the requirements of this section, shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office," etc. 14 Stat. at L., 486.

Our conclusion is that there was no purpose, by the 5th section of the Act of July 13, 1866, to withdraw from the President the power, *with the advice and consent of the Senate*, to supersede an officer in the military or naval service by the appointment of some one in his place. If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute, as to which we express no opinion, it is sufficient, for the present case, to say that Congress did not intend by that section to impose them. It is, in substance and effect, nothing more than a declaration, that the power theretofore exer- [237] cised by the *President*, without the concurrence of the Senate, of summarily *dismissing* officers of the army and navy, whenever, in his judgment, the interest of the service required it to be done, shall not exist or be exercised *in time of peace*, except in pursuance of the sentence of a court-martial or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, *with the concurrence of the Senate*, to displace them by the appointment of others in their places.

It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated, in law, to supersede the latter, who, thereby, in virtue of the new appointment, ceased to be an officer in

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the army from and after, at least, the date at which that appointment took effect—and this, without reference to Blake's mental capacity to understand what was a resignation. He was, consequently, not entitled to pay as post chaplain after July 2, 1870, from which date his successor took rank. Having ceased to be an officer in the army, he could not again become a post chaplain, except upon a new appointment, by and with the advice and consent of the Senate. *Mimmack* v. *U. S.*, 97 U. S., 437 [XXIV., 1069].

As to that portion of the claim covering the period between April 28, 1869, and July 2, 1870, it is only necessary to say that, even were it conceded that appellant did not cease to be an officer in the army by reason of the acceptance of his resignation, tendered when he was mentally incapable of understanding the nature and effect of such an act, he cannot recover in this action. His claim for salary during the above period accrued more than six years, and the disability of insanity ceased more than three years, before the commencement of this action. The Government pleads the Statute of Limitations, and it must be sustained. Congress alone can give the appellant the relief which he seeks.

Mr. Justice **Swayne** participated in the decision of this case, before his retirement from the bench, and concurs in this opinion.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 339.

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[247] THE STEAMSHIP BENEFACTOR ET AL., *Appts.*,
v.
WILLIAM H. MOUNT ET AL.

NEW YORK AND WILMINGTON STEAMSHIP COMPANY, *Appt.*,
v.
WILLIAM H. MOUNT ET AL.

(See S. C., "*The Benefactor*," 13 Otto, 247-250.)

New rule as to limited liability—stay of decree—effect of decree.

1. This court announces a general rule, extending, to the circuit courts on appeal, the regulations which have heretofore been adopted for the district courts, in cases of proceedings to obtain the benefit of a limited liability.
2. Proceedings on a decree in admiralty for a collision against a ship, her claimants and stipulators, should be stayed until the determination of the proceeding for limited liability.
3. The decree is *res judicata* on the question of liability of the ship and the amount of damage, and is the basis for determining the *pro rata* share of the libelants in the common fund to be distributed on the termination of the limited liability proceeding.

[Nos. 65, 66.]

Motions filed Mar. 21, 1881. Decided Mar. 30, 1881.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

On motions to modify judgment and mandate.

See same cases on merits, *ante*, pp. 157, 351.

The case is fully stated by the court.

Messrs. Edward L. Owen and *Cornelius Van Santvoord*, for appellants.

Messrs. Evarts, Southmayd & Choate, Beebe, Wilcox & Hobbs, and *Robert D. Benedict*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

Since deciding these cases and issuing mandates therein, both parties have applied for additional directions with regard to further proceedings in the court below. The respondents ask that the judgment and mandate in the second case be amended so as to direct that further proceedings for securing a limited liability of the appellants shall be had in the circuit court instead of the district court. It is undoubtedly the general rule that an appeal in admiralty, like all appeals derived from the practice of the civil law, carries the whole cause to the appellate court, in which it is to be tried anew upon the same and such additional proofs as the parties may propound. Whilst this is the general rule, there is also no doubt that the Legislature may authorize the appellate court, after hearing the cause, and determining the questions raised therein, to remand it to the court *a quo* for further proceedings. The late practice under the bankrupt law exhibited an instance of this mode of proceeding. The entire history of appeals in admiralty, as well as in equity, in this court is another instance of the same practice. But on appeals in admiralty from the district to the circuit court, the latter has always retained the cause for trial and final disposition without remanding to the district court. But in the late revision of the statutes of the United States (R. S., sec. 636), it is declared as follows: "A circuit court may affirm, modify or reverse any judgment, decree or order of a district court, brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the district court, as the justice of the case may require." In this case, the question whether the cause should be retained by the circuit court or remanded to the district court was not raised on the argument of the cause, and in entering judgment we directed the circuit court to reverse the decree of the district court and give directions for further proceedings, in conformity with our opinion. It is now suggested by the respondents that this direction could not properly be made, because, as they contend, the 636th section of the Revised Statues does not extend to admiralty proceedings. In this, however, we think they are mistaken. The section follows several other sections which give the right of appeal and writ of error respectively in admiralty and other cases from the district to the circuit court, and makes no distinction between them in conferring upon the latter the power to affirm, modify or reverse, together with power to give directions to the district court for further proceedings. The section in question is a re-enactment of a clause in the 2d section of the Act approved June 1, 1872, entitled "An Act to Further the Administration of Justice," 17 Stat. at L., 196; and in that Act its application seems to be general to all appeals from the district to the circuit court.

[248]

But whilst this seems to be the law, namely: that the circuit court, after hearing a cause on

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appeal, has power to remand with directions; it may not be advisable to resort to it in ordinary cases where the circuit court can as well dispose of the whole case. As we had already established rules for regulating the proceedings in the district court upon petitions for the benefit of a limited liability, under the Act of 1851, we supposed it would be more convenient to continue the further proceedings in that court. Our attention, however, having been more particularly called to the circumstances of this case, we think it possible that the rights of the parties may [249] be better preserved by continuing the cause in the circuit court. We have deemed it advisable, therefore, to alter our judgment in this respect, and to prepare a general rule, which we shall now announce, extending, to the circuit courts on appeal, the regulations which have heretofore been adopted for the district courts in cases of proceeding to obtain the benefit of a limited liability under the Act. We make this general rule in order to obviate all objections as to the ability of the circuit court to proceed.

A question has been made whether, under our decisions in these cases, proceedings ought to be stayed on the decree of the respondents against the steamship Benefactor, her claimants and stipulators, until the determination of the proceedings on the petition for limited liability. We have no hesitation in saying that they ought to be so stayed. Our opinion was very clearly expressed, in deciding the limited liability case, that the petitioners were not too late to obtain relief, and that proceedings to collect any decrees rendered against them should be stayed. We held that such decrees would have the effect of *res judicata* on the question of the liability of the steamship, and as to the amount of damage sustained by the libelants; and that the amount of the decrees would stand as the basis for determining the *pro rata* share of the libelants in the common fund to be distributed on the termination of the limited liability proceedings. We do not well see how our views could have been misunderstood on this point.

It is not necessary or proper, at this time, to pass upon the question whether the appellants, when called upon to pay the amount of their stipulation into court, will be liable to pay interest thereon or not; nor whether they will be liable to pay the costs of the libelants in addition to the value of the steamship; nor whether the circuit court may or may not require them to pay the value of the said ship into court, or give a new bond, before the termination of the limited liability proceedings. Should the future action of the circuit court on any of these points be brought before us on appeal, it will be time enough then to give them the proper consideration.

The order of the court upon the several applications now submitted will be, that the former [250] *judgment and mandate of this court* in the case arising upon the petition of the appellants, The New York and Wilmington Steamship Company, for the benefit of a limited liability, *be and they are hereby modified* so far as they contain directions to the circuit court to enter a decree reversing the decree of the district court and giving directions for further proceedings; and that instead of said portion of the said judgment and mandate, directions be and they are hereby given to the circuit court to proceed upon the petition of the said New York and Wilmington Steamship Company for such limited liability and hear and determine the same, in conformity with law and the opinion of this court, in the meantime staying proceedings upon any and all decrees or judgments against the steamship Benefactor by reason of the collision referred to in said petition until the proceedings for limited liability be determined, and to answer the determination of the same. *It is further ordered that each party pay their own costs on these motions.*

True copy. Test:
James H. McKenney Clerk, Sup. Court. U. S.

SCHUYLER'S STEAM TOW-BOAT LINE, [710
Claimant of THE STEAMBOAT CONNECTICUT, Her Engine, etc., *Appt.*,
v.
MADISON M. CALEB.

MADISON M. CALEB, *Appt.*,
v.
WILLIAM H. FOOTE AND SAMUEL SCHUYLER, Claimants of THE STEAMBOAT S. A. STEVENS, Her Engine, etc.

CHARLES WILSON AND ARTHUR WILSON, Claimants of THE STEAMSHIP OTHELLO, Her Engines, etc., *Appts.*,
v.
MADISON M. CALEB.

(See S. C., "*The Connecticut*," 13 Otto, 710-714.)

Collision.

Where both vessels are in fault for a collision, the loss should be equally divided between them.

[Nos. 234, 235, 236.]

Argued Mar. 8, 1881. Decided Mar. 30, 1881.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

The case is fully stated by the court.

Mr. **Cornelius Van Santvoord,** for claimants of The Connecticut.

Mr. **Abraham Van Santvoord,** for claimants of The S. A. Stevens.

Messrs. **Beebe, Wilcox & Hobbs,** for claimants of The Othello.

Mr. **Henry T. Wing,** for Caleb.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The question in these appeals is, whether, on the facts found, the decree below was right. The facts in brief are as follows: about five o'clock in the morning of Wednesday, August 18, 1875, the steamer Connecticut, assisted by the tug S. A. Stevens, having in tow by a hawser twenty-five boats, arranged in five tiers of [711 five boats each, passed around the battery from the Hudson River to the East River in New

NOTE.—*Collision; damages where two vessels are at fault for injury to a third.* See *note* to The City of Hartford v. Rideout, 97 U. S., XXIV., 980.

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York harbor, on her way to the piers at or near Coenties slip in East River. The entire length of the Connecticut and her tow was about 1,050 feet. She passed between Diamond Reef and Governor's Island, taking the center of the river and heading towards the Brooklyn shore. She kept this course until she reached a point about fifteen hundred feet above Diamond Reef, and about one hundred feet above the drilling machine on Coenties Reef. She then turned westwardly, across the river, and headed towards the Wall Street Ferry, on the New York shore. Her own engine was stopped when this change of course was made, but that of The Stevens was kept at work. The tide was at the time young flood in the East River, but the last of the ebb in the Hudson River.

About the same time The Othello, an ocean steamer, left her dock at pier 44, East River, a mile and three eighths above Diamond Reef, bound for Hull, England. After getting headed down the river, her pilot discovered The Connecticut well on his port hand, and near Diamond Reef. The two vessels were then on courses which if kept would have carried them past each other port to port three hundred feet apart. The Othello was on the usual and proper course for steamers of her class, going to sea, and running at half speed, or about four knots an hour. She was in charge of a licensed Sandy Hook pilot, who stood on the forward bridge.

When The Connecticut changed her course and headed towards the New York shore, she gave no signal to The Othello, but afterwards, when she was north of Coenties Reef, with her tow tailed its full length crosswise of the channel, and when The Othello was at least one fourth of a mile away, she did give two blasts of her whistle, indicating that she wished The Othello to go to starboard. At this time, owing to the position of the tow, headed across the river as it was, The Othello could not pass in safety to starboard until the tow was got out of the way. Under these circumstances she kept on at half speed after the signal was given, until within an eighth of a mile of the tow. She then reversed her engine, but it was too late to stop her headway before she came in collision [712] with and sunk the boat Sam. Morgan, one of the tow of The Connecticut. Had she given attention to the signal when sounded and stopped her engine, no collision would have occurred.

The tug Stevens was a mere helper, and subject to the orders of The Connecticut. The owners of The Sam. Morgan sued all three of the vessels for the loss, and upon the facts as above stated the circuit court gave judgment dismissing the libel as to The Stevens, but holding both The Connecticut and Othello responsible, and dividing the loss between them. The Connecticut was held in fault for not giving her signal at or before the time she changed her course, and The Othello for not heeding the signal when it was given, or taking the necessary precautions against a collision before. All parties have appealed; the libelants because The Stevens was acquitted, and The Connecticut and The Othello each because they were respectively charged with any portion of the loss.

So far as The Stevens is concerned, she was clearly not to blame. She was the mere servant of The Connecticut, and could exercise no will of her own. She was bound to obey orders from The Connecticut, and no part of the responsibility of the navigation, so far as the approaching vessel was concerned, was on her. It was not her duty to signal the movements of The Connecticut, under whose exclusive control she was. The Connecticut is alone responsible for the consequences of her own faults.

Without doubt The Connecticut had the right to go to her landing place, and for that purpose we see no reason why she might not have taken the courses she did. But she was navigating in a crowded harbor with a cumbersome tow, and, do the best she could, her presence would necessarily be an embarrassment to other vessels passing through the channel in which she was. It was her duty as much to notice the movements of The Othello above, as it was that of The Othello to look out for her below. Safety under such circumstances requires all navigators to be watchful and prompt in taking every precaution against mistakes or oversights. From the way The Connecticut was heading when The Othello ought first to have seen her [713] and for some time afterwards, The Othello had the right to assume the vessels would pass in safety port to port. It was proper, therefore, for her to make her calculations accordingly and keep on at the speed she was going. This The Connecticut should also have understood; and since to put herself and her long tow across the channel would necessarily involve a change of action by The Othello, it was certainly her duty to give prompt and timely notice of her intention to execute such a maneuver. Had she done this, she might have called attention to her movements and placed the obligation of keeping out of the way on The Othello. She did not, and a collision afterwards occurred which could have been avoided. Under such circumstances, the law will charge her with contributing to the loss unless she clearly shows the contrary. It is quite probable that if The Othello had been on the watch and had noticed the change of course when it was begun, the collision might not have happened, but the very object of signals is to call attention to what is wanted and make sure there is no oversight. In navigating crowded harbors, while the attention of lookouts is called to one object of importance, another may pass unobserved. To avoid the consequences of accidents of this kind, a system of signals has been adopted and lawfully promulgated, which navigators are required to use when the circumstances are such as to make them necessary. To omit them is a fault, the consequences of which may fall on the delinquent party. Here, when The Othello first saw The Connecticut, she was apparently expected to pass to port. The circumstances of The Connecticut were such as to make it necessary for her to cross the bow of The Othello while that vessel was coming down the river. She could not get by with her tow before The Othello must come to where she or the tow was, unless something was done to prevent it. Clearly it was wrong to attempt such a movement without giving notice.

That The Othello was in fault is equally clear. There was time after the signal was given and before the collision happened for her to have avoided it if she had acted promptly. If the change in the course of The Connecticut had

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escaped her attention before, it was all the more [714] important that she should be active then. Her pilot ought to have known that she could not pass in safety to starboard until The Connecticut had time to get the tow out of her way. She should therefore have stopped or shaped her course to get ahead of The Connecticut, if that could be done with safety. She did neither until it was too late. Under these circumstances it was not wrong to charge her with one half the loss occasioned by the mutual fault of herself and The Connecticut.

Under all the circumstances we think it was right to divide the loss equally between the two defaulting vessels, and *the decree of the Circuit is, consequently, affirmed; the costs of each appeal to be paid by the respective appellants.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[732] GERMAN NATIONAL BANK OF CHICAGO, *Appt.*,

v.

MARK KIMBALL, Collector of the TOWN OF SOUTH CHICAGO, AND SAMEL H. McCREA, Treasurer, etc.

(See S. C., 13 Otto, 732-735.)

Enjoining collection of tax—insufficient case.

1. No one can enjoin the collection of a tax until he has paid so much of the tax assessed against him as it can be plainly seen he ought to pay; he can contest and delay only the remainder.

2. Where the case made by the complainant is this: that the shares of the bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of stock of the complainant, the case should be dismissed.

[No. 225.]

Argued Feb. 28, and Mar. 1, 1881. Decided Mar. 30, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. D. K. Tenney and **J. M. Flower**, for appellant.

Mr. **Consider H. Willett,** for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This is a bill in chancery, filed by the appellant in the Circuit Court for the Northern District of Illinois, to enjoin the defendant, who was the state tax Collector, from enforcing payment of the taxes assessed against its shareholders on their shares of the bank stock.

The general ground on which this relief is sought is two fold, namely: that the assessment violates the provision of the Act of Congress concering national banks, which forbids the States from taxing these shares at any higher rate than other moneyed capital within the State; and that it also violates the provision of the Constitution of the State of Illinois concerning uniformity of taxation. The bill of complaint was dismissed on demurrer and from that decree this appeal is taken.

The bill is made up of averments which are intended to show that the valuation of the property of other persons in the same town, made by the same assessor, is less in proportion to its actual cash value than that of plaintiff's shares; that the same is true in other parts of the State; that some corporations are favored in this valuation, and that certain classes of property are favored in a general way. But there is no dis- [733] tinct averment that the shares of this Bank are valued higher for the purpose of taxation than other moneyed capital generally, though this is alleged in regard to particular instances. The allegations are pretty full that the assessments are partial, unequal and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires.

But we think there are two fatal objections to the bill.

The first of these is that there is no offer to pay any sum as the tax which the shares of the Bank ought to pay.

We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. That he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity. That the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder. *State R. R. Tax Cases*, 92 U. S., 575 [XXIII., 663].

The bill attempts to evade this rule by alleging that the tax is wholly void and, therefore, none of it ought to be paid, and that by reason of the absence of all uniformity of values, it is impossible for any person to compute or ascertain what the stockholders of the complainant Bank ought to pay on the shares of the Bank. In the case above mentioned this court said, in answer to the first objection: "It is clear that the road-bed within each county is liable to some tax at the same rate that other property is taxed. Why have not complainants paid this tax? It is said they resist the rule by which the value of their road-bed in each county is ascer- [734] tained. But surely they should pay tax by some rule. * * * Should they pay nothing and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should

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NOTE.—*When an injunction to restrain the collection of a tax will be granted*, see, *note* to Dows v. Chicago, 78 U. S., XX., 65.

Taxation of stock or shares in a corporation does not impair the obligation of contracts; taxation of shares in national banks and of other corporations. See *note* to Providence Bk. v. Billings, 29 U. S. (4 Pet.), 514.

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pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them." p. 616 [674].

In the same case the court said: "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves give the right to an injunction in a court of equity," and the authorities there cited support the proposition. The whole extent of the injustice complained of in this bill is the inequality of the actual assessment, and for this it is argued the whole tax of the township is void; and as the bill seeks to bring into view the inequality as regards other counties in the State, it follows that, if the bill be sustained, the entire tax of the State for that year must be declared void, in order that complainant may be relieved of a few thousand dollars and escape taxation for that year entirely.

In the case just referred to, this court said: "Perfect equality and perfect uniformity of taxation, as regards individuals and corporations, on the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded." p. 612 [673].

These principles are sufficient to decide the case, and were declared by this court in a case arising in the same State and under the same constitution and revenue laws with the one now before us.

[735] In the recent case of *People* v. *Weaver*, 100 U. S., 539 [XXV., 705], and *Pelton* v. *Bk.*, 101 U. S., 143 [XXV., 901], and *Cummings* v. *Bk.*, 101 U. S., 153 [XXV., 903], an apparent exception to the universality of the rule is admitted. It is held in these cases that when the inequality of valuation is the result of a statute of the State designed to discriminate injuriously against any class of persons or species of property, a cou t of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject.

So far as anything of the kind is to be inferred, it is that shares of national bank stock, including plaintiff's, were assessed at only 34 per cent of their value, which, by the board of equalization, was raised to 53 per cent; and other property more, and still other less.

The case, then, made by plaintiff is this: that the shares of the Bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of complainant's Bank.

And if any should be paid at all, the sum which may in the end be found justly due, and which, during the four or five years of this litigation, must be paid for the support of the government by some one else, shall remain in complainant's pocket until it is ascertained precisely to the last dollar what each share should have paid.

We think the Circuit Court did not err in dismissing such a bill, and its decree is affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—104 U. S., 80; 105 U. S., 320; 10 Biss., 272.

WILLIAM H. FOLSOM, *Appt.*, [738]
v.
ANN L. DEWEY ET AL.

(See S. C., 13 Otto, 738, 739.)

Case followed.

This case cannot be distinguished in principle from Stringfellow v. Cain, XXV., and that case governs this.

[No. 253.]

Submitted Mar. 14, 1881. Decided Mar. 30, 1881.

APPEAL from the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. **Z. Snow, E. D. Hoge, Arthur Brown** and **W. N. Dusenbury,** for appellant.

Messrs. **Samuel Shellabarger** and **Jeremiah M. Wilson,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case cannot be distinguished in principle from *Stringfellow* v. *Cain*, 99 U. S., 610 [XXV., 421]. The finding is, that the property now claimed by Folsom was sold at public sale on the 11th of March, 1860, to raise money to pay a debt owing by the deceased father of the appellees, who was the original occupant of the premises. The price was $510, which was more than the debt. The overplus was paid the mother of the appellees, who were at the time all minors living with her in a house built by the father on an adjoining part of the lot for a residence. The purchaser took possession immediately after the sale, and when the town site was patented under the town site law, in November, 1871, Folsom, his grantee, had himself been in the actual occupancy of the property for more than ten years, and during that time had made valuable improvements. This, as we think, under the rule in *Stringfellow* v. *Cain*, makes out a case of abandonment on the part of Mrs. Lamareux and her children, and gives Folsom a right to claim title. It is true, the original sale was without the consent of Mrs. Lamareux,

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but it was with her knowledge. She afterwards took a part of the purchase money and suffered Folsom to occupy and improve the property as his own for more than ten years without objection, so far as the findings show. Under these circumstances, neither she nor her children can claim that Folsom was in as a trespasser when the title to the town site was secured from the United States for the "use and benefit of the [739] occupants thereof, according to their respective interests." Folsom was not an intruder on their occupancy, but was himself a lawful occupant.

The evidence satisfies us that the value of the property in dispute is more than $1,000; we, therefore, have jurisdiction.

The judgment against Folsom, who is the only appellant, is reversed and the cause remanded with instructions to enter or cause to be entered a judgment in his favor for the premises claimed by him.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[821] BUFFALO AND JAMESTOWN RAILROAD COMPANY ET AL., *Plffs. in Errr.*,
v.
PATRICK FALCONER ET AL.

BUFFALO AND JAMESTOWN RAILROAD COMPANY ET AL., *Plffs. in Errr.*,
v.
WALTER J. WEEKS ET AL.

(See S. C., 13 Otto, 821-828.)

Commissioners to issue bonds of town—effect of new Constitution.

1. Commissioners appointed under the New York Act of May 10, 1869, as amended, to subscribe for stock of a railroad company and issue the bonds of a town, had no power to make a contract to subscribe for stock, nor a contract to deliver bonds to the railroad company.

2. Where all that was done by a town in New York, through the action of its tax payers and the County Judge, before the new State Constitution went into operation, prohibiting all municipal aid to corporations or individuals, by subscription of stock or otherwise, was to appoint agents for making a subscription to the stock of a railroad and for issuing bonds, on the happening of a certain event; held, that no contract existed at that time for the subscription and issuing the bonds, which the company could enforce.

[Nos. 89, 129.]

Argued Dec. 9, 10, 1880. Decided Mar. 30, 1881.

IN ERROR to the Supreme Court of the State of New York.

The case is fully stated by the court.

Messrs. Bass, Cleveland & Bissell, and **Merrick & Morris**, for plaintiffs in error.

Messrs. **Richard P. Marvin** and **Clarkson N. Potter**, for defendants in error, in support of motion.

Mr. Justice **Bradley** delivered the opinion of the court:

The first of these cases was a petition filed by certain tax payers of the Town of Ellicott, in Chatauqua County, New York, on behalf of themselves and others, against the Buffalo and Jamestown Railroad Company and Weeks, Breed and Jones, commissioners to issue bonds for the town, seeking to restrain the issue and delivery of certain town bonds to the Railroad Company and to prevent a subscription to its capital stock on behalf of the town. In this case a decree was made in favor of the petitioners, awarding a perpetual injunction against the issue of the bonds and the subscription of stock; and this decree was affirmed by the Court of Appeals. The second case was commenced by submitting to the Supreme Court of the State, in a special statutory procedure, an agreed statement of facts in relation to the issue of the bonds and the subscription of the stock which [822] form the subject of the first action, with a prayer on the part of the Railroad Company, as plaintiffs, for an order directing the issue of the bonds and the subscription of the stock, and a prayer of the town commissioners, as defendants, for a decree against such issue and subscription. In this case a decree was made as prayed by the defendants, which was also affirmed by the Court of Appeals. To reverse the decrees in both of these cases, the present writs of error were sued out by the Buffalo and Jamestown Railroad Company, the plaintiffs in error. The jurisdiction of this court to review the decision of the State Court of Appeals is based upon the effect given by said court to the amended Constitution of the State of New York, which went into operation on the first day of January, 1875, whereby, as is alleged by the plaintiffs in error, said Constitution was made to impair the obligation of a contract previously entered into by the Town of Ellicott with the Railroad Company to subscribe to the capital stock of the latter to the amount of $200,000, and to deliver to it the bonds of the town in payment of said subscription. The clause of the amended Constitution to which such effect is alleged to have been given is that which declares as follows: "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes." The Court of Appeals held that there was no such contract in existence, as alleged by the plaintiffs in error, when the amended Constitution went into effect, and, therefore, that the prohibition contained in the clause just quoted was conclusive against the right and power of the Town of Ellicott to issue the bonds and subscribe for the stock which forms the subject of this litigation. The question for us to consider, therefore, is whether any such contract, valid and binding on the town, did exist.

Briefly stated, the facts of the case were as follows: in 1872, when the proceedings took place out of which the present controversy arose, the laws of New York in relation to giving munic- [823] ipal aid to railroad companies like that of the plaintiffs in error were contained in three Acts of the Legislature passed respectively, one on the 10th of May, 1869, by way of amendment to the general railroad law; an amendment to this amendment, passed April 28, 1870; and a further amendment, passed May 12, 1871. By

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the first of these statutes it was provided that, whenever a majority, in number and amount of taxable property, of the tax payers of any municipal corporation should make application to the County Judge, by petition expressing a desire that the corporation should create and issue bonds to any amount named in the petition, not exceeding one twentieth of the taxable property in the corporate limits, and should invest the same or the proceeds thereof in the stock or bonds of any designated railroad company in the State, the said County Judge should give public notice of a hearing to be had before him for the purpose of ascertaining whether the petition was, in fact, signed by the requisite majority of tax payers; and having determined this to be the fact, he should then appoint from the freeholders, residents and tax payers of the corporation, three commissioners to carry out the requests of the petitioners. The duties imposed upon these commissioners were limited and specific and were: to prepare and execute the proposed bonds in the name and under the seal of the corporation, and in its name to subscribe to the stock of the Railroad Company designated in the petition, and to pay for the same by exchanging the bonds therefor or the proceeds thereof. They were also authorized, after subscribing the said stock, to represent the town as a stockholder at all meetings of the Railroad Company. The Act of 1870 also authorized the commissioners and the Railroad Company to enter into an agreement for limiting and defining the times when and proportions in which the bonds should be delivered, and the places where and purposes for which they should be applied. By the Act of 1871 the Act of 1869 was modified by inserting the following clause in the 1st section, namely: "The petition authorized by this section (that is, the petition of the tax payers presented to the County Judge) may be absolute or conditional; and if the same be conditioned the acceptance of a subscription founded on such petition shall bind the Railroad Company accepting the same to the observance [824] of the condition or conditions specified in such petition."

In the present case, the petition of the tax payers of the Town of Ellicott was dated March 25, 1872, and expressed their desire in the following terms, to wit: "Your petitioners desire that the said Town of Ellicott shall create and issue its bonds to the amount of $200,000, and invest the same or the proceeds thereof in the stock of the Buffalo and Jamestown Railroad Company, upon the conditions that the line of the railroad of said Company to be constructed from the City of Buffalo to the line of the State of Pennsylvania, in said county, shall be located and constructed through the Village of Jamestown in said Town of Ellicott, before said bonds shall be delivered to said Company or sold." The petition contained the usual averment that the petitioners were a majority of the tax payers, etc., and after the proper proceedings had, the County Judge appointed the commissioners before named to carry out the purposes of the petition.

On the 14th day of June, 1872, the commissioners entered into an agreement with the Railroad Company, the plaintiffs in error, by which they agreed that when the said Company should have located and constructed through the Village of Jamestown, in said Town of Ellicott, their proposed railroad running from Buffalo to the state line of Pennsylvania, they, the said commissioners, or their successors in office, would immediately subscribe, in the name of the town, to the capital stock of the Company to the amount of $200,000, and would pay for it by delivering to the Company the bonds of the town, to be executed by the commissioners or their successors in office, and to bear date of the time of such subscription; and in consideration thereof the Railroad Company agreed that they would receive such subscription and payment, and issue proper certificates for the stock so to be subscribed. The agreement contained a reference to the petition and proceedings under which the commissioners were appointed, and a declaration on their part that they did not undertake or agree to perform the conditions of the contract except as empowered and authorized by said proceedings.

The defendants in error contend that this agreement was *ultra vires* of the commissioners, [825] and wholly without force or effect as against the Town of Ellicott.

On the 26th of August, 1874, the commissioners caused to be prepared and executed bonds of the Town of Ellicott to the amount of $200,000, payable to the Railroad Company or bearer, and delivered them to Robert Newland and A. F. Allen as trustees, taking from them a receipt in which it was declared that Newland and Allen should, upon the completion of the road through Jamestown, and upon the commissioners having subscribed $200,000 to the capital stock of the Railroad Company, and having received the certificates therefor, deliver said bonds to the Railroad Company in payment of such subscription. It is manifest that this deposit of bonds cannot affect the rights of the parties. By the terms of the deposit, they were only to be delivered when the stock was subscribed; and if that cannot be lawfully done, the bonds must be returned to the town to be canceled.

The railroad was not constructed through Jamestown until the 20th of October, 1875. On the first of January, 1875, when the amended Constitution went into effect, nothing had been done except to survey the route and file a map thereof.

The question then is, whether, at that time, under the circumstances above detailed, the Railroad Company had acquired by contract a vested right to have and receive the town's subscription to its stock, and a delivery of the bonds in payment thereof.

We are clearly of opinion that the agreement made by the commissioners with the Railroad Company in June, 1872, was *ultra vires*. Their powers were confined to subscribing for the stock and making and issuing the bonds in payment thereof when and as the petition of the tax payers directed, that is, after the road was completed through Jamestown. By the Act of 1870 they might also stipulate as to the installments in which the bonds should be delivered, and the purposes for which they might be applied. But the power to do this being but an incident of the principal power to make and issue the bonds, and being only intended to enable the commissioners to prescribe the times and manner of their issue and the uses to which

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[826] they should be applied, would not properly arise and could not be effectively exercised, until the principal power itself arose and became exercisable. Whilst, however, the commissioners had the power or, rather, would have the power, at the prescribed time, to subscribe for the stock and to execute and issue the bonds, neither the statutes nor the tax payers' petition, gave them any power to make a contract to subscribe for stock, nor a contract to deliver bonds to the Railroad Company. They were not charged with any such duty; they were not invested with any such power.

The case of the Railroad Company, therefore, must stand upon the effect of the tax payers' petition, and the proceedings had thereon before the County Judge. If, under the operation of existing statutes, these proceedings amounted to a contract between the town and the Railroad Company, no subsequent legislation or constitutional amendment could lawfully impair its obligation. But it is difficult to see how the said petition and proceedings, including the appointment of commissioners, can be construed as amounting to such a contract. All that was done by the town through the action of its tax payers and the County Judge, was to appoint agents for making a subscription and issuing bonds on the happening of a certain event. When that event should happen, it would be the duty of those agents, under the 5th section of the Act of 1869, to execute their commission. The words of the section are: "Such commissioners are further empowered and *directed* to subscribe," etc. But to whom did they owe this duty? Evidently to the town which appointed them; not to the Railroad Company. The latter came under no obligation, and acquired no rights, until the commissioners should subscribe to its stock. Had no conditions been imposed by the petition, the duty of the commissioners to subscribe stock and issue bonds would have arisen immediately after their appointment; but it would have been an obligation owed to their principals alone. The conditions which were in fact imposed required, it is true, something to be done by the Railroad Company before the commissioners could act; but no stipulation was demanded of the Company nor given by it, that this something should be done. The two parties were not brought together. There was no mutuality between them. Each was free to act as it listed. This [827] was the condition of things on the first of January, 1875, when the new Constitution went into operation, prohibiting all municipal aid to corporations or individuals by subscription of stock or otherwise. It seems to us, therefore, that the New York Court of Appeals was right in deciding that no contract existed at that time.

After the amendment took effect, no county, city, town or village could subscribe for railroad stock; and, of course, no agent or attorney of any such corporation could do so. What had not been done before, in this regard, could not be done afterwards, unless some valid contract required it to be done. But, as we have shown, no such contract existed in this case. The action on the part of the town was voluntary up to the time of the constitutional amendment. The Railroad Company may have expected a subscription when their road should be completed; but they had no subscription and had no valid agreement that any would be made. Everything was inchoate and undetermined up to the first of January, 1875; and then all power to subscribe for stock was taken away from the town.

The case of *Moultrie Co.* v. *Bk.*, 92 U.S., 631 [XXIII., 631], is confidently relied on by the plaintiffs in error to sustain their position that a contract did exist. But an examination of that case will show that it was very far from being parallel to the present. There the statute of Illinois authorized the board of supervisors of the County of Moultrie to subscribe to the stock of a particular railroad company by name, to an amount not exceeding $80,000, and to issue bonds therefor when the road should be opened for traffic between certain points. Before this event took place the board ordered that a subscription to the stock of the Company in the sum of $80,000 be made, and that, in payment therefor, bonds should be issued to the Company when the road should be open for traffic. This resolution was acted upon by the railroad company as a subscription, and was entered on its minutes, and the promised bonds were disposed of by contract. This court held that the board of supervisors itself had complete authority to make a present subscription, and that this included the power to agree to subscribe, and that the resolution amounted to a subscription, or, at least to an agreement to [828] subscribe, which being accepted and acted upon by the railroad company as such, created a contract between the county and the company. In the case before us, no act equivalent to the action of the board of supervisors of Moultrie County was ever done by any person or body of persons, having, at the time of such act, a present power to subscribe for stock or to issue bonds of the Town of Ellicott. The tax payers had no authority to make a subscription of stock or to issue bonds, or to make any contract to do so; they could only express their desire that it should be done, and that commissioners should be appointed to do it; and when they did express such desire, it was conditional as before stated. The commissioners, as we have seen, had no power to act, for no power was given them to act, until the railroad was located and completed through Jamestown. It follows that nothing which was done in the present case can be fairly regarded as equivalent to the action of the parties in the case of *Moultrie County*. The circumstances of the two cases were essentially different.

We think that there is no error in the record of either of the cases, and that the decrees in both must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

ROYAL INSURANCE COMPANY OF LIVERPOOL, ENGLAND, *Plff. in Err.*, [25]

v.

WILLIAM B. STINSON.

(See S. C., 13 Otto, 25-30.)

Insurance of mechanics' lien—insurable interest—limit of.

1. One having a mechanics' lien on a building, which he has procured to be insured, does not lose

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his insurance by discontinuing the prosecution of the lien after the building has been burned.

2. The owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not.

3. One who has a mechanics' lien on the property by virtue of a contract with such owner, has an equal insurable interest, limited only by the value of the property and the amount of his claim.

[No. 123.]

Argued Dec. 7, 8, 1880. Decided Apr. 4, 1881.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is fully stated by the court.

Messrs. **Charles Theo. Russell, Charles Theo. Russell, Jr.,** and *Thomas H. Russell,* for plaintiff in error:

The insured is bound by the description of interest in the policy, as "The extent of his interest must always influence the underwriters in taking or rejecting the risk, and in estimating the premium. * * * Underwriters do not rely so much upon the principles as on the interest of the insured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss."

Ins. Co. v. *Lawrence,* 2 Pet., 25, 49; *S. C.,* 10 Pet., 507; *Carpenter* v. *Ins. Co.,* 16 Pet., 495.

The interest stated is as contractor and builder, that is, a mechanics' lien. It does not give any right of possession of the property as against the owner.

Phillips, Mechanics' Liens, sec. 9.

This lien was then simply a charge on the owner's interest in the land and building at the time the work commenced. "Mechanics are not entitled to a lien on any greater interest in property than their employer has. They are bound to know at their peril, the extent of interest in the land of those they credit."

Phillips, Mechanics' Liens, sec. 186; *Belding* v. *Cushing,* 1 Gray, 576; *Bishop* v. *Boyle,* 9 Ind., 169.

Such lien cannot attach to or interfere with the estate or interest of a pre-existing mortgagee, without his consent.

Phillips, Mechanics' Liens, sec. 67; *Dewey* v. *Fifield,* 2 Wis., 73; *Dean* v. *Wheeler,* 2 Wis., 224; *Schmidt* v. *Gilson,* 14 Wis., 514; *Cox* v. *Broderick,* 4 E. D. Smith (N. Y.), 721.

"The 33d section provides a remedy in cases where the person for whom the work is done has a less estate than a fee-simple, or where the property is subject to a mortgage or other incumbrance, which is preferred to the lien, and in which the creditor cannot sell the whole property, but only the interest to which his lien has attached."

Morton, *J., Dunklee* v. *Crane,* 108 Mass., 470, 472.

"As the estate was mortgaged before the statement (of lien) was recorded, the lien only attaches to the equity of redemption, which Dorman (the contractor with the petitioner) held."

Hoar, *J. Mulrey* v. *Barrow,* 11 Allen, 152, 154; *Francis* v. *Sayles,* 101 Mass., 435; *Hayes* v. *Fessenden,* 106 Mass., 231.

I. The insurable interest of the defendant in error was then limited by the statute to the equity of redemption owned by Flint at the time when the contract for building was made.

II. The defendant in error is restricted, by the terms of the policy of insurance to the loss by fire, to this limited interest in the premises, and cannot recover for the loss to the premises generally.

The term "property" as used in the clause of a policy defining what is insured, means the interest of the insured.

Locke v. *Ins. Co.,* 13 Mass., 61; *Holbrook* v. *Brown,* 2 Mass., 280; *Tyler* v. *Ins. Co.,* 12 Wend., 507; *Whiton* v. *Ins. Co.,* 2 Met., 1, *R. R. Co.* v. *Plymouth,* 14 Gray, 155; 2 Abb. Law. Dic. "Property," p. 337.

So here, the defendant in error acquired another particular interest in the premises; *e. g.,* as assignee of the mortgage, he could have insured it without being subjected, in case of loss, to a proportionate reduction of the amount to be recovered, under the provision in this policy relating to other insurance "extending to the property hereby insured."

Ins. Co. v. *Tyler,* 16 Wend., 385; *Ins. Co.* v. *Allen,* 48 N. Y., 389.

The court erred in refusing to make the distinction between an insurance like this of a special limited interest in the premises, with an agreement to pay only the loss to that interest, and an insurance of the premises generally by one having an insurable interest, with an agreement to pay whatever loss should happen to the premises.

The two contracts are different.

Irving v. *Richardson,* 2 B. & Ad., 193; *Collingridge* v. *Royal Ex. Ass. Co.,* 3 Q. B. D., 173; *Foster* v. *Ins. Co.,* 2 Gray, 216.

The court below ruled that there was no distinction between the two cases. Yet, such distinction is recognized by this court.

Carpenter v. *Ins. Co.* (*supra*).

This contract of insurance shows an intention to insure a special limited interest, and to pay for loss to that interest.

The court below, by its rulings, failed so to construe the contract and enforce this intention of the parties. It, in effect, instructed the jury to consider, not the value of the interest insured, but the value of the whole property, regardless of incumbrances.

Even if the plaintiff in error did not by express contract limit its liability to the loss to the particular lien interest of the defendant in error, still the latter, by describing and insuring specifically such interest, is confined in his recovery to the actual loss to such interest.

Where a particular interest is insured *eo nomine,* the insured in case of loss can recover only the loss of that interest.

Graves v. *Ins. Co.,* 2 Cranch, 419; *Parks* v. *Assurance Co.,* 5 Pick., 34; *Getchell* v. *Ins. Co.,* 14 Allen, 325; *Ins. Co.* v. *Hall,* 12 Mich., 202.

The amount of recovery will depend upon the interest intended to be insured, provided it be covered by the policy.

Ins. Co. v. *Thompson,* 95 U. S., 547 [XXIV., 487]; *Ins. Co.* v. *Baltimore Warehouse Co.,* 93 U. S., 527 [XXIII., 868]; *Ins. Co.* v. *Chase,* 5 Wall., 509 [72 U. S., XVIII., 524]; *Steele* v. *Ins. Co.,* 17 Pa., 290; *Irving* v. *Richardson* (*supra*); *Ins. Co.* v. *Updegraff,* 21 Pa., 513.

Flanders, speaking of insurance by mortgagees, says: "It is not the specific property that is insured, but its capacity to pay the mortgage debt."

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Insurance, p. 360; Wood, Fire Insurance, sec. 258; *Smith* v. *Ins. Co.*, 17 Pa., 253; *Harris* v. *Ins. Co.*, 9 R. I., 207.

"To indemnify the mortgagee for all loss to the property, means to the amount of his interest."

May, Insurance, sec. 424; *Delaware Ins. Co* v. *Quaker City Ins. Co.*, 3 Grant (Pa. Cas.), 71; *Com. Ins. Co.* v. *Mut. Ins. Co.*, 35 Pa. St., 475.

So it is settled that, under a policy upon a vessel, issued to the owner, the amount of bottomry upon her is to be deducted in estimating the loss payable on the policy.

Watson v. *Ins. Co.*, 3 Wash. (C. C.), 1; *Williams* v. *Smith*, 2 Cai. Cas., 1-253; *Read* v. *Ins. Co.*, 3 Sandf., 54; *Glover* v. *Black*, 3 Burr., 1394.

Whatever may be the particular description of the property insured, and of the liability undertaken, the fundamental principle governing a contract of insurance as a contract of indemnity, forbids a recovery by the insured of more than the amount of the actual loss sustained.

It should be observed that the defendant in error does not claim to recover as trustee or agent for others. The only interest he claims to have insured was his own, as "contractor and builder."

This fact distinguishes the case from those where holders of special interests in property are allowed to insure the whole property and recover its whole value to be held for those whose interests were intended to be covered.

Ins. Co. v. *Baltimore Warehouse Co.* (*supra*); *Ins. Co.* v. *Chase* (*supra*); *Ins. Co.* v. *Thompson* (*supra*); *Waters* v. *Ins. Co.*, 5 El. & Bl., 870; *R. Co.* v. *Glyn*, 1 El. & El., 652; *Ins. Co.* v. *Updegraff* (*supra*); *Shaw* v. *Ins. Co.*, 49 Mo., 578; *Bartlet* v. *Walter*, 13 Mass., 267.

And from cases of insurance by mortgagors of whole estate:

Carpenter v. *Ins. Co.* (*supra*); *Gordon* v. *Ins. Co.*, 2 Pick., 249; *Strong* v. *Ins. Co.*, 10 Pick., 40; *Waring* v. *Loder*, 53 N. Y., 581

"The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken."

Shaw, *Ch. J.*, *Wilson* v. *Hill*, 3 Met., 66.

The same principle is recognized by this court, *Ins. Co.* v. *Thompson* (*supra*), and was early recognized by Lord Mansfield.

Mr. **Robert D. Smith,** for defendant in error:

This right of the mechanic is a favored equitable lien.

Foster v. *Stone*, 20 Pick., 543; *In re Coulter*, 5 Bk. Reg., 65.

It amounts to a *jus in re*, like a mortgage. *Dunklee* v. *Crane*, 103 Mass., 472.

This lien is created by the statute and dates from the time when the contract to furnish labor and materials is made.

Hulsman v. *Whitman*, 109 Mass., 411; *Gale* v. *Blaikie*, 126 Mass., 274.

The provisions relating to the filing of a statement in the town clerk's office and the filing and prosecution of a petition to enforce the lien are all in the nature of conditions subsequent merely.

In re Coulter, 5 Bk. Reg., 64.

But the lien arises upon the making of the contract and the furnishing of labor and material, and is only dissolved by a failure to comply with certain conditions. Consequently, if the insurance should be made and the loss happen before the work was absolutely finished and before the time for filing the statement of claim of lien had arrived, the interest of the lienor would be sufficient.

Ins. Co. v. *Coates*, 14 Md., 285.

The interest of such a lienor is insurable. "Every lien holder may insure to the extent of his own interest in that to which such interest relates."

Hooper v. *Robinson*, 98 U.S., 538 (XXV., 221); May, Ins., sec. 93, 88; *Ins. Co.* v. *Coates* (*supra*); *Longhurst* v. *Ins. Co.*, 19 Ia., 364; *Carter* v. *Ins. Co.*, 12 Ia., 287; *Stout* v. *Ins. Co.*, 12 Ia., 371; see, *Brooks* v. *R. Co.*, 101 U. S., 443 (XXV., 1057), on liens in Iowa; *Ins. Co.* v. *Baring*, 20 Wall., 159 (87 U. S., XXII., 250), as to lien on vessel; *Bk.* v. *Bicknell*, 1 Cliff., 85, as to lien of factor; *Ins. Co.* v. *Hall*, 15 B. Mon., 411.

The contract in this case between the assured and underwriters "Is not (to use the language of Shaw, *Ch. J.*) strictly speaking an insurance of the property itself; nor is it a contract to insure the debt due the lienor; but it is a personal contract with a person having a proprietary interest in property, that the property shall sustain no loss by fire within the time expressed in the policy."

It is a fair contract in which "The premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent."

King v. *Ins. Co.*, 7 Cush., 4, 9, 10.

It is a contract against loss of the thing to the person with whom it is made.

Lucena v. *Crauford*, 2 Bos. & P. (N. R.), 269; *Wilson* v. *Hill*, 3 Met., 68.

Mere wager policies are void, but it is only necessary that a person insured should have an interest in the continued existence of the thing, to enable him to recover its value to the extent of his interest.

Fox v. *Ins. Co.*, 52 Me., 333; 3 Kent, Com. (star), 276; see, *Bone Co.* v. *Ins. Co.*, 64 Me., 470; also, 1 Arn. Ins., 229; Phil. Ins., sec. 174; Fland. Ins., 377; *Wilson* v. *Jones*, L. R. 2 Ex., 150; *Barclay* v. *Cousins*, 2 East, 544; *Lucena* v. *Crauford*, 2 Bos. & P. (N.R.), 301, showing that if the event happened, the party will gain an advantage; if it is frustrated, he will suffer a loss; *Ins. Co.* v. *Chase*, 5 Wall., 513 (72 U. S., XVIII., 526); see cases cited in that opinion, and *Ins. Co.* v. *Thompson*, 95 U. S., 547 (XXIV., 487); *Ins. Co.* v. *Hamilton*, 14 Wall., 507 (81 U. S., XX., 780); *Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S., 527 (XXIII., 868).

The difference between an insurance upon the property, in which he had an interest, and upon Stinson's interest in the property, is more nice than wise, especially when we consider that he can only recover in case of loss the amount of his insurable interest not exceeding the value of the property.

Ins. Co. v. *Jackson*, 16 B. Mon., 250.

"It is not the name of the right which gives or refuses an insurable interest; it is the character of the right. A specific lien gives an insurable interest because a loss of the particular property is at once seen to affect disastrously the specific lienor."

Rohrbach v. *Ins. Co.*, 62 N. Y., 56; see, cases generally cited in this brief, and *Robert* v. *Ins. Co.*, 17 Wend., 631; *Godin* v. *London Ass. Co.*, 1 Burr., 489.

Stinson's interest in the Webster House, as

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used in this policy, means his insurable interest; and if he had insured "the property," he could in case of loss, have recovered the full value thereof (not exceeding the $5,000), he will not be prevented from doing so because he mentioned his interest in the property.

Gordon v. *Ins. Co.*, 2 Pick., 249; *Ins Co.* v. *Allen*, 43 N.Y., 395; *Wiggin* v. *Ins. Co.*, 7 Pick., 271; *Holbrook* v. *Brown*, 2 Mass., 280.

[26] *Mr. Justice* **Bradley** delivered the opinion of the court:

This was an action on a policy of insurance against loss or damage by fire. Stinson, the plaintiff below, had a contract to build a hotel to be called the Webster House, at Marshfield, Plymouth County, Massachusetts, for the sum of $25,000, and had nearly completed it; but, failing to get his payments from the owner, he stopped work and took the necessary steps for securing a mechanics' lien on the building. For this purpose he filed the required statement with the town clerk, and commenced an action to enforce his lien within the period prescribed by law. Whilst this action was pending, in July, 1875, he procured the policy in question from the plaintiffs in error, the defendants below, insuring him for three months against loss or damage by fire to the amount of $5,000 on the building; the policy stating his interest to be that of contractor and builder. The loss occurred during the continuance of the policy, and due notice was given. After the fire, the plaintiff did not further prosecute his action to enforce the lien but commenced the present action for the amount of his insurance. When the building contract was entered into and until the loss occurred, the property on which the building was erected was subject to a mortgage for a debt of $17,000, being the purchase money which the owner had agreed to pay to the former owner; and which is conceded to have been a lien on the whole property prior to that of the plaintiff. Two defenses were made by the Insurance Company to the action: first, the failure of the plaintiff to prosecute his suit for enforcing his lien; second, want of insurable interest, from the alleged fact that the property, at the time of the loss, was not worth more than the amount of the prior mortgage. The court overruled these defenses, and charged the jury substantially as follows, namely: that if the plaintiff had a valid builders' lien when the policy was effected, which could have been enforced by the decree of the appropriate court against the equity of redemption of the property, and if it was a valid and subsisting lien at the time of the loss, it was immaterial whether he did or did not subsequently perform those acts, the non-performance of which as conditions subsequent might have dissolved the lien.

The court further instructed the jury in substance that if the plaintiff had such builders' [27] lien when the policy was effected, which could have been enforced by the decree of the appropriate court, and by virtue of which he could have recovered the equity of redemption on that property, that then he was entitled to recover, without regard to the question what his equity of redemption might or might not have realized at an auction sale; that, if a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurs, both parties having full knowledge of the state of the property and the title, when the contract is entered into, that such insurance would cover that second security, although by the subsequent course of events the older and prior security might have swept away the value of the second; and that if the jury found in this case that this plaintiff had a valid claim for a given amount subsisting at the time of the loss, and which he had done everything that was required of him to enforce, up to the time of the loss, and that it was such a claim, for instance, as he could have recovered a judgment for, for $5,000 or $6,000 or $8,000, and a judgment against that equity of redemption on that property, that that was, for the purposes of this trial, an insurable interest and an interest which he had on that property, whether by any course of events that property might have been by subsequent events more or less affected, and, for the purposes of this trial, the court instructed the jury to so consider it.

To this charge and to the refusal to give instructions to the contrary, the defendants took a bill of exceptions.

We think that the instructions were correct. As to the first point, based on the abandonment by the plaintiff, after the destruction of the building, of the proceedings to enforce his lien: it is apparent from the evidence adduced by the defendants themselves, that it could not have injured them. But aside from this consideration, if the plaintiff had an insurable interest at the time of issuing the policy and at the time of the loss, equal to the amount insured, he had a complete and absolute cause of action against the defendants, and it was no concern of theirs whether he farther prosecuted his lien or [28] not, unless they desired to be subrogated to his rights and gave him notice to that effect. Whether if they had done this, and had offered to indemnify him against all costs and expenses, a refusal on his part to continue the proceedings would have been a defense to this action, it is unnecessary to inquire. No such course was taken by the defendants. We may remark, however, that where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of such sureties. They are insurers of the particular property only, and so long as that property is liable for the debt, so long its destruction by fire would be a loss to the creditor within the terms of the policy. A surety of the debt might complain if the creditor should surrender to the debtor collateral securities; but an insurer of property for the benefit of the mortgagee would have no just ground of complaint. True, after a loss has occurred and the insurance has been paid, sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor, and to any collateral securities which the creditor may then hold and which are primarily liable for the debt before the insurers. But even then we do not think that the creditor is bound to take any active steps to realize the fruits of a collateral or to keep it from expiring, unless the insurance be first paid and notice be given to him of a desire

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on the part of the insurers to be subrogated to his rights, with a tender of indemnity against expenses. We are aware that views somewhat differing from these have been held by respectable authority; but we think without any sound reason. See, May, Ins., sec. 457; *Ins. Co.* v. *Woodruff*, 2 Dutch., 541. To impose such restrictions and obligations upon the creditor would be to add to the contract of insurance conditions never contemplated by the parties, making of it a mere shadow of security, and increasing the avenues of escape from obligation to pay, already too numerous and oppressive. When a building is insured in the interest of a mortgagee, the Insurance Company does not inquire what other collaterals he holds, and never reduces its premium on any such consideration.

As to the other question, relating to the insurable interest of the plaintiff, we think that the charge given was equally free from exception. [29] There is no doubt that the owner of the property had an insurable interest, to the extent of the value of the building, notwithstanding the existence of a mortgage on the property of sufficient amount to absorb it. Leading authorities on the point may be found cited in May, Ins., secs. 81, 82. The remarks of *Chief Justice* Marshall in delivering the opinion of the court in *Ins. Co.* v. *Lawrence*, 2 Pet., 46, are apposite and illustrative. The insured in that case, though in possession, had only a contract for a purchase of the property subject to a condition which had not been complied with, but of which the vendor had taken no advantage at the time of effecting the insurance, or at the time of the loss. The *Chief Justice* says: "That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss."

The principle asserted in these remarks, as well as the reason of the thing, leads to the conclusion, that the owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not. His interest arises from his ownership, carrying with it the incidental right of redeeming the property from the incumbrances on it. If he is also personally liable for such incumbrances, it only makes his interest more direct and exacting.

Such being the insurable interest of the owner of the equity of redemption, it follows that one [30] who has a mechanics' lien on the property by virtue of a contract with such owner, has an equal insurable interest, limited only by the value of the property and the amount of his claim. In the present case, it is admitted that the value of the building insured exceeded the amount of the plaintiff's claim and that the latter was equal to the amount insured. The insurable interest of the lien holder arises from the nature of the lien, which is a *jus ad rem*. All the owner's rights in the property are potentially his. They are under hypothecation to him for his security, and he can reduce them to possession if the debt be not paid. He is, therefore, directly interested in the property to the extent of his demand, whatever other security he may hold; and is entitled to insure to that extent; and, if a loss occurs, to recover the full amount of his insurance, or so much thereof as may be necessary to satisfy his debt.

We think that there is no error in the record, and the judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Ct., U. S.

LAURA ELLEN JONES, Widow and Testamentary Exrx. of SIDNEY A. STOCKDALE, Late Collector of INTERNAL REVENUE, *Plff. in Err.*, [87]

v.

WATSON VAN BENTHUYSEN.

(See S. C., 13 Otto, 87-90.)

Tobacco tax.

Where sales were made of tobacco, while situated in a bonded warehouse, the special tax of two per cent required to be paid upon the amount of sales, by dealers in tobacco, cannot properly be collected upon the amount of stamps which by law is required to be affixed upon the tobacco before it is released from the bonded warehouse, unless the stamps were affixed at the time of the sale, so that their value necessarily constituted part of the price for which the tobacco was sold.

[No. 254.]

Argued Jan. 26, 1881. Decided Apr. 4, 1881.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court:

Mr. **Edwin B. Smith,** *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. **John D. Rouse** and **William Grant,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The plaintiff in error is widow and executrix of S. A. Stockdale, who, in his lifetime, was Collector of Internal Revenue at New Orleans, and was sued before his death by defendant in error to recover a tax illegally exacted of him by Stockdale. The case was tried before a jury and a verdict and judgment rendered for the plaintiff below, to which this writ is prosecuted by the executrix of Stockdale, who died pending the proceeding.

The facts of the case, as presented to the jury, are embodied in a short bill of exceptions, from which it appears that the plaintiff was a commission merchant, whose business was the sale of manufactured tobacco for others; that he stood charged on the books of the assessor of that district with sales of tobacco amounting to $1,256,000, on which was assessed a tax of two

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per cent, which he paid to the collector under protest.

The ground of this protest is that the sales so made by him, as shown by the bill of exceptions, "Were made while the tobacco was in bond, and was situated in the bonded warehouse; that said tax was assessed and collected upon the value of the tobacco and upon the amount of stamps which by law was required to be affixed upon the same before it was released from the bonded warehouse; that the value of the tobacco so sold was $787,855.67, and the amount of stamps placed upon said tobacco was $468,144.33; and that plaintiff, as a commission merchant, charged his commissions as against his principals, both [88] upon the value of the tobacco in bond and upon the amount invested in said stamps; that the special tax was assessed and collected upon both the value of the tobacco and the amount of the stamps."

The court refused to instruct the jury that the tax on sales by plaintiff was properly assessed on the gross amount of the sales made by defendant, namely: $1,256,000, but did charge the jury that the special tax of two per cent upon the amount of sales of dealers in tobacco could not properly be collected upon the stamps which were required to be affixed upon the tobacco in bond, and that to the extent of the tax upon the stamps, which plaintiff had paid, he was entitled to recover.

The statute under which these taxes were assessed enacts that "Dealers in tobacco, whose annual sales shall exceed $100, and do not exceed $1,000, shall each pay $5, and when their annual sales exceed $1,000, shall pay in addition $2 for each $1,000 in excess of $1,000. Every person whose business it is to sell, or offer for sale, manufactured tobacco, snuff or cigars shall be regarded as a dealer in tobacco." 15 Stat. at L., 125, 152.

Undoubtedly this statute only intended to impose a tax upon the sales of tobacco, and if the dealer was also the owner of stamps to be used in paying the duties on tobacco, he could sell them separately in any quantity, without being liable to a tax for such sales. When unattached to the tobacco, they are not tobacco and do not enter into the value of the tobacco which has no such stamp upon it. These stamps can be bought and sold at their face value as an independent commodity, to be used when and wherever the purchasers choose to do so, and for such sales no tax is imposed upon the seller or the buyer.

On the other hand, we are of opinion that when they are once attached to the tobacco and canceled, and can never be lawfully used again, they cease to have any separate and independent value, and that which they had previously has become merged into the tobacco. All sales [89] of the tobacco after that are made upon the basis of the increased value it has acquired by the payment of the stamp duty, and can never be estimated apart from this.

It would seem to follow from this that if the stamps for which the plaintiff was charged by the collector, were not affixed to the tobacco at the time he made the sale, no tax should be charged to him for that value. On the other hand, if the stamps were affixed at the time of the sale, they then entered into the value of the tobacco purchased, and the broker who made the sale should be taxed on the price of the tobacco as it was sold.

In the case before us it is stated that the aggregate sum of $1,256,000 of sales on which plaintiff paid the tax, was made up of a vast number of separate sales, during a period running from April, 1869, to January, 1872, of which he made monthly reports to the assessor. It is obvious that the owner of the tobacco in a bonded warehouse might have sold it without any stamps on it, as the law did not require the stamps to be affixed until it was about to be removed. And we see no reason why a single lot of tobacco might not be sold several times before it came to a purchaser who wished to take it out of the warehouse, when for the first time the stamps would be attached. For such sales as this, no tax could be rightfully assessed for the value of the stamps. After the stamps were attached, their value necessarily constituted part of the price for which the tobacco sold, and for this price the dealer should be taxed.

It follows that, in deciding the liability of the plaintiff to taxation on these sales, it is important to know, in the case of each sale, whether the stamps had been affixed to the tobacco at the time of the sale or not.

There is in the bill of exceptions nothing which enables us to ascertain this fact, nor from which the jury could ascertain it. The language of the bill of exceptions is that the sales of tobacco for which the disputed tax was collected "were [90] made when the tobacco was in bond, and was situated in the bonded warehouse," but not a word to show whether the stamps had then been affixed to the tobacco or not.

Under these circumstances we do not think the court was authorized to charge that, "If the jury found as a fact that such tax had been levied and collected from plaintiff, not only upon the proceeds of tobacco sold in bond, but upon the amount of stamps required to be affixed upon such tobacco before it could be delivered from the bonded warehouse," that to the extent of that sum plaintiff was entitled to recover.

The right to recover did not depend upon the amount of stamps required to enable the tobacco to be taken out of the warehouse, or that might have been affixed long after the sale, but upon whether said stamps were affixed to the tobacco at the time of the sale, and, therefore, entered into the purchase price.

For this error *the judgment of the Circuit Court is reversed, with directions to set aside the verdict and grant a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MELISSA A. BARBOUR, Guardian of MAGGIE BARBOUR, AND MAY BARBOUR ET AL., [293]
Appts.,

v.

STEPHEN B. PRIEST, Assignee of HUBBARD COLBY, a Bankrupt.

(See S. C., 13 Otto, 293-297.)

Conveyance in fraud of Bankrupt Act.

It is necessary for the assignee of the bankrupt, in attacking a conveyance made by the bankrupt

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within four months before proceedings in bankruptcy, to prove the existence of reasonable cause of belief of the debtor's insolvency, in the mind of the preferred party.

[No. 250.]

Submitted Mar. 14, 1881. Decided Apr. 4, 1881.

APPEAL from the Circuit Court of the United States for the District of Ohio.

The case is stated by the court.

Mr. A. K. Dunn, for appellant.

It is said by Lowell, *J.*, "I will only say that by our law a conveyance may be an act of bankruptcy in the grantors, although no fraudulent intent is known to, or participated in, by the grantee. * * * It follows that an adjudication of bankruptcy does not *per se* affect the title of the purchaser, * * * and the statute expressly says, that if any person is adjudged a bankrupt for any conveyance, etc., the assignee may recover the property, *provided* the person receiving the payments or conveyance had reasonable cause to believe a fraud was intended, etc."

In re Williams & Williams, 3 Bk. Reg., 74,75.

It is not every transfer, payment or conveyance, made by an insolvent debtor, that is void under the Bankrupt Act as against the party receiving it, even when there is reasonable ground for believing insolvency, but only where there is reasonable ground to believe both insolvency and an intention to prefer. In the case of *Wadsworth* v. *Tyler*, 2 Bk. Reg., 101, Shipman, *J.*, said: "It will be seen at a glance that the 35th section renders the transfer of the property of the insolvent void, only when the party benefited by such transfer, or receiving it, has reason to believe both that the debtor is insolvent, and that a fraud on this Act was intended."

In this section, purchasers who are strangers, and creditors who receive the property of the insolvent in payment or part payment of debts, are placed upon the same footing.

Vide, also, *Shaffer* v. *Fritchery*, 4 Bk. Reg., 179; *Golson* v. *Neihoff*, 5 Bk. Reg., 56; *S. C.*, 2 Biss., 434; *Bartholow* v. *Bean*, 18 Wall., 635 (85 U. S., XXI., 866); *Tiffany* v. *Lucas*, 15 Wall., 410 (82 U. S., XXI., 198); *In re Dibblee*, 2 Bk. Reg., 185.

Messrs. **Nelson N. Leyman** and *W. H. Smith*, for appellee:

The statute cast upon Mrs. Barbour the legal duty of inquiry; unless it is shown that she did pursue all reasonable means to ascertain Colby's financial condition, or at least his reputed condition at the time, she stands charged with knowledge of his insolvency and the fraudulent purposes and effect of the preferences.

Walbrun v. *Babbitt*, 16 Wall., 577 (83 U. S., XXI., 489).

Hubbard Colby had been her only agent for the transaction of her business as guardian. In thus confiding her business to him and subsequently ratifying his acts for her benefit, she made him her agent, and his knowledge of his own condition and intentions became her knowledge. Is she not then bound by the knowledge of Colby, at the time he acted in her behalf in placing the mortgage upon record? Can she avail herself of the benefits and fruits of his acts without being charged with his knowledge and surroundings, as her agent?

Le Neve v. *Le Neve*, 3 Atk., 646; *Toulmin* v. *Steere*, 3 Mer., 210; *Fuller* v. *Benett*, 2 Hare., 394; *Dryden* v. *Frost*, 3 M. & C., 670; *Roddy* v. *Williams*, 3 Jones & La. T., 16; *Frail* v. *Ellis*, 16 Beav., 350; *Tweedale* v. *Tweedale*, 23 Beav., 341; *Alterbury* v. *Wallis*, 8 D. M. & G., 454; *Ogilvie* v. *Jeaffreson*, 2 Giff., 353; *Spaight* v. *Cowne*, 1 H. & M., 359; *Bourset* v. *Savage*, L. R., 2 Eq., 134.

The same rule has been applied where the vendor himself acted as agent.

Sheldon v. *Cox*, Amb., 624; *Dryden* v. *Frost*, (*supra*); *Majoribanks* v. *Hovenden*, Dru., 11; *Robinson* v. *Briggs*, 1 Sm. & G., 188; *Re Rorke's Estate*, 3 Ir. Ch., 371: *Jenning* v. *Moore*, 2 Vern., 609.

Mr. Justice **Miller** delivered the opinion of the court:

The appellee brought his bill in chancery in the District Court for the Northern District of Ohio, as assignee in bankruptcy of Hubbard Colby, to set aside and avoid two mortgages made to appellant a short time before proceedings were commenced against Colby as a bankrupt. The district court rendered a decree against the assignee, which was reversed on appeal to the Circuit Court, the latter holding the mortgages void under the bankrupt law. From that decree this appeal is taken.

Mrs. Barbour was the widow of Justus S. Barbour, and guardian of his minor children, and Colby, the bankrupt, was administrator of said Barbour's estate. He was the brother-in-law of Mrs. Barbour, whose husband had been dead many years, and Colby, after administering the estate, had retained in his hands about [294] $24,000, which he had never paid over to her as he should have done.

Colby was a man of reputed wealth and the owner of much valuable real estate, and it is obvious from the testimony that Mrs. Barbour reposed unlimited confidence in him, and relied on him for the general management of the estate. On the 11th day of June, 1873, Mrs. Barbour received a notice from the Probate Judge to make a settlement, showing the condition of her accounts as guardian, and to file a new bond. She filed the new bond but did not make the settlement. On September 20, of the same year, she received another notice requesting her to file a statement of her account the next day. She swears in her testimony that she handed both these notices to Mr. Colby and requested him to attend to the affair, and that she relied on him entirely in the matter. On the first day of October, Colby made two mortgages on distinct parcels of real estate, for the purpose of securing his indebtedness to Melissa A. Barbour in her right as widow, and as guardian of the minor children of her husband, in the sum of $22,722.20, then in his hands as administrator of the estate of Justus Barbour.

Colby was adjudicated a bankrupt on a petition filed November 3, 1873.

The testimony on which the decree was rendered is very voluminous, and need not be critically examined here. We think three propositions of fact are so clearly established that there can be little doubt about them. They are:

1. That when Colby made the mortgages to Mrs. Barbour he was insolvent, and knew he was in that condition.

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2. That he intended by those mortgages to give Mrs. Barbour a preference over his other creditors, by securing the debt due her and her children from him, as administrator of Barbour's estate.

3. That Mrs. Barbour did not know nor have reasonable cause to believe that Colby was insolvent when the mortgages were made and filed for record.

It will be perceived that the conveyances which are here in question were made, and the proceedings in bankruptcy were commenced against Colby, before the date at which the Revised Statutes became the law, and before the Act of 1874, amendatory of the Bankrupt Law, was passed. The validity of these mortgages, then, so far as they are affected by the bankrupt laws of the United States, is to be determined by section 35 of the original Act of 1867. So much of that section as relates to the question before us reads as follows: "Sec. 35. *And be it further enacted*, That if any person, being insolvent or in contemplation of insolvency, within four months before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him or who is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge or assignment, transfer or conveyance, of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe that such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this Act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

[295]

The act of making these mortgages by Colby, though he knew that he was insolvent, and knew that he was preferring Mrs. Barbour as a creditor at the expense of others, is not forbidden by the common law, and is not a violation of the statute laws of most of the States of the Union. Nor is it an act forbidden by any general rule of morals or of abstract justice. It was in fact a meritorious act, aside from the positive rule established by the bankrupt law. He had long had this money of a confiding widowed sister-in-law and her orphan children, and while holding it in a fiduciary capacity he had used it for his own purposes. He saw her called to account for it by the probate court, and knew he was unable to refund it. He also saw the gulf of bankruptcy before him, and before he was buried beneath its waters he determined at least to secure this debt, the creation of a trust reposed in him. Who shall arraign him for it in the court of conscience?

If, then, it was forbidden neither by the common law nor by the statute of the State nor by the highest sense of honor, it must be made to appear clearly that it is void under the section of the bankrupt law which we have quoted, or else it must stand.

[296]

It is a fundamental condition of the right of the assignee to avoid such a conveyance, that the person receiving it or to be benefited thereby, should have had reasonable cause to believe that the person making such conveyance was insolvent and that it was made in fraud of the Bankrupt Act.

The obvious meaning of this provision is to require the concurrence of the creditor who gets security for his debt in the purpose of defeating the Bankrupt Act. Such person must have reasonable cause to believe the grantor in the conveyance was insolvent at the time it was executed, *and* that it was made with intent to defeat the bankrupt law. Both these must exist as facts which the grantee had reasonable cause to believe. And so careful was Congress to protect the rights acquired by an honest creditor, that unless bankrupt proceedings are commenced by or against the debtor within four months after such a preference it should stand good, though the creditor knew the debtor was insolvent, and knew that the conveyance was intended to defeat the purpose of the Bankrupt Law in securing equality of distribution of the debtor's property. And this period was reduced by the Act of 1874 to two months.

It has never been denied, so far as we are advised, that in attacking such a conveyance by the assignee of a bankrupt it is necessary to prove the existence of this reasonable cause of belief of the debtor's insolvency in the mind of the preferred party.

The testimony fails to establish that Mrs. Barbour had any reasonable cause to believe this of Colby. She was a widow, devoted to her children. Her business affairs were managed for her by others. Colby was her brother-in-law and friend, and had been the friend of her deceased husband. He had been reputed for many years to be a wealthy man. He was known to be the owner of valuable real estate. All this was well understood by Mrs. Barbour, while she did not know and had no reason to suspect, that he was largely in debt and his real estate covered by mortgages. Up to the time of the failure of the First National Bank of Mansfield, September 26, 1873, very few persons had any doubt of Mr. Colby's entire solvency. The rapid succession of events in the locality where Colby and Mrs. Barbour resided, and its effect upon Mr. Colby's condition, as described by some of the witnesses, might well have been matters of which Mrs. Barbour was ignorant. She swears that she was, and no one is able to say that she had any reason to be aware of the effect of these matters on Mr. Colby. Nothing was brought to her notice or attention which would suggest a suspicion of his insolvency, and her confidence in him clearly was not shaken.

[297]

In the case of *Grant* v. *Bk.*, 97 U. S., 80 [XXIV., 971], this court said: "The Act very wisely, as we think, instead of making a payment or a security void for mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." Tested by this rule, which, we think, is the sound one, there is no evidence of any such knowledge brought home to Mrs. Barbour. In fact we do not believe

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that at the time the deeds were executed she even suspected Mr. Colby's insolvency or contemplated his failure.

It results from this view of the case that the decree of the Circuit Court must be reversed, and a decree rendered establishing the validity of the mortgages to her and adjusting the rights of the parties on that basis.

True copy. Test:

James H. McKenney, Clerk, Sup. Court U. S.

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[304]

JOHN MILES, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 13 Otto, 304-316.)

Jury in territorial court—defense in bigamy—proof of first marriage—reasonable doubt—second wife, when witness.

1. In impaneling a jury in a territorial court, the court is bound to follow the law of the Territory on that subject.
2. On an indictment for bigamy, it is no defense that the doctrine and practice of polygamy were parts of the religion of the accused.
3. On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner.
4. A charge to a jury, that proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind, to a moral certainty, that the fact exists that is claimed to exist, held, not erroneous.
5. This court cannot re-examine questions of fact upon a writ of error.
6. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify; and she can then be a witness to the second marriage, and not to the first.

[No. 592.]

Argued Jan. 25, 1881. Decided Apr. 4, 1881.

IN ERROR to the Supreme Court of Utah Territory.

The case is fully stated by the court.

Messrs. E. D. Hoge, W. N. Dusenberry and **Arthur Brown,** for plaintiff in error.

Messrs. Charles Devens, Atty-Gen., and **E. B. Smith,** *Asst. Atty-Gen.,* for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court: [305]

Section 5352 of the Revised Statutes of the United States declares:

"Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term not more than five years."

The plaintiff in error was indicted under this section in the Third District Court of Utah at Salt Lake City. He was convicted. He appealed to the Supreme Court of the Territory, where the judgment of the district court was affirmed.

That judgment is now brought to this court for review upon writ of error.

The indictment charged that the plaintiff in error, John Miles, did, on October, 24, 1878, at Salt Lake County, in the Territory of Utah, marry one Emily Spencer, and that afterwards, and while he was so married to Emily Spencer and while she was still living, did, on the same day and at the same county, marry one Caroline Owens, the said Emily Spencer, his former wife, being still living and at that time his legal wife.

The criminal procedure of Utah is regulated by an Act of the territorial Legislature, passed February 22, 1878. The following are the sections pertinent to this case, which prescribe the rules for the impaneling of juries:

"SEC. 241. A particular cause of challenge is:

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law, disqualifies the juror, and which is known in this Act as implied bias.

2. For the existence of a state of mind on the part of the juror which leads to a just inference, in reference to the case, that he will not act with entire impartiality, which is known in this Act as actual bias.

NOTE—*What constitutes a valid marriage; evidence to prove marriage.* See, *note* to Jewell v. Jewell, 42 U. S. (1 How.), 219.

Causes of challenge of jurors and their qualifications. See, *note* to Clinton v. Englebrecht, 80 U. S., XX., 659.

Bigamy; proof of marriage in cases of.

A foreign marriage may be proved by the foreign registry or a certified copy of it, with proof of the foreign law, if it requires the keeping of such a registry. State v. Dooris, 40 Conn., 145; Stanglein v. State, 22 L. J. Ch., 177; Bird v. Com., 21 Gratt., 800; Squire v. State, 46 Ind., 459.

The testimony of witnesses to the fact of marriage may be substituted for the registry. The evidence of the register or of some person who was present is sufficient. Morris v. Miller, 4 Burr., 2057; Birt v. Barlow, Doug., 171; Reg. v. Cradock, 3 Fost. & F., 837; Reg. v. Hawes, 2 Cox C. C., 432; Reg. v. Mainwaring, 7 Cox C. C., 192; Murphy v. State, 50 Ga., 150; State v. Hodgkins, 19 Me., 155; People v. Clark, 64 N. Y., 456; People v. Calder, 30 Mich., 85; State v. Kean, 10 N. H., 347; State v. Williams, 20 Iowa, 98; Warner v. Com., 2 Va. Cas., 95; Wolverton v. State, 16 Ohio, 173; Arnold v. State, 53 Ga., 574; State v. Clark, 54 N. H., 456; Com. v. Putnam, 1 Pick., 136.

A consensual marriage is, by the common law, valid; and proof of such marriage by admissions and conduct is sufficient where there is no conflicting statute. They are not alone sufficient to convict, but must be coupled with cohabitation. Carmichael v. State, 12 Ohio St., 553; Stanglein v. State, 17 Ohio St., 453; State v. Hilton, 3 Rich., 434; Jackson v. People, 3 Ill., 281; Langtry v. State, 30 Ala., 536; Williams v. State, 54 Ala., 131; State v. Britton, 4 McCord, 256; Cameron v. State, 14 Ala., 546; Wolverton v. State, 16 Ohio, 173; State v. Seals, 16 Ind., 352; Squire v. State, 46 Ind., 459; Finney v. State, 3 Head, 544; State v. Abbey, 29 Vt., 60; Gorman v. State, 23 Tex., 646; State v. Crayford, 7 Me., 57; Robinson v. Com., 6 Bush, 309; Com. v. Jackson, 11 Bush, 679; 1 Am. Cr. R., 74; State v. Sanders, 30 Iowa, 532; Com. v. Murtagh, 1 Ashm., 272; Com. v. Littlejohn, 15 Mass., 163; People v. Humphrey, 7 Johns., 314; Reg. v. Creamer, 10 Low. Can., 404; Reg. v. Simmonsto, 1 Car. & K., 164; Reg. v. Newton, 2 Moody & R., 503.

Marriage may be proved by parol, and if *prima facie* regular, it will be presumed that the technical conditions existed. Com. v. Holt, 118 Mass., 61; Reg. v. Creswell, 13 Cox C. C., 126.

The testimony of the minister, and the marriage license with his certificate, is sufficient whether he was ordained or not. Taylor v. State, 52 Miss., 84.

Reputation alone is not sufficient to prove a marriage; nor is cohabitation alone sufficient; but proof of cohabitation, accompanied by defendant's admissions of the marriage, is sufficient. Langtry v. State, 30 Ala., 536; Moore v. State, 7 Tex. Ct. of App., 608; Steward v. State, 7 Tex. Ct. of App., 326; Brown v. State, 52 Ala., 340; Williams v. State, 44 Ala., 24; Breakey v. Breakey, 2 U. C. Q. B., 353; Doe v. McWilliams, 3 U. C. Q. B., 165; Reg. v. Smith, 14 U. C. Q. B., 567.

The first and lawful wife is not a competent witness, even for the defense, to prove her marriage unlawful. Reg. v. Bienvenu, 15 Low. Can. Jur., 141; Reg. v. Tublee, 1 U. C. P. R., 108; Reg. v. Madden, 14 U. C. Q. B., 588; Williams v. State, 44 Ala., 24.

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SEC. 246. If the facts are denied, the challenge *must* be tried as follows: (1) If it be for [306] implied bias, by the court: (2) If it be for actual bias, by triers.

SEC. 247. The triers are three impartial persons, not on the jury panel, appointed by the court. All challenges for actual bias *must* be tried by three triers thus appointed, a majority of whom may decide.

SEC. 249. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry.

SEC. 250. Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge.

SEC. 252. On the trial of a challenge for actual bias, when the evidence is concluded, the court must instruct the triers that it is their duty to find the challenge true, if, in their opinion, the evidence warrants the conclusion that the juror has such a bias against the party challenging him as to render him not impartial; and that if, from the evidence, they believe him free from such bias, they must find the challenge not true; that a hypothetical opinion unaccompanied with malice or ill will, founded on hearsay or information supposed to be true, is of itself no evidence of bias sufficient to disqualify a juror. The court can give no other instruction.

SEC. 253. The triers must thereupon find the challenge either true or not true, and their decision is final. If they find it true, the juror must be excluded."

Upon the trial of the case in the district court of the territory, Oscar Dunn and Robert Patrick were called as jurors. They were challenged for actual bias, and sworn upon their *voir dire*. Three triers were appointed by the court to pass upon the challenges to the jurors. Dunn, in answer to questions propounded to him, testified that he believed polygamy to be right, that it was ordained of God, and that the revelations concerning it were revelations from God and that those revelations should be obeyed, and that he who acted on them should not be convicted by the law of the land.

The juror was challenged by the prosecution "For actual bias for the existence of a state of mind on his part which led to a just inference that he would not act with entire impartiality." [307]

The triers found the challenge true and the juror was rejected.

Robert Patrick was examined on his *voir dire*, and testified that he believed that the revelation given to Joseph Smith touching polygamy came from God, that it was one of God's laws to his people, and that he who practiced polygamy, conscientiously believing that revelation to be from God was doing God's will. He also testified that, in his opinion, the law of Congress was in conflict with that law of God, that Congress had the right to pass such a law, and that on the trial of a person who was in the practice of polygamy charged with bigamy he would consider it his duty, if satisfied by the evidence, to find the defendant guilty, and that he would do so.

The juror was challenged for actual bias, and the triers found the challenge true, and the juror was excused. A large number of other jurors were examined and challenged, and excused on the same grounds.

Upon the trial, evidence was given tending to show that a short time before the date laid in the indictment, October 24, 1874, the plaintiff in error was in treaty for marrying, at or about the same time, three young women, namely: Emily Spencer, Caroline Owens and Julia Spencer, and that there was a discussion between them on the question which should be the first wife, and that upon appeal to John Taylor, president of the Mormon Church, the plaintiff in error and the three women being present, it was decided by him that Emily Spencer, being the eldest, should be the first wife; Caroline Owens, being the next younger, the second, and Julia Spencer, being the youngest, the third wife; that being according to the rules of the church.

It appeared further that marriages of persons belonging to the Mormon Church usually take place at what is called the Endowment House; that the ceremony is performed in secret, and the person who officiates is under a sacred obligation not to disclose the names of the parties to it.

It further appeared that, on October 24, 1878, the plaintiff in error was married to the said Caroline Owens, and that on the night of that day he gave a wedding supper at the house of [308] one Cannon, at which were present Emily Spencer, Caroline Owens and others. Evidence tending to establish these facts having been given to the jury, the court permitted to be given in evidence the declarations made by the plaintiff in error, on that night, in presence of the company assembled, and on subsequent occasions, to the effect that Emily Spencer was his first wife.

Section 1604 of the compiled laws of Utah declares: "A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband."

Upon the trial and after the evidence above recited had been given, tending, as the prosecution claimed, to prove the marriage of the plaintiff in error to Emily Spencer just before his marriage to Caroline Owens, the latter was offered as a witness against him to prove the same fact.

Thereupon the defendant admitted, in open court, the charge of the indictment that he had been married to Caroline Owens, and even offered testimony to prove it, but this was ruled out by the court.

The defendant, therefore, objected to the introduction of Caroline Owens as a witness against him, the objection being based on the statute just quoted.

The court overruled the objection and admitted her as a witness, and she gave testimony tending to prove the marriage of the plaintiff in error to Emily Spencer previous to his marriage with the witness.

It appeared from the evidence that the name of Caroline Owens' father was Maile, but that she had been adopted by an uncle and aunt named Owens, and had taken their name, by which she was called and known, but that, when she was baptized in the Mormon Church, she was required to be baptized in her father's name, and was married to Miles under that name.

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The court, among other things, charged the jury as follows:

"If you find, from all the facts and circumstances proven in this case, and from the admissions of the defendant, or from either, that the defendant Miles married Emily Spencer, and while she was yet living and his wife he [309] married Caroline Owens, as charged in the indictment, your verdict should be, guilty.

A legal wife cannot, but when it appears in a case that the witness is not a legal wife but a bigamous or plural wife then she may, testify against the bigamous husband, and her testimony should have just as much weight with the jury as any other witness, if the jury believe her statements to be true. And her evidence may be taken like the evidence of any other witness to prove either the first or second marriage. And so in this case you are at liberty to consider the testimony of Miss Caroline Owens, if you find from all the evidence in the case that she is a second and plural wife, and give it all the weight you think it entitled to, and may use it to prove the first marriage alleged, to wit: the marriage of defendant and Emily Spencer, or any other fact which in your opinion is proven by the testimony, if you believe it, as you do the testimony of any witness to prove any fact about which she has testified.

The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests."

The plaintiff in error alleges as ground of error, the exclusion from the jury of Oscar Dunn and Robert Patrick and others of the Mormon faith. He claims that the examination of the proposed jurors and the rulings of the court show that it was the deliberate purpose of the court to exclude from the jury everyone who was of the Mormon faith. He insists that neither the court nor counsel had the right to inquire into the religious belief of the juror.

[310] There is no complaint that the jury was not a fair and impartial one, or that any juror impaneled was disqualified.

Whether the exclusion of qualified jurors from the panel is a ground for setting aside the verdict and judgment on error, we do not find it necessary to decide.

It is insisted on behalf of the defendant in error that the excluded jurors were not qualified to sit in the case of the defendant in error. In impaneling the jury the court was bound to follow the law of the Territory on that subject. *Clinton* v. *Englebrecht*, 13 Wall., 434 [80 U. S., XX., 659]; *Reynolds* v. *U. S.*, 98 U. S., 145 [XXV., 244].

The jurors excluded were objected to by the prosecution as disqualified from serving in the case of the plaintiff in error for actual bias.

The challenge for actual bias was tried by the triers appointed by the court, in accordance with the law of the Territory. The triers found the challenge true. By the same law their decision is declared to be final, and thereupon the jurors challenged must be excluded. The law was carefully followed. The jurors were found disqualified and were, therefore, as required by the law, excluded from the panel.

It is evident from the examination of the jurors on their *voir dire*, that they believed that polygamy was ordained of God, and that the practice of polygamy was obedience to the will of God. At common law, this would have been ground for principal challenge of jurors of the same faith. See, 3 Bl., 363. It needs no argument to show that a jury composed of men entertaining such a belief could not have been free from bias or prejudice, on the trial for bigamy, of a person who entertained the same belief and whose offense consisted in the act of living in polygamy. But whether the evidence of bias was sufficient or not, it was so found by the triers and that was conclusive.

Whether or not that bias was founded on the religious belief of the juror, is entirely immaterial, if the bias existed. It has been held by this court, that on an indictment for bigamy it was no defense that the doctrines and practice of polygamy were a part of the religion of the accused. *Reynolds* v. *U. S.* [*supra*].

It could not, therefore, be an invasion of the constitutional or other rights of the juror, called to try a party charged with bigamy, to inquire [311] whether he himself was living in polygamy, and whether he believed it to be in accordance with the divine will and command.

If the jurors themselves had no ground of complaint, it is clear the defendant had none.

We find nothing in the record in relation to the impaneling of the jury which would have required the Supreme Court of the Territory to set aside the verdict and the judgment of the district court.

It is next assigned for error, that the court admitted the declarations and admissions of the plaintiff in error to prove the fact of his first marriage, and the charge of the court that the declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage, and that such marriage might be proven like any other fact, by the admissions of the defendant, or by circumstantial evidence, and that it was not necessary to prove it by witnesses who were present at the ceremony.

To hold that, on an indictment for bigamy, the first marriage can only be proven by eyewitnesses of the ceremony, is to apply to this offense a rule of evidence not applicable to any other.

The great weight of authority is adverse to the position of the plaintiff in error.

In *Regina* v. *Simmonsto*, 1 Car. & K., 164, it was held that, "On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized."

The same view is sustained by the following cases: *Regina* v. *Upton*, cited in 1 Car. & K., 165, *note;* and in 1 Russ. Crimes, Greaves' ed., 218;

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Duchess of Kingston's Case, 20 How. St. Tr., 355; *Truman's Case*, 1 East P. C., 470; *Cayford's Case*, 7 Me., 57; *Ham's Case*, 11 Me., 391; *State* v. *Hilton*, 3 Rich., 434; *State* v. *Britton*, 4 McCord, 256; *Warner* v. *Com.*, 2 Va. Cas., 95; *Norwood's case*, 1 East P. C., 470; *Com.* v. *Murtagh*, 1 Ashm., Pa., 272; *Regina* v. *Newton*, 2 Moo. & R., 503; *State* v. *Libby*, 44 Me., 469; *State* v. *McDonald*, 25 Mo., 176; *Cameron* v. *State*, 14 Ala., 546; *Wolverton* v. *State*, 16 Ohio, 173; *State* v. *Seals*, [312] 16 Ind., 352; *Quin* v. *State*, 46 Ind., 725; *Arnold* v. *State*, 53 Ga., 574; *Brown* v. *State*, 52 Ga., 338; *Com.* v. *Jackson*, 11 Bush. (Ky.), 679; *Williams* v. *State*, 44 Ala., 24.

The declarations of the plaintiff in error touching his marriage with Emily Spencer, admitted in evidence against him, appear to have been deliberately and repeatedly made, and under such circumstances as tended to show that they had reference to a formal marriage contract between the plaintiff in error and Emily Spencer.

We are of opinion that the district court committed no error in admitting such declarations, or in its charge to the jury concerning them.

The charge of the court defining what is meant by the phrase "reasonable doubt" is assigned as ground of error.

The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favorable to the accused and is sustained by respectable authority. *Com.* v. *Webster*, 5 Cush., 320; *Arnold* v. *State*, 23 Ind., 170; *State* v. *Nash*, 7 Iowa, 347; *State* v. *Ostrander*, 18 Iowa, 435; *Donnelly* v. *State*, 2 Dutch., 601; *Winter* v. *State*, 20 Ala., 39; *Giles* v. *State*, 6 Ga., 276.

We think there was no error in the charge, of which the plaintiff in error can justly complain.

The plaintiff in error next alleges that the description of the woman named in the indictment as the person with whom the crime of bigamy was committed was not sufficiently specific, and that on the trial she turned out to be not Caroline Owens, but Caroline Maile.

The designation of Caroline Owens, as the person with whom the second marriage was contracted, is clearly sufficient. If it were not, it is too late after verdict to object. As to the fact, the jury has found that the person whom the plaintiff in error was charged to have mar- [313] ried while his first wife was living, and still his legal wife, was Caroline Owens and not Caroline Maile, and that question is, therefore, conclusively settled by the verdict. This court cannot re-examine questions of fact upon writ of error. Rev. Stat., sec. 1011.

The plaintiff in error, lastly, claims that the court erred in allowing Caroline Owens, the second wife, to give evidence against him touching his marriage with Emily Spencer, the alleged first wife; and in charging the jury that they might consider her testimony, if they found from all the evidence in the case that she was a second and plural wife.

This assignment of error, we think, is well founded.

The law of Utah declares that a husband shall not be a witness for or against his wife, nor a wife for or against her husband.

The marriage of the plaintiff in error with Caroline Owens was charged in the indictment and admitted by him upon the trial. The fact of his previous marriage with Emily Spencer was, therefore, the only issue in the case, and that was contested to the end of the trial. Until the fact of the marriage of Emily Spencer with the plaintiff in error was established, Caroline Owens was *prima facie* his wife, and she could not be used as a witness against him.

The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely: the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are *prima facie* competent, but [314] whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue, on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.

The authorities sustain these views.

Upon a prosecution for bigamy under the statute of 1 Jac., cap. 11, it was said by Lord Hale:

"The first and true wife is not allowed to be a witness against her husband, but I think it clear the second may be admitted to prove the second marriage, for she is not his wife, contrary to a sudden opinion delivered in July, 1664, at the Assizes in Surrey, in *Arthur Armstrong's Case*, for she is not so much as his wife *de facto*." 1 Hale's Pleas of the Crown, 693.

So in East's Pleas of the Crown the rule is thus laid down: "The first and true wife cannot be a witness against her husband, nor *vice versa;* but the second may be admitted to prove the second marriage, for the first being proved she is not so much as wife *de facto*, but that must be first established." 1 East, P. C., 469. The text of East is supported by the following citation of authorities: 1 Hale, 693; 2 M. S. Sum., 331; *Ann Cheneys Case*, O. B. May, 1730, Sergt. Foster's Manuscript.

In Peake's Evidence (Norris), 248, it is said: "It is clearly settled that a woman who was never legally the wife of a man, though she has been in fact married to him, may be a witness

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against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife.

Mr. Greenleaf, in his work on evidence, volume 3 [4th ed., sec. 206], says: "If the first marriage is clearly proved and not controverted, then the person with whom the second marriage was had may be admitted as a witness to prove the second marriage, as well as to other facts not tending to defeat the first or legalize the second. There it is conceived she would [315] not be admitted to prove a fact showing that the first marriage was void, such as relationship within the degrees or the like, nor that the first wife was dead at the time of the second marriage, nor ought she to be admitted at all if the first marriage is in controversy."

The result of the authorities is that, as long as the fact that the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence, to the satisfaction of the court, the second may be admitted to prove the second marriage, but not the first, and the jury should have been so instructed.

In this case the injunction of the law of Utah, that the wife should not be a witness for or against her husband, was practically ignored by the court. After some evidence tending to show the marriage of plaintiff in error with Emily Spencer, but that fact being still in controversy, Caroline Owens, the second wife, was put upon the stand and allowed to testify to the first marriage, and the jury were, in effect, told by the court that if, from her evidence and that of other witnesses in the case, they were satisfied of the fact of the first marriage, then they might consider the evidence of Caroline Owens to prove the first marriage.

In other words, the evidence of a witness, *prima facie* incompetent and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue and at the same time to establish the competency of the witness.

In this we think the court erred.

It is made clear by the record that polygamous marriages are so celebrated in Utah as to make the proof of polygamy very difficult. They are conducted in secret, and the persons by whom they are solemnized are under such obligations of secrecy that it is almost impossible to extract the facts from them when placed upon the witness stand. If both wives are excluded from testifying to the first marriage, as we think they should be under the existing rules of evidence, testimony sufficient to convict in a prosecution for polygamy in the Territory of Utah is hardly attainable. But this is not a consideration by which we can be influenced. We must administer the law as we find it. The remedy is with Congress, by enacting such a [316] change in the law of evidence in the Territory of Utah as to make both wives witnesses on indictments for bigamy.

For the error indicated the judgment of the Supreme Court of the Territory of Utah must be reversed and the cause remanded to that court, to be by it remanded to the District Court, with directions to set aside the verdict and judgment and award a venire facias de novo.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—14 Tex. Ct. App., 464; 46 Am. Rep., 245.

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[518]

CLAY GREEN, *Appt.*,
v.
MARY ANN FISK, Widow of FRANCIS M. FISK.

(See S. C., 13 Otto, 518-520.)

Final decree—what is not.

1. In a partition suit, a decree settling the several interests of the parties in the property and referring it to a master, to proceed to a partition according to law, under the direction of the court, is not a final decree.
2. A decree cannot be said to be final until the court has completed its adjudication of the cause.

[No. 561.]

Submitted Mar. 21, 1881. Decided Apr. 4, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

The case is stated by the court.

Messrs. **Durant & Hornor,** for appellee, in support of motion.

Mr. **Thomas J. Semmes,** for appellant.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[519] This was a suit begun by Mrs. Fisk, the appellee, in a state court of Louisiana, to obtain a partition of real property. She alleged that she was the owner of one half the property; that she was not willing to continue her joint ownership and that a partition by sale was necessary, as a division could not be made in kind. The prayer of her petition was in accordance with these allegations.

Green, the defendant below, being a citizen of California, removed the case to the Circuit Court of the United States for the District of Louisiana. In that court, on the 31st of March, 1879, Mrs. Fisk was decreed to be the owner of one half the property, and the case was referred to "J. W. Gurley, Esq., master, to proceed to a partition according to law, under the direction of the court." From that decree an appeal was taken by the defendant, which Mrs. Fisk now moves to dismiss, because the decree appealed from is not the final decree in the cause.

We think the motion must be granted. In the circuit court, the suit was one in equity for partition. Although no formal order was entered assigning it to the equity side of the court, that was clearly its proper place and it was so treated by the parties and the court.

In partition causes, courts of equity first ascertain the rights of the several persons interested and then make a division of the property After the division has been made and confirmed by the court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. Mitford, Eq. Pl., 4th ed. by Jeremy, 120; 1 Story, Eq., sec. 650; 2 Daniell Ch. Pr., 4th Am. ed., 1151.

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See, *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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A decree cannot be said to be final until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. This can only be done by a further decree of the court. Ordinarily, in chancery, commissioners are appointed to make the necessary examination and [520] inquiries and report a partition. Upon the coming in of the report, the court acts again. If the commissioners make a division, the court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division cannot be made and recommend a sale, the court must pass on this view of the case before the adjudication between the parties can be said to be ended.

In this case, a partition by sale was asked for because the property was not susceptible of division in kind. That the court has not ordered, and the reference to the master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The master was in everything to proceed under the direction of the court. He had no fixed duty to perform. He was the mere assistant of the court, not in executing its process, but in completing its adjudication of the partition which was asked. There are, still, questions in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for.

In foreclosure suits it has been held that a decree, which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds, is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the court and simply enforces the rights of the parties as finally adjudicated. Here, however, such is not the case, because still the court must act judicially in making the partition it has ordered. What remains to be done is not ministerial but judicial. The law has prescribed no fixed rules by which the officers of the court are to be governed in the performance of the duty assigned to them. The court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds.

The appeal is dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 481.

CLAY GREEN, *Appt*,

v.

HENRY C. FISK AND FRANCIS M. FISK.

154 US 668

1. A decree in a partition suit which simply adjudges that the appellees are the owners each of one eighth of the property and refers the matter to a master to proceed to a partition according to law under the directions of the court is not a final decree.

2. Where the two appellees, complainants below, claim to be the owners each of one eighth of the property to be divided which is worth only $10,000, which has been adjudged to the appellees, the value is less than the amount required to bring a case here and this court is without jurisdiction.

3. The appellant, to sustain his appeal, must show affirmatively that more in pecuniary value than the jurisdictional requirement of this court, has been adjudged against him.

[No. 965.]

Submitted Mar. 21, 1881. Decided Apr. 4, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

The case is stated by the court.

Messrs. **Durant & Hornor,** for appellees.

Mr. **Thomas J. Semmes,** for appellant.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This, like *Green* v. *Fisk*, just decided [*ante*, 485], is a motion to dismiss an appeal in a partition suit, because the decree appealed from is not final, and also, because the value of the matter in dispute does not exceed $5,000. The appellees, complainants below, claim to be the owners each of one eighth of the property to be divided, which it is admitted is worth only $10,000. In the petition it is alleged that the value of the annual income was $5,000, and an account of the revenue is asked as well as a partition. This suit, like the other, was begun in a state court, and removed by Green to the circuit court, where, by an express order, it was put on the equity docket and a change in the pleadings directed so as to make it conform to rules governing equity cases.

The decree appealed from simply adjudges that the appellees are the owners each of one eighth the property, and refers the matter "To J. W. Gurley, Esq., master, to proceed to a partition according to law, under the directions of the court." As was decided in the other case, this is not a final decree, but if it was, we would be without jurisdiction, because the property only has been adjudged to the appellees, and the value of that is less than the amount required to bring a case here. There has been no order even for an accounting, and as yet we are not advised there ever will be one, much less that if it should be made, a balance would be found due from the appellant sufficient to make the value of the matter in dispute on an appeal by him such as our jurisdiction requires. As the appellant to sustain his appeal must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to consider.

The motion to dismiss is granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

BOARD OF SUPERVISORS OF WAYNE COUNTY, ILL., ET AL., *Plffs. in Errr.*, [554]

v.

JOHN W. KENNICOTT ET AL.

(See S. C., 13 Otto, 554–558.)

Waiver of jury—judgment on agreed facts—damages on supersedeas *bond.*

1. A stipulation to submit a case on agreed facts

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is a sufficient waiver of a jury to meet the requirements of section 649, of the Revised Statutes.

2. A judgment on agreed facts, spread at large on the record, can be reviewed here on a writ of error.

3. Where the appeal was from a decree which subjected lands to the payment of a debt, the damages recoverable on the *supersedeas* bond are such as followed from the delay in the sale of the property, and do not include the accumulation of interest nor the balance of the mortgage debt.

[No. 219.]

Argued Jan. 28, 1881. Decided Apr. 4, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is fully stated by the court

Messrs. J. C. Robinson, **C. C. Boggs** and *E. Beecher*, for plaintiffs in error.

Messrs. James P. Root, **Samuel J. Crooks**, *Walter B. Scates* and *S. A. Goodwin*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The County of Wayne, Illinois, mortgaged its swamp and overflowed lands to secure an issue of bonds by the Mt. Vernon Railroad Company. The County was in no way bound for the payment of the debt. It simply mortgaged its lands for the benefit of the company. Default having been made in the payment of the bonds, a suit was begun in the Circuit Court of the United States for the Southern District of Illinois to foreclose the mortgage. In this suit a decree was entered, June 25, 1874, finding the amount due from the company on its bonds, and directing that the lands of the [555] County be sold and the proceeds applied to the debt. From this decree the County appealed to this court, giving a bond, with a large number of persons as sureties, in the penal sum of $40,000, conditioned according to law, for a *supersedeas*. At the October Term, 1876, the decree below was affirmed here with costs and the cause remanded. *Supervisors* v. *Kennicott*, 94 U. S., 498 [XXIV., 260].

This was a suit on the appeal and *supersedeas* bond, the allegations in the declaration as to damages being as follows:

"A large amount of damages hath accrued to the said plaintiffs by the failure of the said Board of Supervisors to make good their plea, to wit, the amount of one hundred thousand dollars, consisting of forty thousand dollars of interest which accrued on said decree during the pendency of said appeal, which is wholly unpaid, and of $200,000 of said decree remaining unsatisfied by sale of the lands ordered by said decree, and of fifty thousand dollars depreciation in the value of said lands during the pendency of said appeal, and of $25,000, attorneys' fees for attending to said appeal, and $50,000 taxes on said lands during the pendency of said appeal."

The bill of exceptions shows that the case was submitted to the court on an agreed state of facts, it being stipulated "that pleas proper in such case were on file." This agreed statement purported to be signed by the attorneys for the plaintiff, the attorney for the county, and the attorney for the sureties on the bond. The part material to the questions presented here is as follows:

"It is further agreed that, so far as the right of recovery in this case is concerned, it shall be deemed and considered that a sale of the lands in the decree described had been made and approved by the court before the commencement of this suit, and that the lands in the decree and mortgage and trust-deed mentioned did not bring enough at said sale to satisfy and pay the amount due the complainant under the decree, as holders of the bonds of said railroad company, by an amount largely over the amount of the appeal bond in this cause sued on, and that the interest at the legal rate on the aggregate amount of the bonds of the railroad company found due the complainants as established by the decree during the pendency of said appeal would amount to a sum largely exceeding the amount of the appeal bond in this cause sued on."

It was further admitted, as appears of record, that the costs of the appeal had been paid.

Upon the facts so stated and agreed the court found generally for the plaintiffs on the issue [556] and that they had sustained damage to the amount of $40,000, the penalty of the bond. Judgment was given accordingly. To reverse that judgment this writ of error has been prosecuted.

It is contended by the defendants in error that the case cannot be re-examined here on its merits, 1, because the record does not show that a "stipulation in writing waiving a jury" was filed with the clerk, as required by section 649 of the Revised Statutes; and, 2, because the finding of the court was in form general, and not special, as required by section 700.

1. As to the waiver of a jury. The record does contain a stipulation in writing, signed by the attorneys of the respective parties, submitting the cause to the court for trial on the agreed facts. As a case cannot be submitted to the court for trial without waiving a jury, a stipulation to submit, especially if it be on agreed facts, is of itself a sufficient waiver to meet the requirements of section 649.

2. As to the finding. Even before the Act of 1865, 13 Stat. at L., 501, ch. 86, sec. 4, reproduced in secs. 649 and 700, Rev. Stat., it was always held that a judgment on agreed facts spread at large on the record could be reviewed here on a writ of error. *U. S.* v. *Ellison*, 16 Pet., 301; *Stimpson* v. *R. R. Co.*, 10 How., 346; *Graham* v. *Bayne*, 18 How., 62 [59 U. S., XV., 266]; *Suydam* v. *Williamson*, 20 How., 434 [61 U. S., XV., 980]; *Campbell* v. *Boyreau*, 21 How., 227 [62 U. S., XVI., 97]; *Burr* v. *Des Moines Co.*, 1 Wall., 102 [68 U. S., XVII., 562]. Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. It is manifest that the Act of 1865 was not intended to interfere with this practice. The evident object of that legislation was to give special findings the same effect, for the purposes of a writ of error, as a special verdict or an agreed case.

This record shows distinctly that the court was only required to determine whether in law, on the agreed facts, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, is no more than a declaration that the court [557] found the law to be in favor of the plaintiff on the case as stated.

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There were in fact no pleadings after the declaration, and the effect of the stipulation that pleas proper to the case were on file, was that the pleadings presented in form the case as stated and left nothing for the court to do but to enter judgment thereon. There was no issue but of law, and that the court found for the plaintiffs. The same case is brought here by the record and we are entirely satisfied it is one we have the power to review.

This brings us to the consideration of the assignment of errors, which is to the effect that the court was wrong in giving judgment for the plaintiffs. Section 1000 of the Revised Statutes provides that when an appeal "Is a *supersedeas* and stays execution," the security must be that the appellant "shall prosecute his appeal to effect, and, if he fails to make his plea good, shall answer all damages and costs." In regulating the practice under this statute, we, by our Rule 29, provide that in suits on mortgages, "Indemnity . . is only required in an amount sufficient to secure the sum recovered, for the use and detention of the property, and the costs of the suit, and 'just damages for delay,' and costs and interest on the appeal." The damages to be answered for are clearly only such as are incident to the plea that fails; that is to say, the appeal that is taken.

The appeal of Wayne County was from a decree which subjected its lands to the payment of the debt of the railroad company. By taking the appeal no new obligations were assumed in respect to the debt. Clearly, then, the damages which the County and its sureties bound themselves to answer must have been such only as followed from the delay in the sale of the property. That does not necessarily imply an obligation to pay the balance which remains of the mortgage debt after the entire proceeds of the lands have been applied to its satisfaction.

In *Jerome* v. *McCarter*, 21 Wall., 82 [88 U.S., XXII., 517], we held that our rule did not require security for the payment of all the accumulation of interest on the mortgage debt pending the appeal, but only indemnity against loss [558] by reason of such accumulation, the amount of which would depend in each case on its own facts.

The damages in this case claimed by the plaintiffs are: 1, for interest on the debt which accrued during the appeal; 2, the balance of the decree which remained unsatisfied after the sale; 3, depreciation in the value of the lands; 4, attorney's fees; and 5, taxes on the lands. No claim is made for the use and detention of the property otherwise than in this way. The agreed case shows that there was an accumulation of interest on the debt during the appeal, largely exceeding the penalty of the bond, and that a balance of the mortgage debt, also much more than the penalty of the bond, was left unpaid when the proceeds of the sale had all been applied in accordance with the terms of the decree. This is the extent of what was agreed on. There is no statement that the lands had depreciated in value or that taxes had accumulated. Neither is it stated that any loss had actually accrued to the appellees by reason of the stay of sale. So far as appears, the lands may have increased in value to an amount larger than the accumulation of interest, and the taxes may have been paid. The single question, therefore, was presented to the court, whether on the agreed facts the County and its sureties were liable in law to the extent of their bond for the accumulation of interest or the balance of the mortgage debt. The judgment was to the effect that they were. In this we think there was error. Upon the agreed facts no damages had resulted from the appeal for which the County could in law be required to answer, and the judgment should have been for the defendants.

There were other rulings presented by the bill of exceptions, but as upon the whole case as made there can be no recovery, we have considered it unnecessary to state them.

The judgment of the Circuit Court is reversed and the cause remanded, for further proceedings to be had therein not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 635; 107 U. S., 390; 112 U. S., 607.

COUNTY OF WILSON, STATE OF TENNESSEE, *Plff. in Err.*, [770]
v.
THIRD NATIONAL BANK OF NASHVILLE, TENNESSEE.

(See S. C., 13 Otto, 770-779.)

Jurisdiction of Circuit Courts—county bonds, negotiable—demurrer—statute—county bonds—subscription to stock.

1. The Circuit Courts have jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties.
2. County bonds, payable to a railroad company or holder, if the bonds are transferred by the signature of the president of the company, are negotiable, and after transfer may be sued upon by the holder.
3. Where all the defenses set up in pleas to which a demurrer was sustained were allowed to be made under the other pleas, it is wholly immaterial whether the court was right or wrong in its judgment on the demurrer.
4. What is implied in a statute is as much a part of it as what is expressed.
5. The power of the County of Wilson, Tennessee, under the state Act of Dec. 16, 1867, to issue bonds in payment of stock taken by it in the Tennessee and Pacific Railroad Company, is beyond question.
6. The Tennessee law does not require that there shall be a final and definite survey and location of the road, nor an estimate of the quantity of grading, before an election is held to decide whether or not a county shall subscribe stock.

[No. 851.]

Submitted Jan. 12, 1881. Decided Apr. 4, 1881.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

The case is fully stated by the court.

Messrs. R. E. Thompson, Lilliard Thompson, **Joseph S. Fowler,** and *Andrew McCain,* for plaintiff in error.

Mr. **R. McPhail Smith,** for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

On December 16, 1867, the Legislature of the [771] State of Tennessee passed "An Act to Incorporate the Lebanon & Gallatin Railway, and for Other Purposes."

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Section 3 of the Act provided that the twenty-six persons named in section 1 should select by ballot five of their number to open books for subscription to the stock of the Lebanon & Gallatin Railway Company, and to apply to counties and municipalities for subscriptions thereto. Section 4 declared that such subscriptions might be payable in county and municipal bonds.

Section 19 declared as follows: "The five commissioners provided for in the 3d section may apply to the county courts of Sumner and Wilson Counties and to the corporate authorities of the Towns of Lebanon and Gallatin for subscription to the capital stock of the company, payable in the bonds of said counties and towns, running not less than ten nor more than thirty years, bearing six per cent interest payable semi-annually; and upon said application being made in writing, the county courts and corporate authorities shall cause an election to be held under the laws now in force regulating elections for county and corporate officers, first causing thirty days' notice of the day of such election, the amount of stock to be subscribed, for what purpose and how and when payable, to be given as required in county and corporate elections."

Section 35 of the Act declared "That the provisions of chapter 3, article 3, of the Code (of Tennessee) shall be in force, and said company shall have the benefit of the same except so far as modified or changed by this Act."

These provisions of the Act were by section [772] 40 extended to the Tennessee & Pacific Railroad Company.

Chapter 3, article 3, of the Code of Tennessee provided as follows:

"Sec. 1142. Any county * * * may subscribe to stock to an amount not exceeding in the aggregate one fifteenth of its taxable property nor more than one million dollars in railroads running to or contiguous thereto, upon the following terms and conditions.

Sec. 1143. The approbation of the legal voters of the county * * * to the proposed subscription must be first obtained by election held by the sheriff in the usual way in which popular elections are held.

Sec. 1144. The election may be ordered by the county court upon the application, in writing, of the commissioners appointed to open subscription books for the stock of such road, or of the board of directors if the company is organized.

Sec. 1145. Before such application can be made, the entire line of the road in which the stock is proposed to be taken, shall be surveyed by a competent engineer, and substantially located by designating the *termini* and approximating the general direction of the road, and an estimate of the grading, embankment and masonry made by the engineer under oath, and filed with the application.

Sec. 1149. The money raised under the provisions of this article shall be expended within the county in which such stock is taken, or as near thereto as practicable.

Sec. 1150. As soon as the stock is subscribed, it is the duty of the county court to levy a tax upon the taxable property, privileges and persons liable by law to taxation within the county, sufficient to meet the installments of subscription as made and the cost and expenses of collection, which tax shall be levied and collected like other taxes.

Sec. 1151. The revenue collector or any other person may be appointed by the county authorities to collect the railroad tax, who shall first give bond with good security in double the amount of the installment proposed to be received, payable to the State and conditioned to discharge the duties of the office and faithfully collect and pay over to the railroad company such railroad tax."

The suit was brought by the Third National Bank of Nashville, Tennessee, upon two hundred and ninety-four bonds for $50 each, issued, as the plaintiff claimed, by the County of Wilson under authority of the laws above cited. [773] The bonds were all of the same tenor and effect. The following is a copy of one of them:

"UNITED STATES OF AMERICA.

State of Tennessee. County of Wilson.

Six-per-cent Bond.

Subscription to the Tennessee & Pacific Railroad Company.

Know all men by these presents, that the County of Wilson, in the State of Tennessee, is indebted to the Tennessee & Pacific Railroad Company, or the holder hereof, if this bond is transferred by the signature of the president of said company, at the office of the treasurer of said County, in the City of Lebanon, on the first day of January, 1879, with interest thereon at the rate of six per cent per annum, on the first day of January and July ensuing the date hereof, until the principal sum is paid, upon the presentation and surrender of the interest warrants hereto attached at the said office of the treasurer of Wilson County, State of Tennessee; this being one of a series of bonds in all amounting to $300,000, issued for stock in the Tennessee & Pacific Railroad Company.

In testimony whereof, the county judge of said County hereunto sets his name and causes the seal of the said County of Wilson to be affixed, with the attestation of the clerk of said County, this first day of January, 1869.

W. H. Goodwin, *Judge County Court.*

J. S. McClain, *Clerk.*"

The bonds were all indorsed as follows:

"For value received, this bond is transferred to bearer.

Geo. Maury, *President Tenn. & Pacific R. R. Co.*"

The defendant demurred to the declaration. The grounds of demurrer were: first, because the court had no jurisdiction of the case; and second, because no right of action on said bonds was shown by the declaration to have accrued to the plaintiff.

The demurrer was overruled.

The defendant thereupon filed twelve pleas. Demurrers were filed to all of them, and were sustained as to the 4th, 5th, 6th, 7th, 8th, 9th and 10th, and overruled as to the others

The 9th plea, upon which defendant specially [774] relied, and which contained the substance of all the other pleas to which the demurrer was sustained, read as follows:

"And for a further plea to said first count in plaintiff's declaration defendant says that before application was made by any authorized commissioners or by the president and directors of the Tennessee & Pacific Railroad Company to

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the county court of said County of Wilson, to order an election to obtain the approbation of the legal voters of said Wilson County to any proposed subscription of stock in said company, no survey of the entire line of said road had been made by a competent engineer, and the said road had not been substantially located by designating the *termini* thereof and approximating the general direction thereof, and no estimate of the grading, embankment and masonry by a competent engineer of the entire road had been made, and of all said facts the plaintiff had actual notice when it obtained the said bonds; and it does not appear, upon the face of said bonds or any of them, upon what authority they were executed and delivered to the said company other than that of the ministerial officers whose signatures appear thereto; and this defendant is ready to verify."

The ground of demurrer to this plea was that it was virtually the plea of *non est factum* and was not sworn to.

Upon the trial of the case the plaintiff offered in evidence the bonds on which the suit was brought, and proved their execution by the officer whose official signature was appended to them, and by the impression on them of the county seal, and proved the indorsement of them by George Maury, the President of the Tennessee & Pacific Railroad Company. The plaintiff also read the Acts of the Legislature of Tennessee above mentioned, and rested.

Thereupon the defendant introduced one Falconett, who testified that he was engineer of the Tennessee & Pacific Railroad Company; that as such engineer he had made an experimental survey of the entire line of the road from Nashville to Knoxville, before any application was made to the defendant County to order an election, as provided by the statute, to determine whether said County should subscribe to the capital stock of said company, and, if so, on what terms said subscription should be made; that said survey [775] of 181 miles was not final, but that by it the line was substantially, and the main points of said road definitely, located, and an approximate estimate of the cost of said road made; that he afterwards had located finally and definitely about one half of said entire line and made a report thereof to the directors of said company.

It was after this report that application was made to the defendant County, as per statute in that case made and provided, to order an election and subscribe stock, etc., for the payment of which the bonds sued on were issued.

The plaintiff, in rebuttal, proved the payment of interest on the bonds by the County for several years. This was all the evidence in the case.

The court charged the jury as follows:

"1. That the defendant County had legislative authority to issue the bonds declared on, upon the conditions prescribed in the Acts having reference to the matter, and that if the jury find from the evidence adduced in the case, that said bonds had been issued by the county judge and clerk as alleged and verified by the county seal, and that plaintiff was a *bona fide* holder for value without notice that the same was issued by virtue of an election ordered and held before a final and definite survey and location of the line of said road had been made, the same would be valid in the plaintiff's hands, and the jury ought to find a verdict against defendant.

2. That if the evidence of Falconett were true, the condition contained in the Acts aforesaid, requiring a survey and location of the line of said road and an estimate of the cost thereof made before an election to determine whether the County should subscribe stock in said railroad, etc., could be lawfully ordered and held, had been substantially complied with, and there was nothing in Falconett's testimony militating against plaintiff's right to recover."

The jury found a verdict for the plaintiff, on which judgment was rendered. To reverse this judgment this writ of error is brought.

The plaintiff in error claims that it is apparent on the face of the declaration that the Circuit Court was without jurisdiction, because both the parties were citizens of the State of [776] Tennessee.

Section 629 of the Revised Statutes of the United States declares that the Circuit Courts shall have original jurisdiction as follows: * * * * "*Tenth*. Of all suits by or against any banking association established in the district in which the court is held under any law providing for national banking associations."

This section gives the Circuit Courts jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties, and it has been so held by this court. *Kennedy* v. *Gibson*, 8 Wall., 498 [75 U. S., XIX., 476].

The jurisdiction of the Circuit Court was, therefore, clear.

The plaintiff in error next claims that the bonds sued on were not negotiable paper and, therefore, the plaintiff below showed no right of action in itself.

In order to make a promissory note or other obligation, for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity. Com. Dig. Merchant, F., 5; 3 Kent, Com., lect. 44, p. 77; Chit. Bills, ch. 5, p. 180, 8th ed.; Bayley, Bills, 120, 5th ed. Storey, Prom. N., sec. 44.

The purpose of the plaintiff in error, that the bonds on which the suit is brought should be negotiable is perfectly clear. They are payable to the railroad company, or holder, if the bond is transferred by the signature of the president of the company.

This is equivalent to making the bonds payable to the company or order, provided the "order" or indorsement is made by the president of the company. The bonds bear the indorsement of the president transferring them to bearer. On what ground their negotiability can be denied, it is difficult to imagine. They are in precisely the same plight as a promissory note payable to order and indorsed in blank or to bearer, the title to which passes by mere delivery. Chit. Bills, 252, 253, 8th ed.; Bayley, Bills, ch. 1, sec. 10, p. 31, 5th ed.

It is next objected that the court erred in sustaining the demurrer of the plaintiff to the [777] fourth, fifth, sixth, seventh, eighth, ninth, and tenth pleas.

It is quite evident, however, from the record, that all the defenses set up in these pleas were allowed to be made under the other pleas, to

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which the demurrers were overruled. Whether the court was right or wrong in its judgment on the demurrers is, therefore, entirely immaterial. "There must be some injury to the party to make the matter generally assignable as error." *Greenleaf* v. *Birth* 5 Pet., 132; *Randon* v. *Toby*, 11 How., 493.

It is next alleged as error that the court instructed the jury that the County of Wilson had legislative authority to issue the bonds sued on, upon compliance with the conditions prescribed by the law.

There is certainly no express provision in chapter 3 article 3 of the Code which authorizes the issue of bonds. It has been so twice held by the Supreme Court of Tennessee. *Justices of Campbell Co.* v. *R. R. Co.*, 6 Cold., 598; *State* v. *Anderson*, 8 Baxter, 249. The implication against the power to issue bonds is very persuasive. The Act contemplates the payment of the stock subscribed for in installments, and provides the means of payment, as they fall due, by a special tax. The bond of the officer who collects this tax requires him to pay it over to the railroad company. If the purpose of the Act had been to authorize the payment of the stock in bonds, the County, after paying in bonds, would not have been required to pay over to the railroad company the railroad tax collected to satisfy the bonds. In other words, the County would not have been required to pay twice for its stock; once in bonds and once in money. See *Wells* v. *Pontotoc Co.*, decided at the present Term [*ante*, 122].

But the Act of December 16, 1867, to incorporate the Lebanon & Gallatin Railway Company, some of the provisions of which have been stated, clearly implies the power in the county authorities to subscribe stock in the Tennessee & Pacific Railroad Company, and to issue bonds in payment thereof.

Section 4 declares that subscriptions to the capital stock of the railroad company may be taken in county bonds, and section 19 authorizes the commissioners provided for in section 3 to apply for a subscription to the capital stock [778] of the railroad company, payable in the bonds of the County; whereupon the county authorities are required to cause an election to be held, first causing thirty days' notice of such election, the amount of stock to be subscribed, for what purpose, and how and when payable, to be given, as required in county elections.

There can scarcely be a stronger implication of the power to issue bonds.

What is implied in a statute is as much a part of it as what is expressed. *U. S.* v. *Babbit*, 1 Black, 61 [66 U. S., XVII., 96]; *Gelpcke* v. *Dubuque*, 1 Wall., 220 [68 U. S., XVII., 530].

We think, therefore, that the power of the county, under the Act of December 16, 1867, to issue bonds in payment of stock taken by it in the Tennessee & Pacific Railroad Company is beyond question, and that the Circuit Court did not err in saying to the jury that such power existed.

Plaintiff in error claims next that there was evidence tending to show that the bonds in suit were issued by virtue of an election ordered and held *before* a final and definite survey and location of the railroad had been made, and that the court erred in instructing the jury that, if plaintiff was a *bona fide* holder without notice of that fact, the bonds would be valid in his hands, and there should be a verdict against defendant.

The charge was not erroneous, because the law does not require that there shall be a final and definite survey and location of the road before an election is held to decide whether or not the county shall subscribe stock. Its requirement is that the entire line of the road shall be surveyed by a competent engineer, and substantially located by designating the *termini* and approximating the general direction of the road. The evidence of Falconett, the engineer, showed that this had been done.

The law even contemplated that this survey might be made before the railroad company was organized, for it declared that the application to the county authorities to order an election might be made by the commissioners appointed to open subscription books for the stock of such road, or by the board of directors if the company was organized. It would be a strange enactment indeed which should require a final and definite survey and location of the line of a railroad before any company had been or- [779] ganized to construct it.

The next complaint of the plaintiff in error has reference to the charge of the court to the effect that, if the evidence of Falconett, the engineer, were true, the election to decide whether the County would subscribe to the stock of the railroad company was lawfully held.

The contention of the plaintiff in error seems to be that before application could be made to the county authorities to order an election to decide whether or not the County should subscribe to the stock of the railroad company, an estimate in linear and cubic feet and yards of the embankment, grading and masonry should be made, on oath, and filed with the application. It is asserted that no such estimate of quantity was made, but merely an estimate of the cost, and that this was not a compliance with the law.

We think the Circuit Court gave a correct construction of the law in instructing the jury substantially that it was an estimate of the cost and not of the quantity of the grading, embankment and masonry that was required to be made by the engineer. The point upon which information was necessary to enable the people of the County to vote intelligently on the question whether or not they should subscribe to the stock of the railroad company was what would the road cost, and not how many yards of embankment or excavation or what quantity of masonry would be required to construct it.

If we are right in these views, then all the conditions precedent upon authority of which the power to issue bonds depended were performed and, there being legislative authority for the issue of the bonds upon such performance, no valid objection can be raised to their enforcement.

We can find no error in the record, and *the judgment of the Circuit Court must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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580] VITAL JARROLT, *Plff. in Err.*,

v.

CITY OF MOBERLY.

(See S. C., 13 Otto, 580-591.)

Void Missouri Act—donations to railroad companies—void city bonds.

1. The Missouri Act of Mar. 18, 1870, entitled "An Act to Authorize Cities and Towns to Purchase Lands, and Donate, Lease or Sell the Same to Railroad Companies," is in conflict with section 14, of article 11, of the Constitution of Missouri.
2. The Missouri Act of Feb. 16, 1872, forbidding the officers of a county, city or town to loan its credit without the previous assent of its voters, was not an authority to loan it when such assent was given.
3. Bonds issued by a City in Missouri for the purchase of lands to be donated to a railway company for machine shop purposes, held to be void.

[No. 173.]

Argued Jan. 4, 1881. Decided Apr. 11, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

Statement of the case, by *Mr. Justice* **Field:**

The plaintiff is a citizen of the State of Illinois. The defendant is the City of Moberly, a municipal corporation of the State of Missouri. [581] This action was brought to recover judgment upon several interest coupons, originally annexed to, but now detached from bonds issued by the City for the purchase of lands, consisting of two hundred acres, to be donated to the St. Louis, Kansas City and Northern Railway Company, for "machine shop purposes." The petition, which is the designation given to the first pleading in the action, avers that on the first of May, 1872, the City issued fifty bonds, similar in form, differing only in their numbers, each for $500, to each of which twenty coupons were attached, each for the sum of $25, payable on the first day of November and May of each year, and numbered from one to twenty; and it sets forth a copy of one of the bonds and coupons, as follows:

"*Moberly machine shop bonds.*

No. .] UNITED STATES OF AMERICA. [$500.

Know all men by these presents that the 'municipal corporation of the inhabitants of the Town of Moberly," in the County of Randolph, in the State of Missouri, acknowledges itself indebted and firmly bound to W. F. Burrows or bearer in the sum of five hundred dollars, in current funds, which sum the said inhabitants of the Town of Moberly hereby promise to pay to the said W. F. Burrows or bearer, at the Bank of America, in the City of New York, ten years after the date of this bond, together with interest thereon from date at the rate of ten per cent per annum, which interest shall be paid semi-annually, in current funds, on the presentation and surrender at said bank of the annexed coupons as they severally become due and payable, but this bond is payable at the option of the said inhabitants of the Town of Moberly at any time after three years from the date hereof, and is payable only by a special tax on all the real estate and personal property lying and being within the corporate limits of said town.

This bond is issued in pursuance of an election held in said town on the 26th day of March, A. D. 1872, to decide whether said town should purchase and donate to the St. Louis, Kansas City and Northern Railway Company two hundred acres of land for machine shop purposes, the result of said election being two hundred [582] and twenty-eight votes for the purchase and donation and one vote against the purchase and donation; and in pursuance to orders of the board of trustees of the inhabitants of the Town of Moberly, made on the eighteenth day of April, A. D. 1872, which orders were made in accordance with an Act of the General Assembly of the State of Missouri, entitled 'An Act to Authorize Cities and Towns to Purchase Lands and to Donate, Lease or Sell the Same to Railroad Companies,' approved March 18, A. D. 1871.

In witness whereof, the said inhabitants of the Town of Moberly have executed this bond, by the chairman of the board of trustees of said town signing his name thereto, and by the clerk of said board of trustees, by order of said board, attesting the same and affixing thereto his signature and the seal of said corporation, in the Town of Moberly, County of Randolph, State of Missouri, on the first day of May, 1872.

J. B. FREEMAN,
Chairman of the Board of Trustees of the Inhabitants of the Town of Moberly.

Attest:

[SEAL.] J. W. DORSEY, *Clerk.*"

"*Coupon No. 1.*

MOBERLY, RANDOLPH COUNTY, MISSOURI.

$25.] [$25.

The municipal corporation of the inhabitants of the Town of Moberly will pay the bearer, at the Bank of America, in the City of New York, twenty-five dollars, on the first day of May, 1872, being six months' interest on bond No. ——, for $500.00 J. W. DORSEY, *Clerk.*"

The petition also avers that the plaintiff is the holder of coupons amounting to $4,200, originally annexed to these bonds, but now detached from them, which are due and unpaid, for which sum he asks judgment. To the petition the defendant demurred on the ground, among other things, that the Act of the Legislature under which the bonds were issued is in conflict with the Constitution of the State, and that the petition does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff electing to stand upon his petition, final judgment was entered thereon for the defendant.

The Judges, however, were divided in opinion upon the questions raised by the demurrer, and, in accordance with the statute, have certified, for the decision of this court, the following [583] points upon which they differed, namely:

First. Whether the Act of March 18, 1870, entitled "An Act to Authorize Cities and Towns to Purchase Lands and Donate, Lease or Sell the Same to Railroad Companies," recited in the bonds, is in conflict with section 14 of article 11 of the Constitution of Missouri.

Second. Whether the petition states a valid and sufficient cause of action.

The Act of March 18, 1870, under which the bonds were issued, declares that "It shall be lawful for the council of any city or the trustees of any incorporated town, to purchase lands and to donate, lease or sell the same to any railroad company, upon such terms and conditions as such board may deem proper, and for the purposes of assisting and inducing such railroad company to locate and build machine shops or

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other improvements upon such lands; and for such purposes to levy taxes upon the taxable property of such city or town, and to borrow money and to issue the bonds of such city or town for such purposes: *Provided* a majority of the qualified voters of such town or city, at a special election to be held therein, shall assent to such purchase and donation."

The 14th section of article 11 of the Constitution of Missouri of 1865, with which it was contended the Act conflicted, declares that "The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless *two thirds* of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

To meet the objections to the alleged invalidity of the bonds, the plaintiff cited the Act of the Legislature, of February 16, 1872, entitled "An Act to Protect Counties, Cities and Incorporated Towns From Combinations between Railroad Companies, County Courts, City Councils of Cities and Boards of Trustees of Incorporated Towns," the 1st section of which declares that "No county court of any county, city council of any city, nor any board of trustees of any incorporated town, shall hereafter have the right to donate, take or subscribe stock for such county, [584] city or incorporated town, in, or loan the credit thereof to, any railroad company, or other company, corporation or association, unless authorized do so by a vote of two thirds of the qualified voters of such county, city or incorporated town. And any justice of a county court, member of a city council or member of a board of trustees of any incorporated town, who shall hereafter vote to donate, take or subscribe stock for such county, city or incorporated town, in, or loan the credit thereof to, any railroad company, or other company, corporation or association, unless authorized to do so by a vote of two thirds of the qualified voters of such county, city or incorporated town, shall be adjudged guilty of a felony, and on conviction thereof shall be punished by imprisonment in the penitentiary for not less than two years."

Other sections repeal all Acts or parts of Acts inconsistent with it. The Act took effect on its passage. On the 29th of March, 1872, the Legislature passed another Act, in terms amending the 1st section of the Act of March 18, 1870, so as to read as follows: "It shall be lawful for the council of any city, or the trustees of any incorporated town, to purchase land, and to donate, lease or sell the same to any railroad company, and to contract for a period of time not exceeding twenty years, with such railroad company, for the payment of all or any part of the taxes which may at any time be levied by the authorities of such town or city, and for such town or city purposes only, upon property of such railroad company, and upon such terms and conditions as such board of said city or town may deem proper, for the purpose of assisting and inducing said railroad company to locate and build machine, work or other shops, or other improvements, upon such land for the purpose of such purchase, to levy taxes upon the taxable property of such city or town, and to borrow money and issue the bonds of such city or town for such purpose: *Provided, that two thirds* of the qualified voters of such town or city, at a regular or special election to be held therein, shall *assent* to such purchase or donation."

This Act took effect on its passage.

Messrs. G. C. Yeaton and **John D. Stevenson**, for plaintiff in error.

Messrs. **J. H. Overall** and *James O. Broadhead*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court: [585]

The object of the inhibition in the state constitution was to prevent the creation of debts by counties, cities and towns on behalf of any company, association or corporation without the assent of two thirds of their qualified voters. The loan of their credit, that is, the placing of their obligation for the payment of money for the use of companies was the usual mode in which they incurred indebtedness. Aid in this way to companies, particularly such as were organized for the construction of railroads, was given so frequently by municipal bodies in Missouri, before the Constitution of 1865 went into effect, as in many instances to greatly embarrass and subject them to burdensome and oppressive taxation to provide for the interest on their obligations and the ultimate payment of the principal.

Numerous Acts of the Legislature had authorized officers of counties and cities to subscribe for stock in railway companies, and to issue bonds for their aid without limit as to amount and without the previous assent of those who were to be taxed for their payment. In many instances the road, in aid of which the bonds were issued, was never constructed, and as no benefit resulted to the counties and cities, their inhabitants naturally felt impatient under the burdens which their officers had improvidently imposed.

It was the purpose of the constitutional provision to check these abuses, by requiring the previous assent of two thirds of the qualified voters of the municipal bodies before any more stock should be subscribed by them or any further indebtedness be thus incurred. The issue of obligations directly to the company, association or corporation, without such previous assent, is within the letter of the prohibition, and to purchase property to be given to such company, association or corporation, by the issue of obligations to others, without such assent, is within its spirit. Both modes of using the bonds of the municipality are equally a use of its credit, the difference being that the one is a direct and the other an indirect way of employing the credit of the municipality for the benefit of the railway company. It would be a narrow and strict construction of the constitutional [586] provision to hold that it prohibited the creation of indebtedness, by a municipality, by a direct use of its credit for the railway company, and yet permitted such creation by the indirect use of it for the same purpose. A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed. In accordance with this principle, this court held in *Harshman* v. *Bates Co.*, that the inhibition in question extended to townships in Missouri as well as to counties, cities

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and towns, although townships were not mentioned. To contend, said the court, that the mere subdivision of counties into townships enabled the legislature to evade the constitutional provision is to ignore the manifest intention and spirit of that instrument; that it could not be possible that it was intended to restrict the legislature as to counties and not to restrict it as to mere sectional portions of the counties. 92 U. S., 569 [XXIII., 747].

Considering the provision in this spirit, and looking at the evil to be prevented, we are of opinion that the issue, by the defendant, of its bonds to purchase lands to be donated to the railway here, was a loan of its credit which could not be made without the assent of two thirds of the qualified voters of the City. It is true that a loan implies a return of the thing loaned at some future day. A loan of credit would, therefore, seem to require that the party receiving its benefit should provide for its cancellation by the payment of the bonds issued. This being so, it would be unreasonable to hold that, whilst the framers of the constitution intended to prohibit a temporary use of the credit of a municipality, without the previous assent of two thirds of its qualified voters, they were willing that the absolute grant of the credit should be made without such assent. We do not think that a construction leading to such a conclusion is permissible. The Act of March 18, 1870, must, therefore, be held to be in conflict with the Constitution of the State. It authorizes a majority of the voters of a municipality to do that which the Constitution declares the Legislature shall not authorize to be done, except by the assent of two thirds of its voters.

The Supreme Court of Missouri has given a similar construction to the constitutional provision. [587] An Act of the Legislature had, among other things, provided for the establishment of a school of mines and metallurgy as a branch of the university of the State, which was to be located in such county having mines as should donate to the board of curators of the university, for buildings and other purposes of the school, the greatest available amount of money and bonds. The Act authorized the county court, of a county desirous of making a donation, to issue bonds of the latter to be delivered to the board of curators and to be by them sold, and the proceeds used in the purchase of the land and the erection of the necessary buildings. Under this Act, the County Court of Phelps County ordered the issue of bonds, at different times, amounting in all to $75,000, to be used as mentioned, and their delivery to the curators. The order was made without the assent of two thirds of the qualified voters of the county, and, upon the petition of the State, the sale of the bonds was enjoined, the court holding that their issue was a loan of credit within the constitutional inhibition, and that the Act authorizing their issue, without the sanction of two thirds of the voters of the county, was void. It stated that the object of the inhibition upon county courts and city and town municipalities was to prevent them from taxing the people without their assent. *State* v. *Cur. St. University*, 57 Mo., 178.

The difference between that case and the one at bar is only in the mode of effecting the same result. There the bonds were given to the curators to be by them sold and the proceeds invested in the establishment of the school of mines. Here the bonds were to be sold by the municipality issuing them and the proceeds used by it in the purchase of lands to be donated to the railroad company. The object of the loan in both cases, in authorizing the issue of the bonds, was the purchase and donation of property to corporations. As remarked by counsel, it is difficult to see how the fundamental law of the State could be evaded by a change of the parties through whom the credit of the municipality is to be converted into money. In either case the debt created is to be paid by taxation.

The subsequent case of the County Court of St. Louis County against Griswold does not change this decision. The bonds there considered were issued to purchase lands in St. Louis [588] for a public park for the benefit of its inhabitants. There was no loan of credit for the use of any other parties in the case. *St. Louis Co. Ct.* v. *Griswold*, 58 Mo., 175.

The Act of the Legislature, of February 16, 1872, upon which much reliance is placed by counsel for the plaintiff, is merely prohibitory in its character, forbidding the officers of counties, cities and towns to donate, take or subscribe stock in any railroad or other company, corporation or association, or the loan of their credit, without the previous assent of two thirds of their qualified voters, and prescribing a punishment for a disregard of its provisions. It confers, of itself, no authority. The inhibition upon the officers of a county, city or town to loan its credit without the previous assent of others, was not an authority to loan it when such assent was given. Authority to create an indebtedness against a municipality, except on certain conditions, was not conferred, because the attempt thus to create it was made punishable as a crime. Further legislation was needed. Such was the evident opinion of the Legislature of the State, for, by an additional Act, passed on the 29th of March, 1872, the authority was given in terms.

We answer, therefore, the first question certified to us in the affirmative and the second in the negative.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** dissenting:

The recitals in the bonds show that an election was held, in the Town of Moberly, three days before the passage of the Act of March 29, 1872, to wit, on the *twenty sixth* of March, to decide whether that town should purchase and donate to the St. Louis, Kansas City and Northern Railway Company, 200 acres of land for machine shop purposes; that two hundred and twenty eight votes were cast in favor of, and only one against, such donation and purchase; that the bonds in question were issued in pursuance of that election and of the orders of the board of trustees of the town, made on the 18th day of April, 1872; and that such orders were made in accordance with the aforesaid Act of March 18, 1870.

The circuit judge conceded it to be the settled [589] law of Missouri that municipal aid could be given to railroad companies without infringing

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the Constitution of the State; and that if machine shops constituted an integral or essential part of a railroad, or were necessary for its convenient use or operation, then the Act of March 18th, 1870, was not obnoxious to the principles announced in *Loan Asso.* v. *Topeka*, 20 Wall., 655 [87 U. S., XXII., 455]. But he was of opinion that the issuing of the bonds in suit to be used in the purchase and donation of lands to a railroad company for machine shop purposes was a "*loan of credit*," upon the part of the town, within the meaning of the state constitution; and that, consequently, the Act of March 18, 1870, was unconstitutional, in that it permitted an issue of bonds, for such purposes, upon the assent only of a *majority* of the qualified voters of the municipality.

In the view which I take of this case, it is not necessary to decide whether this transaction was, or not, a loan of credit. For, assuming that it was, the petition must be regarded as stating a valid and sufficient cause of action against the defendant, if, at the time of the election, held on the 26th March, 1870, the Act of March 17, 1870, had become so modified by subsequent legislation, as to require the assent of two thirds of the qualified voters of the town as a condition precedent to any issue of bonds to be applied in the purchase of lands to be donated to the railroad company for machine shop purposes. And such, I think, was the legal effect of the Act of February 16, 1872. The first clause of its first section declares, that "'No county court of any county, city council of any city, nor any board of trustees of any incorporated town, shall *hereafter* have the right to donate, take or subscribe stock for such county, city or incorporated town, in or loan the credit thereof to, any railroad company * * * *unless authorized to do so by a vote of two thirds* of the qualified voters of such county, city or incorporated town." The General Assemby, of course, knew when they passed the law of February 16, 1872, that the previous statute of March 18, 1870, had assumed to authorize counties, cities and towns to make donations to railroad companies, for machine shop purposes, upon a bare majority vote of the qualified electors. The prohibition against donations thereafter, *except with* the sanction of two thirds of the qualified voters, was, in view of former legislation, equivalent to an affirmative recognition of power *thereafter* to [590] make such donations in pursuance of the provisions of the Act of February 16, 1872. That Act imported into the Act of March 18, 1870, the requirement of a two thirds affirmative vote, as a condition precedent to any donation of land for machine shop purposes. The express repeal, by the Act of February 16, 1872, of all *parts of* laws inconsistent therewith, evinces a purpose, upon the part of the General Assembly, to do something more than declare a violation of that Act, by any of the officers therein named, to be a felony. Nor was it intended to withdraw from counties, cities and towns authority, under any circumstances, to make such donations. Manifestly there was also a purpose to provide against the possibility of donations or loans of credit, under any existing statute, except with the express sanction of two thirds of the qualified voters of the municipality. The only difficulty in the way of this conclusion arises from the negative character of the language of the first clause of the Act of February 16, 1872. But that difficulty seems to be removed by the fact that a previous statute having assumed to confer upon counties, cities and towns the power to make donations to railroad companies for machine shop purposes, the object of the Act of February 16, 1872, was thereafter to require the previous assent of two thirds of the electors, and to repeal all Acts or parts of Acts inconsistent with that requirement. The bonds, upon their face, show the assent of all the electors voting except one. Had these bonds recited, in terms, that they were issued in pursuance of the Act of March 18, 1870, *as modified by subsequent legislation*, there would have been no ground upon which to question the authority to issue them.

But the rights of the purchaser of the bonds should not be sacrificed because the reference to the statute, by authority of which they were issued, was not full or technically accurate. When the election was held, the statute of March 18, 1870, as modified by that of February 16, 1872, authorized an issue of bonds for the purchase of lands to be donated for machine shop purposes, two thirds of the qualified voters of the town assenting thereto. The provisions of that statute, as thus modified, seem to have been complied with.

I am of opinion that the Act of March 29, 1872, passed after the election of March 26, [591] 1870, was only cumulative legislation, so far as it related to subjects embraced in the Act of March 17, 1870, as modified by the Act of February 16, 1872. I think that the Act of March 17, 1870, as modified by the Act of February 16, 1872, was constitutional, and that the petition states a good cause of action against the appellee, even if the issue, by the town, of bonds for the purposes indicated, was a loan of credit, within the meaning of the state constitution.

For these reasons I feel obliged to dissent from the opinion and judgment.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHICOT COUNTY, *Plff. in Err.*, [164]
v.
CHARLES E. LEWIS.

(See S. C., 13 Otto, 164-168.)

Power of County to subscribe to stock of railroad.

Where a state law confers a general power on a County to subscribe to the stock of any railroad in the State, for any amount not exceeding $100,000, the County may subscribe to the stock of two railroads, $100,000 to each.

[No. 161.]

Submitted Dec. 17, 1880. Decided Apr. 11, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The case is fully stated by the court.

Mr. **U. M. Rose**, for plaintiff in error.

Mr. **Eben W. Kimball**, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court: [165]

The Legislature of Arkansas, in 1868, passed an Act, the 1st and 2d sections of which are as follows:

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"Section 1. *Be it enacted by the General Assembly of the State of Arkansas*, That any county in this State may subscribe to the stock of any railroad in this State, now chartered or incorporated or which shall hereafter be chartered or incorporated under and in accordance with the laws of this State and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions, and upon such conditions as the county court may require, and the president and directors of such company may approve; *Provided*, That the amount of such subscription shall not exceed $100,000, and the consent of the inhabitants of such county to such subscription shall be first obtained in the manner hereinafter provided.

"Section 2. Whenever the president and directors of any such railroad shall make application to the county court of any county for such subscription by such county, to its stock, specifying the amount to be subscribed and the condition of such subscription, and one hundred voters of the county shall petition the court for such purpose, it shall be the duty of the court immediately to order an election, to be holden at the place and in the manner other elections in such county are holden, for the purpose of determining whether such subscription shall be made, and at least twenty days' notice thereof shall be given in the manner provided by law for other elections, at which election those voting for such subscription shall have written or printed on their ballots or tickets the words 'for subscription' or 'against subscription,' and if a majority of the votes cast shall be in favor of subscription, the court shall cause such subscription to be made, and upon its acceptance by the company, shall cause bonds to be issued in conformity with such vote.

Under this Act, Chicot County subscribed $100,000 to the stock of the Mississippi, Ouachita & Red River Railroad Company, and $100,000 to the stock of the Little Rock, Pine Bluff & New Orleans Railroad Company, both subscriptions being made by virtue of a single election held by the voters of the County for that purpose. Bonds were issued for the amount of each subscription, $100,000 thereof payable to the Mississippi, Ouachita & Red River Railroad Company, or bearer, and $100,000 thereof payable to the Little Rock, Pine Bluff & New Orleans Railroad Company or bearer. Each [166] bond contained the following recital: "This bond is one of a series numbered from one to two hundred, inclusively of like date, tenor and amount, issued under an Act of the General Assembly of the State of Arkansas, entitled 'An Act to Authorize Counties to Subscribe Stock in Railroads,' approved July 23, 1868, and in obedience to a vote of the people of said County at an election held in accordance with the provisions of said Act authorizing a subscription of $100,000 to the capital stock of said railroad company; and each bond was executed by the Judge, under the county seal, and attested by the county clerk.

The present suit was brought by the defendant in error to recover the amount of certain coupons, some of which were attached to bonds issued to one of the railroad companies, and some of them to bonds issued to the other company. The complaint alleged that the plaintiff was purchaser and *bona fide* owner of the coupons for value. The County put in a plea setting up the fact of the single election in reference to both subscriptions, and the amount of stock subscribed and bonds issued for each road. This plea being demurred to, the question was raised, whether the two subscriptions, amounting in the aggregate to $200,000, were *ultra vires* of the County under the proviso of the 1st section of the Act. The court below sustained the demurrer and gave judgment for the plaintiff.

We do not well see how a different decision could have been made. The State did not restrict the County to a single subscription. The language is: "Any county in this State may subscribe to the stock of any railroad in this State, * * * and may issue bonds for the amount, etc., provided that the amount of *such subscription* shall not exceed $100,000." That is, the power to subscribe is general, but no subscription shall exceed $100,000. The meaning might have been more distinctly expressed by using the plural, "any railroads," and making the proviso to read, "the amount of such subscriptions shall not exceed $100,000 to any one railroad;" but the same sense is sufficiently indicated by the words actually employed. The [167] power given is a power to subscribe to any railroad. This includes all railroads in the State, without restriction. A subscription to one does not extinguish the power of subscribing to any other railroad; otherwise a subscription of $1,000 to one railroad would exhaust the power; for the argument is based upon the idea that a single exercise of the power exhausts it and leaves the County *functus officio*. It may be said that such a construction might lead to disastrous consequences by opening the door to subscriptions to a ruinous amount. But no subscription can be made without an election in favor of it. The law simply meant to give the county full liberty on the subject, limiting only the amount of a single subscription. That the limitation contained in the proviso has reference to a single subscription only is apparent from a bare reading of the context. Omitting surplus words, the section reads thus: "Any county in this State may subscribe to the stock of any railroad in this State, and issue bonds therefor; *Provided*, That the amount of *such subscription* (that is the subscription to any railroad) shall not exceed $100,000." Here the words: any railroad, are used distributively, including all railroads taken severally; and the limitation has reference to the subscription to any railroad, that is, to any one railroad taken separately. Had the Legislature desired to limit the power of subscription to $100,000, the natural and appropriate mode of doing so would have been either to limit the County to one subscription not to exceed $100,000, or to provide that the amount of its subscriptions should not in the aggregate exceed $100,000. Neither of these things was done. As the law stands, it confers a general power to subscribe to the stock of any railroad in the State for any amount not exceeding $100,000.

This construction of the statute disposes of the case, and renders it unnecessary to consider the other point raised by the defendant in error, namely: that as a *bona fide* holder of the coupons he is not obliged to go behind the recital

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in the bonds to which they were attached, which amounted to a declaration by the County [493] authority intrusted with the power to ascertain and determine the fact, that the bonds were issued under the Act and in obedience to an election held in accordance with its provisions. Perhaps a criticism might be made upon this argument, that by comparing the two classes of bonds together it would appear from the several recitals that the County had issued more than $100,000 in amount.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[494] CHARLES KERN, EMIL DIETZSCH, BANK OF NORTH AMERICA ET AL., *Appts.*,

v.

FREDERICK W. HUIDEKOPER ET AL.

(See S. C., "*Dietzsch v. Huidekoper*," 13 Otto, 494-498.)

Injunction to restrain parties from proceeding in State Court after removal of cause.

1. After plaintiff in replevin removed the case from a State to the Federal Court, the defendants proceeded in the State Court notwithstanding such removal and obtained judgment against the plaintiff, and then brought action in such court on the replevin bond against plaintiff and his sureties; held that, the plaintiff having obtained judgment in the U. S. Circuit Court, that court could, on a bill filed for that purpose, enjoin the defendants from proceeding in the action at law brought by them on the replevin bond in the State Court.

2. The bill was ancillary to the replevin suit, and was a proceeding in the Federal Court to enforce its own judgment. A court of the United States is not prevented from enforcing its own judgment against parties to a suit in it, their agents and attorneys, by the statute which forbids it to grant an injunction to stay proceedings in a State Court.

[No. 854.]

Submitted Jan. 24, 1881. Decided Apr. 11, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Case No. 538, mentioned in the opinion, is *Kern* v. *Huidekoper*, *ante*, 303.

Mr. **E. Walker**, for appellants.

Mr. Henry Crawford, for appellees.

[495] *Mr. Justice* **Woods** delivered the opinion of the court:

After the recovery of the judgment at law, on June 5, 1878, by Charles Kern, one of the appellants, in the Circuit Court for the County of Cook, in the action of replevin mentioned in case No. 538 [*Kern* v. *Huidekoper*, *ante*, 303], notwithstanding the removal of the said cause to the Circuit Court of the United States for the Northern District of Illinois, the writ of *retorno habendo* was issued thereon, which the plaintiffs in the replevin suit refused to obey. Thereupon, on June 7, 1878, an action of debt upon the replevin bond given by them was begun in the Circuit Court of Cook County against Frederick W. Huidekoper, Thomas W. Shannon, and John Dennison, the principals, and A. B. Meeker and John B. Drake, the sureties on said bond.

The action was brought in the name of Emil Dietzsch, the coroner, for the use of Charles Kern, the sheriff, who was nominally interested only, the real interest in the litigation being in the judgment and execution creditors, the Bank of North America and John McCaffrey.

Thereupon Huidekoper, Shannon and Dennison, on June 10, 1878, filed the bill in this case in the United States Circuit Court for the Northern District of Illinois, against Dietzsch and Kern, in which they prayed an injunction to restrain them, their attorneys, agents, etc., and the execution creditors represented by them, from prosecuting any suit upon said replevin bond against the principals or sureties therein, "Or in any manner whatever taking any action to enforce any liability or right upon said pretended judgment of return entered in said Circuit Court of Cook County or upon the said replevin bond."

On July 1, 1878, a preliminary injunction was allowed, restraining the defendants below from in any manner prosecuting said action upon the replevin bond or in any manner enforcing said judgment of return.

After the filing of this bill the action on the replevin bond in the State Court was dismissed as to all the defendants except John B. Drake.

On October 20, 1879, the complainants below filed their supplemental bill, in which they alleged that on October 1, 1879, on motion of William J. Hynes, an order was entered in the [496] Circuit Court for Cook County in the said suit brought in the name of Emil Dietzsch on said replevin bond, against complainants and their sureties, by which the Bank of North America and John McCaffrey were substituted for Dietzsch as parties plaintiff in said action, and an amended declaration was filed by them as such plaintiffs, and a rule was entered against Drake requiring him to plead to such amended declaration within twenty days.

The supplemental bill charged that the Bank of North America and John McCaffrey, and Edwin Walker, their attorney, had personal knowledge of the allowance and issue of said injunction, and that the judgment in favor of the Bank of North America was the property of Walker, and that the proceedings in said action of debt were in violation of the injunction of the court and taken for the purpose of evading its orders, and prayed that the Bank of North America, McCaffrey, Walker and Hynes might be made parties defendant to the bill and that the injunction allowed upon the original bill might be so enlarged as to include the said new defendants.

Thereupon the Bank of North America, McCaffrey, Walker and Hynes appeared and filed their demurrer to the original and supplemental bills, alleging as grounds of demurrer, that the court had no jurisdiction to enjoin proceedings in the Circuit Court of Cook County, Illinois, as prayed for in said original and supplemental bills.

The demurrer was overruled. The defendants who demurred, electing to stand by their demurrer, declined to plead or answer. Thereupon a decree *pro confesso* was taken against them, and a final decree was made against all the defendants, by which the preliminary

NOTE.—*Removal of causes under Act of 1875: citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 893.

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injunction allowed the case was made absolute and perpetual.

That decree is brought here by appeal.

We have already decided in *Kern* v. *Huidekoper*, No. 588, that the suit in replevin, instituted by Huidekoper and others against Kern in the Circuit Court for Cook County, was removable to the United States Circuit Court; that by the proceedings for that purpose it was effectually removed on July 27, 1877, to the Federal Court, which, after that date alone had jurisdiction thereof, and that all the proceedings in the State Court in the cause after that date were without jurisdiction and absolutely null and void.

[497]

Upon this state of facts, the only question for decision in this case is: could the court below enjoin the appellants from proceeding in the action at law, brought by them on the replevin bond in the Circuit Court for Cook County?

The action on the replevin bond in that court was simply an attempt to enforce the judgment of that court in the replevin suit, rendered after its removal to the United States Circuit Court, and after the State Court had lost all jurisdiction over the case. If no judgment had been rendered in the State Court against the plaintiffs in the replevin suit, no action could have been maintained upon the replevin bond. The bond took the place of the property seized in replevin, and a judgment upon it was equivalent to an actual return of the replevied property. The suit upon the replevin bond was, therefore, but an attempt to enforce a pretended judgment of the State Court, rendered in a case over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court, by a judgment in favor of the plaintiffs in replevin.

The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal Court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them.

A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court. Dietzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending and was finally determined in the United States Circuit Court. That court had jurisdiction of his person and could enforce its judgment in the replevin suit against him or those whom he represented, their agents and attorneys. The bill in this case was filed for that purpose and that only.

[498]

If the bill is not maintainable, the appellees would find themselves in precisely the same plight as if the judgment of the United States Circuit Court in the replevin suit had been against them, instead of for them. The judgment in their favor would settle nothing. Instead of terminating the strife between them and their adversaries, it would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding. These views are sustained by the case of *French* v. *Hay*, 22 Wall., 250 [89 U. S., XXII., 857], between which and this case there is no substantial difference.

We think, therefore, that the demurrer to the bill was properly overruled, and that the decree of the Circuit Court should be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF MORGAN, *Appt.*,

[498]

v.

JOHN ALLEN AND EDWIN S. TROWBRIDGE, Survivors of AARON ARNOLD, Deceased.

(See S. C., 13 Otto, 498-515.)

Trust fund of company—bonds of county—when valid—conditional delivery—former decree.

1. The debts which a County owes, by reason of its subscription and the bonds given therefor, to a railroad company, constitute, with other property of the company, a trust fund, to which all its creditors can rightfully look for satisfaction of their claims.
2. The County is liable for the whole of that debt, and, by no device or combination to which particular creditors were parties, can it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company, on the company becoming insolvent.
3. The subscription of Morgan County, Illinois, to the stock of the Illinois Riv. R. R. Co.; held to be authorized and valid.
4. Under the facts, and the decisions of Illinois, it is no defense to the bonds that they were deposited with a third party to be delivered upon the condition, to which the railroad company assented, that they should be used only for the payment of work done in Morgan County; and that no such work was done by the company.
5. The appellees are not concluded by a decree in the state court, in which they were not parties nor represented, under which the County obtained possession of its bonds.

[No. 78.]

Argued Nov. 22, 23, 1880. Decided Apr. 11, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

Statement of the case by *Mr. Justice* **Harlan:**

[499]

The County Court of Morgan County, in the State of Illinois, at its December Term, 1856, in pursuance of authority conferred by statute (*Private L. Ill.*, 1853, *p.* 53; 1854, *p.* 207) and in accordance with a vote of the people at an election previously held, entered upon its records a subscription, unconditional in form, of the sum of $50,000, payable in bonds of the County, to the capital stock of the Illinois River Railroad Company, a corporation created by the laws of Illinois, with power to construct a railroad from Jacksonville, in Morgan County, *via* the towns or cities of Virginia, Bath, Pekin and Lacom, to La Salle, in La Salle County. At the same time, by an order of record, authority was given the County Judge to act in regard to such sub-

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scription as might be necessary, according to the charter, rules or by-laws of the company to perfect the same, to represent the County in voting upon the stock, and to provide for the issuing and delivery of the bonds as they might be required.

By an Act passed January 29, 1857, the vote taken was declared to have been legally taken, and the county court was required to subscribe the stock and to issue bonds therefor. Shortly thereafter a subscription, unconditional in form, was made by the proper county officers on the [500] books of the company. The bonds were not issued immediately, and application therefor was made by R. S. Thomas, the president of the railroad company. In order to meet some objections urged against their immediate issue, that officer, upon his own responsibility, so far as the evidence discloses, filed with the county clerk a certificate stating that the part of the railroad north of the Town of Virginia was then in process of construction and that the part between Jacksonville and Virginia was "Under contract to be completed by the 1st of December, 1858, and that it is provided in the contract for the construction of said road that the Morgan County bonds are to be expended for work done in Morgan County, and not elsewhere." The county court, at its September Term, 1857, thereupon entered of record an order, which, after reciting, among other things, the execution of that certificate, and that the interest and advantage of the County would be promoted by the delivery of the bonds theretofore subscribed, directed "*That there be delivered to the Illinois River Railroad Company* the amount of $50,000 of the bonds of this County of this date," etc.,; also, that the certificate of stock "be deposited with the treasurer of the County for safe keeping," etc.

The bonds were thereupon issued, and deposited by the County Judge with Elliott & Brown, bankers, for the railroad company. The evidence is conflicting as to whether the bankers were instructed to hold them until further orders from the county court, or whether they were to be delivered to the railroad company, upon receiving the certificate of stock for the County. The records of the court indicated an absolute unconditional delivery; and the weight of the evidence supports such a delivery.

In 1859, the bonds still being in the custody of Elliott & Brown, the company gave Allen & McGrady, contractors, two orders for $2,000 each for work done by them outside of Morgan County, but payable on their face in Morgan County bonds. These were subsequently transferred for value to William Thomas.

Vail & Ladd, creditors of the Illinois River Railroad Company, having obtained judgments [501] against the company, the principal and interest of which amounted to $7,008.10, and upon which executions issued and were returned *nulla bona*, instituted garnishee proceedings against Elliott & Brown, to obtain satisfaction of their claims out of the bonds in their hands. Thereupon Elliott & Brown filed a bill of interpleader in the Circuit Court of Morgan County, against Vail & Ladd, The Illinois River Railroad Company, the County of Morgan, Studwell, Hopkins & Cobb, trustees in a mortgage executed November 1, 1858, by the railroad company to secure bonds amounting to $1,020,000, R. S. Thomas, who held an acknowledged debt against the company of $16,502.24, payable out of any funds belonging to the company, and William Thomas, the holder of the two orders issued to Allen & McGrady.

By an interlocutory decree entered in that case, the bonds, after deducting $200 interest coupons for charges and solicitors' fees, were directed to be placed in the custody of M. P. Ayres & Co., to await the further order of the court. In that suit the County denied its liability upon the ground that no work had been done in Morgan County by the railroad company, and that by agreement between it and the company, the former was not entitled to the bonds except for the purposes of work done by it in that County. The trustees named in the trust-deed of 1858, in their answer, claimed that they were entitled to hold the bonds for the use and benefit of the Peoria, Pekin and Jacksonville Railroad Company, as the successor of the Illinois River Railroad Company, to be used by the former in the construction of the road in the County of Morgan, in accordance with the alleged agreement that they should be so used. Upon final hearing, the bills of all the parties interpleading were dismissed, but the court directed that the bonds remain in the custody of Ayres & Co. An appeal to the Supreme Court of the State was prayed by all the parties except the County of Morgan. The case is reported as *Thomas* v. *Morgan Co.*, 39 Ill., 496. That court held: *first*, that, whether the bankers had notice or not of the certificate executed by R. S. Thomas, as president of the company, it showed an understanding, at least between the County and Thomas, as to the use of the bonds for work to be done in Morgan County, and his claim, as a creditor, should not be allowed in violation of that understanding. *Second*, as to the claim of William Thomas, he was affected by the notice disclosed in the contract between Allen & McGrady, which provided for the payment of their claims by these bonds only for work done in Morgan County. *Third*, that the claims of Vail & Ladd stood upon an entirely different [502] footing; that they were creditors of the company for ties furnished, and had no notice of the condition upon which the bonds were issued by the County; that they only knew that the County had subscribed to the stock and issued its bonds; that any agreement or understanding between the company and the County, of which they had no knowledge, and the effect of which would be to place the bonds beyond their reach as creditors, would be fraudulent as to them; that the county subscription and the absolute order of the county court, directing the issue and delivery of the bonds, may have induced them to give credit to the company; that while, as against the president and Allen & McGrady, who had notice of the specific purpose for which the bonds were to be used, the County might insist that the delivery was qualified, it could not do so as to those creditors; that, "as to them, it cannot prove that the delivery was not as absolute as its records indicated; they had a right to regard the bonds as assets in the hands of the company." *Fourth*, the trustees, Studwell, Hopkins and Cobb, having failed to assign errors; the court did not consider the propriety of the decree as to them.

Upon the return of that cause to the inferior

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state court a decree was entered, by consent of the creditors, Vail & Ladd and the County, by which the County obtained possession of its bonds of the nominal value of $17,882.18, with coupons attached, in consideration of its paying off the judgment debts of Vail & Ladd, amounting to the sum already stated. The coupons alone exceeded in amount and value the debts of those creditors.

In a suit subsequently instituted by William Thomas, as the assignee of the orders issued in favor of Allen & McGrady, the question [503] arose as to whether he was not entitled to be paid out of the county bonds, inasmuch as the road had then been finally constructed in the County by the successors of the first company. That suit proceeded upon the ground that such construction, for all the purposes for which the stock was subscribed, was equivalent to its construction by the original company. The bill alleged that certain judgment creditors of the railroad company had filed a bill in chancery in the Morgan Circuit Court, making only the Illinois River Railroad Company, the County of Morgan, and Ayres & Co., defendants, for the purpose of subjecting to those judgments the county bonds left in the custody of Ayres & Co. To that suit William Thomas was not made a party, although he alleges that the complainants therein knew he was interested in the disposition of the bonds; that by an agreement between those creditors and the County, which was carried into decree, by a collusive arrangement, the County, by paying only $6,000 in cash and about $6,000 in bonds, in full satisfaction of the claims of those creditors, had received from Ayres & Co. $32,500, in nominal value of its bonds, with coupons attached, the latter alone exceeding the amount of the debts thus paid off, and had canceled the same. To the bill a demurrer was interposed by the County, which, being sustained, the bill was dismissed. Thomas appealed to the Supreme Court of Illinois, and the case is reported as *Thomas* v. *Morgan Co.*, 59 Ill., 479. The court in that case, speaking by *Chief Justice* Breese, said: "It is undeniable that the moving cause for the subscription, the real motive, was the construction of the road in Morgan County. It did not matter to the County by what particular agencies the road should be made; it was sufficient that it was made. The stipulation must be construed with reference to its object and substance. The object was to secure the road in Morgan County. Had the company built the road out of its general assets, it is very certain they could have demanded the bonds. The sense of the stipulation is, not that these identical bonds shall pay for work done in Morgan County, but it is, if the work is done in the County, the bonds shall be delivered. The fact that the road has been completed from Virginia to Jacksonville is a substantial performance of the condition upon which the bonds were issued, and the Allen & McGrady orders for $4,000 of them, drawn by the company, which have honestly come into the possession of the appellant, operated as an equitable transfer of so much of the county subscription from the railroad company to the appellant."

In another part of the opinion the court say: "Upon the theory that these bonds are a trust fund in the custody of the court, it is the duty of the court to see that it is not wasted or misapplied, as the demurrer admits it has been, in [504] the respects alleged in the bill of complaint.

It is not denied that the parties prosecuting that suit agreed to receive from the County, in full satisfaction of their claims, the sum of $6,000 in cash and $6,360 of these bonds. There were then in the hands of the custodian, Ayres & Co., bonds of the nominal value of $32,500. These were surrendered, by the custodian, to the solicitor of the complainants in that action, in discharge of an indebtedness of only $12,360. This, without explanation, is a wasting and misappropriation of the fund, which a court of chancery can and ought to correct."

The decree was reversed, with directions to require an answer to the bill.

Upon the return of the cause the County filed an answer, claiming that its bonds had all been canceled except those disposed of pursuant to the previous decrees of the court. That cause was consolidated, subsequently, with the suit of *Morgan Co.* v. *Peoria, etc., R. R. Co.*, in which the County sought to recover from that company the possession of some of the bonds, which had gone wrongfully, as claimed by the County, into its custody. From the final decree in that case the County prosecuted an appeal to the Supreme Court of Illinois. That case is reported as *Morgan Co.* v. *Thomas*, 76 Ill., 189. The court re-examined the grounds of the previous decisions and, among other things, adjudged in that case:

First. That the claim of William Thomas should be sustained, not for the reason that the supposed condition upon which the bonds were placed in the custody of Elliott & Brown was performed, "But because no such condition, so far as the stockholders and *creditors* of the Illinois River Railroad Company, including Mr. Thomas, were concerned, ever existed. The subscription which the county court was authorized to make for capital stock in the Illinois River Railroad Company, by the vote of the people and the subsequent enactment of the Legislature, was not conditional, but *absolute, and the subscription made pursuant to this authority was unconditional.* It was made prior to any issue of bonds, and when made, the contract between the County on the one side, and [505] the railroad company on the other, was complete. The County was *then legally bound to issue and deliver its bonds to the company in conformity with the terms of its subscription*, and upon its doing so, the company was bound to deliver to the County the requisite certificate showing that it was the owner of the number of shares subscribed for in its capital stock. This claim for unpaid subscription *then became a part of the assets of the company.* Creditors might rely upon it for payment of their debts as implicitly as upon any other assets of the company, and this, too, although the company, subsequently to the making of the subscription, may have abandoned all proceedings under its charter, on account of its insolvency."

Second. "The subscription being absolute in its terms and, therefore, constituting a part of the assets of the company, R. S. Thomas had no authority, simply as president of the company, to consent that it should become conditional, nor could the County make such claim as a matter of right."

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Third. "The Peoria, Pekin and Jacksonville Railroad Company acquired no claim to the Morgan County bonds at the sale under the deed of trust, because they were neither expressly, nor by necessary implication included within its terms;" that "the bonds, then, remaining as assets of the Illinois River Railroad Company could not have been donated by the County to the Peoria, Pekin and Jacksonville Railroad Company; nor was it competent for the Legislature, by enactment, to make such donation. They were a trust fund, to be held for the payment of the debts of the company to which they belonged, and this, even if the failure of that corporation to exercise its corporate powers had worked its dissolution."

It thus appears that the County, by the payment of a little over $19,000 to certain creditors of the Illinois River Railroad Company, attempted, to the prejudice of other creditors, to discharge its own indebtedness to that insolvent corporation, represented by bonds of the nominal value of about $50,000, with coupons attached, the latter alone exceeding the claim of the particular creditors thus paid off.

Messrs. **Wm. Brown,** *Kirby & Russell, Wm. H. Barnes,* **Wm. M. & J. T. Springer,** for appellant.

Messrs. Dearborn & **Campbell** and **H. S. Green,** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

In pursuance of authority conferred by its charter, the Illinois River Railroad Company conveyed, by way of mortgage, of date November 1, 1858, to Alexander Studwell, Lucius Hopkins and George S. Cobb, as trustees, all of its corporate property, real and personal, franchises and effects, acquired, and to be acquired, including all rents, issues, income, profits, moneys, rights and advantages, derived, and to be derived therefrom, in trust, to secure the payment of 1,320 bonds, aggregating the sum of $1,020,000, and payable in New York, on the first day of January, 1880, with semi-annual interest at the rate of ten per cent per annum. [506]

The deed provided that, if the company failed at any time to meet the annual interest on the bonds, all of them might be treated as matured obligations, and the mortgaged property, in that event, should be surrendered to the trustees, to be owned, operated and held for the use and benefit of holders of the bonds.

The company failed to pay the interest when due, after having constructed only the part of the road between Pekin, in Tazewell County, and Virginia, in Cass County. Its board of directors, at a meeting held on 12th of July, 1862, ordered a surrender of the mortgaged property to the trustees. It then suspended all further operations and ceased to discharge its functions. The mortgage trustees took possession by an agent, and, on the 17th of December, 1862, instituted a suit for foreclosure in the Circuit Court of the United States for the Southern District of Illinois.

By an Act of Assembly passed June 11, 1863, Studwell, Hopkins and Cobb, trustees, and Arnold, Allen and Trowbridge, holders of the bonds secured by the deed of trust, and their associates, who should thereafter become purchasers of the mortgage property under any decree of foreclosure, were constituted a corporation, under the name of the Peoria, Pekin and Jacksonville Railroad Company, with power to purchase the property described in the mortgage, and, upon receiving a proper transfer thereof, to have and be vested with all the corporate powers, privileges, immunities and franchises theretofore given or granted to the Illinois River Railroad Company.

A final decree of sale was rendered in the foreclosure suit, from which it appears that the principal and interest, then due and unpaid, of the bonds was $1,419,666. The sale occurred on the 1st of October, 1863, when the mortgaged property was purchased by Allen, Trowbridge and Arnold at the price of $400,000. It was duly confirmed, and subsequently, in June, 1864, a further decree was entered against the railroad company for the sum of $1,061,292.56, the balance then due upon the mortgage debt, after crediting the proceeds of sale. [507]

Shortly before the last decree the purchasers at the decretal sale conveyed and transferred the railroad, franchises and property of the company to the Peoria, Pekin and Jacksonville Railroad Company, which thereafter completed the road from Virginia, in Cass County, to Jacksonville.

The present suit in equity was instituted by Allen, Trowbridge and Arnold, the holders jointly of all the bonds secured by the trust-deed, and, therefore, the equitable owners of the decree in the foreclosure suit, for the purpose mainly of subjecting to that decree such amount as was due from the County of Morgan upon a subscription, in bonds, by it made in the year 1856, to the capital stock of the Illinois River Railroad Company. The bill proceeds upon the ground that the bonds issued for the County's subscription were a part of the assets of that corporation, constituting a trust fund to which its creditors could resort for the satisfaction of their debts. Before the commencement of this suit, the County had obtained possession of and destroyed or canceled its bonds. It denied all liability to complainants, as creditors of the railroad company, by reason of the alleged subscription, or upon any other ground. The complainants contended in the court below, as they do here, that the County obtained possession of the bonds in fraud of their rights as creditors of the Illinois River Railroad Company, and that, to the extent it had not, in fact, paid the amount due upon the bonds given for the subscription, and notwithstanding their cancellation, the County remained liable to creditors of that company. In that view the court concurred, and having ascertained through a master that there was due from the County, principal and interest, on its original subscription of $50,000 in bonds, the sum of $72,539.56, after allowing all payments theretofore made by it to creditors of the company, a decree was rendered in favor of complainants for that amount. From that decree the present appeal is prosecuted.

The right of creditors of the Illinois River Railroad Company to subject to the satisfaction of their claims, the bonds, issued by Morgan County for its subscription to the capital stock of the company, has been the subject of litigation in the courts of Illinois for many years. The general history of that litigation is given [508]

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in *Thomas* v. *Morgan Co.*, 89 Ill., 496; *S. C.*, 59 Ill., 488; and *Morgan Co.* v. *Thomas*, 76 Ill., 189. The essential facts disclosed in those suits appear in some form in the transcript now before us, and are summarized in the statement which precedes this opinion. They are numerous and complicated, and our labor in ascertaining them with accuracy, has been increased no little by the confused condition in which the transcript is found.

We will notice such of the questions of law, suggested by the assignments of error, as we deem necessary to consider or determine.

1. In *Sawyer* v. *Hoag*, 17 Wall., 621 [84 U. S., XXI., 736], we had occasion to consider the question whether the creditors of an insolvent corporation were at liberty to assail a transaction between it and one of its debtors, whereby the latter's subscription of stock was withdrawn, so far as general creditors were concerned, from the assets of the corporation. In that case we declared the doctrine to be well established that the capital stock of a corporation, especially its unpaid subscriptions, constituted a trust fund, for the benefit of the general creditors of the corporation, and that the governing officers of a corporation could not, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing, and for a valuable considera tion. In the subsequent case of *Sanger* v. *Upton*, 91 U. S., 60 [XXIII., 222], we had occasion to consider the same question, and there said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demand, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." *Upton* v. *Tribilcock*, 91 U. S., 45 [XXIII., 203]; *Webster* v. *Upton*, 91 U. S., 65 [XXIII., 384]; *Hatch* v. *Dana*, 101 U. S., 210 [XXV., 886]. In no court have these doctrines been more distinctly approved, than in the Supreme Court of Illinois when considering the liability of the County of Morgan to creditors of the Illinois River Railroad Company arising out of these identical bonds. *Morgan Co.* v. *Thomas*, 76 Ill., 141.

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These principles condemn the arrangements with certain creditors of the company, through which the County, to the prejudice of other creditors, attempted to discharge its liability to the common debtor by paying less than the entire sum due from it. The suits in the state court, under cover of which these arrangements were consummated, were all commenced after the decree of foreclosure, and after the railroad company had suspended operations, and was notoriously insolvent. The County recognized the dangers which beset the original enterprise, in furtherance of which its people had voted a subscription of stock payable in bonds. Its officers believed that it would inevitably fail, and that the ends expected to be accomplished by the aid voted would not be attained. It was for these reasons, that they sought or acceded to an arrangement looking to the protection of the County against liability. But it is clear that other creditors besides those with whom it combined had an interest in the disposition of the assets of the bankrupt railroad company, and that the plan, as conceived and consummated, was wholly inconsistent with the established doctrines of equity. Upon recognized principles of public policy and good faith, the debt which the County owed, by reason of its subscription and the bonds given therefor, constituted, with other property of the insolvent company, a trust fund to which all its creditors could rightfully look for satisfaction of their claims. The County was liable for the whole of that debt, and by no device or combination to which particular creditors were parties, could it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company.

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Had the County's liability to the railroad company rested upon its original subscription, the present case, it must be conceded, would come within the very letter of our decisions in the cases just cited. That the subscription was paid or merged in bonds can certainly make no difference in the application of the principle upon which those cases were determined. The bonds were the evidence of the debt created by the original subscription. The railroad company had become, as all its creditors knew, wholly unable to meet its engagements, and had practically ceased to exist. The bonds in question were part of its assets, in which all the creditors had an interest. The County, by an arrangement with some of those creditors, attempted to lessen its obligation to pay what it had stipulated to pay, and thereby defeat the rights of other creditors, who had as much claim upon the assets of the insolvent company as those with whom the County contracted. What it did is utterly indefensible, under any known rules of equity.

2. But it is contended that the subscription was without authority of law, and that, consequently, the County is not liable thereon nor upon the bonds. The specific ground upon which this contention rests is, that the vote of the people of 1856 conferred no legal authority to make the subscription, such vote having been taken under an order of the county court submitting, as a single proposition, the question of subscribing $50,000 to the capital stock of three separate railroad companies, one of which was the Illinois River Railroad Company; that a vote upon such a proposition, submitted in that form, was not one upon which a municipal subscription could rest. There are two sufficient answers to this suggestion. One is, that in no

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one of the three cases in the Supreme Court of Illinois, involving this subscription, was any such question distinctly raised by the County. All [511] of them proceeded manifestly, upon the undisputed ground, that the county court had ample power by statute to make the subscription. We are not now disposed to inquire whether the particular mode in which the people were invited to pass upon the proposed subscription affected the substance or validity of the subscription when made; nor whether the subscription was not a waiver of any irregularity in that respect. The County has never until this suit was brought, more than fifteen years after the subscription was made, disputed, in any direct form, the legality of the order submitting the question of subscription to the voters. Another answer to this objection is suggested by the Act of January 29, 1857, declaring the vote to have been legally taken, and requiring a subscription and the issuing of bonds in accordance with the vote of the people. That Act, it is argued, was beyond the power of the Legislature to pass, in that, in violation of section 9 of article 5 of the State Constitution of 1848, as construed by the Supreme Court of Illinois, it imposed upon the people of the County a burden or debt which they had never legally voted upon themselves; that the vote in 1856, upon the proposition to subscribe stock in three distinct railroad corporations, was an absolute nullity, which could not be constitutionally remedied by any Act of Assembly or otherwise than by a direct vote of the electors upon a new proposition submitted in legal form. In support of these views we are referred to numerous decisions of the state court, which we have had occasion heretofore to examine in other cases. We deem it unnecessary to consider the general doctrine, with all its limitations and qualifications of the power of the Legislature, by retrospective enactments, to cure defects or omissions which have occurred in elections relating to municipal subscriptions. It is often difficult to determine, as matter of local constitutional law, whether the defect or omission in a particular case involves a mere irregularity in the execution of a statutory power, or is vital and jurisdictional. It is quite sufficient on this point to say that the Supreme Court of the State, in *Thomas* v. *Morgan Co.*, 39 Ill., 498, as well as in *Morgan Co.* v. *Thomas*, 76 Ill., *supra*, recognized the Act of 29th of January, 1857, as having legalized the vote of the County. Those cases, in connection with *Thomas* v. *Morgan Co.*, 59 Ill., 480, are adjudications, under which certain creditors of the Illinois River Railroad Company have received payments of their claims out of the [512] amount due from the County, upon the bonds issued in payment of its subscription. The decrees in those cases could not have been rendered, except upon the ground that the subscription was not invalid by reason of the particular mode in which the question of county aid was submitted to the electors.

3. It is further contended that the bonds were deposited with Elliott & Brown, to be delivered upon the condition, to which the railroad company assented: that they should be used only for the payment of work done in Morgan County; and, since no such work was done by that company, neither the latter nor its creditors can enforce liability upon the County.

Undoubtedly the county authorities, at the outset, expected that the bonds would be applied only upon such work, and there is no reason to suppose that the president of the railroad company intended any application inconsistent with the paper which he executed and delivered to the County, prior to the issue of the bonds. The county court relied upon the assurances given by that officer, and made an order, at its September Term, 1857, that the bonds be *delivered to the company*. In conformity with that order the bonds were deposited with Elliott & Brown, the bankers of the company, and were held by them subject to its order. They, in return, received, for the County, and by its direction, the certificate of stock. Subsequently, and after the bonds were issued and delivered to Elliott & Brown, the County voted as a stockholder in the election of directors, and for two years paid the interest on its bonds. During all that time who owned the bonds? We have already seen that the Supreme Court of the State adjudged, and, as we think, rightly, that the subscription was absolute and unconditional, and, when made, the company became entitled to the bonds, and the County to the stock. When the absolute subscription was made, the claim for its payment became, as was held by the Supreme Court of the State, a part of the assets of the company, upon which creditors could rely for the payment of their debts. 76 Ill., 141. While, as held by the state court, Thomas might bind himself to treat the subscription as conditional, he had no authority, simply as president of the company, "to consent that it should become conditional." P. 143. The [513] present appellees, by their purchase of its mortgage bonds, about $900,000 of them purchased in April or May, 1862, and the remainder in 1868, became creditors of the company, and nothing is disclosed by the evidence which estops them from claiming, as against the County, that the bonds given for the County's unconditional subscription, constituted, from at least the time of their issue and delivery to Elliott & Brown, a part of the assets of the company, to which the latter's creditors could look. Upon this very point the Supreme Court of the State, in the case last cited, expressed similar views, and said that "Where a party receives property from another, in discharge of precedent liability, and the party delivering the property has no legal right to prescribe its future disposition or use, as in the present instance, the mere fact that when he delivers it he expects and intends that it shall be applied to a particular disposition or use, does not make such an application of it a condition precedent to the vesting of title."

4. The objection that the appellees are concluded by the decree in the state court, under which the County obtained possession of its bonds, is not well taken. They were not parties to any of those suits, but it is contended that they are nevertheless bound by the adjudication upon the claim asserted therein by Studwell, Hopkins and Cobb, in their capacity as trustees in the mortgage deed, that *they* were entitled to the possession of the bonds, for delivery to the *new company* in completion of the original contract with the County. The Supreme Court of the State was of opinion that the mortgage deed did not, by its terms, include these bonds; that the Peoria, Pekin and Jacksonville Railroad

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Company was not a reorganization of the Illinois River Railroad Company, but a new and totally independent organization; and, therefore, the new company acquired no claim to the bonds at the sale under the deed of trust. 76 Ill., *supra*. But if the trustees, after obtaining the decree of foreclosure and a sale of the mortgage property, for the benefit of the bondholders, were under a duty, or by virtue of their position, were authorized, to enforce, for the benefit of those creditors, the collection of the judgment against the railroad company for the balance of the mortgage debt, it is manifest that they did not assume, in the suit in the state court, to which they and the county were parties, [514] to represent the bondholders. In the suit commenced by Elliott & Brown, and which is reported in 39 Ill., *supra*, they claimed the right to hold the bonds for the benefit of the new company, and not for the bondholders, whose claims, after crediting the proceeds of the foreclosure sale, were unsatisfied to the extent of $1,061,292.56. Besides, the state court did not, in that case, decide that Morgan County was discharged altogether and as to everybody, from responsibility upon the bonds, because of the failure of the old company to construct the road in that County. In the original decree it directed the bonds to remain in the custody of Ayres & Co. And in the case in 59 Ill., *supra*, the court held that the construction of the road by the new company was a substantial compliance with the contract between the old company and the County. There was no adjudication, in the state court, against the claims of the present appellees. On the contrary, the grounds upon which the claims of Vail, Ladd, Thomas, Blair and other creditors were adjudged by the Supreme Court of the State to be payable out of these bonds are the precise grounds upon which we sustain the claims of appellees as creditors of the old company.

5. In reference to the suit which, it is suggested, was instituted by Studwell, Hopkins and Cobb in the Circuit Court of the United States for the Southern District of Illinois, it is sufficient to say that the present transcript contains nothing upon that subject. We are not advised, in any proper form, of the nature and object of that suit, nor who were parties to it. We cannot, therefore, say that the final decree in that case, if any was rendered, would affect the rights of parties in this litigation.

There are many other questions which counsel have discussed, but we do not regard them as material in determining the essential rights of the parties. We, therefore, refrain from any discussion of them. *The decree below is in line with the adjudications in the Supreme Court of the State, and in our judgment, is right. It is affirmed.*

While upon the bench *Mr. Justice* **Swayne** and *Mr. Justice* **Strong** participated in the decision of this case. They concur in the opinion and judgment; and it is ordered that the judgment of affirmance be entered as of the date [515] when this cause was submitted in this court.

John Allen and Edwin S. Trowbridge, Survivors, etc., v. *The County of Morgan*, No. 293.

This is an appeal from the same decree as in the preceding case. We perceive therein no error to the substantial prejudice of appellants, and it is affirmed.

Mr. Justice **Miller** dissenting in No. 78.

I dissent from the judgment of the court in this case, and am authorized by *Justices* **Field** and **Bradley** to say that they also dissent.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—105 U. S., 152.

ANTOINE DUBUCLET, *Plff. in Err.*, [550]

v.

STATE OF LOUISIANA, *ex rel.* JOHN C. MONCURE.

(See S. C., 13 Otto, 550-553.)

Removal of cause—sec. 2010, R. S.

1. Where a suit is brought in a State Court against a state officer to remove him from office, and his right to his office depends on the laws of the State, he cannot remove the cause to the United States Court.

2. Section 2010, Revised Statutes, does not provide for the removal of a suit brought against one in office, to put him out.

[No. 226.]

Argued Mar. 1. 1881. Decided Apr. 11, 1881.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Mr. **John Ray**, for plaintiff in error.

Mr. Conway Robinson, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit begun in a State Court of Louisiana, on the 20th of March, 1877, to try the title of Dubuclet, the plaintiff in error, to the office of Treasurer of State, the duties of which he was performing under a commission from the Governor, dated December 31, 1874. The allegations of the petition are, in substance, that Moncure was in fact elected to the office at an election which was held on the 2d of November, 1874, but that the returning board, by a false and illegal canvass and compilation of the votes, declared that a majority were in favor of Dubuclet, who was thereupon commissioned.

On the 2d of April, 1877, Dubuclet filed his petition for the removal of the suit to the Circuit Court of the United States for the District of Louisiana. This petition was granted by the state court, but when the case got to the circuit court it was remanded on the ground that it was not in law removable. To reverse that order of the circuit court this writ of error was brought.

It is conceded that, according to the decisions [551] in *Strauder* v. *West Virginia*, 100 U. S., 303 [XXV., 664], and *Virginia* v. *Rives*, 100 U. S., 313 [XXV., 667], a case was not made for removal under sec. 641, Rev. Stat. We think it equally clear that the showing in the petition was not sufficient to effect a transfer under the Act of March 3, 1875, 18 Stat. at L., 470, ch. 137, sec. 2. The averments relied on for this purpose are as follows:

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"Petitioner further represents that, at the election held in this State on the — day of November, A.D. 1874, for state treasurer, at which petitioner was a candidate, that in the Parishes of De Soto, Bienville, Union, Grant and other parishes of the State, there were more than five thousand citizens of color of the State of Louisiana and of the United States, qualified by law to vote at said election and who offered to vote, and if they had been permitted to vote would have voted for petitioner, and against Jno. C. Moncure, relator, and who were prevented, hindered and controlled and intimidated from voting for petitioner by relator Moncure and those acting in his interest, by means of bribery, threats of depriving them of employment and occupation, and of ejecting them from rented houses, lands, and other property, and by threats of refusing to renew leases or contracts for labor, and by threats of violence to them or their families, in violation of their and your petitioner's civil rights, and in violation of the laws of the United States, made and enacted to protect the civil rights of citizens of color and previous condition of servitude.

Petitioner further represents that, in consequence of said illegal acts, and violation of the laws of the State of Louisiana and the United States, by relator Moncure, and those acting in his interest, at and before said election, and for the purpose of defeating your petitioner for treasurer of the State of Louisiana, that the returning officers of election of the State of Louisiana, in accordance to law and their sworn duty, duly returned your petitioner elected, by rejecting the votes cast in the several parishes and at the several polls where relators, in their petition, complain the vote should have been counted in his, Moncure's, favor, and where they complain the vote should not have been counted in favor [552] of petitioner.

Petitioner further represents that the suit of relators is for the object and purpose of depriving your petitioner of the office of Treasurer of the State of Louisiana, by reason of the denial of the aforesaid citizens the right to vote on account of race, color and previous condition of servitude, in violation of the laws of the United States made to protect the equal civil rights of petitioner and those offering to vote for him, and by reason of the right guarantied by the Fifteenth Article of Amendment to the Constitution of the United States."

If all that is here alleged be true, it does not show a case "Arising under the Constitution or laws of the United States." If Moncure was guilty of what is charged against him, he had violated the provisions of section 5507 of the Revised Statutes, but that gave Dubuclet no right, under the laws of the United States, to have the entire vote of the designated parishes thrown out by the canvassers of the election. Moncure might have been prosecuted for what he had done; but neither his prosecution, conviction or punishment would of itself set aside the vote of the parishes or polls as returned. The effect of such conduct on the validity of the election depended, so far as this record shows, on the laws of the State and not on those of the United States. Whether Moncure and those in his interest have been guilty of a crime punishable by law, may depend alone on the laws of the United States, but the United States have not as yet attempted to declare what effect such unlawful acts shall have on the election of a purely state officer. The laws of Louisiana, it is conceded, gave colored men the right to vote at all elections, and because in this case they were prevented by intimidation from exercising that privilege, the properly constituted canvassing board of the State, acting, as is alleged by Dubuclet in his petition, "in accordance to law and their sworn duty," rejected all votes from the parishes and polls where intimidation occurred, and thus found that he was elected. Had the vote of these parishes been counted, the result would have been in favor of Moncure. Thus, according to Dubuclet's own showing, his right to his office depends on the laws of the State. Because the laws of the State required the returning board to reject the votes of the [553] parishes and polls where intimidation, whether of white or colored voters, materially interfered with the election, the majority of the votes cast at the election, which could be counted, were in his favor, and, therefore, he is in office. Such is in effect his allegation in the petition for removal. Clearly, then, on his own showing, his right arises not so much under the Constitution and laws of the United States as under those of the State.

Section 2010, Revised Statutes, gives one who "is defeated or deprived of his election," to such an office as Dubuclet holds, the right of suing for his office in the courts of the United States, "Where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who offer to vote, on account of race, color or previous condition of servitude." That certainly is not this case; for Dubuclet, instead of being defeated or deprived of his election, is now in office under his election duly declared, pursuant to the laws of the State, and exercising all the duties of his place and enjoying all its privileges. This section provides for an original suit by one out of office to get in, but not for the removal of a suit against one in office to put him out. It is unnecessary to discuss the validity of the law in its application to purely state offices, for it does not affect this case. It is one thing to have the right to sue in the courts of the United States, and another to transfer to that jurisdiction a suit lawfully begun in a State Court.

We think it clear that the Circuit Court ought not to have taken jurisdiction of the case; and its judgment to that effect is, consequently, affirmed.

True copy. Test:

James H. McKenney Clerk, Sup. Court, U.S.

OUACHITA COUNTY, *Plff. in Errr.*, [559]

v.

JOSEPH C. WOLCOTT.

(See S. C., 13 Otto, 559-562.)

County warrants not negotiable—failure to present.

1. County warrants of a county in Arkansas are not negotiable paper in the mercantile sense.
2. Where a law of the State enacted that warrants, not presented after due notice, shall no longer exist as debts against the county, a failure to present

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them after such notice constitutes a good defense to them.

[No. 180.]

Submitted Jan. 5, 1881. Decided Apr. 11, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The case is fully stated by the court.

Messrs. **F. W. Compton** and **A. H. Garland,** for plaintiff in error.

Mr. **U. M. Rose,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This case comes before us on a certificate of division of opinion between the Judges of the Circuit Court for the Eastern District of Arkansas. The action was commenced in that court March 10, 1876, on fifty-four county warrants of Ouachita County, of the State of Arkansas, the plaintiff being a citizen of another State. The defense was that on January 4, 1876, the county court of the County made an order in conformity to the Act of the Arkansas Legislature of January 6, 1857, calling in all the outstanding warrants of the County, including those sued on in this case, for the purpose of examining, canceling and re-issuing the same, fixing Friday, the 7th day of April of that year, as the limit of time for presentation of said warrants. The order notified all persons holding these warrants that they might deposit them with the clerk any time prior to that day, and that, on failure to do so, the holders of said warrants would be forever barred from any claim on their account against the County. These warrants not being presented, were formally declared to be barred by order of the county court. At the time of the original order calling in the warrants, they were the property of A. A. Tufts, a citizen of the State of Arkansas, who, some six weeks thereafter, sold them to Henry M. Cooper, also a citizen of that State, both of whom had legal and actual notice of said order.

[560] On these facts the Circuit Judge was of opinion that, as plaintiff was a citizen of another State, and had brought the present suit before the time limited for bringing in the warrants under the order of the county court, they were not barred under the statute, while the District Judge was of opinion that, because of the failure to comply with that order, the suit could not be maintained.

The Circuit Judge does not appear to have rested his judgment upon any idea that the Statute of Arkansas violated the contract, and was, therefore, void. There is no foundation for such a proposition, for the statute had been the law of the State for seventeen years when the warrants were issued. They were, therefore, subject to its operation. Nor is there any objection to this defense on the ground that the warrants were negotiable paper in the mercantile sense. This proposition is carefully considered and overruled in the opinion of this court, delivered at this Term, in the case of *Wall* v. *Monroe Co.* [*ante*, 430], where this question was involved.

But the citizenship of the plaintiff, and the right to sue in the Federal Court seems to have been the main point on which the judgment of the Circuit Judge rested.

Certainly if the purpose or effect of the Statute of Arkansas was to deprive a citizen of another State of the right which the Act of Congress gives him, to prosecute any legal remedy he may have in that court, it should to that extent be disregarded. And the Circuit Judge probably treated the Circuit Court of the United States, and the County Court of Ouachita as courts of co-ordinate jurisdiction over the same subject, and the same parties, and, therefore, disregarded the order of the county court, made while the suit was pending in the Circuit Court. If this manner of looking at the jurisdiction of the two courts were the true one, the result reached by the court would not follow. For the county court, according to the course of procedure prescribed by the statute, having first commenced proceedings, of which the then holders of the warrants had due notice, and the paper not being negotiable as mercantile paper, the final judgment of that court barring the claim of the holder, was properly pleadable *puis darrein continuance* as a defense to the action. [561]

But we do not think this is the correct mode of viewing the matter.

The Statute of Arkansas, though a peculiar one, is a law which the Legislature of that State had a right to make, and which is valid as to all county warrants issued after its enactment. It was a regulation designed to enable the officers who had charge of the financial affairs of the County to bring before them for review, adjustment and renewal, all the outstanding orders of the County; that they might know the amount of the debt; detect forgeries and frauds, incorporate interest which had been long standing in a new warrant with the principal; assign each warrant to payment out of its appropriate fund and make arrangements for payment according to priority or other just claim of preference. There can be no doubt of the legislative authority to do this, and, as a means of enforcing the power thus conferred, to declare that warrants, not presented after due notice, shall no longer exist as debts against the County.

We see no reason to hold that such a proceeding is designed to deprive a holder of these warrants of his right of action in a court of the United States. The effect of it is the same in both state and federal courts. If the party neglect to perform the duty which the law imposed on him as a holder of such warrant, that neglect is a defense in either court. If he had presented his warrants, they would probably have been re-issued, and this *might* have been a good replication to the plea. Or, he could have commenced a new suit in the same court on his new warrants.

If, after presenting his warrants in due time, they had been illegally declared void, or rejected, the matter might have been inquired into by the court. But the holder of these warrants had no right to disregard the requirements of the law, which was a part of the contract on which they were issued, or to seek to evade it by a suit in the circuit court, after receiving notice that he was called on to comply with that law. His right to sue in the circuit court is not denied or refused, but when that court comes to decide his case the decision must be governed by the law of the State, under which his non-negotiable warrants were issued, by one of its municipal bodies. [562]

It is ordered to be certified that the plea and the

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facts certified to us constitute a good defense, and the judgment of the Circuit Court is reversed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[606] ALBERT T. BABBITT, *Appt.*

v.

PARKER P. CLARK ET AL.

(See S. C., 13 Otto, 606-613.)

Order as to removal of case reviewable—petition for removal.

1. The order of the Circuit Court, that a suit has not been lawfully removed from a State Court, and remanding the suit on that account, may be reviewed in this court without regard to the value of the matter in dispute.

2. The Act of 1875 requires that the petition for removal shall be filed in the State Court at or before the term at which the suit could be first tried and before the trial. A presentation of the petition for removal at the next term was too late.

[No. 885.]

Submitted Jan. 10, 1881. Decided Apr. 11, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The case is fully stated by the court.

Mr. **John C. Lee,** for appellant.

Mr. **Isaac P. Pugsley,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This action was brought by the appellees, [607] citizens of New York, in the Court of Common Pleas of Lucas County, Ohio, against Babbitt, the appellant, a citizen of Wyoming Territory. By the Statutes of Ohio regulating practice and pleadings in the courts of that State, a civil action is commenced by filing a petition in the office of the clerk of the proper court, and causing a summons to be issued thereon. R. S., Ohio, 1880, sec. 5035. The summons is ordinarily returnable the second Monday after its date. Sec. 5039. The only pleadings are, a petition, demurrer, answer and reply. Sec. 5059. The rule day for the answer or demurrer to a petition is the third Saturday, and for a reply to the answer the fifth Saturday after the return day of the summons, but the court or a judge thereof, in vacation, may for good cause shown extend the time. Secs. 5097, 5098. Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, is for the purposes of the action to be taken as true, but the allegation of new matter in the reply is deemed controverted by the adverse party. Sec. 5081. When the action is founded on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the petition. Sec. 5085. A trial is defined to be "A judicial examination of the issues, whether of law or fact, in an action or proceeding," sec. 5127, and all actions are triable as soon as the issues therein, by the time fixed for pleadings, are or ought to have been, made up. Sec. 5135.

The petition in this action was filed on the 28th of October, 1878, and alleged that on the 10th of June, 1878, the plaintiff recovered judgment in the Court of Common Pleas of the City, County and State of New York, against Babbitt and one Edgar A. Weed for $2,626.80 debt and costs, which was in full force and unsatisfied, except "By the following payments, to wit: one of $311.92, and a further payment of $887.50 made, to wit: October 1, 1878." Judgment was asked for the balance which remained unpaid, and interest at seven per cent. From the record of the New York suit found in the transcript sent up on this appeal, it appears that the action in that court was brought August 7, 1877, to recover a debt for goods sold Babbitt and Weed, February 8, 1877, which it was al- [60 leged had been created by the fraud of Babbitt. The answer, which was by Babbitt alone, admitted that the debt had been contracted but denied the fraud. It then alleged by way of defense that, on the 7th of July, 1877, proceedings in bankruptcy were instituted against Babbitt and Weed in the District Court of the United States for the Northern District of Ohio, which resulted in the acceptance by the creditors of the bankrupts and an approval by the court of a proposition for composition under the Act of June 22, 1874, 18 Stat. at L., 182, ch. 390, sec. 17, by which the bankrupts were to give their notes indorsed by T. S. Babbitt to their several creditors for forty cents on the dollar of their debts, divided into three equal parts, and payable in three, six and nine months, respectively, from July 15, 1877, and that notes for the several amounts due the plaintiffs, according to the terms of the composition, were executed and tendered them in proper time, and ever since had been and were subject to their order and disposal. Upon the issue thus made, a trial was had which resulted in the judgment now sued on.

The summons in the present action bears date December 4, 1878, and January 4, 1879, at Rules, Babbitt filed his answer, in which he denied that the several payments credited on the judgment in the petition were made by himself or Babbitt and Weed, but averred that the item of $311.92 was collected by a sale of property on execution, and that of $887.50 was paid the plaintiffs by John R. Osborn, a register in bankruptcy. He then set forth the proceedings in bankruptcy and the composition, substantially as stated in his answer in the New York suit. He then alleged that the composition notes intended for the plaintiffs were paid to Osborn, the register in bankruptcy, as they matured, and that on the 11th of September, 1878, the plaintiffs took from the register the money in his hands for them, with a full knowledge of all the facts.

The rule day for a reply to this answer was January 18, 1879, but no reply was filed at that time and no extension of time was asked or given.

The cause, therefore, under the law regulating the practice of the court, stood for trial on the issues presented by the petition and answer. [609 A Term of the court began on the 2d of January, and did not end until the 7th of April, though nothing but formal business was done after March 24.

On the 3d of April the plaintiffs filed in the clerk's office a reply, without leave of the court, and without notice to Babbitt or his counsel. In this reply the facts in relation to the New York suit are set forth substantially as they appear in the record sued on, and it was insisted,

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that the acceptance of the money, from the register in bankruptcy, did not operate in law as a satisfaction of the judgment. The next Term of the court began on the 28th of April, and on the 3d of May the plaintiffs, also without leave of the court, filed an amendment to their reply, in which they set out certain unsuccessful proceedings by Babbitt in the New York court on the 5th of July, 1878, to obtain an injunction against the further execution of that judgment, because of his payment of the composition notes to the register in bankruptcy.

On the 17th of May, which was during the Term of the court that began on the 28th of April, and before the cause had ever been called for trial, Babbitt filed his petition to remove the suit to the Circuit Court of the United States for the Northern District of Ohio, on the ground that his defense, "which was made by answer filed in due time," was "one arising under the Constitution and laws of the United States." The State Court ordered the suit transferred, but the Circuit Court on motion remanded it because the petition for removal was not filed in time. To reverse that order the case has been brought here by *appeal*.

It is insisted that we have no jurisdiction: 1, because an order of a Circuit Court remanding a cause to a State Court on the ground that the petition for its removal from that court had not been presented in time, is not reviewable here either on writ of error or appeal; 2, because if reviewable at all, this case should have been brought here by writ of error rather than appeal; and 3, because the value of the matter in dispute does not exceed $5,000.

Before the Act of 1875, 18 Stat. at L., 470, [610] ch. 137, we did hold that an order by the Circuit Court remanding a cause was not such a final judgment or decree in a civil action as to give us jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was, then, by *mandamus* to compel the Circuit Court to hear and decide. *R. R. Co.* v. *Wiswall*, 23 Wall., 507 [90 U. S., XXIII., 103]; *Ins. Co.* v. *Comstock*, 16 Wall., 270 [83 U. S., XXI., 498]. But the 5th section of the Act of 1875 provides that if it satisfactorily appears to the Circuit Court, that a suit has been removed from a State Court which does not really and substantially involve a controversy properly within the jurisdiction of the Circuit Court, it may be remanded and the order to that effect shall be reviewable by this court "on writ of error or appeal as the case may be."

The appellees contend that the right of appeal or writ of error, which is here given, applies only to cases which are remanded because the subject-matter of the controversy is not one within the jurisdiction of the Circuit Court. The language of the statute might be more explicit in this particular than it is, but we think it may fairly be construed to include a case where the Circuit Court decides that the controversy is not properly within its jurisdiction because the necessary steps were not taken to get it away from a State Court, where it was rightfully pending. The right to remove a suit from a State Court to the Circuit Court of the United States is statutory, and to effect a transfer of jurisdiction, all the requirements of the statute must be followed. If this is done, the controversy is brought properly within the jurisdiction of the Circuit Court and may be lawfully disposed of there, but if not, the rightful jurisdiction continues in the State Court. When, therefore, the Circuit Court decides that a controversy has not been lawfully removed from a State Court and remands the suit on that account, it in effect determines that the controversy involved is not properly within its own jurisdiction. The review of such an adjudication is clearly contemplated by the Act of 1875.

We think, also, this right of review has been given without regard to the pecuniary value of the matter in dispute. There is no pecuniary limit fixed to our jurisdiction in the Act of 1875 itself. Final judgments and decrees in the Circuit Courts in civil actions cannot ordinarily be brought here for review unless the value of the matter in dispute exceed $5,000; R. S., secs. 691, [611] 692, 18 Stat. at L., 315, ch. 77, sec. 3; but an order of the circuit court remanding a removed suit to the State Court is in no just sense a final judgment or decree in the action. It simply fixes the court in which the parties shall go on with their litigation. Under the old law there was no pecuniary limit to our jurisdiction to proceed in this class of cases by *mandamus*, and we think it was the intention of Congress to substitute appeals and writs of error for that mode of proceeding. If the new remedies are found to be productive of vexatious delays on account of the great accumulation of business in this court, it will be easy for Congress to do away with the evil by a repeal of the law. It follows, that if the order in question could properly be brought here by *appeal*, we have jurisdiction.

Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that where the suit was in equity, an appeal should be taken. That is the fair import of the phrase "Writ of error or appeal as the case may be." This was a suit at law and consequently should have been brought up by writ of error. There seems to have been very little attention paid to this distinction heretofore, and we now find that we have often considered cases on writ of error that ought to have been presented by appeal, and on appeal, when the proper form of proceeding would have been by writ of error. No objection was made, however, at the time, and we did not ourselves notice the irregularity. Without deciding whether we would reverse the order of a Circuit Court if objection were made, when the case was brought up in a wrong way, we are not inclined to delay a decision on the merits in this case, because of the irregularity which appears, as we think the suit was properly remanded and the order to that effect should be affirmed.

The Act of 1875 requires that the petition for removal shall be filed in the State Court at or before the term at which the suit could be first tried and before the trial. The answer of Babbitt in this case was filed in time, and the rule day for a reply expired on the 18th of January. Had the case been called at any time after that date, and before April 3, neither party could have objected to a trial on the pleadings as they [612] then stood. As no reply had been filed, the new facts set out in the answer would have been taken as true, and the rights of the parties determined accordingly. The case arising under

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the Constitution and laws of the United States was presented by the answer, and the right of Babbitt to his removal was as apparent then as now. It needed no reply to put his case in a condition for judicial examination. His answer required the court to determine, whether in law, with all the facts set out uncontroverted, his composition in bankruptcy presented a valid defense to the judgment sued on. The pleadings presented, to say the least, an issue of law to be tried.

It is true, that after the court had substantially closed the business of the Term, and had stopped the trial of causes, a reply was put on file without leave, which was supplemented the next Term, also without leave, and that in this way the issues as they originally stood may have been to some extent changed, but that does not in our opinion relieve Babbitt from the consequences of his delay. The Act of Congress does not provide for the removal of a cause at the first Term at which a trial can be had on the issues, as finally settled by leave of court or otherwise, but at the first Term at which the cause, as a cause, could be tried. Under the Judiciary Act of 1789, 1 Stat. at L., 73, ch. 20, sec. 12, the application for removal must have been made by the defendant when he entered his appearance, but under the Act of 1866, 14 Stat. at L., 306, ch. 288, and 1867, *id.*, 558, ch. 196, it might be effected at any time before trial. This was the condition of existing legislation when the Act of 1875 was passed, and the language of that Act shows clearly a determination on the part of Congress to change materially the time within which applications for removal were to be made. It was more liberal than under the Act of 1789, but not so much so as in the later statutes. Under the Acts of 1866 and 1867 it was sufficient to move at any time before actual trial, while under that of 1875 the election must be made at the first Term in which the cause is in law triable.

Clearly, under the laws of Ohio, this case was in a condition for trial, and actually triable, more than two months before the January Term closed. *It follows that the presentation of the* [613] *petition for removal at the next Term was too late, and the order of the Circuit Court remanding the cause on that account, is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 16; 105 U. S., 580; 106 U. S., 555; 111 U. S., 775; 112 U. S., 504.

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[651] THOMAS WARDELL, *Appt.*,

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

(See S. C., 13 Otto, 651-659.)

Illegal acts of directors — contracts — auxiliary company.

1. Directors of a company constituting the executive committee, clothed with power to manage the affairs of the company for the benefit of its stockholders and creditors, cannot exercise their powers for their own personal ends against the interest of the company.

2. They cannot derive any advantage from contracts, made by their authority as directors, except through the company for which they acted.

3. Arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they or some of them shall take stock in it, and then that valuable contracts shall be given to it, will be condemned whenever properly brought before the courts for consideration.

[No. 167.]

Argued Dec. 21, 22, 1880. Decided Apr. 11, 1881.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The case is fully stated by the court.

Messrs. **James O. Broadhead** and **James M. Woolworth**, for appellant.

Messrs. **Andrew J. Poppleton**, *Samuel Shellabarger* and *J. M. Wilson*, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

The road of the Union Pacific Railroad Company passes for its entire length, from Omaha on the Missouri River to Ogden in Utah, a distance of 1,086 miles, through a country almost destitute of timber fit for fuel. During its construction, however, large deposits of coal, of excellent quality and easily worked, were dis- [652] covered in land along its line, from which abundant supplies for the use of the Company could be obtained. The complainant represents that their extent, quality and value were unknown, and that doubts were generally entertained as to their adequacy to meet the necessities of the Company, until he had made explorations in June, 1868, and reported to its managers the information which he had thus acquired; and that upon that information the contract which has given rise to this suit was made, after much negotiation, between the Company and himself and Cyrus O. Godfrey, with whom he had become associated in business. But in this respect he is mistaken. Though he may have imparted to the managers the information acquired by his explorations, the knowledge of the existence and general character of the deposits had been communicated to them years before by the engineers appointed to survey the route for the construction of the road. They had reported that coal in inexhaustible quantities, of suitable quality for the purposes of the Company, was found so near the line of the road as to render its extraction and delivery easy and convenient. It is of little moment, however, whether the knowledge of the existence, character, extent and accessibility of the deposits was obtained from the complainant or from others; it is sufficient that the directors of the Union Pacific Railroad Company, having the control and management of its road and business, were informed upon the subject, at the time the contract mentioned was made. That contract was as follows.

"This agreement, made this 16th day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between the Union Pacific Railroad Company, by its proper officers, of the first part, and Cyrus O. Godfrey and Thomas Wardell, of the State of Missouri or assigns, parties of the second part:

Witnesseth, that the said party of the first

NOTE.—*Fiduciary position of directors; their contracts and dealings with corporation.* See, *note* to Koehler v. Hubby, 67 U. S., XVII., 339.

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part agrees that the said parties of the second part may prospect at their own expense for coal on the whole line of the Union Pacific Railway and its branches and extensions, and open and operate any mines discovered, at their own expense; that said Railroad Company agrees to purchase of said parties of the second part all clean merchantable coal, mined along its road, [653] needful for engines, depots, shops and other purposes of the Company, and to pay for the same the first two years at the rate of $6 per ton; for the next three years at $5 per ton; for the four years thereafter at $4 per ton; and for the six years remaining at the rate of $3 per ton, delivered upon the cars, at the mines of the said party of the second part; and which shall not be less than ten per cent added to the cost of the same to the said party of the second part. This contract to be and remain in full force and effect for the full term of fifteen years from the date hereof.

The said Railroad Company agrees to facilitate the operations of the said parties of the second part, in prospecting and otherwise, by means of such information as it may possess, and by furnishing free passes on its road to the agent of the parties of the second part, not exceeding six in number. Said Railroad Company further agrees to put in switches and the necessary side tracks, at such points as may be mutually agreed upon, for the accommodation of the business of the said parties of the second part; that the said parties of the second part agree to make all necessary exertions to increase the demand and consumption of coal by outside parties along the line of said railroad, and to open and operate mines at such points where coal may be discovered, as may be desired by said Railroad Company; and to expend within the first five years from the date of this agreement, in the purchase and development of mines and mining lands, and improvements for the opening, successful and economical working of the same, not less than the sum of $20,000; also to furnish for the use of the said Railroad Company good merchantable coal, and to pay all expenses for improvements for loading coal into cars. Any improvement desired by said Railroad Company in regard to the coal to be used by it shall be at the cost of said Railroad Company.

In consideration of their exertions to increase the demand for coal, and the large sum to be expended in improvements, it is further agreed, that the parties of the second part shall have the right to transport over the said railroad and its branches for the next fifteen years from the date of this agreement, coal for general consumption at the same freight that will be charged to others; but the said parties of the second part shall be entitled in consideration of services to be rendered as herein provided, to a drawback of twenty-five per cent on all sums charged for the transportation of coal.

The said Railroad Company agrees to furnish the parties of the second part such cars as they [654] may require in the operation of their business, and to transport them as promptly as possible. This agreement to remain in force for fifteen years.

The coal lands owned by said party of the first part are hereby leased, for the full term of fifteen years, to the said parties of the second part or their assigns, for the purpose of working the same as may seem to them profitable; said parties of the second part to pay for the first nine years a royalty of twenty-five cents per ton for each ton of coal taken from their lands, excepting always coal taken from entries, air courses or passage ways, for which coal no royalty shall be paid; payments for the same being due and payable monthly.

The royalty for the last six years of this lease shall be free, provided the price of coal to the Railway Company is reduced to $3 per ton. If three dollars and twenty five cents or more per ton, then in that case the royalty shall be as during the first nine years.

In witness whereof we have hereunto set our hands and seals, this the day and year first above mentioned.

(Signed) OLIVER AMES,
President of the Union Pacific R. R. Co.
C. O. GODFREY.
THOMAS WARDELL."

This contract on the part of the Railroad Company was made by direction of the executive committee of the board of directors, of whom the president was one, and not by the board itself. It was never reported to the board for its consideration or action. But, notwithstanding this defect, in August following, the contractors, Wardell and Godfrey, entered upon its execution and began work on several mines along the line of the road. Soon afterwards Godfrey transferred his interest to Wardell, perceiving, as the bill alleges, that sums beyond those stipulated would be required, and being alarmed at the risks which he believed he had assumed.

In January following, 1869, a corporation under the laws of Nebraska, called the Wyoming Coal and Mining Company, was formed to develop and work the mines, having a capital stock of $500,000, divided into shares of $100 each, a majority of which was taken by six of the directors of the Railroad Company, one of whom was its president; and to it Wardell assigned his contract without any consideration.

The corporation continued the execution of the contract, Wardell, acting as its superin- [655] tendent, secretary and general manager, and delivered coal as needed by the Railroad Company up to the 18th of March, 1874, when the officers and agents of that Company, by order of its directors, took forcible possession of the mines and of the books, papers, tools and other personal property of the coal company, which they have held and used ever since. Hence the present suit, which Wardell brings in his own name, alleging as a reason that a majority, if not all, of the directors and stockholders of the coal company, except himself, are also directors and stockholders of the Railroad Company and that, therefore, he can obtain no relief by a suit in the name of the coal company. He prays that an account may be taken of the amount due for the coal delivered to the Railroad Company; for drawback on freight from the date of the contract to the forcible seizure alleged; for coal extracted from the mines since their seizure; for the property of the coal company taken and for the damages arising from the seizure and the attempted abrogation of the contract; and that the rights and interests of

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the several parties may be ascertained and declared; and for general relief.

To this bill the Railroad Company filed an answer, setting up in substance three defenses:

1. That the contract of July 16, 1868, was a fraud upon the Company; that it was made on its part by the executive committee of its board of directors, a majority of whom were by previous agreement, to be equally interested with the contractors in it, and for that reason its terms were made so favorable to the contractors and unfavorable to the Company as to enable the former to make large gains at the expense of the latter, and that the organization of the Wyoming Coal and Mining Company was a mere device to enable those directors to participate in the profits; and that, therefore, the contract was of no validity and binding obligation upon the Company.

2. That, at the time of the seizure of the property the Railroad Company was the owner of nine tenths of the stock of the coal company and had become apprehensive that Wardell, its superintendent and manager, would not furnish the coal needed to run the trains; and,

[656] 3. That since then the coal company and the Railroad Company, through their boards of directors, have had a settlement of their transactions, by which the contract of July 16, 1868, has been rescinded and the sum of $1,000,000 allowed to the coal company, and that the Railroad Company has set apart and tendered to the complainant $100,000 for his share in the coal company in that settlement.

The court below held that the contract of July 16, 1868, was a fraud upon the Company, but that the complainant was, apart from it, entitled to some compensation for his time, skill and services while engaged in taking out the coal, with the return, of the money actually invested and compensation for its use, the amount to be credited with what he had actually received out of the business; and that at his election he could have an accounting upon that basis or take the $100,000 tendered by the Company. Of the alternatives thus offered the complainant elected to take the $100,000 instead of having the accounting mentioned, but appealed to this court from the decree, contending that the contract itself was valid and that he is entitled to an accounting upon that hypothesis.

The evidence in the case justifies the conclusion of the court below as to the nature of the contract of July 16, 1868. It was evidently drawn more for the benefit of the contractors than for the interest of the Company. The extent, value and accessibility of the coal deposits along the line of the road of the Company were, as stated above, well known at the time to its directors, having the immediate control and management of its business. Wardell, the principal contractor, informed those with whom he chiefly dealt in negotiating the contract, that coal could be delivered to the Company at a cost of $2 per ton, yet the contract, which was to remain in force fifteen years, stipulated that the Company should pay treble this amount per ton for the coal the first two years, two and a half times the amount for the next three years, twice the amount for the following four years, and one half more for the balance of the time. And lest these rates might prove too little, the contract further provided that the sum paid should not be less than ten per cent added to the cost of the coal to the contractors. These [657] terms and the leasing of all the coal lands of the Company for fifteen years to those parties upon a royalty of twenty-five cents a ton for the first nine years, and without any royalty afterwards if the price of the coal should be reduced to $3, with the stipulation to provide side tracks to the mines, and also to furnish cars for transportation of coal for general consumption, and after charging them only what was charged to others, to allow them a drawback of twenty-five per cent on the sums paid, gave to them a contract of the value of millions of dollars. These provisions would of themselves justly excite a suspicion that the directors of the Railroad Company, who authorized the contract on its behalf, had been greatly deceived and imposed upon, or that they were ignorant of the cost at which the coal could be taken from the mines and delivered to the Company. But the evidence shows that those directors were neither deceived nor imposed upon, nor were they without information as to the probable cost of taking out and delivering the coal. And what is of more importance, it shows, as alleged, their previous agreement with the contractors for a joint interest in the contract, and, in order that they might not appear as co-contractors, that a corporation should be formed in which they should become stockholders, and to which the contract should be assigned; and that this agreement was carried out by the subsequent formation of the Wyoming Mining and Coal Company, and their taking stock in it. This matter was so well understood that when the contractors commenced their work in developing the mines and taking out the coal, they kept their accounts in the name of the proposed company, though no such company was organized until months afterwards.

It hardly requires argument to show that the scheme thus designed to enable the directors, who authorized the contract, to divide with the contractors large sums which should have been saved to the Company, was utterly indefensible and illegal. Those directors, constituting the executive committee of the board, were clothed with power to manage the affairs of the Company for the benefit of its stockholders and creditors. Their character as agents forbade the exercise of their powers for their own personal ends against the interest of the Company. They were thereby precluded from deriving any advantage from contracts, made by their authority as directors, except through the Company for which they [658] acted. Their position was one of great trust, and to engage in any matter for their personal advantage, inconsistent with it, was to violate their duty and to commit a fraud upon the Company.

It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another, whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, "Constituted as humanity is, in the majority of cases duty would be overborne in the struggle." *Marsh*

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v. *Whitmore*, 21 Wall., 183 [88 U.S., XXII., 484]. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to other parties and are clothed with power to act for them are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence, all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they or some of them shall take stock in it, and then, that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. *R. R. Co.* v. *Magnay*, 25 Beav., 586; *Benson* v. *Heathorn*, 1 Young & C. (C. C.), 326; *R. R. Co.* v. *Dewey*, 14 Mich., 477; *R. R. Co.* v. *Poor*, 59 Me., 277; and *Drury* v. *Cross*, 7 Wall., 299 [74 U. S., XIX., 40].

659] The scheme disclosed nere has no feature which relieves it of its fraudulent character, and the contract of July 16, 1868, which was an essential part of it, must go down with it. It was a fraudulent proceeding on the part of the directors and contractors who devised and carried it into execution not only against the Company, but also against the government, which had largely contributed to its aid by the loan of bonds and by the grant of lands. By the very terms of the charter of the Company, five per cent of its net earnings were to be paid to the government. Those earnings were necessarily reduced by every transaction which took from the Company its legitimate profits. It is true that some of the directors, who approved of, or did not dissent from the contract, early stated that they held their stock in the coal company for the benefit of the Railroad Company and transferred it or were ready to transfer it to the latter; but the majority expressed such a purpose, only when the character and terms of the contract became known and they were desirous to screen themselves from censure for their conduct.

The complainant, therefore, can derive no benefit from the contract, thus tainted, nor sustain any claim against the Railroad Company for its repudiation. The coal company may, perhaps, be entitled to reasonable compensation for the labor actually expended in the development of the mines and delivery of coal to the Railroad Company, considered entirely apart from the contract; and also for its property forcibly taken possession of by the officers of the Railroad Company. But an accounting for compensation thus limited is not desired by him, and as the two companies have since settled the matter in dispute between them by the payment of $1,000,000 to the coal company, of which $100,000 has been set apart for complainant, and he has elected to take that sum if an accounting cannot be had upon the assumed validity of the contract, *the decree of the court below is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 524, 526.

REED PECK, Admr. of GEORGE W. PECK, Deceased, *Plff. in Errr.*, [660]

v.

TRUMAN D. COLLINS.

(See S. C., 13 Otto, 660-665.)

Surrender of patent—effect of.

1. A patent surrendered for re-issue is canceled in law, as well when the re-issue is denied as when it is granted.
2. Since the surrender of the patent in this case, a new clause in the patent law, declaring that the surrender "shall take effect upon the issue of the amended patent," is retained in section 4916 of the Revised Statutes. What may be the effect of this provision in cases where a re-issue is refused, this court does not now decide.

[No. 162.]

Argued Dec. 20, 1880. Decided Apr. 11, 1881.

IN ERROR to the Court of Appeals of the State of New York.

The case is fully stated by the court.

Messrs. **Alexander D. Wales** and *W. E. Lansing*, for plaintiff in error.

Mr. **M. M. Waters**, for defendant in error.

M. Justice **Bradley** delivered the opinion of the court

This writ of error is brought to review a judgment of the Court of Appeals of the State of New York involving the construction and effect of certain proceedings under the laws of the United States relating to letters patent for inventions. On the 25th of October, 1865, one Byron Mudge obtained letters patent for an improved mode of sinking wells. In January, 1866, he assigned to Preston R. Peck and George W. Peck, each an undivided quarter of the patent. On the 5th of March, 1866, Mudge surrendered his patent and applied for a re-issue, and at the same time asked that an interference should be declared between him and one James Suggett, who had obtained two patents relating to the same matter, one in March, 1864, and the other in February, 1866. An interference was accordingly declared, and the application for re-issue was, of course, suspended. The interference also embraced the application of one Nelson W. Green for a patent, then pending. This interference case was pending before the Patent-Office and the Supreme Court of the District of Columbia, to which it was finally appealed, until January, 1868, when a decision was reached adverse to Mudge's application for a re-issue, sustaining Suggett's patent, and granting a patent to Green. The effect of these proceedings and of this decision upon Mudge's patent was the matter passed upon by the court of appeals. That court held that the patent had [661] thereby become valueless and void for any purpose, except perhaps as it might be ancillary to

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a bill in equity under section 4915 of the Revised Statutes of the United States.

The materiality of this decision to that of the case arose from the following facts: on the 24th of April, 1866, after Mudge had surrendered his patent for a re-issue and had obtained a declaration of interference, as before stated, he and the two Pecks entered into an agreement with Collins, the defendant in error, to sell to him, for the price of $4,000, one fourth of the patent, and to give him a deed therefor whenever he should call for it. Collins paid the Pecks their portion of the purchase money in advance by delivering to them two 7-30 U. S. bonds for $1,000 each. On the 28th of April, 1866, George W. Peck entered into a further agreement with Collins to convey to him, for the price of $1,500, three thirty seconds more of the patent, and to give a deed therefor when called upon for that purpose. Collins gave his note for the last named sum.

As these contracts were made in ignorance of the effect of a surrender of the patent for a re-issue they were afterwards conditionally revoked by returning the consideration money and note to Collins, upon the following stipulations respectively. On the 11th of June, 1866, Collins and George W. Peck executed an agreement of which the following is a copy, namely:

"Articles of agreement made this 11th day of June, 1866, between Truman D. Collins, of Cortland, N. Y., of the first part, and George W. Peck, of Cortland, N. Y., of the second part, are as follows:

Whereas, the said Peck did, by a contract bearing date April 28, 1866, bind himself, in consideration of the sum of $1,500, which sum was then paid to said Peck, to deed to said Collins an undivided three thirty second part of a patent-right, entitled a new mode of sinking wells; and whereas said contract was given after the letters patent had been surrendered up for a re-issue, and in ignorance of the fact that under certain circumstances the letters would not be returned to the owners of said patent; and whereas the said Peck desires a release from his obligations under the said contract in case he shall not be enabled to fulfill such obligations:

Now this agreement witnesseth, that the said [662] Collins, in consideration of the restoration of the said $1,500, agrees to release the said Peck from all obligations he has incurred under said contract, provided said Peck shall not be enabled at any time to fulfill the terms and conditions of said contract. And the said Collins further agrees to pay all that portion of the expenses of the application for a re-issue which have been incurred or which may be hereafter incurred, which it shall be incumbent on said Peck to pay as an owner of said patent, as stated in said patent, viz: a three thirty second part. The said Collins further agrees to pay to the said Peck the sum of $1,500 when the said Peck shall notify him of his readiness to fulfill the said contract by deeding to said Collins his interest in said patent or any re-issue which may be granted under said application.

T. D. COLLINS.
G. W. PECK."

On the 6th of July, 1866, Collins, on receiving from the two Pecks the two 7-30 bonds which he had delivered to them, gave them the following receipt and agreement, namely:

"Received July 6th, 1866, of Preston R. Peck and G. W. Peck, two thousand (2,000) dollars in 7-30 bonds, said bonds to be returned to Preston R. Peck and G. W. Peck as soon as Byron Mudge succeeds in getting a re-issue of a patent for putting down wells, now in the Patent-Office, or providing the old patent is returned; but if said patent is not re-issued or returned, then T. D. Collins is to keep the bonds and surrender his article he has for the purchase of an interest in said patent.

T. D. COLLINS."

Preston R. Peck assigned all his interest in this agreement to George W. Peck.

After the application of Mudge for the re-issue of the patent had been refused, and a final adjudication had been made against his claim and in favor of Suggett and Green, the attorney of G. W. Peck, in some way which does not appear, got possession of the original patent, and Peck tendered himself ready to perform the conditions of the last two agreements, and demanded payment or return of the sums mentioned therein, to wit: the $2,000 and the $1,500. This being refused by Collins, the present suit was brought to recover the money. The Judge [663] who tried the cause nonsuited the plaintiff upon the following view of the case, as stated in the bill of exceptions, namely: "I am inclined to think that I ought to nonsuit the plaintiff for the reason that the surrender of this patent by the patentee operated as an extinguishment of that patent. That, certainly, is within the reasoning of *Judge* Nelson in the case in Black's Reports, although that case is not precisely in point and in accordance with the apparent and real intent of the parties when a surrender is made, and if such surrender does not absolutely and unqualifiedly extinguish the patent, it seems to me that there should be some act of the department indicating an intention to send that patent back into the world as a valid patent. There should be a definite act of the department indicating an intention that it should remain in force, still having life and vitality."

The plaintiff excepted and the cause was taken by appeal to the Supreme Court of New York in General Term, and thence to the Court of Appeals, by both of which courts the judgment was affirmed. The Court of Appeals construed the two contracts to mean by a *return* of the old patent, a return of said patent clothed with the same force and validity which it had before it was surrendered for a re-issue; and held that the effect and operation of the refusal of a re-issue, and the decision against Mudge on the interference, was to destroy such force and validity. The first question for us to decide is, whether this decision as to the effect of the surrender, and the refusal to re-issue the patent, was or was not erroneous. If it was not, we are relieved from an examination of any other question in the case. And on this point we have very little embarrassment. We think that the Court of Appeals was right in deciding that by the surrender of Mudge's patent for a re-issue, the interference declared thereon, the decision against Mudge, and the subsequent refusal of a re-issue of his patent, said patent became destitute of validity and absolutely void.

It was decided by this court in the case of *Moffitt* v. *Garr*, 1 Black, 273 [66 U. S., XVII.,

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207], that the surrender of a patent, under the Act, extinguishes it. That was an action to recover damages for an infringement of a patent. [664] Whilst the action was pending the patent was surrendered, and this fact was pleaded as a bar to the further prosecution of the suit. The averment of the plea was "That since the commencement, etc., the said Moffitt surrendered to the United States the patent before that time issued to him, and for the alleged infringement of which this suit is brought." This plea was sustained on demurrer and judgment given for the defendant. The judgment was affirmed by this court after argument by able counsel. *Mr. Justice* Nelson, in delivering the opinion of the court, said: "The point in the case is, whether or not the patentee may maintain a suit on the surrendered patent instituted before the surrender, if he has not availed himself of the whole of the provision, and taken out a re-issue of his patent with an amended specification. The construction given to this section, so far as we know, and the practice under it, in case of a surrender and re-issue, are that the pending suits fall with the surrender. A surrender of the patent to the commissioner, within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence [it] can no more be the foundation for the assertion of a right after the surrender, than could an Act of Congress which has been repealed."

Since the decision of this case, it has been uniformly held that if a re-issue is granted, the patentee has no rights except such as grow out of the re-issued patent. He has none under the original. That is extinguished. And, although for the purpose of fixing a date to the title in a question of priority, and of limiting the period for which the patent is to run, the date of the original patent is important; no damages can be recovered for any acts of infringement committed prior to the re-issue.

It seems to us equally clear, that as the law stood when that decision was made, and as it continued to stand in 1866, when the surrender of Mudge's patent took place, a patent surrendered for re-issue was canceled in law as well when the application was rejected as when it was granted. The patentee was in the same situation as he would have been if his original application for a patent had been rejected. The law declares in terms, that "The specifications [665] and claim in every such case shall be subject to revision and restriction in the same manner as original applications are." Act of 1837, sec. 8 [5 Stat. at L., 193]; 1870, sec. 53 [16 Stat. at L., 205]; R. S., sec. 4916. The question of his right to any patent at all was opened anew, the same as upon an original application for a patent. Surrender of the patent was an abandonment of it, and the applicant for re-issue took upon himself the risk of getting a re-issue, or of losing all. A failure upon the merits, in a contest with other claimants, only gave additional force to the legal effect of the surrender.

Since the surrender of the patent in this case the patent laws have undergone a general revision by the Act passed July 8, 1870. In the 53d section of that Act, being the section relating to the surrender and re-issue of patents, a new clause was introduced, declaring that "The surrender shall take effect upon the issue of the amended patent;" and this clause is retained in section 4916 of the Revised Statutes. What may be the effect of this provision in cases where a re-issue is refused, it is not necessary now to decide. Possibly it may be, to enable the applicant to have a return of his original patent if a re-issue is refused on some formal, or other ground, which does not affect his original claim. But if his title to the invention is disputed and adjudged against him, it would still seem that the effect of such a decision should be as fatal to his original patent as to his right to a re-issue.

We find no error in the record, and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ASHBEL H. BARNEY, ET AL., *Appts.*, [205]
v.
WILLIAM H. LATHAM ET AL.

(See S. C., 13 Otto, 205-216.)

Act for the removal of causes—right of removal.

* The 2d clause of the 2d section of the removal Act of March 3, 1875, which declares that "When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper district;"

Construed, and held to mean that the entire suit is removed when one or more of the parties actually interested in such separable controversy files the proper petition and bond for removal. Such right is not affected by the fact that a defendant, who is a citizen of the same State with one of the plaintiffs, may be a proper, but not an indispensable party, to the separable controversy between the citizens of different States.

[No. 192.]

Submitted Jan. 10, 1881. Decided Apr. 18, 1881.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is fully stated by the court.

Mr. **Thomas Wilson,** for appellants.

Mr. **Gordon E. Cole,** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the construction of the 2d clause of the 2d section of the Act of March 3, 1875, ch. 137 [18 Stat. at L. 470], determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from the State Courts.

It was commenced by a complaint filed in one of the courts of the State of Minnesota. The [206] plaintiffs are William H. Latham and Edward P. Latham, citizens, respectively, of Minnesota and Indiana. The defendants are Ashbel H. Barney, Jessie Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Wm. G. Fargo, N. C. Barney, Charles T. Barney, citizens of New York; Angus Smith, a citizen of Wisconsin; Benjamin P. Cheney, a citizen of Massachusetts; and the Winona and

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Removal of causes under Act of 1875; citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 593.

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St. Peter Land Company, a Corporation organized under the laws of Minnesota.

The complaint is very lengthy in its statement of the grounds upon which the suit proceeds, but the facts, so far as it is necessary to state them, are these:

The Territory and State of Minnesota received, under various Acts of Congress, lands to aid in the construction of railroads within its limits. Act of March 3, 1857, 11 Stat. at L., 195; Act of March 3, 1865, 13 Stat. at L., 526; Act of July 13, 1866, 14 Stat. at L., 97. The benefit of the grants from the Government was transferred by the State to the Winona and St. Peter Railroad Company, a corporation created under its own laws, with authority to construct a road from Winona westerly by way of St. Peter in that State.

Prior to October 31, 1867, the individual defendants already named, except N. C. Barney and Charles T. Barney, together with Charles F. Latham and Danforth N. Barney, both of whom died before the commencement of this suit, had, under a contract between them and that company, constructed one hundred and five miles of the proposed road, whereby the latter became entitled to several hundred thousand acres of the lands granted by Congress to the State. On the day last named those persons entered into a written contract with the company, whereby the latter, among other things, agreed, in consideration of its indebtedness to the former, to sell and convey to them such lands as it should receive from the State by reason of the construction of the one hundred and five miles of road, excepting so much thereof as was necessary for tracks, right of way, depot grounds, and other purposes incidental to the operation of the railroad. Of the moneys advanced and used in construction, Charles F. Latham contributed one thirty seventh, and to that extent, it is claimed, he was entitled, in equity, to an undivided one thirty seventh of the lands earned. The company, prior to October, 1870, received from the [207] State conveyances of lands to the extent of 364,154, acres, which quantity was increased to 617,510 acres by a deed from the State, of date February 26, 1872; and, on May 30, 1874, it received a further conveyance for more than 500,000 acres. Up to the end of the year 1869, the railroad company made numerous sales, on long time, and in small quantities for actual settlement. Charles F. Latham died in October, 1870, seised and possessed, it is contended, of the equitable title to the undivided one thirty seventh of the lands earned. He left nine heirs at law, among whom are the plaintiffs. The defendant Ashbel H. Barney, acting for his associates, had a settlement with those heirs in reference to the sales of lands, and procured releases from them, which are averred to have been fraudulent and void as to present plaintiffs. The facts averred in support of that charge need not be here detailed. They are fully set forth in the complaint. The surviving associates of Charles F. Latham, together with N. C. Barney and Charles F. Barney, heirs at law of D. N. Barney, deceased, without the knowledge and consent of plaintiffs, incorporated themselves under the general laws of the State of Minnesota, as the Winona and St. Peter Land Company, to which, by their direction, the railroad company conveyed, and by which were thereafter managed, all the lands remaining unsold. The plaintiffs claimed that the individual defendants owed them, as heirs of Chas. F. Latham, the further sum of $3,500, on account of sales of land made both prior to his death and subsequently thereto, up to the time when the title to the lands was conveyed to the land company. The individual defendants repudiated the claim of plaintiffs to any further sum on that account, and the land company refused to recognize the claim of plaintiffs to an interest in the unsold lands.

The specific relief asked for is:

1. That the individual defendants be required to account to plaintiffs for the amount of all moneys which came to their hands from the sales of land prior to the death of Charles F. Latham, and pay over to plaintiffs the sum of $3,500, or such other sum as shall be found, on an accounting, to be due them as their share thereof; also such amounts as might be due them out of the sums received by Ashbel H. Barney, from purchasers subsequently to the death of Charles F. Latham.

2. That the plaintiffs be adjudged to be the owners of two ninths of one thirty seventh [208] part of all unpaid contracts and securities in the hands of the land commissioner of the company; that the land company be required to account with plaintiffs for all lands sold by it subsequently to the conveyance from the railroad company, and convey to them an undivided two ninths of one thirty seventh of all the unsold lands.

The individual defendants answered and put in issue all the material allegations of the complaint.

The land company, in its answer, admits the conveyance by the railroad company to have been without any consideration by it paid; that the stock therein is all held by its co-defendants and the heirs or personal representatives of D. N. Barney; and, that if the relief prayed for against the other defendants be granted, the company is liable to and should account to plaintiffs as asked in their complaint. It consented that the matters and facts established and proven as against its co-defendants may be considered as established and proven against it, and such judgment accordingly entered as might be equitable and proper.

Upon the petition, accompanied by a proper bond, filed by the individual defendants, the State Court entered an order that it would proceed no further in the suit. But, upon motion of plaintiffs, the Circuit Court remanded the suit to the State Court, upon the ground that it was not removable under the Act of Congress.

Is this suit removable upon the petition of the individual defendants, citizens of New York, Wisconsin, and Massachusetts? Does the fact that the land company, one of the defendants, is a corporation of Minnesota, of which State one of the plaintiffs is a citizen, prevent a removal of the suit to the Circuit Court of the United States?

The answer to these questions depends upon the construction which may be given to the 2d clause of the 2d section of the Act of March 3, 1875 [18 Stat. at L., 470].

We will be aided in our construction of that Act, by recalling as well the language as the settled interpretation of previous enactments

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upon the subject of removal of causes from State Courts.

The Act of Sep. 24, 1789, ch. 20 [1 Stat. at L., 78], gives the right of removal to the de-
[209] fendant in any suit, instituted by a citizen of the State in which the suit is brought against a citizen of another State. According to the uniform decisions of this court it applied only to cases in which all the plaintiffs were citizens of the State in which the suit was brought, and all the defendants citizens of other States. It made no distinction between a suit and the different controversies which might arise therein between the several parties; that is, Congress, when authorizing the removal of the suit, did not permit any controversy therein between particular parties to be carried into the Federal Court, leaving the remaining controversies in the State Court for its determination. If the whole suit could not be removed, no part of it could be taken from the State Court.

Thus stood the law until the Act of July 27, 1866, ch. 288 [14 Stat. at L., 306], which provided (omitting such portions as have no bearing upon the present question) that "If in any suit . . in any State Court . . by a citizen of the State in which the suit is brought against a citizen of another State, . . a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, *so far as relates . . to the defendant who is a citizen of a State other than that in which the suit is brought*, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, *or* if the suit is one in which there *can be a final determination of the controversy, so far as it concerns him*, without the presence of the other defendants as parties in the cause, then, and in every such case . . the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause *as against him* into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient security for *his* entering in such court . . . copies of said process *against him*, and of all pleadings, depositions, testimony, and other proceedings in said cause *affecting or concerning him*, and also for his there appearing; . . and it shall be thereupon the duty of the State Court to accept the surety and proceed no further in the cause *as against the defendant so applying for its removal*, . . . and the said copies being entered as aforesaid in such court of the United States the cause shall there proceed in the same manner as if it had been brought there by original proc-
[210] ess *against the defendant who shall have so filed a petition for its removal* as above prescribed.

And such removal of the cause, *as against the defendant petitioning therefor*, into the United States Court, shall not be deemed to prejudice or take away the right of the *plaintiff* to proceed at the same time with the suit in the State Court, *as against the other defendants*, if *he* shall desire to do so." 14 Stat. at L., 306.

This provision is explicit and leaves no room to doubt what Congress intended to accomplish. It proceeds, plainly, upon the ground among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that, in such a case, although the citizen of another State under the particular mode of pleading adopted by the plaintiff, is made a co-defendant with one whose citizenship is the same as the plaintiff's he should not, as to his separable controversy, be required to remain in the State Court, and surrender his constitutional right to invoke the jurisdiction of the Federal Court; but that, at *his* election, at any time before the trial or final hearing, the cause, *so far as it concerns him*, might be removed into the Federal Court, leaving the plaintiff, if he so desires, to proceed, in the State Court, against the other defendant or defendants. When there were several defendants to that separable controversy all of whom are citizens of States other than that in which the suit was brought, they could unite in claiming the removal of such controversy.

Next came the Act of March 2, 1867, ch. 196, which allows the citizen of the State other than that in which the suit was brought, whether plaintiff or defendant, upon the proper affidavit of prejudice or local influence, filed before the final hearing or trial of the suit, to remove *the suit* into the Federal Court. 14 Stat. at L., 558. It was construed in *Case of Sewing Mach. Co.*, 18 Wall., 553 [85 U. S., XXI., 914], as allowing a removal, upon such an affidavit, only where there is a common citizenship upon each side of the controversy raised by the suit; that is, all on one side being citizens of the State in
[211] which the suit is brought, while all on the other side are citizens of other States. In that case the plaintiff and one of the defendants were citizens of the State where the suit was brought, while two of the defendants were citizens of other States. It was ruled that whatever was the purpose of the Act of 1866 as to the particular cases therein provided for, Congress did not intend, by the Act of 1867, to give to parties, who are citizens of States other than that in which the suit is brought, the right of removal, upon the ground of prejudice or local influence, when their co-defendants or co-plaintiffs, as the case might be, are citizens of the same State with some of the adverse parties. The court, there, evidently had in mind the case where the presence in the suit of all the parties, on the side seeking the removal, was essential that complete justice might be done, and not a suit in which there was a separable controversy, removable under the Act of 1866.

We come now to the Act of March 3, 1875, ch. 137, the 2d section of which is in these words: "That any suit of a civil nature at law or in equity now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there is a controversy between citizens of different States, * * * * * either party may remove said suit into the Circuit Court of the United States for the proper district; *and* when, *in* any *suit* mentioned in this section, there shall be *a controversy* which is wholly between citizens of different States, and which can be fully determined *as between them*, then either *one or more* of the

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plaintiffs *or* defendants, actually interested *in such controversy*, may remove said *suit* to the Circuit Court of the United States for the proper district." 18 Stat. at L., pt. 3, 470.

We had occasion to consider the meaning of the first clause of this section in *Removal Cases*, 100 U. S., 468 [XXV., 597]. Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute, according to the facts, we found that the only controversy there, was between citizens of Ohio and Pennsylvania on one side, and certain corporations created under the laws of Iowa on the other. And we held that if, in arranging the parties upon the respective sides of the real matter in dispute, all those on one side are citizens of different States from [212] those on the other, the suit is removable, under the 1st clause of the 2d section of the Act of 1875; those upon the side seeking a removal uniting in the petition therefor. Whether that suit was not also removable under the 2d clause of that section we reserved for consideration until it became necessary to construe that part of the statute. The present case imposes that duty upon us.

We may remark that with the policy of the Act of 1875 we have nothing to do. Our duty is to give effect to the will of the law-making power when expressed within the limits of the Constitution.

We are of opinion that the intention of Congress by the clause under consideration, was not only to preserve some of the substantial features or principles of the Act of 1866, but to make radical changes in the law regulating the removal of causes from State Courts. One difference between that Act and the 2d clause of the 2d section of the Act of 1875 is, that, whereas, the former accorded the right of removal to the defendants who were citizens of a State other than that one in which the suit was brought, if between them and the plaintiff or plaintiffs there was in the suit, a controversy finally determinable as between them, without the presence of their co-defendants or any of them citizens of the same State with plaintiffs, the latter gave such right to any one or more of the plaintiffs or the defendants actually interested in such separate controversy. Both Acts alike recognized the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies. But while the Act of 1866, in express terms, authorized the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal, leaving the remainder of the suit, at the election of the plaintiff, in the State Court, the Act of 1875, provided, in that class of cases, for the removal of the entire suit.

That such was the intention of Congress is a proposition which seems too obvious to require enforcement by argument. While the Act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns [213] the defendant seeking the removal, there is nothing whatever in the Act of 1875 justifying the conclusion that Congress intended to leave any part of a suit in the State Court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former Act permitting the separation of controversies arising in a suit, removing some to the Federal Court, and leaving others in the State Court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal Court.

If the clause of the Act of 1875, under consideration, is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the Act of 1866 which, *ex industria*, limited the removal, in the class of cases therein provided for, to that controversy in the suit, which is distinctively between citizens of different States, and of which there could be a final determination without the presence of the other defendants as parties in the cause.

It remains only to inquire how far this construction of the Act of 1875 controls the decision of the case now before us. The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs an undivided two ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.

But the suit as distinctly presents another and entirely separate controversy, as to the [214] right of the plaintiffs to a decree against the individual defendants for such sum as shall be found, upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy, the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens, respectively, of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin and Massachusetts. And since the presence of the

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land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal Court.

It may be suggested that, if the complaint has united causes of action, which, under the settled rules of pleading, need not or should not have been united in one suit, the removal ought not to carry into the Federal Court any controversy except that which is wholly between citizens of different States, leaving for the determination of the State Court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin and Massachusetts. Whether those defendants and the land company were not *proper* parties to the suit we do not now decide. We are not advised that any such question was passed upon in the court below. It was not discussed here, and we are not disposed to conclude its determination by the court of original jurisdiction, when it is therein presented in proper form. A de- [215] fendant may be a proper, but not an indispensable, party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience; and it may be that there was or is such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit and to every controversy embraced by it; at least in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder.

In *Oliver* v. *Piatt*, 3 How., 411, we said, "It was well observed by *Lord* Cottenham, in *Campbell* v. *Mackay*, 1 Myl. & C., 603, and the same doctrine was affirmed in this court in *Gaines* v. *Chew*, 2 How., 619, that it is impracticable to lay down any rule, as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances; and must necessarily be left, where the authorities leave it, to the sound discretion of the court." We further said that the objection or multifariousness cannot, "as a matter of right, be taken by the parties, except by demurrer or plea or answer, and if not so taken it is deemed to be waived;" that although the court may take the objection, it will not do so unless it deems such a course necessary or proper to assist in the due administration of justice. Story, Eq. Pl., secs. 530-540; *Shields* v. *Thomas*, 18 How., 259 [59 U. S., XV., 370]; *Fitch* v. *Creighton*, 24 How., 163 [65 U. S., XVI., 598]. No objection was taken by the defendants, in the court below to the complaint upon the ground of multifariousness or misjoinder, and the plaintiffs should not be heard to make it for the purpose or with the effect of defeating the right of removal. They are not in any position to say that that right does not exist, because they have made those defendants, who were not proper parties to the entire relief asked. The fault, if any, in pleading, was theirs. Under their mode of pleading, whether adopted with or without a purpose to affect the right of removal, accorded by the statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different States, and can be fully determined without the presence of the other party defendant. The right of removal, if claimed, in the mode prescribed by the statute, depends upon [216] the case disclosed by the pleadings as they stand when the petition for removal is filed. The State Court ought not to disregard the petition, upon the ground that, in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more properly for the determination of the trial court, that is, the Federal Court, after the cause is there docketed. If that court should be of opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, and for that reason should require the pleadings to be reformed both as to subject-matter and parties, according to the rules and practice which obtain in the Courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can, under the 5th section of the Act of 1875, dismiss the suit or remand it to the State Court as justice requires.

We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all the defendants may have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State Court was erroneous.

The judgment is reversed with directions to the court below to overrule the motion to remand, to re-instate the cause upon its docket and proceed therein in conformity with the principles of this opinion.

Mr. Justice **Swayne**, while on the bench, participated in the decision of this case in conference, and concurs in this opinion.

The judgment now ordered is directed to be entered as of 10th of January, 1881, when the cause was submitted in this court.

Mr. Justice **Miller** dissenting:

I dissent from the judgment and opinion of the court in this case, and am requested to say that *Mr. Chief Justice* **Waite** and *Mr. Justice* **Field**, also dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 337; 104 U. S., 409; 106 U. S., 194; 112 U. S., 720; 4 Hughes, 213, 219; 10 Biss., 319, 473; 2 McCrary, 159; 3 McCrary, 105, 543; 6 Sawy., 222.

TOWNSHIP OF LINCOLN, *Plff. in Err.*, [412]
v.
CAMBRIA IRON COMPANY.

(See S. C., 13 Otto, 412-417.)

Verdict, effect of—municipal bonds, declaration on—sufficient verdict.

1. A verdict cures a defective statement of a title.

NOTE.—*Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited.* See, *note* to Mercer Co. v. Hackett, 68 U. S., XVII., 548.

What defects are cured by verdict; what not. See, *note* to Wills v. Claflin, 92 U. S., XXIII., 490.

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or cause of action, but not the statement of a defective title or cause of action.

2. In an action on municipal bonds issued by authority of law, plaintiff need only declare on the bonds. If there is any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it is for the defendant to show it.

3. Although the form of a verdict is defective, yet if it substantially finds the issue made by the pleadings, it is sufficient on writ of error.

[No. 189.]

Argued Jan. 7, 1881. Decided Apr. 18, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is fully stated by the court.

Mr. **H. F. Severens,** for plaintiff in error.

Messrs. **M. J. Smiley** and *Hughes & O'Brien,* for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

The principal question raised in this case by the assignment of errors is as to the sufficiency of the first and second counts of the declaration. These counts are upon certain bonds alleged to [413] have been made and executed by the Township of Lincoln, in the County of Berrien and State of Michigan, in aid of a railroad company; and the objection made to them is, that they do not aver that an election was held, to authorize the issue of the bonds, as required by law, and do not aver various other prerequisites to such issue. The question is whether the omission to make these averments is error.

The law from which the authority of the Township to issue bonds is derived, was passed March 22, 1869, and was entitled "An Act to Enable any Township, City or Village to Pledge its Aid, by Loan or Donation to Any Railroad Company, etc."

The 1st section declared that it should be lawful for any township or city to pledge its aid to any railroad company chartered or organized under and by virtue of the laws of the State of Michigan, in the construction of its road, by loan or donation, with or without conditions, for such sum or sums not exceeding ten per centum of the assessed value of the property in such township or city, as a majority of its electors, voting should, at a meeting called for that purpose determine. The 2d section prescribed the manner of calling the election, and giving notice thereof. The 3d section directed the manner in which the elections should be conducted, and the recording of the proceedings on the records of the township or city. The 4th section authorized the issue of coupon bonds for the amount of aid voted, and prescribed the form of the bonds and the manner of their execution; if issued by a township they were to be executed by the supervisor and township clerk, and under the seal of the township if it had one. Subsequent sections directed that the bonds when executed should be delivered to the state treasurer as trustee for the municipality and the railroad company; that the treasurer should record them in a book so as to show their amount, date, number, etc.; and that he should deliver them out to the railroad company whenever the company should present a certificate of the Governor of the State that it had complied with the provisions of the Act, and was entitled to the bonds; that, upon delivering them, he should indorse upon each bond the date of delivery and notify the clerk of the township or city; and that the township or city should levy the necessary taxes to meet the interest and principal as they became due. The 11th section provided that no bonds should be delivered to the railroad company, until it [414] should have complied with the conditions voted and completed its road through or into the township or city concerned, according as the charter required, and thence to its terminus or to some connecting line of railroad; or, if not touching such township or city, then that it should have completed its road through the adjoining municipality, or for a certain number of miles adjoining the nearest terminus.

The declaration, after referring to the statute and stating the organization of the Chicago and Michigan Lake Shore Railroad Company under the laws of Michigan, having for object the construction of a railroad from New Buffalo through and beyond the Township of Lincoln, proceeds, in the first count to aver that, on the first of June, 1869, the Township, acting under and in accordance with the authority conferred upon it by said Act of the Legislature, made a donation to said railroad company, and for that purpose made and executed four certain bonds payable to the said company or bearer, describing them, which bonds were duly delivered to the company, as provided in the Act; that the plaintiff, the Cambria Iron Company, on a certain day named, and before the maturity of the bonds, became and is now the owner, holder and bearer of said bonds for value; and that the bonds are due and have not been paid. The second count describes four other bonds issued by the Township under the authority given to it by the said Act as a further donation to the said railroad company, and certain interest coupons attached to said bonds and payable to bearer, of which it is stated the plaintiff became the lawful owner and holder for value before maturity, and which have become due and have not been paid. The declaration contained also the common money counts. The defendant pleaded in abatement want of service of process, to which plea a demurrer was put in and sustained by default, for want of a joinder in demurrer. The defendant also pleaded the general issue and gave notice of several special defenses; as, that the Chicago and Michigan Lake Shore Railroad Company, and not the defendant, was owner of the bonds; that whatever of indebtedness was referred to in the declaration, arose by reason of a vote of certain of the electors of the Township to aid in the construction of the railroad of the Chicago and Michigan Lake Shore Railroad Company; that the bonds in suit were delivered to said company in fraud of the Township; and [415] "That, when said bonds and the coupons for interest were so delivered, the road-bed of said railroad was not completed; that through said Township of Lincoln the culverts were not built nor were the bridges done or completed; nor was said railroad fenced; nor were the ties laid down; nor was the iron laid thereon; nor had the road crossings been completed; nor the cattle guards constructed."

The cause came on for trial and the following is the record of the proceedings which subsequently took place:

This cause having been called for trial the

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following jury was called and sworn, to wit: (giving the names of the jurors), who sat together in the jury box and heard the evidence this day adduced, the arguments of counsel, and the charge of the court, and without leaving their seats say upon their oath that the defendant is guilty in manner and form as alleged in the declaration, and assess its damages at the sum of $6,273.32, over and above its costs and charges. It is, therefore, considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed together with its costs and charges to be taxed, and that it have execution therefor.

We think it very clear that after a verdict upon the issues presented by this record, the omission in the declaration to state the holding of the election and the occurrence of the other preliminary facts which the law required to precede the issuing of the bonds, cannot be regarded as error. It is a rule of the common law that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the Judge would have directed the jury to give the verdict, such defect or omission is cured. [*Stennel* v. *Hogg*], 1 Wms. Saund., 228. Or, as it has been tersely put, a verdict cures a defective statement of a title or cause of action, but not the statement of a defective title or cause of action. 1 Wms. Saund., 228, *c. note*. The declaration in this case states that the defendant, the Township of Lincoln, acting under and in accordance with the authority conferred by the Act, made a certain donation to the railroad company, and for that purpose did make and execute the bonds in question; [416] that the bonds were afterward duly delivered to the company as provided in the Act; and that the plaintiff before maturity became the owner thereof for value. The defendant denied all this, and also set up special defenses, that the transfer was fraudulent, that the road was never built as required before the delivery of the bonds, etc. Now if the Township could only make the donation alleged by way of an election duly held, it was the duty of the court below to require proof of this fact, as well as of the other facts necessarily involved in the issue as made, and it will be presumed that this was done. What proof was sufficient for this purpose it is not necessary to decide, as no exception was taken on that point.

But we do not think that there was any defect in the declaration to be cured. We think that it would have been good on demurrer. The Township had authority by law to issue its bonds by way of donation to a railroad. It did issue its bonds. They got into circulation as commercial securities, and were purchased by the plaintiff. All the plaintiff had to do in case of non-payment was simply to sue on the bonds. If there was any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it. A bond, especially a negotiable bond, is a *prima facie* obligation of the obligor, if he has capacity to make it; and is binding according to the terms and conditions apparent on its face until the contrary be shown. Whether an alleged defense, when set up, is or is not good against the particular holder is to be determined by the court in each case. How far, as against a *bona fide* holder, the obligor may, in any case, go behind the obligation itself, for the purpose of showing a failure to pursue the law authorizing its issue, is not yet, perhaps, clearly determined. Here the defendant Township had opportunity to set up any defense. It denied all the averments of the declaration and also gave notice of the non-performance of certain conditions to be performed by the railroad company preliminary to the issue of the bonds. The verdict was against the defendant, and no erroneous rulings at the trial are complained of. [417] We think that the declaration and proceedings as exhibited by the record are not obnoxious to any just exception.

The form of the verdict is defective, it is true, finding "That the defendant is guilty in manner and form as alleged in the declaration:" but this is a mere clerical error properly amendable. It substantially finds the issue made by the pleadings. The declaration was in *assumpsit;* the plea was a general denial of the allegations of the declaration, equivalent to a plea of *non-assumpsit*, with notice of special matter. The verdict in effect says that the defendant did promise and violate its promise, as alleged in the declaration.

We think there is no error in the record and the judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 586; 112 U. S., 217.

HENRY G. FISK ET AL., *Plffs. in Err.*, [431]
v.
CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

(See S. C., 13 Otto, 431-434.)

Duties on cotton goods.

Manufactured shirtings, not made up, composed of linen and cotton, the cotton being the material of chief value and largely predominating, are manufactures of cotton chargeable with the duty prescribed by the Act of Mar. 3, 1865, ch. 80, sec. 1.

[No. 260.]

Argued April 6, 1881. Decided April 18, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Stephen G. Clarke,** for plaintiff in error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit to recover back duties paid under protest. The goods imported were manufactured shirtings, not made up, composed of linen and cotton; the cotton being the material of chief value and largely predominating. There were more than two hundred threads to the square inch, counting the warp and filling. The Act of March 2, 1861, 12 Stat. at L., 192, [432]

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ch. 68, sec. 22, provided for a duty of 30 per centum *ad valorem* on "Manufactuers not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, or worsted, or flax." The same Act, section 14, provided for specific duties on all manufactures of cotton not bleached, etc., having certain numbers of threads to the square inch, counting the warp and filling, and being of certain weights. An addition was made to the duties on manufactures of mixed materials by the Act of July 14, 1862, 12 Stat. at L., 557, ch. 163, sec. 13. By an Act passed June 27, 1864, 13 Stat. at L., 208, ch. 171, sec. 6, the duties on manufactured cottons, as provided in the Act of 1861, were to some extent changed, and a general clause added at the end of the section, as follows: "All other manufactures of cotton, not otherwise provided for, thirty five per centum *ad valorem*." On the 3d of March, 1865, 13 Stat. at L., 491, ch. 80, sec. 1, the rates of duty on manufactures of cotton dependent on the weight and the number of threads to the square inch were somewhat changed.

By the Act of April 30, 1842, 5 Stat. at L., 565, ch. 270, sec. 20, now sec. 2499 of the Revised Statutes, it was provided that there should be levied and collected on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article it most resembles in any of the above particulars; and if any non-enumerated [433] article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, it shall pay the highest rate, and on all articles manufactured from two or more materials the duty shall be assessed at the highest rate chargeable on any of its component parts.

The Collector in this case demanded and collected the duties at the rates chargeable on manufactures of cotton exceeding two hundred threads to the square inch, while the importer claimed the goods were dutiable under the Acts of 1861 and 1862, as composed of mixed materials. The suit was brought to recover back the excess charged by the Collector, and on the trial the court instructed the jury on the conceded facts to bring in a verdict for the defendant. This instruction is assigned for error here.

We have decided at this Term, in *Solomon* v. *Arthur* [*ante*, 147], that the mixed material clause of the Act of 1861 was descriptive rather than denominative, and that because goods were made of mixed materials they were not necessarily stamped with the name of mixed goods. Consequently goods made of mixed materials were not dutiable under that clause if they came properly within any other description found in the tariff Acts. The Act of 1864 provides for all manufactures of cotton, so that the question here is, whether these goods are essentially of that character. If they are, they are not dutiable under the mixed material clause.

In *Stuart* v. *Maxwell*, 16 How., 162, it was held that the Act of 1842 brought goods made of linen and cotton within the provision of the tariff Act of 1846, 9 Stat. at L., 46, ch. 74, sec. 11, sched. D, which imposed a duty on "manufactures composed wholly of cotton, not otherwise provided for." It was conceded that manufactures of cotton and linen were not enumerated in the Act of 1846, but we said that, "By providing for the principal thing, it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling or colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before or known it [434] under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 then declares that it is to be deemed the same and to be charged accordingly." The effect of this is to hold that such an article "is provided for, under the name of what it resembles." Here, all manufactures of cotton are provided for in the Act of 1864 and its amendments, and the article now in question, in material, quality and texture, as well as the use to which it is to be applied, is precisely like cotton shirtings. As cotton largely predominates, we think the burden was cast on the importer to show that the change was substantial and not for the purpose of evading the requirements of the law. It is not pretended that the new article had acquired any distinctive name in commerce, or that it was in any material respect different from similar goods manufactured entirely of cotton. The only difference between this case and that of *Stuart* v. *Maxwell* is that here it is claimed the articles are enumerated as mixed goods, while there that they were not enumerated at all. There it was held that they were not non-enumerated because they were substantially cotton goods, and here we think for the same reason they are not mixed goods. They are substantially and, therefore, within the meaning of the tariff Acts, actually manufactures of cotton. Linen has been used to a limited extent, not to make goods of "mixed materials," but to make "manufactures of cotton" more useful for some purposes. To hold, upon the facts as they are admitted to be, that these goods were something radically different from cotton shirtings, would be to encourage evasions of the descriptive terms in the tariff laws, "by some trifling or colorable change in the fabric, or some of its incidents." This we are not inclined to do.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 129.

JOHN F. B. THOMPSON, *Plff. in Errr.*, [480]
v.
UNITED STATES, *ex rel.*, CAMBRIA IRON COMPANY.

(See S. C., 13 Otto, 480-485.)

Case followed—resignation of town officer—evidence of motive—subsequent fact—abatement of proceedings in mandamus.

1. Edwards v. U. S., *ante*, followed.
2. The tender of a resignation by the supervisor or the clerk of a township, by filing the same with

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the clerk, is not valid and effectual as a resignation, so as to relieve the officer of his official character, without an acceptance by the township board, or an appointment to fill the vacancy.

3. Evidence to show the motive and intent with which the supervisor and clerk attempted to resign, it seems, was admissible for the purpose of showing that the attempted resignation was simulated and fraudulent.

4. A fact which had arisen since the return was made, was not competent under the issue framed thereon. To make it effectual as a matter of defense, it should have been set up by a plea *puis darrein continuance.*

5. Proceedings in *mandamus* do not abate by the expiration of the term of office of the defendant, where there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached.

6. The cases in which it was held by this court that an abatement takes place by the expiration of the term of office, have been those of officers of the Government, whose alleged delinquency was personal, and did not involve any charge against the Government.

[No. 188.]

Argued Jan. 7, 1881. Decided Apr. 18, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is fully stated by the court.

Mr. **H. F. Severens,** for plaintiff in error.

Messrs. **M. J. Smiley,** *Hughes & O'Brien,* for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This case arises upon a petition for a *mandamus* to compel Thompson, the township clerk of the Township of Lincoln, in the County of Berrien, State of Michigan, to make and deliver to the supervisor of the township a certified copy of a judgment recovered against it by the Cambria Iron Company, the petitioners, in order to its being placed upon the tax roll for collection and payment. The questions arising are much the same as those disposed of in the case of *Edwards* v. *U. S.* [*ante*, 293], just decided. The petition states that the Cambria Iron Company recovered judgment against the Township of Lincoln, in the Circuit Court of the United States, on the 29th of May, 1876, for the sum of $6,273.32, besides costs, and caused to be delivered a certified copy thereof to Thompson, the township clerk, with a request to certify it to the supervisor, to be raised by tax on the township; but that Thompson declared that he would not do it, and pretended that there was no supervisor; that one Mitchell Spillman, who had been supervisor, had resigned; and that if there were any supervisor, still he would not do it; that he himself had [481] resigned, and was not clerk of the township; that the supervisor and himself had both resigned for the express purpose of defeating the collection of petitioner's judgment and other similar claims. The petition charges that the said supervisor and clerk have fraudulently combined to cheat and defraud the petitioners, by falsely pretending to resign; whereas, they actually continue to discharge the duties of their offices; setting forth various facts corroborative of the charge.

The court below having granted a rule to show cause why a *mandamus* as prayed for should not issue; the defendant filed an answer to the petition, admitting that a judgment had been entered against the township, as stated in the petition, but averring that it was not a valid judgment, because, as the answer alleged, the court never obtained jurisdiction; that no service was ever had of process in the cause upon the supervisor of the township; that Alonzo D. Brown, upon whom service was made, was not at the time supervisor; and that, although one Clapp, an attorney appeared for the township he was never employed by the township; that the defendant was, it is true, duly elected clerk of the township in April, 1876, but that he resigned his office before the certified copy of the judgment was served upon him, by filing in the office of clerk (that is, his own office) and depositing with the files of the township a written resignation addressed to the township board; and that he has not acted as clerk since. He admits that he refused to certify the judgment, but did so because he was not clerk and because there was no supervisor, Spillman, who had been supervisor, having resigned. This answer was demurred to, but the demurrer was overruled and the cause came on for trial. The jury rendered a special verdict, as follows:

"First. That, on the 23d day of November, 1875, Alonzo Brown, upon whom the declaration was served in the original case of *Cambria Iron Co.* v. *Lincoln*, was supervisor of said Township of Lincoln, and was such supervisor at the time the declaration in said cause was served upon him, as such supervisor by the marshal.

Second. That George S. Clapp, who entered his appearance as attorney for the defendant in said cause, and appeared and plead therein for said Township of Lincoln, was duly authorized by said defendant to appear and plead for it in said cause. [482]

Third. That the respondent, John F. B. Thompson, was, at the time of the service of the order to show cause in this [matter] why a *mandamus* should not issue against him, clerk of the said Township of Lincoln, and still is such clerk, and has not resigned the said office.

Fourth. That Mitchell Spillman was, at the time the said order to show cause was served, the supervisor of said township, and still holds the said office, and held the said office on October 1, A. D. 1876."

The questions raised on the trial were, as in the previous case of Edwards, whether the tender of a resignation by a supervisor or clerk of a township, by filing the same with the clerk, was valid and effectual as a resignation, so as to discharge the officer of his official character, without an acceptance by the township board, or an appointment to fill the vacancy. Such a resignation was relied on to show that Brown, on whom process in the original action was served, was not supervisor, and that Spillman was not supervisor, and the defendant was not clerk when the present proceedings were commenced. As we have fully discussed this question in the previous case, it is not necessary to say anything further on the subject. The ruling of the court below was in conformity with our decision in that case. This also disposes of the question of the appearance of Clapp, the attorney in the original action, he having been employed by Brown, the supervisor.

Another question raised at the trial was whether the petitioner might show the motive and intent with which the supervisor and clerk

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attempted to resign, with a view to show that it was done for the purpose of defrauding the petitioners, and avoiding to do those acts which were necessary to the collection of his judgment. The court allowed evidence to be given on the subject, and to this the defendant excepted. We do not see why the evidence was not admissible for the purpose of showing that the attempted resignation was simulated and fraudulent. But it is not necessary to decide this point, since the admission of the testimony did not injure the defendant, because the at- [483] tempted resignations were not completed by the acceptance of the township committee.

Another point raised was that it appeared by the township book, offered in evidence, that the township board did appoint a successor to the defendant as township clerk on the 4th day of November, 1876, after the cause was at issue. On motion of the petitioner's counsel, this evidence was stricken out, for the reason that such fact having arisen since the return was made, it was not competent under the issue framed thereon. It does not appear that this matter was in any way brought to the notice of the court or sought to be put in issue, until the evidence was offered during the trial. In addition to this, the evidence was not conclusive. It did not show that the attempted appointment was effectual. Had the point been properly put at issue the whole matter could have been known. We think the court was justified in striking out the evidence. As a matter of defense, whether in abatement or in bar, it should have been set up by a plea *puis darrein continuance* or its equivalent. It could not be given in evidence under any of the issues in the cause. *Jackson* v. *Rich*, 7 Johns, 194; *Jackson* v. *McCall*, 3 Cow., 79.

But we cannot accede to the proposition that proceedings in *mandamus* abate by expiration of office of the defendant, where, as in this case, there is a continuing duty, irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. The contrary has been held by very high authority. *People* v. *Champion*, 16 Johns, 61; *People* v. *Collins*, 19 Wend., 56; High, Extr. Rem., sec. 38. We have had before us many cases in which the writ has, without objection, been directed to the corporation itself, instead of the officers individually; and yet, in case of disobedience to the peremptory *mandamus*, there is no doubt that the officers by whose delinquency it was incurred, would have been liable to attachment for contempt. The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment. *Comrs. of Knox Co.* v. *Aspinwall*, 24 How., 376 [65 U. S., XVI., 735]; *Supervisors* v. *U. S.*, 4 Wall., 435 [71 U.S., XVIII., 419]; *Von* [484] *Hoffman* v. *Quincy*, 4 Wall., 535 [71 U.S., XVIII., 403]; *Benbow* v. *Iowa City*, 7 Wall., 313 [74 U. S., XIX., 79]; *Butz* v. *Muscatine*, 8 Wall., 575 [75 U. S., XIX., 490]; *Mayor* v. *Lord*, 9 Wall., 409 [76 U. S., XIX., 704]; *Comrs.* v. *Sellew*, 99 U. S., 626 [XXV., 335]; and many others.

And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him, in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and re-appointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office. The writ might be directed to the township clerk by his official designation, and will not be deprived of its efficacy by inserting his individual name. The remarks of *Mr. Justice* Cowen, in *People* v. *Collins*, 19 Wend., 68, are very pertinent to the case, and seem to us sound. That was a *mandamus* to commissioners of highways, who were elected annually; and it was objected that their term would expire before the proceedings could be brought to a conclusion. *Justice* Cowen said: "The obligation sought to be enforced devolves on no particular set of commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners and their successors; and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. To say otherwise would be a sacrifice of substance to form." In this connection we may also refer to the recent case of *Comrs.* v. *Sellew* [*supra*].

The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government, whose officers they were. A proceeding against the gov- [485] ernment would not lie. *Sec.* v. *McGarrahan*, 9 Wall., 298 [76 U. S., XIX., 579]; *U.S.* v. *Boutwell*, 17 Wall., 604 [84 U. S., XXI., 721].

We think that the proceedings have not abated, either by the resignation of the clerk and the appointment of a successor, or by the expiration of his term of office, even if it sufficiently appeared that either of these contingencies had occurred.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

LITTLE ROCK WATER WORKS COMPANY, *Appt.*, [516]

v.

JOHN G. BARRETT ET AL.

(See S. C., 13 Otto, 516-518.)

Appointment of receiver—condition in mortgage.

1. Where the appointment of a receiver in the court below was made by consent of parties, such parties, appellants here, are bound by their consent, in this court as well as in the court below.

2. Where a mortgage contains a condition that, upon the failure for ninety days to pay the interest, the principal shall become due, provided such failure is not caused by the faults of a third party, it is

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sufficient to allege the default in payment of interest. If there was any such fault in the third party, it is matter of defense to be made out by the defendant.

[No. 1099.]

Submitted Jan. 12, 1881. Decided Apr. 18, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is fully stated by the court.

Messrs. **Henderson & Caruth,** *W. F. Henderson* and **A. H. Garland,** for appellant.

Mr. **U. M. Rose,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

The appellant, a Corporation under the laws of the State of Arkansas, undertook to construct a system of water works, for the use of the City of Little Rock and the citizens of that city, under an ordinance passed by the city authorities.

In order to raise the money necessary to do this work, the Company issued its bonds to the amount of $80,000, the payment of which was secured by a mortgage on the entire works and property of the Company. The appellees were trustees in that mortgage, and on failure of payment of semi-annual coupons for the interest on the bonds they brought the present suit to foreclose the mortgage. In the progress of the suit it was removed from the state court in which it was commenced into the Circuit Court of the United States, and that court appointed a receiver to take charge of the property, pending the litigation. The court rendered a final decree for the full amount of the bonds and coupons secured by the mortgage, and ordered a sale to satisfy that amount, from which this appeal is taken.

Two errors are assigned.

1. The appointment of a receiver by the circuit court.

[517] 2. Rendering a decree for the amount of the bonds which by their terms are not yet due.

As regards the first assignment of error, it is sufficient to say that the record shows that the appointment of receiver was made by consent of parties, the attorneys of appellant being in court at the time. However other parties may complain of this act, and there were other parties none of whom have appealed, the present appellants are bound by their consent in this court as well as in the court below, and cannot be heard to object to what they then agreed to.

As to the second error assigned, the counsel for appellant says, "The court will search in vain through the bill, two amended bills and supplemental bill, to find any reason why the appellees should have a decree for the payment of bonds which will not be due for many years." Yet in the very body of the original bill is a long extract from the deed of trust on which the suit is founded, a part of which is in this language: "It is further agreed that in the event said party of the first part (the Water Works Co.), shall fail, for the space of ninety days, to pay the semi-annual interest due on said bonds, as and when the same may become due, or any of said annual installments of the sinking fund, as and when the same may become due, provided that such failure is not caused by the said City of Little Rock, under the contract aforesaid, after presentation and demand of the payment of said coupons, or after the demand of any installment of said sinking fund, then and in that event all of said bonds shall become due and payable, and the lien hereby created may be enforced for the whole debt." The bill shows that one set of coupons was due and unpaid over ninety days, when suit was begun, and others fell due during the litigation, and that the Company was insolvent, and the works going to ruin. The copy of the deed of trust is made a part of the bill by reference, and is attached to it as an exhibit.

It is said, however, that it does not appear by any allegation of the bill that the failure to pay was not by reason of the fault of City of Little Rock, mentioned in the mortgage. It seems probable that the fault of the city, which might mitigate the failure of the Company to pay its interest, so far as to prevent the whole sum [518] falling due, for that failure had reference to the money which the city had agreed to pay for the use of water in the public buildings, and certain hydrants which were to be for public use.

If there was any such fault in the city, it was matter of defense to be made out by defendants, for the innocent purchaser of their bonds could not be supposed to know whether the city had paid as it should or not. No such case is made by appellant. On the contrary, the case shows that the appellant did not construct the works, but let out the job to Dennis Long and Samuel A. Miller; that by reason of their failure to do the work, according to the contract of the Company with the city, the latter refused to accept it, and the Company sued Long and Miller for that cause, and attached the work they had constructed, which suit was pending when the foreclosure suit began, the record of the former being made a part of the latter. It was obviously the fault of the appellant, and not the city, which caused the default in paying the coupons.

As these are all the errors assigned and they are not sustained by the record, the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[595]

UNITED STATES, *Appt.*,

v.

E. J. QUIGLEY.

(See S. C., 13 Otto, 595, 596.)

Abandoned and captured property.

Where a resident of Georgia left there when the State seceded and went to Indiana and there remained until the end of the war, and before leaving appointed an agent who bought for him, cotton that was captured by the United States, and the proceeds are in the Treasury, under the Abandoned and Captured Property Act, held, that he is entitled to recover such proceeds.

[No. 213.]

Argued Apr. 5, 1881. Decided Apr. 18, 1881.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Mr. **Edwin B. Smith,** *Asst. Atty-Gen.*, for appellant.

Mr. **John D. McPherson,** for appellee.

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[596] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The facts of this case, as gathered from the findings below, are these: in 1860 the claimant, a native of Georgia, was domiciled at Dalton in that State, and doing business as a merchant. About the time the State seceded he left his home and his business, and went to Indiana, where he remained until the end of the war. Before leaving, he appointed an agent to manage for him while he was gone. This agent, in 1864, bought for him, with moneys collected or acquired on his account, two bales of cotton that were afterwards captured by the military forces of the United States at Savannah. The proceeds, $350.66, are now in the Treasury, under the Abandoned and Captured Property Act. On these facts, the Court of Claims gave judgment against the United States, and to reverse that judgment this appeal was taken.

As was very properly said by the court below, if this claimant had remained at home in his native State, and served the Confederacy during the entire war, acquiring his money and buying his cotton himself, this judgment would be right. No actual change of his domicil is shown, and his agent has done for him no more than he might himself have lawfully done if he had staid where his property was. In no just sense was he trading across the lines with the enemy, through the operations of this agent. He was simply saving what he had been compelled to leave, in order to avoid becoming in law an enemy of his Government. His property being in enemy territory, was enemy property, and subject to capture as such, but he was both in law and in fact a friend. The agency he left behind, was only to manage what he could not take away, and as the money invested in the cotton was collected or acquired through this agency, we will presume it was obtained at the place he left rather than sent through the lines. If the facts were otherwise the United States should have caused it to be so found. No other reasonable construction can be given to the findings as they appear in the record, than that the cotton is the proceeds of the property, invested in the business the claimant was compelled to abandon, in order to avoid becoming personally implicated in a rebellion against his Government.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

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[597] JOSEPH SWAN, *Plf. in Err.*,

v.

CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK.

HERMAN FLEITMAN ET AL., *Plfs. in Err.*,

v.

SAME.

HENRY FLEGENHEIM ET AL., *Plfs. in Err.*,

v.

SAME.

(See S. C., 13 Otto, 597, 598.)

Construction of Tariff Act.

Under section 8 of the Tariff Act of 1864, laces, ribbons, galloons and braids, made substantially of silk, are subject to a duty of sixty per cent.

[Nos. 221, 222, 261.]

Argued Apr. 6, 1881. Decided Apr. 18, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case, which arose in the court below, is fully stated by the court.

Mr. Stephen G. Clarke, for plaintiffs in error.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 8 of the Tariff Act of June 30, 1864, 13 Stat. at L., 210, ch. 171, provides for the levy and collection of duties on imports, as follows:

"On all dress and piece silks, ribbons, and silk velvets, or velvets of which silk is the component material of chief value, sixty per centum *ad valorem*. On silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, sixty per centum *ad valorem*.

On all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum *ad valorem*."

In one of the cases the importation was of laces; in another cigar ribbons; and in the other galloons and braids. The articles in each case were made of silk and cotton, but the silk preponderated so largely that they were, substantially, silk. The Collector charged them with duties at the rate of sixty per centum *ad valorem*, as silk laces, ribbons, galloons and braids, while the importers claimed they were dutiable at fifty per centum only, as manufactures of which silk was the component material of chief value, not otherwise provided for. These suits were brought to recover back what had been paid in [598] excess of fifty per centum. In the cases for the laces, galloons and braids, the evidence was positive and uncontradicted to the effect that they were substantially made of silk, and there was no claim that they were commercially known otherwise than as silk goods. Upon these facts, the court directed a verdict in favor of the defendant. In the case for the ribbons, the jury was instructed that if the goods were made substantially of silk, and were not commercially regarded as different from silk ribbons, a verdict must also be returned for the defendant. In the last case, there was some evidence which, it was claimed, showed that the particular kind of ribbon imported had, by usage, been taken out of the commercial designation of silk ribbons. These writs of error have been brought to reverse the judgments which followed from these rulings.

We think the court below was right in the view it took of the law. While tariff Acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use

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unless the contrary is shown. Outside of commerce there can hardly be a doubt that laces, ribbons, galloons and braids, made substantially of silk, would be denominated silk goods. Until, then, it was shown that they were regarded differently by dealers, it was right to class them as dutiable at sixty per centum. The burden of bringing them under the reduced rate was thrown on the importer. So far as the laces, galloons and braids are concerned, there was no attempt to do so, and in respect to the ribbons, the attempt that was made failed before the jury. We cannot believe that what are bought and sold in the market as dress or piece silks, are not in commercial designation silks because they are to some extent adulterated with a cheaper fiber, if the silk so far predominates over the inferior material that it can be said they are made, substantially, of silk. If that is true of piece silks, it certainly must be of laces, ribbons, galloons and braids. So, in general, it may be said, as we think, that all goods made substantially of silk will be treated as silk, commercially, unless it directly appears that commerce has given another name to the admixture.

The judgment in each of the cases is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[683] TOWN OF WALNUT, *Plff. in Err.*,

v.

J. H. WADE.

(See S. C., 13 Otto, 683–697.)

Review of facts—bill of exceptions—statute—clerical error—parliamentary law—donation to railroad—town bonds—recitals—coupons—interest on—presentation—excess of issue.

1. There can be no review in this court of the findings of fact made by the court below.
2. The only use which can be made of the bill of exceptions, when there is a special finding of facts, is to present the rulings of the court in the progress of the trial, upon questions of law. The facts are conclusively settled by the finding of the court.
3. The question whether an alleged statute "is really a law or not, is a judicial one, and is to be settled and determined by the court and judges, and is not a question of fact to be determined by a jury."
4. A mere clerical error in keeping the journals of the Senate of the Illinois Legislature, does not render void a law which appears on its statute-book and in its archives.
5. There is no rule of parliamentary law, and there is no provision of the Constitution of Illinois, which requires a bill to preserve the same title through all its stages in both Houses.
6. After a vote by the electors of a township in favor of a donation to aid in the construction of a railroad, the supervisor and clerk of the township are the proper corporate authorities to subscribe for the stock of the company and to issue the bonds of the township therefor.
7. The significance of the words "people of a town" and "inhabitants of a town" in the Illinois Act of Mar. 25, 1869, is the same. Inhabitants, means legal voters.
8. A *bona fide* holder is not bound to look beyond the legislative Act and the recitals in the bonds, to see whether the conditions precedent to issuing the bonds have been complied with.
9. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before a suit can be maintained on them.
10. Coupons for installments of interest, when severed from bonds, are negotiable and pass by delivery and bear interest from the day they are payable.
11. The failure to present the coupons for payment does not prevent the running of interest.
12. The fact that the amount of bonds issued by the corporate authorities exceeded by $10,000 the amount of stock voted for by the inhabitants, can have no influence upon the right of a *bona fide* holder for value to recover upon the bonds which he holds.

[No. 258.]

Argued Apr. 5, 6, 1881. Decided Apr. 18, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. **Allan C. Story** and **W. C. Goudy**, for plaintiff in error.

Messrs. **Thomas S. McClelland** and *George A. Sanders*, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

This suit was brought upon one thousand and ten coupons for $10 each, representing the annual interest on three hundred and twenty-one bonds for the sum of $100 each, purporting to be executed by the plaintiff in error. It was claimed that said bonds were issued in aid of the Illinois Grand Trunk Railway Company, and in payment of stock in that company subscribed for by the plaintiff in error and delivered to it. [684]

The coupons bore the following numbers: from 1 to 200 inclusive, 258, and from 281 to 400 inclusive, and were cut from bonds bearing corresponding numbers.

Before final judgment in the court below, the defendant in error took a nonsuit as to all coupons sued on, bearing numbers from 301 to 400 inclusive and withdrew the same from consideration by the court, and left, as the cause of action, only those coupons which bore numbers under 301.

The declaration set out a copy of one of the coupons sued on, and averred that all the others were of the same tenor and effect, except as to their numbers and date of payment respectively. The copy was as follows:

"No. 251. Series 4, due January 1, 1875, for $10.

$10.] WALNUT TOWNSHIP. [No. 251.

Railroad bond.

Interest warrant.

Supervisor of Walnut Township, pay to bearer, January 1st, 1875, ten dollars, at the office of the State Treasurer, Springfield, Illinois.

WM. SANDERS, *Town Clerk.*

M. KNIGHT, *Supervisor.*"

The parties waived a trial by jury and submitted the cause to the court upon the issues of fact as well as of law. The court made a special finding of facts, as follows:

"First. That said defendant Town, by its town clerk and supervisor, did, some time in the month of October, A. D. 1870, make its four hundred bonds for the sum of $100 each, and numbered consecutively from one to four hundred, inclusive, amounting in the aggregate to the sum of $40,000, said bonds bearing interest at the rate of ten per cent per annum, payable annually, and the principal thereof payable to the Illinois Grand Trunk Railway or [685] bearer on the first day of January, A. D. 1881, and dated January 1, 1871, said interest being evidenced by ten interest warrants or coupons for $10 each, payable to bearer and attached to

NOTE.—*Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited.* See *note* to Mercer County v. Hackett, 68 U. S., XVII., 548.

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said bonds, as set out in the declaration in this case. That said bonds recited on their face that they were issued to said Illinois Grand Trunk Railway by authority of an Act of the Legislature of the State of Illinois, approved March 25, 1869, entitled 'An Act to Amend an Act Entitled 'An Act to Incorporate the Illinois Grand Trunk Railway,' and 'in pursuance of a vote of the people of said Town, had and taken June 25, 1870,' being the same bonds described in plaintiff's declaration. That the coupons described in said declaration were cut from the first three hundred of said bonds, and are all due and unpaid.

Second. That at some time in the month of January, A. D. 1871, the supervisor and town clerk of said Town, acting for and in behalf of said Town, subscribed for $40,000 of the capital stock of said Illinois Grand Trunk Railway, and issued and delivered said four hundred bonds to said railway in payment of said subscription, and that within ten or fifteen days therefrom the said railway corporation sold said bonds for value, and applied the proceeds to the construction of its railroad through said Town; and that said plaintiff, on the — day of September, A. D. 1871, bought the bonds from which the coupons sued on were detached, and also all the coupons thereto attached and unpaid, in good faith, in the New York market, and paid therefor in money at the rate of ninety two and one half cents on the dollar, without actual notice of any defense whatever against said bonds or coupons.

Third. That the said Act of the Legislature of the State of Illinois, approved March 25, 1869, entitled 'An Act to Amend an Act to Incorporate the Illinois Grand Trunk Railway,' was duly and constitutionally passed by the General Assembly of said State of Illinois.

Fourth. That the voters of said Town, at an election duly called and held in said Town, pursuant to the provisions of said Act, on the 25th day of June, 1870, voted that said Town would subscribe for $30,000 of the capital stock of said railway, and in payment therefor issue the bonds of said Town for the amount of said stock, bearing ten per cent interest annually, and the principal sum payable in ten years from their date.

[686] That on the 6th day of August, 1870, at another election called and held in pursuance of the requirements of said Act, the electors of said Town voted to subscribe for $10,000 of the capital stock of said railway, in addition to the $30,000 voted on the 25th day of June, 1870, to be paid for in bonds of said Town, bearing the same rate of interest, and payable at the same time as the bonds to be issued for said $30,000 subscription.

Fifth. That the coupons offered in evidence and upon which judgment is rendered in this case were cut from bonds of said issue numbered from one to three hundred."

Besides this special finding the record contained a bill of exceptions, which embodied all the evidence submitted by both parties in the case.

Upon the special finding, the court rendered judgment for the plaintiff below for the principal sum due on the coupons, and for interest thereon from the date when they were payable respectively.

The alleged Act of the Legislature, by authority of which it was claimed the bonds were issued, is as follows:

"An Act to Amend an Act Entitled 'An Act to Incorporate the Illinois Grand Trunk Railway.'

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, that any city, incorporated town or township which may be situated on or near the route of the Illinois Grand Trunk Railway, west of the City of Mendoto, *via* Prophetstown, to the Mississippi River, may become subscribers to the stock of said railway, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions and on such conditions as they may choose, and the directors of said company may approve the proposition for said subscription, having been first submitted to *the inhabitants* of such city, town or township, and *approved by them;* and upon application of any ten voters of any city, town or township, as aforesaid, specifying the amount to be subscribed, and the conditions of such subscription, it shall be the duty of the clerk of such city, town or township immediately to call an election, in the same manner that other elections for said city, town or township are called, for the purpose of determining whether said city, town or township will subscribe to the stock of said railway; and if a majority of said votes shall be 'for subscription,' then the corporate authorities of said city, town or township, and the supervisor and town clerk of said [687] township so voting, shall cause said subscription to be made; and upon its acceptance by the directors of said company, shall cause bonds to be issued in conformity with said vote, which bonds shall not be of less denomination than $100, and in no case bear a higher rate of interest than ten per cent, provided no such election shall be held until at least thirty days' previous notice thereof shall be given in the manner prescribed by law.

Sec. 2. It shall be the duty of the proper authorities of any city, town or township, issuing bonds as aforesaid, to make all necessary arrangements, and provide for the prompt payment of all interest and other liabilities accruing thereon, and to levy such taxes as may be necessary therefor, as other taxes are levied by them.

Sec. 3. This Act shall be liberally construed for the purposes intended and expressed therein, and shall be held to be a public Act and shall be in force from and after its passage." Approved March 25, 1869.

This Act was passed while the Constitution of Illinois of 1848 was in force.

That Constitution contained the following provision, section 23 of article 3:

"Every bill shall be read on three different days in each House * * * and every bill having passed both Houses shall be signed by the speakers of their respective Houses; and no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title."

On July 2, 1870, a vote was taken by the voters of the State of Illinois, which resulted in the adoption of a new Constitution and of

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certain separate articles, one of which reads as follows, and it took effect that day:

"No county, state, town, township or other municipality, shall ever become subscribers to the capital stock of any railway, or private corporation, or make donation to or loan its credit in aid of such corporation, but *provided, however*, that the adoption of this article shall not be construed as affecting the right of such [688] municipality to make such subscription, when the same has been authorized under existing laws by a vote of the people of such municipality, prior to such adoption."

The first assignment of error relates to the finding of the court, that the Act, by authority of which the bonds in question were issued, "was duly and constitutionally passed." The plaintiff in error disputes this finding.

A question arises here whether this finding is open to challenge.

One thing is clear: that there can be no review in this court of the finding of fact made in the court below.

Section 649 of the Revised Statutes declares: "The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

The office of a bill of exceptions, where the facts are tried by the court, is pointed out by section 700, Revised Statutes: "The rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed by the Supreme Court upon error or appeal." The same section declares: "When the finding is special, the review may extend to the determination of the sufficiency of the facts to support the judgment."

In *Norris* v. *Jackson*, 9 Wall., 125 [76 U. S., XIX., 608], this court said: "A special finding is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. Whether the finding be general or special, it should have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a special verdict (finding) the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant. The bill of exceptions, while professing to detail all the evidence, is no special finding of the facts."

It is thus seen that the only use which can be made of the bill of exceptions, when there is [689] a special finding of facts, is to present the rulings of the court in the progress of the trial, upon questions of law. The facts are conclusively settled by the findings of the court.

But the finding under consideration is not a finding of fact, but of law. The question whether an alleged statute "Is really a law or not, is a judicial one, and is to be settled and determined by the court and judges, and is not a question of fact to be determined by a jury." *S. Ottawa* v. *Perkins*, 94 U. S., 260 [XXIV., 154]; *Gardner* v. *Collector*, 6 Wall., 499 [78 U. S., XVIII., 890].

So, notwithstanding the finding of the court below, the question whether the Act of March 25, 1869, was duly and constitutionally passed, is open for examination here as a question of law, the decision of the court on that question having been excepted to by the plaintiff in error at the proper time. And in deciding this question, not only the facts presented by the bill of exceptions, but any other competent evidence accessible, may be considered by the court here.

The plaintiff in error insists that the evidence set out in the bill of exceptions does not sustain the finding under consideration; in other words, that there is error in law in the holding of the court, that, upon the facts disclosed, the statute in question was duly and constitutionally passed.

It is settled by decisions of the Supreme Court of Illinois, that the journals of the Legislature may be resorted to for the purpose of overthrowing the *prima facie* evidence of the constitutional enactment of a law, furnished by the signatures of the presiding officers of the two Houses. See, *S. Ottawa* v. *Perkins*, *supra*, where the Illinois decisions on this subject are collected.

Both parties upon the trial in the court below introduced the journals of the two Houses of the Illinois Legislature, one to prove and the other to disprove the constitutional passage of the law. From this evidence it appears that the bill in question when introduced into the House was designated and distinguished as House Bill No. 231, and with the title "An Act to Amend an Act entitled 'An Act to Incorporate the Illinois Grand Trunk Railway.'" It regularly passed the House with this title, having been read three times on three different days and having been referred to, and reported by a committee.

In the Senate, according to the journals, the proceedings were as follows: on February 8, a [690] message was received from the House to the effect that it had passed House Bill No. 231, entitled, An Act to Amend an Act Entitled "An Act to Incorporate the Grand Trunk Railway." On February 9, the bill with the same number and title was read the first and second time and referred to a standing committee. On March 4th, House Bill No. 231, for "An Act to Amend an Act Entitled an Act to Incorporate the Illinois Grand Trunk Railway," was reported back with amendments by the committee, to which House Bill No. 231 had been referred, which recommended that as amended it be read a third time and passed. The next day, House Bill No. 231, and with the same title, except that the word *Illinois* was omitted therefrom, was read a third time and passed.

The senate amendments to House Bill No. 231, with the same title as that under which it passed the House, were agreed to by the House. In the messages between the two Houses, in which the passage of the bill by each is reported to the other, the word "Illinois" is omitted from the title, but its designation as House Bill No. 231 is preserved. The bill, after its final passage, was enrolled as House Bill No. 231, with the title "An Act to Amend an Act to Incorporate the Illinois Grand Trunk Railway," and it was signed by that title by the presiding officers of both Houses and approved and signed by the Governor.

We are now called on to decide whether, upon this evidence, the court below was justified in

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holding that the Act was duly and constitutionally passed.

The evidence discloses the fact that in its passage through the Senate, according to the journal of that body, the word "Illinois" was twice dropped from the title of the bill, and that from the message of the House to the Senate, and of the Senate to the House reporting the passage of the bill by those bodies respectively, the word "Illinois" is left out of the title of the bill.

The contention of the plaintiff in error is that the omission of the word "Illinois" from the title of the bill in several of its stages in the senate, and specially in its final passage, defeats [691] it as a law and renders the enactment null and void. The ground of this claim is that, according to the journals of the two Houses, "one bill by one title passed the House and another bill by another title passed the Senate."

The evidence of the journals of the two Houses satisfies us that, beyond question, there was but one bill, and that was House Bill No. 231, "To Amend an Act Entitled an Act to Incorporate the Illinois Grand Trunk Railway;" that this bill regularly passed through all stages by both Houses without any change in its title, was signed by their presiding officers respectively, and was approved and signed by the Governor.

The journals show no amendment to the title of the bill in either House. It is, therefore, perfectly clear that the omission of the word "Illinois" from the title in some of the stages of its passage through the Senate was a mere clerical error in keeping the journals. The designation of the bill as House Bill No. 231, was preserved through all the stages of its passage through both Houses, and until it was finally signed by the presiding officers of the two Houses, and approved by the Governor. The statute-book of the State of Illinois shows that only one Act was ever passed to incorporate any "Grand Trunk Railway", and that was the Act to incorporate the Illinois Grand Trunk Railway. Therefore the Act in question must have been an amendment to that Act of incorporation, and could be an amendment to no other.

The fact of the identity of the bills passed by the two Houses is so clear that it seems to us no court could have any doubt on the subject.

In the case of *Larrison* v. *R. R. Co.*, 77 Ill., 11, it appeared that by some clerical error the bill was introduced into the Senate as "Senate Bill No. 453, for an Act to Incorporate the Peoria, Atlanta & *Danville* Railroad Company," thus changing the name of Decatur, in the title, to Danville; but as the bill preserved its identity by holding its number, "453," the Supreme Court of Illinois decided that the Act was constitutionally passed. It said:

"And the question is: was the bill for the Act read three times in the senate before its passage by that body? If the entries on the journal refer [692] to the same bill, then the requirements of the organic law are satisfied. The question is one of identity. Do these entries show there was one, or two bills acted upon by the senate? The number is the same throughout. About that there is not the pretense of the slightest doubt, and it is manifest that to have more than one bill pending at the same time, with the same number, would lead to confusion; it would defeat the very object of numbering bills, which is to preserve their identity and prevent confusion."

Another objection, based on the fact that the journals do not preserve exact title of the bill in all the stages of its passage through the Senate, is that the title did not at all times conform to the constitutional requirement, that the subject of the bill should be expressed therein.

There is no rule of parliamentary law, and there is no provision of the Constitution of Illinois, which requires a bill to preserve the same title through all its stages in both Houses. *Larrison* v. *R. R. Co.*, *supra*; *Binz* v. *Weber*, 81 Ill., 290; *Plumer* v. *People*, 74 Ill., 362. But, as already said, it is sufficiently clear from the journals of the two Houses that no change whatever was made in the title of the bill in either House, and that the omission of the word "Illinois" from the title, as given in the journals of the senate, was a mere clerical error, which could deceive or mislead no one. We are of opinion that these objections to the Act are slender grounds for declaring to be null and void a law which appears on the statute-book of a State, and is found among its archives.

It is next insisted that the title of the Act, as it appears upon the statute-book of the State, does not express its subject.

The Supreme Court of Illinois has substantially decided this point against the plaintiff in error in the case of *R. R. Co.* v. *Gregory*, 15 Ill., 20; see, also, *Town of Unity* v. *Burrage*, decided by this court at the present Term [*ante*, 405], where other cases decided by the Supreme Court of Illinois, on this question, are cited. See, also, *San Antonio* v. *Mehaffy*, 96 U. S., 312 [XXIV., 816].

We are clear, therefore, that the circuit court was right in holding that the Act, by authority of which the bonds in question were issued, was duly and constitutionally passed.

It is next contended by the plaintiff in error that, under the Act referred to, the corporate authorities of the Township alone could make [693] the subscription to the stock of the railroad company, and issue the bonds of the Township. This claim is based on section 5, article 9, of the Constitution of Illinois of 1848, which prohibits the Legislature from authorizing any person to impose a burden of debt on the township, except the corporate authorities.

The stock was subscribed and the bonds issued in this case by the supervisor and clerk, and it is insisted that neither the Act of the Legislature nor the Constitution of the State allowed this to be done; that it could only be done by the corporate authorities, which included the legal voters as well as the supervisor and clerk.

In construing a similar statute, passed under the Constitution of 1848, the Supreme Court of Illinois has decided that, after a vote by the electors of a town in favor of a donation to aid in the construction of a railroad company, the supervisor and clerk of the Township were the proper corporate authorities to subscribe the stock and issue the bonds of the Township therefor. *Douglass* v. *Bk.*, not yet reported. To the same effect see *Windsor* v. *Hallett*, 97 Ill., 209.

These cases are conclusive of this question, if, indeed, it needed any authority to settle it.

The next point made by the plaintiff in error

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is that the Act of March 25, 1869, by authority of which the bonds were issued, did not authorize an election to be held on the question of subscribing stock in the railway company, at which only legal voters should vote; that the word "inhabitants," whose approval the Act requires, cannot be construed to mean "voters" or "electors."

No copies of the bonds appear in the pleadings in this case. The special finding of the court, to which alone we are authorized to look to ascertain the facts, upon which the judgment of the court rests, declares that the bonds recited on their face that they were issued "in pursuance of a vote of the *people* of said Town, held and taken June 25, 1870."

The popular signification of the words "people of a town" and "inhabitants of a town" is the same; so that, according to the finding of the court, the bonds recited on their face a substantial compliance with the requirement of the [694] statute, that the proposition for the subscription to the stock of the railroad company should be submitted to the "inhabitants of the town and affirmed by them." The plaintiff being, as appears from the findings of the court, a *bona fide* holder of the bonds without notice, is not bound to go behind this recital.

But it is not necessary, in order to maintain the validity of the bonds, to rely on this finding.

The findings of the court show that the "voters" of said Town, on June 25, 1870, voted in favor of the proposition to subscribe $30,000 to the stock of the said railroad company.

We think that, by a fair construction of the Act of March 25, 1869, this was all that was necessary. The Act, it is true, requires the approval of the "inhabitants" of the Town. In its broadest sense this would include all sexes, ages and conditions. To require the approval by a vote of the "inhabitants" in this sense would be an absurdity. The Act itself is its own interpreter, and shows that this is not its meaning. It provides that, upon the application of ten voters, it shall be the duty of the clerk "to call an election, in the same manner that other elections for said city, town or township are called, for the purpose of determining whether said city, town or township will subscribe to the stock of said railway."

The calls for "other elections for said city, town or township" are addressed to the legal voters, and legal voters only are allowed to vote. The Act, though carelessly drawn, clearly meant to restrict the election to the voters, and the approval of the "inhabitants" was to be indicated by the vote of a majority of the legal voters. This approval, the findings of the court show, was obtained.

The intimation that the law required two elections for precisely the same purpose; one at which the inhabitants and the other at which the electors of the Town should vote, imputes to the General Assembly an absurdity in legislation which the language of the Act utterly fails to justify.

We think, therefore, that this assignment of error is without substantial ground to rest on.

It appears from the findings of the court that [695] an election was held on June 25, 1870, on the proposition to subscribe $30,000 to said railroad company. The plaintiff in error claims that this proposition was never approved by the directors of the company and, therefore, that the bonds issued to carry this proposition into effect were issued without authority, and are, therefore, invalid.

There are two answers to this claim: 1. The Act of March 25, 1869, does not require the approval of the directors of the company to the proposition, as a condition precedent to the subscription of stock and the issue of bonds. 2. The court finds that the bonds contained recitals averring that they were issued by authority of the Act of March 25, 1869, and in pursuance of a vote of the people of said Town, which is, in effect, an averment that the conditions prescribed by said Act to be performed, before said bonds could be issued, had been in fact performed. Whether the conditions precedent had been complied with, was a question which was in effect left by the law to the "corporate authorities" who issued the bonds, to decide. The plaintiff, therefore, being a *bona fide* holder, was not bound to look beyond the legislative Act and the recitals in the bonds. *Coloma* v. *Eaves*, 92 U. S., 484 [XXIII., 579]; *Marcy* v. *Oswego*, 92 U. S., 639 [XXIII., 749].

The bill of exceptions shows that the plaintiff in error objected to the admission in evidence of the coupons sued on, because, (1) they were not presented to the proper officers or demand of payment made thereon and notice given to the drawers before suit; (2) because they were detached from and not annexed to any bond, and the absence of the bond was not accounted for, and the same were not negotiable paper, sufficient to base an action upon; and (3) because said coupons never were indorsed, and are not negotiable by delivery.

None of these grounds of objection are tenable. The form of the coupons does not change their nature. They are evidences of the sums due for interest on the bonds. The fact that they are made payable at a particular place does not make a presentation for payment at that place necessary, before a suit can be maintained on them. *Wallace* v. *McConnell*, 13 Pet., 148; *Irvine* v. *Withers*, 1 Stew., 234; *Montgomery* v. *Elliott*, 6 Ala., 701.

The second and third grounds of objection are answered by the decision of this court in *Clark* [696] v. *Iowa City*, 20 Wall., 583 [87 U. S., XXII., 427], where it is said: "Coupons for installments of interest when severed from bonds are negotiable, and pass by delivery. They then cease to be incidents and become in fact independent claims; and they do not lose their validity if, for any cause, the bonds are canceled or paid before maturity, nor their negotiable character, nor their ability to support separate actions." See, also, *Aurora* v. *West*, 7 Wall., 82 [74 U. S., XIX., 42]; *Thompson* v. *Lee Co.*, 3 Wall., 327 [70 U. S., XVIII., 177].

It is next alleged for error that the circuit court allowed interest on the coupons sued on to be included in the judgment.

The coupons bore interest from the day when they were payable. *Aurora* v. *West*, *supra*; *Clark* v. *Iowa City*, *supra*; *Geneva* v. *Woodruff*, 92 U. S., 502 [XXIII., 586].

There is nothing in the Act, by authority of which these bonds, to which the coupons belonged, were issued which takes them out of these decisions. And we have been referred to

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no legislation in the State of Illinois, which forbids the allowance of interest on this kind of commercial paper.

The failure to present the coupons for payment does not prevent the running of interest. If the Town had shown that it had money ready to pay the coupons at the time and place where they were payable, this would have been a defense to the claim for interest. *Wallace* v. *McConnell, supra.* But no such proof was offered, nor was it claimed that the fact existed.

Finally: the fact that the corporate authorities of the plaintiff in error issued bonds to the amount of $40,000, when the election held on June 25, 1870, only authorized the issue of $30,000, can have no effect on the rights of the defendant in error to his judgment in this case. The finding of the court is, that his bonds recited on their face that they were issued by authority of the Act of March 25, 1869, and in pursuance of the vote taken June 25, 1870.

There was nothing in the Act which placed any limit to the amount of stock which the Town might subscribe, and the recitals of the bond gave no notice to the holder that the bonds issued exceeded the amount of stock which the Town had voted to subscribe. There was nothing to arouse the suspicions of a purchaser; [697] nothing to put him on inquiry. As the defendant in error is a *bona fide* holder for value, the fact that the amount of the bonds, issued by the corporate authorities, exceeded by $10,000 the amount of stock voted for by the inhabitants of the plaintiff in error, on June 25, 1870, can have no influence upon his right to a recovery upon the bonds which he holds.

We find no error in the record. The judgment of the Circuit Court must, therefore, be affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 697; 104 U. S., 677; 105 U. S., 3.

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[697]

TOWN OF OHIO, *Plff. in Errr.*,

v.

AUGUSTUS FRANK.

(See S. C., 13 Otto, 697, 698.)

Case followed—interest on bonds.

1. Walnut v. Wade, *ante*, followed.
2. In Illinois, where bonds by their terms bear interest at the rate of ten per cent per annum, in entering judgment upon them, interest may be included at that rate, from their maturity until the date of the judgment, although the legal rate, when not settled by contract, is six per cent.

[No. 259.]

Argued Apr. 6, 1881. Decided Apr. 18, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. **W. C. Goudy** and **Allan C. Story**, for plaintiff in error.

Messrs. **J. H. Roberts, S. M. Cullom** and *T. C. Mather*, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

This was an action upon bonds issued by the Town of Ohio, the plaintiff in error, and upon certain unpaid coupons attached to them. The bonds were issued by authority of the Act of the Legislature of Illinois of March 25, 1869, referred to in the case of *Walnut* v. *Wade*, No. 258, in which the opinion has just been read [*ante*, 526]. That case decided every question raised in this except one. That question relates to the matter of interest on the bonds.

The bonds sued on bore interest at the rate of ten per cent per annum. In entering judgment, the court below included interest upon the bonds at that rate, from their maturity until the date of the judgment. This was assigned [698] for error because, there being no agreement in the bonds to pay interest after maturity, it was claimed that no interest at all should have been allowed on them after they fell due; but that if any interest was allowed it should have been computed only at the rate of six per cent per annum, which is the legal rate in Illinois.

At the date of the bonds sued on, the law of Illinois fixed the rate of interest at six per cent per annum, where it was not settled by the contract, but allowed parties to contract for any rate not exceeding ten per cent per annum.

No authority is cited by the plaintiff in error in support of the proposition that no interest should have been allowed on the bonds after their maturity.

The plaintiff in error relies upon the case of *Holden* v. *Trust Co.*, 100 U. S., 72 [XXV., 567], to support the claim that only six per cent interest should have been computed on the bonds after their maturity.

That case arose in the District of Columbia, where substantially the same regulations on the subject of interest were prescribed by statute as in Illinois. The court in that case said: "The rule heretofore applied by this court, under the

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NOTE.—*Interest after maturity, at what rate.*

A note, payable two months after date with interest at five per cent a month, bears interest at the contract rate after maturity. Kohler v. Smith, 2 Cal., 597; Overton v. Bolton, 9 Heisk., 762; S. C., 24 Am. Rep., 367.

Legal rate of interest at date of note regulates rate where none is named until same is paid. Change of law does not affect it. Lee v. Davis, 1 A. K. Marsh, 397; S. C., 10 Am. Dec., 746; Cox v. Marlatt, 36 N. J., 369; Hubbard v. Callahan, 42 Conn., 524; S. C., 19 Am. Rep., 564; Seymour v. Continental L. Ins. Co., 44 Conn., 300; S. C., 26 Am. Rep., 469; Cecil v. Hicks, 29 Gratt., 1; S. C., 26 Am. Rep., 391.

Where there is a rate of interest established by law and a rate fixed by the contract, the contract rate is payable after as well as before maturity, and until the debt is paid. Pridgen v. Andrews, 10 Tex., 461; Hopkins v. Critenden, 10 Tex., 189; Thompson v. Pickel, 20 Iowa, 490; Hand v. Armstrong, 18 Iowa, 324; Morgan v. Jones, 20 Eng. L. & E., 454; Etnyre v. McDaniel, 38 Ill., 210; Cox v. Smith, 1 Nev., 171; McLane v. Abrams, 2 Nev., 199; Adams v. Way, 33 Conn., 431; Spencer v. Maxfield, 16 Wis., 178; Pruyne v. Milwaukee, 18 Wis., 368; Findlay v. Hall, 12 Ohio, 610; Cecil v. Hicks, 29 Gratt., 1; S. C., 26 Am. Rep., 391; Kellogg v. Lavender, 15 Neb., 256; S. C., 48 Am. Rep., 339; Jersey City v. O'Callaghan, 41 N. J. L., 349; Hydraulic Co. v. Chatfield, 38 Ohio St., 575; Meaders v. Gray, 60 Miss., 400; S. C., 45 Am. Rep., 414; Shaw v. Rigby, 84 Ind., 375; S. C., 43 Am. Rep., 96.

A note, stipulating for a special rate of interest, will, after maturity, draw interest at statutory rate only, unless special rate is expressly agreed to be paid after maturity. Eaton v. Boissonnault, 67 Me., 540; S. C., 24 Am. Rep., 52; Lidwick v. Huntzinger, 5 Watts & S., 51; Cook v. Fowler, 7 L. R. H. L., 27; Newton v. Kennerly, 31 Ark., 626; S. C., 27 Am. Rep., 592; Pearce v. Hennessy, 10 R. I., 223; Suffield Eccl. Soc. v. Loomis, 42 Conn., 570; Burns v. Anderson, 68 Ind., 202; S. C., 34 Am. Rep., 250; Goodchap v. Roberts, 42 L. T. N. S., 666.

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circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate." But the court added: "When a different rule has been established, it governs, of course, in that locality. The question is always one of local law."

A different rule has been established in Illinois by the decisions of the Supreme Court of that State. In *Phinney* v. *Baldwin*, 16 Ill., 108, it was held that a note given for a sum of money, bearing interest at a given rate per month, continues to bear that rate of interest, as long as the principal remains unpaid.

This rule was followed by the court below in computing the amount of the judgment in this case.

There is, therefore, no error in the record, and the judgment of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[800] WALTER S. JOHNSTON, Receiver of the NATIONAL BANK OF THE STATE OF MISSOURI, *Appt.*,

v.

SYLVESTER H. LAFLIN ET AL.

(See S. C., 13 Otto, 800-806.)

Principal chargeable with notice to his agent—sale of stock—power of attorney—validity of sale.

1. A principal in a transaction is chargeable with notice of matters affecting its validity, coming to the knowledge of his agent, pending the proceeding.
2. As between the parties to a sale of stock of a bank, the sale is concluded when the certificate is delivered, and the price is paid. It is not necessary, in order to complete the sale, that there be a subsequent transfer of the certificate on the books of the bank.
3. The subsequent filling up of the blank power of attorney indorsed thereon with another name, does not so connect the vendor with the party named as to charge him with the latter's knowledge, and thus affect the previous transaction.
4. The validity of a sale and its completeness must be determined by the relation which the contracting parties, at the time, openly bear to each other.

[No. 184.]

Argued Jan. 6, 1881. Decided Apr. 18, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Messrs. **Henderson & Shields,** for appellant:

Shareholders are conclusively charged with notice of the trust character of the capital stock and assets of the association. As against creditors or other stockholders, they cannot hold as to such trust funds the relation of innocent purchasers. They are privies to the trust, and if by any means they become possessed of this trust fund, they hold it subject to all equities of the creditors and other stockholders; and equity will compel them to account to the Receiver for all such trust property.

Woods v. *Dummer*, 3 Mas., 308; *Gratz* v. *Redd*, 4 B. Mon., 178; *Adler* v. *Brick Co.*, 13 Wis., 62; Thompson, Liability of Stockh., sec. 13; *Sawyer* v. *Hoag*, 17 Wall., 610 (84 U. S., XXI., 731); *Curran* v. *Ark.*, 15 How., 304; *Bartlett* v. *Drew*, 57 N. Y., 587; *Webster* v. *Upton*, 91 U. S., 65 (XXIII., 384); *Bk.* v. *Wulfekuhler*, 19 Kan., 60.

Laflin did not part with any value. The Corporation was wholly insolvent; his stock possessed no value. The bank got nothing for its money. Laflin did not change his position for the worse by the sale, nor put himself in a position that cannot be retracted. Therefore, he does not occupy the position of *bona fide* purchaser in point of fact.

2 Ld. Cas. Eq., pp. 75, 82, 83; *McLeod* v. *Bk.*, 42 Miss., 99; *Curran* v. *Ark.*, 15 How., 304; *Wright* v. *Petrie*, 1 Sm. & M. Ch., 282; *Boon* v. *Barnes*, 23 Miss., 136.

By statute, Laflin was liable to the creditors to an amount equal to his stock; and was subject to assessment to pay the same.

Revised Statutes, U. S., sec. 5151.

His name appeared as a stockholder on the stock register, required by law to be kept public by the Bank, and creditors were induced to credit the Bank on the strength of his name.

R. S., U. S., sec. 5210; *Rosevelt* v. *Brown*, 11 N. Y., 148; *Magruder* v. *Colston*, 44 Md., 349.

The transfer of the stock avoiding this liability could not be complete until made on the books of the bank. This was required by its organic law. It was so expressed on the face of the certificates so transferred, and in the power of attorney given by Laflin to make the transfer.

R. S., U. S., 5139; *Brown* v. *Adams*, 5 Biss., 181; *Bowden* v. *Bk.*, 1 Hughes, 309; *Bk.* v. *Laird*, 2 Wheat., 390; *Brent* v. *Bk.*, 10 Pet., 596; *Black* v. *Zacharie*, 3 How., 483; *Bowden* v. *Santos*, 1 Hughes, 158; *Ins. Co.* v. *Sax*, 2 Tenn. Ch., 507;

A note, payable on demand, with ten per cent interest, draws interest at that rate until date of verdict or entry of judgment on default. Paine v. Caswell, 66 Me., 80; S. C., 28 Am. Rep., 21.

A contract to pay a certain sum at a future day, with a conventional rate of interest, bears interest at that rate until due, and from that time upon the aggregate of principal and interest, at the legal rate. Briggs v. Winsmith, 10 S. C., 133; S. C., 30 Am. Rep., 46.

Where one contracts to pay a sum at a certain date, with interest, the interest prior to the maturity of the contract is payable by virtue of the contract; and thereafter as damages for its breach, and at the statutory rate. Macomber v. Dunham, 8 Wend., 550; U. S. Bk. Chapin, 9 Wend., 471; Hamilton v. Van Rensselaer, 43 N. Y., 244; Ritter v. Phillips, 53 N. Y., 586; S. Cent. R. R. Co. v. Moravia, 61 Barb., 180; Brewster v. Wakefield, 63 U. S., XVI., 301; Bernhisel v. Firman, 89 U. S., XXII., 766; Holden v. Trust Co., 100 U. S., XXV., 567; O'Brien v. Young, 95 N. Y., 428; S. C., 47 Am. Rep., 64.

When the amount of the note represents a principal sum, and interest at a rate higher than the legal rate, and nothing is said in the note itself about interest, it bears interest after maturity at the legal rate. Ewell v. Daggs, 108 U. S., 143, XXVII.

Where the contract provides that the interest shall be at a specified rate until the principal shall be paid, the contract rate governs until payment of the principal, or until the contract is merged in judgment. Where one contracts to pay on demand "with interest," or generally with interest, without specifying the time of payment, the statutory rate then existing becomes the contract rate and must govern until payment, or at least until demand and actual default. O'Brien v. Young, 95 N. Y., 428; S. C., 47 Am. Rep., 64.

Upon a mortgage, executed May 10, 1876, the principal of which was due May 10, 1881, interest was allowed at seven per cent up to the latter date, and at six per cent thereafter, the statutory rate of interest having been changed Jan. 1, 1880, from seven to six per cent. Bennett v. Bates, 94 N. Y., 354.

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Weyer v. *Bk.*, 57 Ind., 198; *Pinkerton* v. *R. R. Co.*, 42 N. H., 424; *Hale* v. *Walker*, 31 Ia., 344; *Sabin* v. *Bk.*, 21 Vt., 358; *Shipman* v. *Ins. Co.*, 29 Conn., 245; *Mfg. Co.* v. *Smith*, 2 Conn., 579; *Northrop* v. *Newton & B. T. Co.*, 3 Conn., 545; *Wheelock* v. *Kost*, 77 Ill.. 296.

This is so as to the bank, whether the signing of the power to transfer in blank and delivery of the certificate conferred only an equitable title to the transferee, as held in *Union Bk.* v. *Laird*, and cases cited *supra*, or whether it conveyed both the legal and equitable title, as between the parties.

R. R. Co. v. *Schuyler*, 34 N. Y., 30; *McNeil* v. *Bk.*, 46 N. Y., 325; *Bk.* v. *Smalley*, 2 Cow., 770; *Grymes* v. *Hone*, 49 N. Y., 17; *Cushman* v. *Mfg. Co.*, 76 N. Y., 365.

If the transfer was not complete as to the bank, until made on the transfer books, it was not complete as to the creditors of the bank.

Thompson, Liability of Stockholders, sec. 220; *Bosanquet* v. *Shortridge*, 4 Exch., 699; *Walker's Case*, L. R., 2 Eq., 554; *Burke* v. *Smith*, 16 Wall., 390 (83 U. S., XXI., 361).

If the transfer was not complete until registered, then Laflin is bound by the knowledge of Geralt, his transfer attorney, upon familiar principles. Laflin is estopped to complain of the result of Geralt's knowledge, as he executed a power to transfer in blank, and is responsible for all consequences of the act. Geralt had a right to insert his name in the blank, and transfer his stock, and thus became Laflin's agent, and Laflin is charged with Geralt's knowledge.

Thomp. Liab. Stockh. and cases cited, sec. 240, p. 306; Wade, Notice, sec. 672.

Laflin could only transfer his stock to a person capable of taking and holding the same, and who was able to assume and respond in his place, to his liability as a shareholder. The transfer to the bank being prohibited, it was incapable of taking. Being insolvent, it could not respond for Laflin to the creditors. Hence, the transaction stands as if no transfer was made, and the transferer is still a shareholder. If this is true, Laflin cannot retain the bank's funds even as against the bank, much less its creditors and the other shareholders.

R. S., U. S., sec. 5159; Thomp. Liab. Stockh., secs. 205, 215-217, 234-237; *Nickalls* v. *Merry*, L. R., 7 H. L., 530; *Symon's Case*, L. R., 5 Ch., 298; *Weston's Case*, L. R., 5 Ch., 614-620; *Re Imperial Asso.*, L. R., 9 Eq., 223; *Zulueta's Claim*, L. R., 5 Ch., 444; *Walter's 2d Case*, 3 DeG. & S., 244; *Webster* v. *Upton*, 91 U. S., 65 (XXIII., 384); *Currier* v. *State Co.*, 56 N. H., 262; *Matter of Reciprocity Bk.*, 22 N. Y., 18; *Johnson* v. *Laflin*, 5 Dill., 72.

Mr. **A. W. Slayback,** for appellees:

If a shareholder has sold *bona fide*, and the sale has been recorded upon the transfer book of the corporation, there is no such thing as constructive fraud, but there must be shown actual notice to the shareholder, in order to make him a participator in the misapplication of funds by a corporate officer.

Bigelow, Fraud, sec. 317; *Bargate* v. *Shortridge*, 5 H. L. Cas., 297; *Nixon* v. *Green*, 11 Exch., 550; *Austin* v. *Daniels*, 4 Den., 299; *McCullough* v. *Moss*, 5 Den., 567; *Bond* v. *Appleton*, 8 Mass., 472; *Child* v. *Coffin*, 17 Mass., 64; *Coffin* v. *Collins*, 17 Me., 442; *Merrill* v. *Walker*, 24 Me., 287; *Hoagland* v. *Bell*, 36 Barb., 57; *Mann* v. *Currie*, 2 Barb., 294; *Middletown Bk.* v. *Magill*, 5 Conn., 28.

"The transfer books of the corporation are conclusive, so far as the creditors of the corporation are concerned, as to who are to be considered stockholders."

Stanley v. *Stanley*, 26 Me., 191; *Turnbull* v. *Payson*, 95 U. S., 421 (XXIV., 438).

The issuing of a new certificate to Britton was immaterial.

Field, Corp., secs. 110, 113; *Comins* v. *Coe*, 117 Mass., 45.

The vendee of shares in a bank can enforce the issue of a certificate to him.

Hill v. *Bk.*, 45 N. H., 300; Moses, *Mandamus*, 181.

The sale of the shares was a completed transaction, so far as Laflin was concerned, when he took the checks from Keleher & Co., and surrendered the certificates. The equitable title was then transferred. The legal title was completely vested in Britton, as soon as the transfer book showed record of the transfer. Although neither in form nor character negotiable paper, such stock approximates it as nearly as practicable.

Bk. v. *Lanier*, 11 Wall., 377 (78 U. S., XX., 174); *Bk.* v. *Bk., etc.*, 13 Am. L. Reg. (N. S.), 249.

Such record gave notice to the world, and devested Laflin of the legal and equitable title to the stock; from that day, he could not reclaim it, his dominion over it ceased.

As to Geralt, whatever power he had from Laflin was exhausted by inserting the name of the vendee in the blank. The power gave him no authority to transfer the stock in any manner not contemplated by his constituent.

Denny v. *Lyon*, 38 Pa., 98; *Bk.* v. *Smalley*, 2 Cow., 778.

Mr. Justice **Field** delivered the opinion of the court:

The questions raised in this case are important to owners of shares in the national banks, but they are not difficult of solution. The delay in their decision has been caused by the great pressure of business upon the court and not from any doubt as to their proper disposition. The appellant, the complainant below, is the Receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency on the 27th of June, 1877. The bank failed on the 20th of that month. The defendant, James H. Britton, was its president and had been so for some years. On the 16th of May, 1877, and for some time previously, the defendant, Laflin, was a stockholder of the bank, owning eighty-five shares of full paid stock. He was not a [801] director of the bank, nor had he any personal knowledge of its actual financial condition. It is to be presumed that he regarded that condition as sound, for up to the time of the failure he continued to deposit funds with it for a company of which he was a resident director at St. Louis. On the day mentioned, May 16, 1877, he sold his eighty-five shares to a broker, to whom he delivered his certificate of the stock, with a blank power of attorney indorsed thereon, authorizing the attorney, whose name might be subsequently inserted by the broker, or any other party becoming the owner of the certificate, to transfer it on the books of the bank in

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such form and manner as might be necessary or required by its regulations. Laflin did not at the time know for whom the stock was bought; information on the subject was withheld from him. He received for the price agreed the broker's check on a banking house in St. Louis, which was paid the same day, on presentation. The broker was, however, in fact acting for Britton, the president of the bank, who represented that he was purchasing for himself or for a party whose name he did not disclose. There was no intimation that he was making the purchase for the bank or in its interest. He gave the broker his individual check on the bank for the price of the stock, which was paid on presentation. Subsequently, but on the same day, he received the certificate and thereupon directed a bookkeeper in the bank, named Geralt, to fill up the power of attorney with his, the bookkeeper's name, and to transfer the certificate to his, Britton's, name as trustee on the transfer book or stock register of the bank, which was accordingly done. He had at the time to his individual credit at the bank several hundred dollars more than sufficient to meet his check. He had for years dealt largely on his own account in its stock, and there was nothing in the transaction between the broker and himself to awaken suspicion as to its legality or propriety. Some days afterwards, on the 29th of the same month, at an election of directors, he represented and voted on the stock purchased.

[802] It appears, however, that whilst the shares stood on the official stock register in the name of Britton, as trustee, without stating for whom he was trustee, the transaction was entered on the stock ledger in an account with him as "trustee of the bank." And by his directions the bookkeeper credited his individual account with the amount of the check given for the shares, and charged the same amount to the "sundry stock account." In other words, the entries on the books, other than the official stock register, showed that the stock was purchased by Britton for the benefit of the bank and paid for with its funds. But neither Laflin nor the broker had any notice of the manner in which the transfer was made, nor of the entries on the books of the bank, nor that the purchase had been made with its funds. The bookkeeper, Geralt, who made the transfer and the entries, had, however, actual knowledge of the facts.

The present suit is brought by the Receiver of the bank to set aside the purchase of the eighty-five shares, to compel Laflin to repay the money received, and Britton to retransfer to him the shares on the books of the bank, and to have him declared to be still a stockholder in respect of those shares.

The statute declares that the capital stock of every national banking association shall be divided into shares of $100 each, and be transferable on its books in such manner as may be prescribed by its by-laws or articles, and that every person becoming a stockholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder. There was no by-law of the association here, regulating transfers of its shares, but each certificate of stock contained this provision: "Transferable only on the books of the said bank, in person or by attorney, on the return of this certificate, and in conformity with the provisions of the laws of Congress and the by-laws which may be in force at the time of such transfer."

The statute also declares that no association shall be the purchaser of any shares of its own capital stock, unless the purchase be necessary to prevent a loss upon a debt previously contracted. The purchase by the bank, through its president, in the present case, was not made to prevent such a loss. Laflin was not indebted to the bank at the time he sold his shares. The [803] Receiver, therefore, starting with the conceded fact that the purchase by the bank was prohibited and, therefore, illegal on its part, seeks to charge Laflin with the consequences of such illegality, as though he had dealt directly with the bank or had known at the time that the purchase was made for it. He assumes such knowledge by Laflin because the party with whose name the blank power of attorney was filled, to make the transfer of the certificate of stock, was cognizant of the facts. His argument is substantially this: the transfer of the stock is not complete until made on the books of the bank; and the attorney who made it knew that the purchase was by the bank and with its funds; and his knowledge was the knowledge of Laflin.

The general doctrine that the principal in a transaction is chargeable with notice of matters affecting its validity, coming to the knowledge of his agent pending the proceeding, is not questioned. Had Geralt, the bookkeeper, been appointed by Laflin to make the sale, and had he in negotiating it learned the facts as to the purchase and use of the funds of the bank, there would be ground to invoke the application of the doctrine. But such was not the position of Geralt to Laflin. The sale was consummated, so far as Laflin was concerned, when he delivered the certificate, with the power to transfer it, to the broker. The latter did not mention the name of the principal for whom he was acting. He declined to give it. Laflin had a right, therefore, to treat him as the principal, and if he was competent to make the purchase the sale was valid. Shares in the capital stock of associations, under the national banking law, are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect, however, can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the [804] directors or other stockholders It is not necessary, however, to consider what restrictions would be within its power, for it had imposed none. As between Laflin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser.

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The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank it can be compelled, at the instance of either of them. *Bk.* v. *Lanier*, 11 Wall., 369 [78 U. S., XX., 172]; *Webster* v. *Upton*, 91 U. S., 65 [XXIII., 384]; *Bk.* v. *Smalley*, 2 Cow., 777; *Gilbert* v. *Manchester Iron Co.*, 11 Wend., 628; *Bk* v. *Kortright*, 22 Wend., 362; *Sargent* v. *Ins. Co.*, 8 Pick., 90.

The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge, and thus affect the previous transaction. [805] A different doctrine would put a speedy end to the signing of powers of attorney in blank. And instruments of that kind are of great convenience in the sale of shares of incorporated companies, and are in constant use. The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.

The further position of the Receiver, that the assets of the bank constituted a trust fund for the benefit of its creditors and, where wrongfully diverted, can be followed in whosesoever hands they can be traced, may, as the statement of a general doctrine, be admitted. But it has no application to the case at bar. Here no assets of the bank were received by Laflin. What he received came from the broker, the only person with whom he dealt, or whom he knew as principal in the negotiation. The circumstance that the purchase was actually in the interest of the bank, though of that fact the broker was ignorant, cannot affect the latter's character as principal, so far as Laflin was concerned, which he bore in the negotiation.

The whole transaction, on the part of Laflin, was free from any imputation of fraud. He sold his shares to a person competent to purchase and hold them, and received the stipulated price. It would be a perversion of justice and of the ordinary rules governing men in commercial transactions, to hold the sale, under such circumstances, vitiated by the relations of the purchaser to others, of which the seller had no knowledge, or any grounds to entertain a suspicion. The validity of the sale of stock cannot be made to depend upon the accident of the immediate purchaser, or of the party to whom he may transfer the certificate, in filling up the blank in the power of attorney with the name of a person, to make the formal transfer, who is acquainted with the secret interests of others in the shares purchased. The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other.

Of course the whole case here would be [806] changed if the sale by Laflin had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 221; 4 Hughes, 533; 11 N. W. Rep., 190.

THOMAS THACHER, Claimant of 102 PACKAGES OF DISTILLED SPIRITS, *Plff. in Errr.*, [679]
v.
UNITED STATES.

(See S. C., "*Thacher's Distilled Spirits*," 13 Otto, 679–682.)

Regulations for making whisky—forfeiture of property.

1. The Commissioner of Internal Revenue had authority to prescribe regulations for conducting the business of making and selling whisky, and to adopt forms of reports as to the information which it must receive from the officers engaged in collecting the tax, and the parties who should pay the tax.

2. When the act has been done which the law declares to work a forfeiture of the property, the right of the Government to seize the property and assert the forfeiture, attaches at once and may be pursued by the Government whenever and in whose hands soever that property may be found.

[No. 182.]

Submitted Jan. 5, 1881. Decided Apr. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Messrs. Thomas Harland and *Cornelius A. Runkle*, for plaintiff in error.

Messrs. **Charles Devens,** *Atty-Gen.*, and *Edwin B. Smith, Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The case before us originated in an information filed, in the District Court for the Southern District of New York against certain packages of distilled spirits, by the district attorney, as forfeited by reason of a violation of the reg- [680] ulations of the Commissioner of Internal Revenue concerning the tax on distilled spirits.

Section 3249 of the Revised Statutes authorizes that officer "To prescribe rules and regulations to secure a uniform and correct inspec-

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tion, weighing, marking and gauging of spirits." One of the regulations established under this authority says that:

"Whenever any rectifier proposes to empty any spirits for the purpose of rectifying, purifying, refining, redistilling or compounding the same, he will file with the collector a notice or statement giving the number of casks or packages; the serial number of each; the number of wine and proof gallons in each; the kind of stamps and serial numbers of each; the particular name of such spirits as known to the trade; the proof; by whom produced; the district where produced; by whom inspected and the date of inspection."

It is made the duty of the gaugers to inspect, brand and stamp all spirits required by law to be inspected, of which returns are to be made daily in duplicate to the assessor and collector, containing a true account in detail on Form No. 59.

The information, after reciting the seizure of the spirits and alleging that they had formerly been owned by one Bensberg, alleges:

"That said Bensberg, while his ownership of said spirits continued, and with the purpose and intention of obtaining the issue to him of stamps for rectified spirits, to be placed upon certain other spirits upon which the tax had not been paid, and for the purpose of evading said tax, and enabling him to dispose of the latter mentioned spirits without compliance with any requirement of law respecting them, falsely made returns to the collector of the collection district aforesaid upon Form 122 aforesaid; that the spirits first above mentioned were emptied for rectification upon his premises aforesaid, and the stamps, marks and brands thereupon effaced and obliterated, and that said Bensberg, then and there, by means of a bribe of money for that purpose, paid by said Bensberg to a certain United States gauger, who was then and there charged with the duty of inspecting the emptying of packages of spirits for rectification upon the premises aforesaid, and of making his certificate relating thereto, as set forth in Form 122 aforesaid, and of making a report relating thereto to said collector upon a form duly, by the commissioner aforesaid, according to law, for that purpose prescribed, and known as Form 59, [681] whereof a copy is hereto annexed and marked B, induced said gauger to make his certificate upon Form 122 as aforesaid, and the return upon Form 59 aforesaid, that the packages of spirits first above mentioned were emptied upon said premises, and the stamps, marks and brands upon them effaced and obliterated, while in truth and in fact such returns, Forms 122 and 59, and said certificate, were wholly false, and said packages were not emptied, or said stamps, marks or brands effaced or obliterated; but, on the contrary thereof, said packages were subsequently shipped and delivered to the claimant in this action, and said Bensberg then and there conveyed to said claimant all the right, title and interest therein which he could convey in view of the facts hereinbefore alleged, against the form of the statutes of the United States in such case provided."

On demurrer to this information, judgment was rendered for the United States in the district court, which was affirmed on a writ of error by the circuit court.

The Revised Statutes, section 3451 is as follows:

"Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry or document required by the provisions of the internal revenue laws, or by any regulations made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years, and the property to which such false and fraudulent instrument relates shall be forfeited."

It is objected by counsel for the claimant of the whisky, that the regulation in question is unauthorized by the statute. But we see no just ground for such a proposition.

The internal revenue law is very specific in the details of that which is necessary to prevent fraud, especially in regard to the tax on whisky and tobacco, and it was still found necessary to authorize the bureau, which had charge of the collection of that tax, to prescribe regulations for conducting the business of making and selling whisky, and to adopt forms of reports in [682] the information which it must receive from the officers engaged in collecting the tax, and the parties who should pay the tax.

The rule in question seems to be a reasonable one, and within the purview of the power conferred.

After all, the essence of the charge against Bensberg is that he defrauded the government out of the tax justly due, and that he did it by the fraudulent use of these forms and in violation of the regulations.

It is also urged that the offense which he committed had relation to the other whisky on which he placed the stamps fraudulently obtained. The answer to this is, that while both packages were properly stamped, the fraud was committed in obtaining stamps on a false certificate of emptying the casks now seized, and a false certificate of the gauger to that effect in violation of the regulation on that subject. We are of opinion that it was in regard to the whisky now seized that the false entry was made, and the forfeiture attached to it.

Though claimant's counsel sets up the innocence of the present claimant in regard to the fraud or any knowledge of it, it can hardly be necessary at this day to reconsider the doctrine, that when the act has been done which the law declares to work a forfeiture of the property. the right of the Government to seize the property, and assert the forfeiture, attaches at once and may be pursued by the Government whenever, and in whose hands soever that property may be found. See *Henderson's Distilled Spirits*, 14 Wall., 44 [81 U. S., XX., 815].

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 183.

HARVEY P. WILMOT, *Plff. in Err.*, [217]

v.

ENOCH R. MUDGE ET AL.

(See S. C., 13 Otto, 217-221.)

Composition between a bankrupt and his creditors.

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The proceeding for composition between a bankrupt and his creditors, under the Act of 1874, is a proceeding in bankruptcy under the Bankrupt Act, and debts created by fraud will not be discharged under it. No debt created by a fraud shall be discharged by any proceedings in bankruptcy.

[No. 247]

Argued Mar. 31, and Apr. 1, 1881. Decided Apr. 25, 1881.

IN ERROR to the Superior Court of the Commonwealth of Massachusetts.

The case is fully stated by the court.

Messrs. **James B. Richardson,** *Edward Avery* and *Edwin B. Hale*, for plaintiff in error:

"Creditors here" (in composition), "plainly means all persons who have provable debts in bankruptcy."

Judge Lowell *Ex parte Trafton*, 2 Lowell, Dec., 506; *In re Schwarz* (C. C.), 15 Bk. Reg., 330; *Bamberg* v. *Stern* (N. Y. C. P.), 18 Bk. Reg., 74; *Wells* v. *Lamprey*, 58 N. H. (Sup. Ct.), 16 Bk. Reg., 205; *In re Shafer*, 17 Bk. Reg., 116.

The claim of defendants in error arose on a contract, and the amount of it was a certain and definite one, for goods for an agreed price, and correctly stated on the debtor's statement produced at the meeting of his creditors. That they did not attend these meetings at the court, or sign the confirmation, did not make them any the less creditors of the debtor.

In re Lissberger (C. C.), 18 Bk. Reg., 237.

There is nothing in section 17, indicating that the word "creditors" there is applicable to, or used to describe persons other than those it is ordinarily used to describe.

"A creditor is one who has a legal claim against another."

(Abb. L. Dic., 321.)

If the defendants in error could have proved their claim, they were "creditors" of said debtor.

In re Scott, etc., 15 Bk. Reg., 74; Williams, Bankr., 2d ed., 161; *In re Rodger*, 18 Bk. Reg., 252; *In re Jordan*, 2 Fed. Rep., 319, and cases cited.

The provisions for composition contained in section 17, of the Act of June 22, 1874, and section 5117 of the Revised Statutes, are not to be regarded or considered as contemporaneous statutes, or as having been passed by the same Congress. The latter is the expression of the Legislative will and policy in 1867, and the former the expression of that will, seven years later, by another Congress.

The conditions of the debtor's relief in one are not the same as in the other; nor is the relief or result the same, but very different. A discharge is a thing which may be set up, like the Statute of Limitations, in bar of an action. Composition is a satisfaction and extinguishment of the debt.

In *Wells* v. *Lamprey* (*supra*), the Supreme Court of that State said, referring to one who had made a composition with his creditors, under section 17, "He was not discharged, but has settled with his creditors the same as if he had gone to each one separately."

In re Lissberger, 18 Bk. Reg., 239, *Chief Justice* Waite says, "The special provision in the composition Act was not intended as a substitute for this part of the general Bankrupt Act," and that the *pro rata* payment is for the satisfaction of the debts, and not as a dividend from the estate in bankruptcy.

In re Odell, 16 Bk. Reg., 501; *In re Becket*, 2 Woods, 173; *In re Leitziger*, 1 A. M., Insolvency Ct. Rep., 149; *In re Morris*, 19 Bk. Reg., 114; *In re Proby*, 17 Bk. Reg., 175; *In re Bagley*, 19 Bk. Reg., 73; *In re Haskell*, 11 Bk. Reg., 164; *In re Morris*, 19 Bk. Reg., 115; *Breslauer* v. *Brown*, L. R., 3 App. Cas., 700, House of Lords; *U. S.* v. *Fisher*, 2 Cranch, 359; *In re Lewis* v. *U. S.*, 14 Bk. Reg., 65.

Messrs. Benj. F. Brooks, Joshua D. Ball and **Moorfield Story,** for defendants in error:

A claim for damages caused by deceit is not a debt.

Montgomery v. *Bucyrus Machine Works*, 92 U. S., 257 (XXIII., 656); *Donaldson* v. *Farwell*, 93 U. S., 631 (XXIII., 993); *Stewart* v. *Emerson*, 52 N. H., 301.

The fact that they might have affirmed the sale, and treated the claim as a debt, is immaterial.

Goodtitle v. *North*, 2 Doug., 583; *Parker* v. *Norton*, 6 T. R., 695; *Parker* v. *Crole*, 2 M. & P., 150; *Dusar* v. *Murgatroyd*, 1 Wash., 13.

If provable at all, it must be as a claim for damages on account of goods wrongfully taken.

Even if the claim is provable, it is a debt created by the fraud of the bankrupt, and to such a debt the composition is no bar.

The language of the Revised Statutes is: No debt created by the fraud * * of the bankrupt, * * shall be discharged by proceedings in bankruptcy," where the original Acts used the words "shall be discharged under this Act."

This declaration of what the original words meant, makes it clear that Congress intended that no proceedings in bankruptcy would relieve the debtor from the consequences of his fraud.

No reason has been suggested for supposing that Congress intended to give a composition any greater effect than a discharge.

The view of the defendants in error is supported by the Supreme Courts of New York, Massachusetts and New Jersey.

Libbey v. *Strasburger*, 21 N. Y. S. C. (14 Hun.), 120; *Mudge* v. *Wilmot*, 124 Mass., 493; *Leggett* v. *Barton*, 40 N. J. L., 83; *Argall* v. *Jacobs*, 21 Hun, 114.

The opposite view has been adopted by the Supreme Court of New Hampshire, the District Court of New Jersey, and the District Court of the Southern District of New York.

Wells v. *Lamprey*, 16 Bk. Reg., 205; *In re Shafer*, 17 Bk. Reg., 116; *In re Rodger*, 18 Bk. Reg., 252.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Superior Court of Massachusetts, to which the record of the case had been remitted from the Supreme Court of that State.

The bill of exceptions, on which the case was heard in the Supreme Court, shows that Mudge and others brought their action against Wilmot in the superior court, in tort, for false representations made in order to induce plaintiffs to sell him certain goods, and the damages claimed were the value of the goods. Wilmot denied the false representations, and also pleaded a composition order of the District Court of the United States, and his offer to pay to plaintiffs what was due them under the composition.

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The case was tried by the court without a jury, who found for plaintiffs and gave judgment for the agreed price of the goods.

The Supreme Court of Massachusetts affirmed the judgment of the superior court on all points.

The only question we can consider is whether the composition and the order of the court thereon is a discharge of the liability of plaintiff in error on account of the cause of action on which he was sued in this case.

The Supreme Court of Massachusetts held that it was not such a discharge, because the action was founded on a fraud.

Section 5117 of the Revised Statutes enacts that "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." The phraseology of the [218] original Statute of Bankruptcy, of 1867, was, that no such debt "shall *be discharged under this Act;*" and an argument is made that while such debt might not be discharged under the Act of 1867, it might be under the composition provided for by the Act of 1874, because the latter was a different Act. We are of opinion that the language of the Revised Statutes expresses the true construction of the Act of 1867, namely: that no such debt should be discharged by the proceedings which the Bankrupt Law of the United States authorized. The language adopted in the Act of 1867 was appropriate, because that was the only Bankrupt Act then in existence, and established a complete system in itself. When the Revised Statutes came to be enacted, many amendments had been made to the original Act, and as none of them were supposed to affect the principle that debts founded in fraud should not be discharged by bankrupt proceedings, it was proper to say so.

The Act of 1874 introduced the system of composition which, when the proposal of the bankrupt to pay a certain proportion of his debts had been accepted by a majority in number and three fourths in value of the creditors, and confirmed by the signatures of the parties and approved by the court, it "Shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to them, are shown in the statement of the debtor produced at the meeting, at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditor." 18 Stat. at L., pt. 3, p. 183, sec. 17. Everything was done which this Act required to bring Mudge & Co. within its provisions. They did not, however, take part in the meeting which passed the composition resolution, nor did they accept the sum which by the terms of the composition they were entitled to receive, though they had been included in the bankrupt's list of creditors and received notice of the composition meeting.

Their counsel relies solely on the proposition, that as their claim against the bankrupt arises out of his fraudulent representations to them in purchasing the goods, their debt is not discharged by this composition, nor by any other [219] proceedings in bankruptcy.

To this it is answered that proceedings in composition are not proceedings in bankruptcy, but are so far distinct, that they constitute a compromise and release of the debtor, by virtue of the provision which declares them binding on both parties.

It is said to be an accord and satisfaction. But this requires the voluntary assent of the creditor, which in this case was not given.

Next it is said that the 17th section of the Act of 1874 [18 Stat. at L., 183], which provides for this composition, is not *in pari materia* with the bankrupt law, and is a new and independent mode of distributing the bankrupt's assets and releasing him from his debt, and is not a part of the proceedings under the bankrupt law.

We do not understand that there is any power in the debtor to invoke this remedy until proceedings in bankruptcy have been commenced by him or against him under the bankrupt law.

Nor can the district court make the necessary order establishing the composition, except in a case of regular bankruptcy proceedings, either voluntary or involuntary. The composition proceeding is, therefore, a part of the bankrupt proceedings, and is one of the modes, which the bankrupt law authorizes, of releasing the debtor and securing to his creditors an equal share of his means

The section itself, 17 of the Act of 1874, is one of many sections amending the bankrupt law in numerous particulars, and is declared to be an amendment of section 43 of the original Act of 1867.

We are very clear, therefore, that the provision for composition is a proceeding in bankruptcy under the bankrupt Act, whether reference be had to the language of the Act of 1867 or of the Revised Statutes, that debts created by fraud shall not be discharged under it. See, opinion of *Ch. Justice* Waite *In re Holmes*, 15 Blatchf., 170.

But the Act of 1874, which contains the provision for composition, is later in date than the Act of 1867 or the Revised Statutes, for as to the latter it must be so held, though both were actually passed at the same session of Congress, and if the later Act is in conflict with the older, so that they cannot be reconciled, the last must prevail. In other words, it is a repeal, *pro tanto*, of the first Act.

That this is the true view of the several pro- [220] visions of the statutes referred to, is strongly urged by counsel for plaintiff in error, on account of the positive language of the latest enactment: "The provisions of a composition accepted by such a resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed."

It is conceded that the defendants in error came within the terms of this provision, and it is insisted they must be bound by the composition. We admit the apparent force of the logic. But, as we have already said, these several statutes, sections and provisions are to be construed as parts of one entire system of bankrupt law. No positive enactment found in one part of it is to be considered as repealed by another unless it be by express language, or by necessary implication. The provision that no debt created by a fraud shall be discharged by any

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proceedings in bankruptcy is a very positive and clear statement of a principle, applicable as well to such proceedings authorized after as before this special one was enacted. The resolution of composition is a proceeding in bankruptcy. Can it be binding *on the parties* within the meaning of the Act and not discharge the claims of all who come within its terms?

If those to be affected by it are such as hold claims that may be discharged by bankrupt proceedings, then all are bound by it. But if there is a person who has proved his debt, and who for the purpose of receiving a dividend declared in the usual mode is a proper party to the general proceeding, but whose claim is at the same time one which, though provable in bankruptcy, cannot be discharged by the bankrupt law, we do not see why the composition may not be binding on others and not on him. There is no injustice nor any difficulty in restraining the language of the composition section, as regards its binding force, to persons whose debts are capable of being discharged by the bankrupt law.

If a certain class of debts cannot be discharged by proceedings in bankruptcy, then they cannot be discharged by this proceeding, [221] for it is a proceeding in bankruptcy. If all other debts may be discharged by a composition in bankruptcy, then the debtor and the other creditors get its benefit and are bound by it, while the one whose debt may not be thus discharged does not. He neither takes its benefit nor is he bound by it.

In this manner both provisions of the bankrupt law can stand and be consistent. Thus construed, there is no conflict between them and each has its appropriate sphere of operation and the effect which the law-makers intended.

The rules of construing statutes in like cases with the present are so well understood as to need no citation of authorities. They are: First, that effect shall be given to all the words of a statute, where this is possible without a conflict; and Second, that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted. We think that which we have already suggested reconciles the two provisions without doing violence to either. Numerous decisions of respectable courts are cited by counsel on each side. Several of these are in conflict with each other. *None of these courts are of higher authority than the one which rendered the judgment we are now reviewing, 124 Mass., 493, and as it concurs with our own views, it is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 12, 562; 98 N. Y., 571: 87 N. Y., 113; 41 Am. Rep., 356.

CHRISTOPHER OSCANYAN, *Plff. in Err.*, [261]
v.
WINCHESTER REPEATING ARMS COMPANY.

(See S. C., 13 Otto, 261-278.)

Verdict on counsel's opening—pleading—foreign contracts—contract to bribe.

1. The trial court may direct a verdict for the defendant upon the opening statement of the plaintiff's counsel.
2. The illegality of the contract in suit can be considered, although not affirmatively pleaded.
3. Contracts permissible by other countries are not enforcible in our courts, if they contravene our laws, our morality or our policy.
4. A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country.

[No. 262.]

Argued Apr. 7, 8, 11, 12, 1881. Decided Apr. 25, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Messrs. **Theodore W. Dwight, Richard O'Gorman** and *Hermon H. Shook*, for plaintiff in error:

Illegality was a defense that should, by every rule of legal pleading, have been set up in the plea. See, *Hill* v. *Mendenhall*, 21 Wall., 453, 455 (88 U. S., XXII., 616), and the course of reasoning on p. 455 (616) by the *Chief Justice;* also *Schulenberg* v. *Harriman*, 21 Wall., 59 (88 U. S., XXII., 554).

The cause was treated by the Circuit Judge as strictly a case under the federal practice, there having been a declaration filed, and the general issue pleaded. The correct rule is, that it is governed by the New York Code of Procedure.

R. S., U.S., sec. 914; *Bennett* v. *Md. Ins. Co.*, 17 Alb. L. Jour., 368 (Northern Dist. of N. Y.); *Lewis* v. *Gould*, 13 Blatchf., 216; *Bills* v. *R. R. Co.*, 13 Blatchf., 227; *Nudd* v. *Burrows*, 91 U. S., 426 (XXIII., 286); *R. R. Co.* v. *Horst*, 93 U. S., 291 (XXIII., 898).

Illegality under this rule is new matter, and must be set up in the answer.

Cummins v. *Barkalow*, 1 Abb. App. Dec., 479, 485; *McKyring* v. *Bull*, 16 N. Y., 297.

The cases in this court admit the propriety of employing a professional man for a contingent compensation, to present a claim before a Board of Commissioners, to adjust demands against a foreign government. The fee was a stipulated percentage on the amount recovered.

Wylie v. *Coxe*, 15 How., 415.

The same rule was applied to a proceeding before a commissioner to adjust claims against the Choctaw Nation, under a Treaty with the United States.

Wright v. *Tebbitts*, 91 U. S., 252 (XXIII., 320).

This rule was applied to the presentation of a claim pending against the United States, in one of the executive departments.

Stanton v. *Embrey*, 93 U. S., 548 (XXIII., 983).

The case of *Tool Co.* v. *Norris*, 69 U. S., 54 (XVII., 870), was explained in this case on p. 557 (985), as being "A contract for an employment to improperly influence public agents in the performance of their public duties."

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Sublimated theories have prevailed in some jurisdictions preventing attorneys from making an agreement with any client for contingent compensation. These rules are based on a supposed public policy.

These authorities have been wisely rejected here, as being unnecessarily restrictive, even when the attorney is employed for his client to transact legal business as between him and the government. Such rules of public policy are purely artificial, changing their complexion with the hue of the sky, where they are sought to be enforced. Would not a rule excluding all brokerage be equally artificial and unwise?

The case of *Pourtailes Gorgier* v. *Morris*, 7 C. B. (N. S.), 588, is one where a person of influence in Switzerland was employed for a compensation to procure a railway concession from the government. There was no intimation by the court that the transaction was illegal, although the promise turned out to be for past services and, for that reason, without consideration.

Reference may be made here to the expressions of the English Master of the Rolls in a late case. "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred; and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Printing & Num. Reg. Co. v. *Sampson*, L. R., 19, Eq., 462, 465.

The claim of the plaintiff in error is sustained by the following decisions in the New York Court, some of which have been rendered since the decision in this court of the *Tool Co.* v. *Norris*, and in view of that decision.

Sedgwick v. *Stanton*, 14 N. Y., 289; *Cummins* v. *Barkalow*, 1 Abb. App. Dec., 479; *Lyon* v. *Mitchell*, 36 N. Y., 235; *Southard* v. *Boyd*, 51 N. Y., 177; *Richard* v. *Quintard*, 51 N. Y., 636; *Howland* v. *Coffin*, 47 Barb., 653; *Brown* v. *Brown*, 34 Barb., 533; *Sturgis* v. *Nav. Co.*, 3 J. & S. (35 N. Y. Super. Ct.) 251; *Mills* v. *Mills*, 40 N. Y., 543; *Rose* v. *Truax*, 21 Barb., 361.

If, however, the court should be of opinion that the case of *Tool Co.* v. *Norris*, is to be accepted as law in the broadest interpretation that can be put upon the language in its head note, we confidently insist that it cannot be applied to the Turkish Government or the Sultan of Turkey. Although it must be admitted that the contract in suit is a New York contract, yet the main contract upon which it acted was a Turkish one. If any rule of public policy was violated, it was a rule of Turkish policy. The act to be done must have been opposed to Turkish interests.

Messrs. Arthur G. Sedgwick and **Edmund Randolph Robinson,** for defendant in error:

The question does not depend upon rules of pleading. The objection is one which it is the duty of the court itself to raise in the interest of sound morals and the due administration of justice. And this duty would not be in any manner affected, even by express stipulation on the part of the defendant to waive the objection; still less by implication that he intended to waive it, derived by the court from his omission to plead it specially.

Coppell v. *Hall*, 7 Wall., 542 (74 U. S., XIX., 244.)

The rules of law applied by this court to contracts like that in question, are as well settled as they are stringent.

The leading cases on the subject are: *Tool Co.* v. *Norris*, 2 Wall., 45 (69 U. S., XVII., 868); *Trist* v. *Child*, 21 Wall., 441 (88 U. S., XXII., 623), and *Meguire* v. *Corwine*, 101 U. S., 108 (XXV., 899).

In *Mills* v. *Mills*, 40 N. Y., 543, the Court of Appeals of New York lays down precisely the same rules.

In *Fuller* v. *Dame*, 18 Pick., 472, the Supreme Court of Massachusetts asserted the same doctrine, extending to the case of a private corporation.

One of the earliest English cases on this subject was *Norman* v. *Cole*, 3 Esp., 253.

No Nation is bound to enforce or recognize any contract which is injurious to its own interests, policy of morals, or is of pernicious example to its own subjects.

Story, Conf. L., secs. 244, 258; 3 Burge, Com. Col. and For. Law, 779; *Greenwood* v. *Curtis*, 6 Mass., 358.

Sedgwick, *J.*, in the course of an opinion not actually delivered but printed with the report of the case, said: "It is pertinent to remark, that where a contract is immoral, or, as it is more technically termed, *malum in se*, a discussion about any *lex loci* is nugatory. It is only by the comity of Nations that an action arising, not between subjects of a particular sovereignty, and without its limits, can be sustained by its courts acting within those limits. * * * * But it would be carrying our courtesy too far to enforce the execution of contracts in themselves vicious. No foreign Nation can justly require and no civility demands that judges should thus become the panders of iniquity."

De Sobry v. *De Laistre*, 2 Har. & J., 191, 228.

Mr. Justice **Field** delivered the opinion of the court:

This is an action to recover the sum of [262] $136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire arms to the Turkish government, effected through his influence. The defendant pleads the general issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was Consul-General of the Ottoman Government at the Port of New York. The defendant is a Corporation, created under the laws of Connecticut. The action was originally commenced in the Supreme Court of New York, and on motion of the defendant, was removed to the Circuit Court of the United States. When it was called for trial, and the jury was impaneled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case, and the facts which they proposed to prove. From such statement, it appeared that the sales, for which commissions were claimed by the plaintiff, were made whilst he was an officer of the

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Turkish Government, and through the influence which he exerted upon its agent, sent to this country to examine and report in regard to the purchase of arms. The particulars of the services rendered will be more fully mentioned hereafter. It is sufficient now to say that the defendant, considering that the facts which the plaintiff proposed to prove, showed that the contract was void as being corrupt in itself, and prohibited by morality and public policy, upon which no recovery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, after which the court directed the jury to find a verdict for the defendant, which was [263] accordingly done. Judgment being entered upon it, the case was brought to this court for review. The reversal of the judgment is sought for alleged errors of the court below in three particulars:

1. In directing a verdict for the defendant upon the opening statement of the plaintiff's counsel;

2. In holding that the question of the illegality of the contract could be considered in the case, the same not having been specially pleaded; and,

3. In adjudging that the contract set forth in the opening statement was illegal and void.

Each of these grounds will be carefully examined.

1. Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove, that might be more properly urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts, upon which it is called to instruct the jury, be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury.

In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof; and if, in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case. If, on a trial for homicide, to take an illustration suggested by counsel, it should appear from the opening statement that the accused had been pardoned for the offense charged, [264] it would be a waste of time to listen to the evidence of his original criminality; for if established he would still be entitled to his discharge by force of the pardon. So, in a civil action, if it should appear from the opening statement that it is brought to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer or to evade the revenue laws or to embezzle the public funds, the court would not hesitate to close the case without delay. Of course in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action.

Here there were no unguarded expressions used, nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client's claim originated, and seldom was a case opened with greater fullness of detail. He dwelt upon and reiterated the statement of the fact which constituted the ground of the court's action in directing a verdict for the defendant, namely: that it was Oscanyan's influence alone which controlled the agent of the Turkish Government, and for the use of that influence the defendant had agreed to give the compensation demanded; that is to say, that, whilst an officer of the Turkish Government, the plaintiff had stipulated for a commission on contracts obtained from it through his personal influence over its agent. Had the case been pending in a court of some of the States, or in an English court, a nonsuit would have been ordered, if the facts stated had been deemed fatal to the action. Involuntary nonsuits not being allowed in the Federal Courts, the course adopted was the proper proceeding. The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit a new action may be brought; whereas, in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.

The language of this court in numerous cases is in accordance with these views, though used with reference to directing a verdict after evidence is received. But, as already stated, it cannot make any difference as to the power of the court, whether the facts be developed by the evi- [265] dence, or be admitted by counsel. In *Merch. Bk.* v. *State Bk.* it appeared, that, upon the evidence on behalf of the plaintiff being closed, the defendant's counsel moved the court below to instruct the jury that it was not sufficient to enable them to find a verdict for the plaintiff. The instruction was given and the jury found for the defendant. And the case being brought here on writ of error, this court said, speaking through *Mr. Justice* Swayne: "According to the settled practice in the Courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further, when such must be the inevitable result. The practice is a wise one; it saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the province of the judge and

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jury, and fixes, where it belongs, the responsibility which should be assumed by the court." 10 Wall., 637 [77 U. S., XIX., 1015].

In *Pleasants* v. *Fant*, this court, speaking of a case where the evidence was insufficient to justify a verdict, and where it would be the duty of the court below to set it aside and grant a new trial, said, speaking through *Mr. Justice* Miller: "Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd and, accordingly, we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." 22 Wall., 122 [89 U. S., XXII., 783].

In *R. R. Co.* v. *Fraloff*, it was claimed by the company that the court below erred, in not giving a peremptory instruction for a verdict in its favor. But this court, whilst holding the position untenable, said, speaking through *Mr. Justice* Harlan: "Had there been no serious controversy about the facts, and had the law, upon the undisputed evidence, precluded any recovery whatever against the company, such an instruction would have been proper." 100 U. S., 26 [XXV., 538]. [266]

Indeed, there can be, at this day, no serious doubt that the court may at any time direct a verdict when the facts are undisputed, and that the jury should follow such direction. The maxim, that questions of fact are to be submitted to the jury and not to be determined by the court, is not violated by this proceeding any more than by a nonsuit in a state court, where the plaintiff fails to make out his case. The intervention of the jury is required only where some question of fact is controverted.

Our conclusion, therefore, is that the first position of the plaintiff is not well taken.

The suggestion in the argument, that the counsel who made the opening had been called into the case only two days before the trial and was not, therefore, fully prepared to open it, does not merit consideration. In the first place, the record does not show that any application was made to the court for a postponement of the trial on that ground; in the second place, two days ought to have been ample time for the counsel to acquaint himself with the essential facts of the case; and in the third place, no new fact is even now mentioned that would have materially changed his statement.

2. The position of the plaintiff, that the illegality of the contract in suit cannot be noticed because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is, therefore, sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract.

Whilst, however, at the common law, under the general issue in *assumpsit*, it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit; such as payment, release, accord and satisfaction, and a former recovery, and excuses for non-performance of the contract; and also that it had become impossible or illegal to perform it. 1 Chit. Pl., 493; *Craig* v. *Mo.*, 4 Pet., 410-426; *Edson* v. *Weston*, 7 Cow., 278; *Young* v. *Rummell*, 2 Hill, 478. It followed that there were many surprises at the trial, by defenses which the plaintiff was not prepared to meet. The English courts, under the authority of an Act of Parliament passed in the reign of William the 4th, adopted rules which, to some extent, corrected the evils arising from this practice of allowing defenses under the general issue which did not go directly to the validity of the original cause of action. And the Code of Procedure of New York did away entirely with the practice in that State, and required parties relying upon anything which, admitting the original existence of the cause of action, went to show its discharge—such as a release or payment or other matter—to plead it specially, in order that the plaintiff might be apprised of the grounds of defense to the action. We do not understand that the Code makes any other change in the matters admissible under the general denial. [267]

But if we are mistaken in this view of the system of procedure adopted in New York, and of the defenses admissible according to it under a general denial in an action upon a contract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the Judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality or the law. History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward, if we may suppose that audacity could go so far, the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law or condemned by public decency or morality. [268]

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This doctrine was applied by this court in *Hall* v. *Coppell*, reported in 7th Wallace, 542 [74 U. S., XIX., 244]. In that case, Coppell was the acting British Consul in New Orleans, and during the late civil war entered into a contract with one Hall, by which the latter agreed to furnish him with sundry bales of cotton, which he was to cause to be protected from seizure by our forces and transported to New Orleans, and there disposed of to the best advantage, he to receive one third of the profits for his compensation. For breach of this contract, he sued Hall, who set up that the contract was against public policy and void, and also a reconventional demand or counter claim for damages for a breach of the contract by Coppell. On the trial, the court below, among other things, instructed the jury that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendant, but this court said, speaking through *Mr. Justice* Swayne, that the instruction "Was founded upon a misconception of the law. In such cases," he added, "there can be no waiver. The defense is allowed, not for the sake of the defendant but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence [269] comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form, to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." See, also *Holman* v. *Johnson*, 1 Cowp., 343.

Approving of the doctrine so well expressed in this citation, our conclusion is that the second position of the plaintiff is not well taken.

3. We are brought, then, to the consideration of the contract upon which the action is founded. This is given in the opening statement of the plaintiff, with full particulars of the services rendered. We need only repeat its essential portions. As already mentioned, he was, at the time, Consul-General of the Ottoman Government at the Port of New York. For many years previously to 1869 he had resided in the United States, and was familiar with our language. In that year the Turkish Government sent Rustem Bey, an officer of high rank in its service, to the United States to examine and report in regard to the purchase of arms and machinery for its use. He was a friend of the plaintiff; had known him many years, and their relations were intimate. On his arrival in this country he made the plaintiff's office his headquarters, and there all his interviews and negotiations with the manufacturers of arms were had, and, as he did not speak English, these interviews and negotiations were conducted through the plaintiff. The manufacturers soon became aware of the relation of the men to each other, and accordingly opened a correspondence with the plaintiff, or waited upon him, to secure his influence with the Bey in presenting their arms. Among others, Winchester, the president of the Winchester Repeating Arms Company, of Connecticut, the defendant here, sought an introduction to him, and the scene is thus narrated: "Said Mr. Winchester to Oscanyan, 'Will you be kind enough to call the attention of Rustem Bey to my repeating rifle?' 'Well,' said Oscanyan, 'Mr. Winchester, I am receiving commissions from all parties for that favor, and I expect commissions for my services, and that is one of the ways by which I make my livelihood; if you can compensate me, if you can remunerate me by giving me commissions, I [270 will use my influence for you and do all I can for you.' 'Very well,' said Mr. Winchester, 'that is all right. You shall have whatever commissions we deem proper, and we will talk the matter over and agree upon that.' Accordingly, Oscanyan showed the Winchester repeating rifle to Rustem Bey," who was not pleased with it but, through Oscanyan's influence, was induced to send samples of it to Constantinople.

In January, 1870, the Bey received instructions from the Turkish Minister of Ordnance to examine and report upon the Spencer gun. These instructions were given because the Turkish Government had heard that the United States had a large number of these guns on hand which they desired to dispose of. They immediately became known to Oscanyan and, as he had agreed with Winchester to press the claims of the Winchester gun, he at once proceeded to use his influence with the Bey to condemn the Spencer gun. The opening statement says that "He raised all manner of objections that he could, and he finally did succeed in inducing" the Bey to put it aside. Then he brought out a Winchester gun, a sample of which he always kept in his office for the very purpose, whenever opportunity offered, of presenting its claims. It appears, however, that the Bey did not, from the first, like that gun, and for that reason, continues the opening statement, "Oscanyan had to use all his ingenuity and skill and perseverance and patience" to get him to look at it at all, but finally he succeeded in getting him to recommend the purchase of a thousand of them for the use of the imperial bodyguard. This, said the plaintiff's counsel, was done by the Bey, "in order to please Oscanyan," knowing the fact that he had an arrangement with the defendant for a commission on the sale. Accordingly the Bey reported to the Turkish Government condemning the Spencer gun and recommending the purchase of the Winchester repeating arms. Soon afterwards Oscanyan informed Winchester of what he had done, when the latter remarked that he would have allowed Oscanyan the same commissions on the Spencer guns as on the others. Oscanyan replied that the United States had a large number of them on hand, and if the Bey had [271 reported favorably on that gun the Turkish Government would have ordered them directly from the United States Government. It was that reason, said Oscanyan, which "weighed on my mind" to persuade the Bey to condemn the gun.

In February, 1870, the Bey received fresh instructions to inquire into and report upon the price of twenty thousand repeating arms and to

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send fresh samples. Oscanyan soon learned of this and immediately telegraphed for Winchester, who arrived at his office on the following day, when Oscanyan informed him that he had got an order for twenty thousand guns, or an inquiry for the price of twenty thousand, and thought he could get an order for one hundred thousand. He then called Winchester's attention to an objection raised by the Bey relating to the spring of the magazine of the rifle, and advised him to meet it; and this advice was acted upon. Soon afterwards Winchester, as president of the Company, put in writing his agreement with Oscanyan, to give ten per cent upon all sales of arms of the Company made to or by the latter to the Ottoman Government, provided that such sales were made at prices and upon terms having his approval. This was dated on the 4th of March, 1870. On the following day a box of fresh samples was forwarded to the Turkish Minister of Ordnance at Constantinople and, after a delay of some months for the receipt of the cartridges, a trial of them was had with a favorable result. Written contracts between the defendant and the Turkish Government followed; one made November 9, 1870, for arms to the amount of $520,000, and another made August 19, 1871, for arms to the amount of $840,000.

The plaintiff claims that these contracts were procured through the recommendations which by his influence were made by Rustem Bey. His counsel stated this in his opening and declared that no other person had possessed any influence in effecting the sales. It is for the use of this influence that the contract in suit was made and compensation is now demanded. The question then arises: is this contract one which the court will enforce? We have no hesitation in answering it in the negative. The contract was a corrupt one; corrupt in its origin and corrupting in its tendencies. The services stipulated and rendered were prohibited by considerations of morality and policy which should [272] prevail at all times and in all countries, and without which fidelity to public trusts would be a matter of bargain and sale and not of duty.

In the first place the plaintiff was, at the time, an officer of the Turkish Government. As its Consul-General at the Port of New York he was invested with important functions and entitled to many privileges by the law of Nations. It is not necessary here to state with any particularity the functions and privileges attached to the consular office. These will be found in any of the approved treatises on international law.

It is enough to observe that a consul is an officer commissioned by his government for the protection of its interests, and those of its citizens or subjects; and whilst he is sometimes allowed, in christian countries, to engage in commercial pursuits, he is so far its public agent and commercial representative, that he is precluded from undertaking any affairs or assuming any position in conflict with its interests or its policy. By some governments he is invested—in the absence of a minister or ambassador to represent them—with diplomatic powers; and, as between their citizens or subjects, may also exercise judicial functions. By all governments his representative character is recognized, and for that reason certain exemptions and privileges are granted to him. In the Constitution of the United States, consuls are classed with ministers and ambassadors in the enumeration of parties whose cases are subject to the original jurisdiction of the Supreme Court, and in the Treaty with the Ottoman Empire, authority is given to it to appoint consuls in the United States.

It was stated in the argument that the office held by the plaintiff was an honorary one, created especially as an evidence of the high regard entertained for him by the government of his country, as if the objection to his claim of a right to exact a commission on contracts with it, made through his influence, was obviated by the fact that he received no salary for the discharge of his official duties. Assuming the office to have been purely an honorary one, we do not perceive how this circumstance could in any respect alter his relations to that government. If conferred as a mark of honor, the fact would seem to impose upon him increased [273] obligation to avoid any departure from the line of duty. The members of Parliament in England receive no pay for their services, and the expenses of many official positions, in this and other countries, exceed the compensation allowed to the incumbents; but this circumstance would not excuse, much less justify, them in sacrificing the public interests for individual gains or profits. All such positions are trusts to be exercised from considerations of duty and for the public good. Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers. The plaintiff, it is true, was not the purchasing agent of the Turkish Government, but he was its honored officer, upon whose fidelity to its interests it had a right to rely in any advice which he might give to its agent. But so far from justifying this confidence, the only motive upon which he appears to have acted was the hope of gain to himself by high commissions on the sales effected. As justly remarked by the judge who tried the case, the benefits which would inure to the government of which he was the commercial representative, do not seem to have entered into the considerations which influenced his mind.

But, independently of the official relation of the plaintiff to his government, the personal influence which he stipulated to exert upon another officer of that government was not the subject of bargain and sale. Personal influence to be exercised over an officer of government, in the procurement of contracts, as justly observed by counsel, is not a vendible article in our system of laws and morals, and the Courts of the United States will not lend their aid to the vendor to collect the price of the article. Numerous adjudications to this effect are found in the state and federal courts. This is true when the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring when he is also its officer.

In *Tool Co.* v. *Norris*, reported in the 2d of Wallace, 45 [69 U. S., XVII., 868], this court held that an agreement for compensation to procure a contract with the government to furnish its supplies was against public policy and could not be enforced. That was a case where the compensation was made contingent upon suc-

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[274] cess in procuring the contract and, as we shall hereafter show, should be distinguished from agreements for services in presenting information on the subject for the consideration of the government. It was a case where nothing was to be paid if no contract was obtained, and if obtained the compensation was to be proportionate to its extent. In deciding the case, the court said: "Considerations as to the most efficient and economical mode of meeting the public wants should alone control in this respect the action of every department of government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency, is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds. * * * * All agreements for pecuniary considerations to control the business operations of the government or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

In this case the doctrine of the court in *Marshall* v. *R. R. Co.*, reported in 16th Howard, 314, was emphasized. There compensation was claimed by the plaintiff for services rendered in procuring the passage of a law by the Legislature of Virginia, upon a contract that if the law was not passed, or, if passed, was not accepted and adopted or used by the stockholders, no compensation should be allowed. It was held that the contract was void as against public policy. The court, speaking through *Mr. Justice* Grier, said: "Bribes in the shape of high contingent compensation must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought [275] to believe that any means which will produce so beneficial a result to himself are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'carcless' members in favor of his bill." See, also, *Wood* v. *McCann*, 6 Dana, 366; *Mills* v. *Mills*, 40 N. Y., 543.

In *Trist* v. *Child*, reported in 21st of Wallace, 441 [*Burke* v. *Child*, 88 U. S., XXII., 623], the distinction is drawn between the use of personal influence to secure legislation and legitimate professional services in making the Legislature acquainted with the merits of the measures desired. Whilst the former is condemned, the latter are, within certain limits, regarded as appropriate subjects for compensation. There the defendant had employed the plaintiff to get a bill passed by Congress for an appropriation to pay a claim against the United States. It was considered by the court to have been a contract for lobby services, and adjudged void as against public policy. Other similar cases were mentioned by the court, and, after observing that in all of them the contract was held to be against public policy and void, it added, speaking through *Mr. Justice* Swayne, "We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics, as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case."

So, too, with reference to furnishing the government with arms or supplies of any kind. It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interests of the country. And for such services compensation may be had as for similar services with private parties, either upon a *quantum meruit* or, where a sale is effected, by [276] the ordinary brokerage commission. And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business. But where, instead of placing before the officers of the government the information which should properly guide their judgments, personal influence is the means used to secure the sales, and is allowed to prevail, the public good is lost sight of, unnecessary expenditures are incurred, and, generally, defective supplies are obtained, producing inefficiency in the public service.

In *Meguire* v. *Corwine*, decided at the last Term, the doctrine of the above cases was approved. There an agreement to pay the plaintiff, in consideration of his appointment as government counsel, one half the fees he might recover, was adjudged invalid. Transactions of the kind were declared to be "an unmixed evil;" and the court said that whether forbidden by statute or condemned by public policy, "no legal right could spring from such a source." 101 U. S., 111 [XXV., 900].

In the present case there is no feature that relieves the contract which the plaintiff seeks to enforce from the condemnation pronounced in the several cases cited. It is the naked case of one officer of a government, to secure its pur-

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chase of arms, selling his influence with another officer in consideration of a commission on the amount of the purchase. The Courts of the United States will not lend their aid to collect compensation for services of this nature; nor does it make any difference that the Turkish Government did not object to the plaintiff's taking commission on such contracts, which counsel contended we must consider as admitted together with the rest of the opening statement. We may doubt whether we are compelled to take as correct, with the facts mentioned touching the contract in court, his state-
[277] ment of the law or customs of other countries. But admitting this to be otherwise, and that the Turkish Government was willing that its officers should be allowed to take commissions on contracts obtained for it by their influence, that is no reason why the Courts of the United States should enforce them. Contracts permissible by other countries are not enforcible in our courts, if they contravene our laws, our morality or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.

The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions contracts made in a foreign country to promote or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents or to affect the public rights, and other contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society. "All such contracts," he adds, "even although they might be held valid in a country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of christian morality or even of natural justice are allowed to have their due force and influence in the administration of international jurisprudence." Story, Confl. L., sec. 258.

Among such obnoxious contracts must be included all such as have for their object the control of public agents by considerations conflicting with their duty, and fidelity to their principals. A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country; not from any consideration of the interests of that government, or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people. *Hope* v. *Hope*, 8 De G. M. & G., 731; *Watson* v. *Murray*, 8 C. E. Green [23 N. J. Eq.], 257.

[278] In any view of the contract here, whether it would be valid or invalid according to Turkish law and customs, it is intrinsically so vicious in its character and tendency, and so repugnant to all our notions of right and morality, that it can have no countenance in the Courts of the United States.

Our conclusion, therefore, is that the third position of the plaintiff is not well taken.

It follows that the judgment of the court below must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 512; 98 Ind., 244; 49 Am. Rep., 750.

BARTLETT LAND AND LUMBER COMPANY, *Plff. in Errr.*, [316]

v.

DANIEL SAUNDERS.

(See S. C., 13 Otto, 316-326.)

Boundaries of land—reference to plat—unascertained boundary—estoppel by a survey.

1. In boundaries of land, monuments control courses and distances.
2. Where land granted was bounded by Hart's Location, it is no objection that Hart's Location had never been located by a fixed definite survey, if the plat of it annexed to the grant and referred to in it, did show a boundary line, laid down to a scale.
3. As Hart's Location must necessarily have a western boundary somewhere, and as its limits and bounds were shown, whether correctly or incorrectly, by public maps in the archives of the State, it could not be said that this boundary was incapable of ascertainment.
4. A line run without any communication or agreement with the proprietors of Hart's Location, or any other parties having an interest in the adjoining lands, and in ignorance of the true western boundary of that location on the land, is no estoppel on the question of that boundary.

[No. 251.]

Argued Apr. 1, 4, 1881. Decided Apr. 25, 1881.

IN ERROR to the Circuit Court of the United States for the District of New Hampshire.

The case is fully stated by the court.

Messrs. **William L. Putnam,** *F. W. Hackett* and **Ossian Ray,** for plaintiff in error:

Hart's Location is not such monument, as is intended by the maxim that "Courses and distances yield to boundaries."

"The reason why monuments, as a general thing, in the determination of boundaries, control courses and distances, is that they are less liable to mistakes; but the rule ceases with the reason of it."

White v. *Luning*, 93 U. S., 525 (XXIII., 940).

"The ordinary rule rests on the presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto."

Higinbotham v. *Stoddard*, 72 N. Y., 98.

"Where a boundary is inadvertently inserted or cannot be found, * * * or an adherence to it would defeat the evident intent of the parties, * * * the boundary may be rejected, and the extent of the grant be determined by measurement, or other portions of the grant."

Morse v. *Rogers*, 118 Mass., 578.

"A call for a line not marked, will not control courses and distances."

Browning v. *Atkinson*, 37 Tex., 633; *R. R. Co.* v. *Stigeler*, 61 N. Y., 348-352; *Carson* v. *Burnett*, 1 Dev. & B. (N. C.), 558; *McCown* v. *Hill*, 26 Tex., 359; *Hamilton* v. *Foster*, 45 Me., 82; *Higinbotham* v. *Stoddard*, 72 N. Y., 94; *Davis* v. *Rainsford*, 17 Mass., 207; *White* v.

NOTE.—*Natural objects or needle; which governs in survey of lands.* See, *note* to Newsom v. Pryor, 20 U. S. (7 Wheat.), 7.

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Luning (*supra*); see, also, *Morse* v. *Rogers*, 118 Mass., 572; *Smith* v. *Dodge*, 2 N. H., 303; *Bowman* v *Farmer*, 8 N. H., 402; *Drew* v. *Drew*, 28 N. H., 489; *Hall* v. *Davis*, 36 N. H., 569; *Cunningham* v. *Curtis*, 57 N. H., 157; *Enfield* v. *Permit*, 5 N. H., 280.

Messrs. **J. G. Abbott,** *Daniel Saunders* and **Charles G. Saunders,** for defendant in error:

It has been repeatedly decided that the line of another tract of land is a monument, which will control both courses and distance mentioned in a deed.

Peaslee v. *Gee*, 19 N. H., 278; *Cunningham*, v. *Curtis* 57 N. H., 157; *Breck* v. *Young*, 11 N. H., 485; *Howe* v. *Bass*, 2 Mass., 380; *Flagg* v. *Thurston*, 13 Pick., 145; *Henshaw* v. *Mullens*, 121 Mass., 143; *Bond* v. *Fay*, 8 Allen, 212; *Chadbourne* v. *Mason*, 48 Me., 389; *Abbott* v. *Abbott*, 51 Me., 575; *Haynes* v. *Young*, 36 Me., 557; *Park* v. *Pratt*, 38 Vt., 545; *Bolton* v. *Lann*, 16 Tex., 96; *James* v. *Brooks*, 6 Heisk., 151; *Corn* v. *McCrary*, 3 Jones, 496.

Hart's Location is such a monument.

The fact that its westerly line had never been actually located on the ground at the point where the north line of Elkins' Grant strikes it, will in no way vary the rule. *Id certum est quod certum reddi potest.*

Corn v. *McCrary* (*supra*); *Dula* v. *M'Ghee*, 12 Ired., 332; *Brown* v. *Hobson*, 3 A. K. Marsh., 380; *Kronenberger* v. *Hoffner*, 44 Mo., 185.

If the distance from the Lincoln corner to the location was greater than they supposed, that would not affect a deed conveying all the land lying between the two bounds.

Newsom v. *Pryor*, 7 Wheat., 7; *Mayhew* v. *Norton*, 17 Pick., 357.

It has been decided that the words, "by land of adjoining owner," mean along the line of such land.

Peaslee v. *Gee* (*supra*); *Breck* v. *Young* (*supra*); *Enfield* v. *Day*, 11 N. H., 520; *Brown* v. *Hobson* (*supra*).

The line from Hart's Location to the Albany corner must be a straight one.

Allen v. *Kingsbury*, 16 Pick., 235.

To the same effect are the following cases:

Henniker v. *Hopkinton*, 18 N. H., 98; *Jenks* v. *Morgan*, 6 Gray, 448; *Henshaw* v. *Mullens* (*supra*); *Call* v. *Barker*, 12 Me., 320.

There is no such point as that mentioned in the grant, from which a line drawn due south shall strike the northwest corner of Albany, the whole western boundary of the location being east of such line.

This boundary must then be a line drawn from Albany to the nearest point on the westerly line of the location.,

Campbell v. *Branch*, 4 Jones, 313.

In the case of *Coburn* v. *Coxeter*, 51 N. H., 158, the above case of *Campbell* v. *Branch*, is cited in the opinion, and the principle there laid down, approved by the New Hampshire court.

Where any principle of law, establishing a rule of real property has been established in the state court, the same rule will be applied to the United States Courts that would be applied to the state tribunals.

Suydam v. *Williamson*, 24 How., 427 (65 U. S., XVI., 742); *Jackson* v. *Chew*, 12 Wheat., 153; *Walker* v. *State Harbor Comrs.*, 17 Wall., 648 (84 U. S., XXI., 744).

Mr. Justice **Bradley** delivered the opinion of the court: [317]

This is a writ of entry brought by the plaintiff in error, the demandant below, against the defendant, to recover possession of a certain tract of land in Grafton County, New Hampshire, described as follows: "Beginning at the northwest corner of the Town of Albany, and thence running north about 3 degrees east, three miles and 65 rods, to a spruce tree marked; and from thence north about 6 degrees east, 4 miles and 95 rods, to a fir tree marked; and from thence south about 87½ degrees east, to the westerly line of Hart's Location, and to the easterly line of Grafton County, as established by the Act approved July 3d, 1875, entitled 'An Act Establishing the East Line of Grafton County;' and from thence along the east line of Grafton County to the bound begun at, and containing 8,000 acres of land, more or less."

The defendant filed a plea, defending his right in, and denying disseizin of, all the land described in the plaintiff's writ which is included in the following described tract, viz: "Beginning at the nortwest corner of the Town of Albany, formerly called Burton, and thence running north about three degrees east, three miles and sixty-five rods, to a spruce tree marked; and from thence north about six degrees east, four miles and ninety-five rods, to a fir tree marked; and from thence south about eighty-seven and one-half degrees east, to the westerly line of Hart's Location; thence southerly by the westerly line of Hart's Location to the point in said westerly line nearest to the nortwest corner of said Albany; thence in a strai't line to the northwest corner of said Albany." As to the remainder of the land claimed in the plaintiff's writ, the defendant disclaimed title.

Upon these issues the cause came on to be tried, and after the demandant's evidence was adduced, the court below instructed the jury that upon the case made by the demandant it was not entitled to recover, and a verdict was given for the defendant, and judgment rendered accordingly. The present writ of error is brought to reverse this judgment. [318]

The specific points raised upon the trial, upon which the court was called upon to pass, are presented by a bill of exceptions, which exhibits the evidence in detail. Such parts of this evidence as may be necessary to understand the matters of law raised by the writ of error will be adverted to.

The demandant, on the trial, produced and deraigned title under a quitclaim deed from James Willey, land commissioner of the State of New Hampshire, to Alpheus Bean and others, dated Nov. 26, 1831, made by authority of a resolve of the Legislature, which included the lands claimed in the writ.

The demandant also produced a prior deed, under which the defendant claimed the land described in his plea, being a deed from Abner R. Kelly, Treasurer of the State of New Hampshire, to Jasper Elkins and others, dated August 31, 1830, and made by authority of a resolve of the Legislature, which deed purported to convey the following described tract in the County of Grafton, New Hampshire, to wit:

"Beginning at the northeast corner of the Town of Lincoln, and running east seven miles and one hundred and seventeen rods to Hart's

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Location; thence southerly by the westerly boundary of said location to a point so far south that a line drawn thence due south shall strike the northwest corner of the Town of Burton; thence south to said northwest corner of Burton; thence westerly along the northern line of Waterville to the eastern boundary of Hatch and Cheever's grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln, and along this line to the point first mentioned."

The principal question in the cause was whether the premises thus granted to Elkins and others by the last named deed embraced the land described in the defendant's plea; if they did, as was held by the Judge at the trial, the defendant's was the elder title to the land in dispute, and the title of the demandant failed, and there is no error in the instructions as to the documentary title.

The beginning corner of the premises granted to Elkins and others was conceded to be a well known point, and the general position of the first line of the survey, which is described as "running east 7 miles and 117 rods to Hart's Location," was not disputed; nor was the position [319] of the northwest corner of the Town of Burton (now Albany) disputed, it being a common point to which both parties referred; nor were the lines of the Elkins survey from the northwest corner of Burton "westerly along the northerly line of Waterville, etc., to the point first mentioned," brought in question. The only point in dispute was the eastern boundary of the Elkins tract; the defendant contending that, by virtue of the deed of 1830, it extended eastwardly to Hart's Location, covering the disputed territory; and the demandant contending that it did not extend further to the eastward than the northwest corner of Burton (or Albany) and a line drawn north from that point.

The language of the grant is, "east 7 miles and 117 rods *to Hart's Location;* then southerly *by the westerly boundary of said location* to a point so far south that a line drawn thence due south shall strike the northwest corner of the Town of Burton; thence, etc." Now, if when the grant was made, there was a tract known as Hart's Location lying easterly and in the vicinity of the land granted, and if it had a westerly boundary to which the granted tract could by any reasonable possibility extend, no more apt language for this purpose could have been adopted. It would be a monument which would control courses and distances. If more or less distant from the point of beginning than 7 miles and 117 rods, still it would control the survey. If a line drawn due south from any point of its western boundary would not strike the northwest corner of Burton, then they must be connected by a line not running due south. The line of shortest distance between said boundary and said northwest corner would be the proper one, and this is the one that was adopted. Hart's Location is called for, and to that location we are bound to go.

The evidence was overwhelming and uncontradicted to show the existence and notoriety of Hart's Location. It is a large tract of land lying on both sides of the Saco River, directly to the eastward of the Elkins tract. On the 27th of April, 1772, this tract was granted by Governor Wentworth, in the name of the King, to one Thomas Chadbourne. The plaintiff produced in evidence a copy of that grant, having a plat or survey of the tract annexed to it. The premises granted are described as follows:

"Beginning at a birch tree being the southwesterly corner bounds of a tract of land granted to Mr. Vere Royse; from thence running north four hundred and seventy rods, from thence ex- [320] tending westerly the same breadth of four hundred and seventy rods, the distance of two hundred and eighty-five rods from thence running northwesterly six hundred rods, from thence running nearly a north course thirteen hundred rods until it meets the notch or narrowest passage leading through the White Mountains lying upon Saco River."

The plat, or survey, annexed to the grant shows the Saco River running through it. It follows the river on both sides from the beginning of the survey up to the mountains. It is conceded that the beginning corner is well known; and the general location of the tract is undisputed. By the name of Hart's Location it has been well known for nearly a century past. Its census has been published in the laws, like that of a regular township, and it seems to have been treated in some sort as a *quasi* township. In the state census published with the laws of 1815, and again in 1820, the population of Hart's Location is put down as 35 for the year 1810, and at 65 for 1820. In the Acts for the apportionment of the state tax among the several townships of the State, the *pro rata* share of Hart's Location was fixed at 8 cents on a thousand dollars in 1816; at 12 cents in 1820; at 10 cents in 1824; and at 8 cents in 1829. By an Act approved Dec. 24th, 1828, it was resolved: "That Hart's Location, in the County of Coos, be annexed and classed with the Towns of Bartlett and Adams, in said county, for the purpose of electing a representative to the general court, until the Legislature shall otherwise order." The demandant's principal witness stated that it had been a political organization at one time and sent a representative to the general court.

But it was claimed by the demandant, and proof was offered to show that the western boundary of Hart's Location, being in a wild and mountainous region, had never been located on the ground in 1830, and could not be located from the description contained in the grant, because it was too vague and uncertain to admit of a fixed and definite survey. But the plat annexed to the grant, and referred to by the grant [321] for greater certainty, did show a boundary line, laid down to a scale. If there was no other evidence on the subject, this would be sufficient to show that Hart's Location had a boundary, and a definite one, whether it was ever actually run out on the ground or not. In or about 1803, on occasion of a general perambulation of the townships of the State, made in pursuance of an Act of the Legislature, a survey of Hart's Location was made by one Merrill, by public authority, and deposited in the office of the Secretary of State. This was also produced in evidence on the trial, and showed a well-defined map of the location, laid down to a scale—differing somewhat from the plat annexed to the original grant, but not more than might be naturally expected if the original was not used.

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There can be no doubt, therefore, that when Hart's Location was referred to in public Acts and resolves, whether for the purpose of taking the census, taxation or political jurisdiction, it was referred to as a defined tract or portion of territory, within the bounds of which the State claimed no proprietary interest. In 1880, when the Legislature, by a resolve, authorized, and by its treasurer made, to Elkins and his associates, a grant of land to extend from the Town of Lincoln on the west to Hart's Location on the east, the exterior line extending along "by the westerly boundary of said location," it is difficult to find any ground for uncertainty or ambiguity in the grant, or to imagine how, after that, the State, or any persons claiming under the State, could, with any show of reason, claim that there was no such thing in being as a Hart's Location having a western boundary; or that the Elkins grant did not extend to and bound upon it. All rights of the State up to and adjoining said location were as clearly disposed of as if the two grants, that of Hart's Location and that to Elkins and others, had been made in the same instrument; granting to one party, first, Hart's Location as described in Chadbourne's patent, and then granting to Elkins and his associates all the residue of the lands westward to the Town of Lincoln between designated side lines on the north and south.

The truth is, that Hart's Location itself was the monument indicated, whatever might be the location of its western boundary. The [322] existence of the location as a territorial subdivision of New Hampshire was as notorious and certain as the existence of any township in the State. It must of necessity have had a boundary whether that boundary had ever been actually surveyed on the ground or not. The State owned all the land lying westerly of it, between it and the Township of Lincoln, and this land had never been granted to any person. It was wild, mountainous land of little value. The whole area, equal to the extent of a large township, and containing probably seventy or eighty square miles, was in 1880 valued at only $800. All this tract thus lying to the west of Hart's Location was granted to Elkins and his associates. They may have been under an erroneous impression as to the true location of the western boundary of Hart's Location, but whatever it was, and whenever found, that was to be the boundary of the grant.

It may be true, as stated by the Supreme Court of Massachusetts in *Morse* v. *Rogers*, 118 Mass., 578, that where a boundary is inadvertently inserted or cannot be found or an adherence to it would defeat the evident intent of the parties, "the boundary may be rejected, and the extent of the grant be determined by measurement, or other portions of the grant." But that is not the case here. The evident intent of the parties was to go to Hart's Location as a territory or known body of land, without particular regard to a marked, designated and visible line. It was their intent to leave no land belonging to the State between that territory and the tract granted. This was clearly the principal object in view; and as Hart's Location must necessarily have a western boundary somewhere, and as its limits and bounds were shown, whether correctly or incorrectly, by public maps in the archives of the State, it could not be said that this boundary was incapable of ascertainment. To hold this, and abandon the call of the deed for Hart's Location, and to confine the grantees to courses and distances, would defeat instead of furthering the intention of the parties. If the western boundary of Hart's Location had never been surveyed on the ground, it could be surveyed; or it could be located by agreement between the owners of it and the owners of the Elkins grant. They were the only parties who after that grant had any interest in the matter.

It may well be asked, if the call for Hart's Location and its western boundary can have no [323] significance in the Elkins grant in 1880, how does it suddenly acquire significance in 1881, in the grant under which the demandant claims? The language used is almost exactly the same: "thence easterly to Hart's Location; thence southeasterly by said Hart's Location, etc."

With the accumulated evidence on the subject which was presented in the demandant's case, most of it of such a character as not to admit of contradiction, we think that the Judge was perfectly right in assuming that Hart's Location was a monument sufficiently definite to control the courses and distances given in the grant. Indeed, we do not see how he could have done otherwise. The fact that the Town of Burton, which lay to the south of Hart's Location, extended so far westerly that its northwest corner would not be met by a line drawn due south from any part of Hart's Location, cannot prevent the Elkins grant from extending to Hart's Location, as its eastern boundary, as called for in the deed. As before stated, the connection between this location and the northwest corner of Burton, if it cannot be made by a line drawn due south as called for, must necessarily be made by the line of shortest distance between them. This is the surveyors' rule and the rule of law. *Campbell* v. *Branch*, 4 Jones (N. C.), 313. It is constantly applied when trees or monuments on or near the margin of a river are called for in a deed where the river is a boundary.

We think that the Judge did not err in relation to the construction and effect of Elkins' deed.

But the demandant raised another point at the trial, namely: that the owners of the Elkins grant had estopped themselves from claiming under it any land eastwardly of a line running north from the northwest corner of the Town of Burton, or Albany. The evidence offered on this point tended to show that about, or soon after the date of the Elkins grant, the grantees or some of them employed surveyors to ascertain the extent and boundaries of the grant, and that a line was run directly (or nearly) north from the northwest corner of Burton, to the north line of the grant, as the supposed eastern boundary adjoining Hart's Location; but that this was done without any communication or agreement with the proprietors of Hart's Location or any other parties having an interest in the adjoining lands, and in ignorance of the true western [324] boundary of that location on the land. The evidence consisted of the testimony as to the declarations of some or one of the grantees, as to the running of such line, made over forty years before, and of a recent examination of marked trees, which indicated a date corresponding with the period referred to.

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We think that the Judge was right in holding that this evidence was totally insufficient, under the law of New Hampshire, or any other law, to show such a *settlement* of the line, as to estop the owners of the grant from claiming to the extent of the description contained in the deed. Conceding that everything was proved which the evidence tended to prove, it would only show that the grantees made a tentative effort to find the limits of their property in a mountainous and almost inaccessible wilderness, without consultation or communication with any other parties, and without doing any act or thing that could in the least commit them in relation to such parties. The only line shown to have been the subject of any agreement was that located by Wilkins in 1850, parallel to, and 235 chains from, the Saco, which was concurred in by Walker, the agent of the owners of the Elkins grant, and one Davis, who professed to own one half of Hart's Location.

It is alleged by the counsel of the demandant that the law of New Hampshire on the subject of estoppel as to boundary lines is peculiar; that an agreement settling such lines, though made by parol, is binding upon the parties and all those claiming under them. Conceding this to be true, not the slightest evidence was offered to show any agreement whatever, or even any communication, between the adjoining owners prior to 1850, and the line then agreed upon coincides substantially with that which is now claimed by the defendant.

It is contended, however, that the running of the hypothetical line northerly from the Burton corner was an estoppel as regards the State; that the State, upon the faith of this line being run and marked by the Elkins grantees, entered upon the land eastward of it, and granted the same to Bean and others. That is, the State, by legislative resolve and solemn grant, having [325] in 1830 granted to Elkins and others all the land west of Hart's Location, had the right to reenter upon some 8,000 acres of the same land in 1831 and grant it out to third parties, because the Elkins grantees, in making an *ex parte* survey, had mistaken the position of the west boundary of Hart's Location. There is no pretense, certainly no proof, that this survey was made by any concurrence of the parties, or that there was even any communication between the agents of the State and the Elkins grantees. The agents of the State simply lay by and watched the operations of Elkins and company, and finding, or supposing, that they had made a mistake, and had left a vacant tract of land between the line they ran and Hart's Location, stepped in and made another grant to other parties of nearly a sixth part of the tract granted to the Elkins party. Not a particle of evidence was produced to show any acquiescence on the part of Elkins and his associates in this proceeding, or that they had any notice or knowledge of it. So far as appears, they have never acknowledged the right of these new grantees, nor have they ever admitted that any one had any right to interfere with the extension of their land eastwardly to Hart's Location. We think no case can be found, that would make out an estoppel under such circumstances as these.

We have been referred with much confidence to the case of *Propr. of Enfield* v. *Day*, 11 N. H., 520. We have carefully examined this case, and do not find in it anything to support the proposition contended for. There the State interposed, after due notice to the parties and an inquiry by the Legislature, in reference to the true and right ownership of a certain gore between two adjoining townships, which by an alleged mistake of a figure had not been included in the grant (of Enfield) in which it was intended to be. The south line was south 68° east in the deed, when it should have been south 58° east. The grant of Grantham was made a few years afterwards, binding on Enfield, but having the right course (south 58° east) for its north line. On the application of the proprietors of Enfield and adjoining townships, the Legislature was applied to to correct this error, and commissioners were appointed to run the true line, and the disputed gore was granted to Enfield. The parties acquiesced for 20 years, and the question was, whether Enfield had sufficient seisin and color of title to claim the benefit of [326] the Statute of Limitations; and the court held that it had. But the court expressed itself with great caution as follows: "In this case we are clearly of opinion the seisin would not pass by the mere effect of the second grant; but was there not such a previous re-entry and assertion of right on the part of the government as to constitute, together with the grant, a conveyance with livery of seisin? An entry upon the land by the government agents, and the running anew and re-marking of lines, with the express design of a reconveyance to rectify a former mistake, would seem to be evidence sufficient to show an actual possession in the government of any given tract." Was anything of this kind done in the present case? Were the Elkins grantees notified of any error or mistake? Were they informed of the intention to regrant a portion of the tract granted to them? Did they acquiesce in such proceedings? Nothing of the kind. But the court adds: "The proceedings of the Legislature were had on public notice, and actual service on the proprietors of Grantham. They also had full knowledge of the subsequent proceedings of the proprietors of Enfield, in their entry upon and frequent sales of portions of this gore of land, claiming the whole under the grant from the State, and must be regarded as acquiescing in such adverse possession and claim. It is now too late for the proprietors of Grantham to assert their title." It is obvious that the cases are totally distinct; and it is unnecessary to discuss the subject further.

The Judge, on this part of the case, instructed the jury that there was no evidence before them to estop or bar those claiming under the Elkins grant from maintaining their line by the westerly side of Hart's Location; and in this we think he was right.

The judgment of the Circuit Court is affirmed

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN S. KENNEDY ET AL., *Appts.*, [599]

v.

CITY OF INDIANAPOLIS, SUSAN McKERNAN ET AL.

(See S. C., 13 Otto, 599-608.)

Private property taken for public use.

Under the Constitution of Indiana, the right to

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enter on and use private property for public purposes is complete as soon as the property is actually appropriated under the authority of law for a public use; but the title does not pass from the owner without his consent, until just compensation has been made to him.

[No. 244.]

Argued Mar. 9, 1881. *Decided Apr. 25, 1881.*

APPEAL from the Circuit Court of the United States for the District of Indiana.

The case is fully stated by the court.

Messrs. T. A. Hendricks, Conrad Baker and **B. Harrison,** for appellants:

The failure to complete a public work, the land for which had been partly paid for in anticipated benefits, if a hardship, is one for which the law has no remedy, and complaint for which should be addressed to the Legislature.

McIntyre v. *State*, 5 Blackf., 389; *People* v. *Hayden*, 6 Hill, 362; *People* v. *R. R. Co.*, 3 Mich., 496.

After a silent acquiescence for thirty-five or forty years, it is too late to complain to anybody. If it could be maintained that the State abandoned this canal, still, having acquired a fee in the land, no right of reversion remained in the original owners.

Heyward v. *Mayor*, 7 N. Y., 314; *Rexford* v. *Knight*, 11 N. Y., 308; *Park Comrs.* v. *Armstrong*, 45 N. Y., 234; *Heard* v. *Brooklyn*, 60 N. Y., 242; *Haldeman* v. *R. R. Co.*, 50 Pa., 425; *Craig* v. *Mayor*, 53 Pa., 477.

The appropriation of land taken for this canal was complete, and the limitation began to run against the owner, not from the time of completion, but from the time the State surveyed and located the canal, and entered upon and took possession of the land, displacing the possession and dominion of the owner.

Act, 1836, secs. 16, 17; especially first proviso to sec. 17, R. S. 1838, 343, 344; *Null* v. *Canal Co.*, 4 Ind., 432; *People* v. *R. R. Co.*, 3 Mich., 501; *People* v. *Hayden*, 6 Hill, 360; *Park Comrs.* v. *Armstrong*, 45 N. Y., 244.

Messrs. **D. Turpie, Claypool** *& Ketchum, R. O. Hawkins* and *John A. Henry*, for appellees:

The general course, both of English and American decisions, in regard to the interest acquired by the public by the exercise of the right of eminent domain is, that no more of the title is devested from the owner than is necessary for the public use.

Heyneman v. *Blake*, 19 Cal., 579; *Hooker* v. *Turnpike Co.*, 12 Wend., 371; *Giesy* v. *R. R. Co.*, 4 Ohio St., 308; *Barclay* v. *Howell*, 6 Pet., 498; *Washington Cemetery* v. *R. R. Co.*, 68 N. Y., 591.

No application where there was simply a purpose and intention not completed.

See, *Callender* v. *Marsh*, 1 Pick. (Mass.), 430; *Cushman* v. *Smith*, 34 Me., 247; also *Nichols* v. *R. R. Co.*, 43 Me., 356.

Private property can only be taken by the government or its agents when necessary for the public use, and in such cases compensation must be made therefor.

Cooper v. *Williams*, 5 Ohio, 392 and cases there cited.

The condition that the property must be taken for the public use, is as much above the reach of the Legislature as it is above the reach and control of the lowest functionary of the government.

Bloodgood v. *R. R. Co.*, 18 Wend., 60; *R. R. Co.* v. *Kip*, 46 N. Y., 546; *R. R. Co.* v. *Davis*, 43 N. Y., 146, and other authorities there cited.

Compensation in its lowest degree implied the completion and construction and use of the canal through the premises in controversy as contemplated by the Act.

Upon the facts in this record the question of reversion is not in the case at all. Reversion is a return of title to one who, having formerly held it, has in some way been devested of it. But a man can have no return of that with which he has never parted.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity, brought by the appellants to quiet title to certain lands in the City of Indianapolis. The facts are as follows: By an Act of the General Assembly of Indiana "To Provide for a General System of Internal Improvements," passed January 27, 1836, R. S. Ind., 1838, p. 337, sec. 4, the board of internal improvements was authorized and directed to construct, among other public works, the Central Canal, commencing at the most suitable point on the Wabash and Erie Canal, between Fort Wayne and Logansport, running thence to Muncietown, thence to Indianapolis, and thence to Evansville on the Ohio River. For this purpose the board was authorized to enter upon, take possession of, and use any lands necessary for the prosecution and completion of the [600] work. Sec. 16. In all cases where persons felt aggrieved or injured by what was done, a claim could be made for damages, which were to be appraised in a way specially provided for, but in making the appraisement the benefits resulting to the claimant from the construction of the work were to be taken into consideration. Any sum of money thus found to be due was to be paid by the board, but no claim could be recovered or paid, unless made within two years after the property was taken possession of. Sec. 17. The board was also authorized to acquire, by donation or purchase, for the State, the necessary ground for the profitable use of any water-power that might be created by the construction of the canal, and to lease, for hydraulic purposes, any surplus of water there might be, over and above what was required for navigation. Secs. 22 and 23.

The Constitution of the State, adopted in 1816, which was in force when this Act was passed, and until all the rights of the State under it had been acquired, contained the following as Art. I., sec. 7: "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

The town plat of Indianapolis was laid out on lands granted by Congress to Indiana for a seat of government. On this plat, as originally made, Missouri street extended across the Town from north to south, a distance of one mile. The board of internal improvements located the Central Canal in this street throughout its entire

NOTE.—*Eminent domain; the right to payment for private property taken for public use generally recognized; Fifth Amendment to Constitution applies only to Federal Government and not to States.* See, *note* to Withers v. Buckley, 67 U. S., XV., 616.

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length. From the southerly end of the street the location extended in that direction across what was then known as outlots 121, 125 and 126. These lots were owned, 126 by one Coe, and the other two by Van Blaricum. During the year 1840 or before, the canal was actually built, filled with water, and to some extent navigated from Broad Ripple, a point on the west fork of the White River, about nine miles north of Indianapolis, to a lock in Missouri street, at Market street. From Market street the canal was actually dug, and its banks built to another lock, a distance of a mile or more below, but it was never filed with water for the purposes of navigation, or, in fact, opened for navigation. The lower lock would perhaps hold the water in the level above, but would not pass a boat below.

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About the time this part of the work was finished, the whole project of completing the canal was abandoned, and has never since been resumed. Considerable work had been done on the line as a whole, before the abandonment, but the only part ever opened for navigation, to any extent whatever, was that between Broad Ripple and the Market street lock. The premises in controversy are between Market street and the next lock below.

The State made a lease of water-power to be used at this lower lock, and for many years conducted the water to supply that lease through the canal as constructed below Market street. No other use of the canal was ever made by the State for any purpose, and both the city and the owners of the several outlots have at all times been permitted to fence, bridge and occupy the property as they pleased, provided they did not interrupt the flow of water to supply the power to a mill that had been built below.

Neither the Town of Indianapolis nor Coe ever made any claim on the State for compensation on account of the appropriation of their property. Van Blaricum did, however, do so, and he prosecuted his claim until 1848, when it was finally decided against him. It is conceded that no damages were ever awarded him. The defendants, other than the City of Indianapolis and the Railroad Company, are the owners of all the title to the outlots occupied by the canal, which did not pass to the State under the appropriation that was made.

In 1850 the General Assembly of Indiana passed an Act to sell the canal, and under the authority of that Act all the part of the canal north of Morgan County, including the premises in controversy, was conveyed to one Francis N. Conwell, for the sum of $2,425. From Conwell the title, such as he got, passed by sundry conveyances to the Waterworks Company of Indianapolis. Afterwards that part of the premises south of Market street, not being essential to the business of the Waterworks Company, was sold to the Indianapolis, Cincinnati & Lafayette Railroad Company.

Between 1872 and 1874, the City of Indianapolis, the legal successor of the town, took actual possession of Missouri street below the Market street lock, and used it for sewerage purposes, building a sewer therein and filling up the canal. About the same time McKernan, the ancestor of the present appellees of that name, filled up the canal on the outlots in question, and erected one or more houses thereon. This

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bill was filed by the mortgagees of the Railroad Company to quiet the title of the Company to this property and protect their security. On the hearing the circuit court dismissed the bill for the reason that the appropriation by the State was not sufficient to devest the owners of their title, and consequently the Railroad Company took nothing by the conveyances under which it claims.

According to the later decisions of the Supreme Court of Indiana, when lands were taken by the State under the internal improvement laws, and just compensation made to the owners, the title in fee was transferred from the owner to the State. *Waterworks Co.* v. *Burkhart*, 41 Ind., 364; *Nelson* v. *Fleming*, 56 Ind., 310. The earlier decisions were the other way. *Edgerton* v. *Huff*, 26 Ind., 35. But so far as we have been able to discover, it has never yet been held that the *title* passed out of the owner until "just compensation" had actually been made. In fact, the decisions appear to have been uniformly to the effect that it did not. Thus, as early as 1838, in *Rubottom* v. *McClure*, 4 Blakf., 508, it was said in reference to a statute, of which the one now under consideration is almost a literal copy, that it insured "to any individual whose interest may have been made to yield to the public good, remuneration for his loss. Actual payment to him is a condition precedent to the investment of the title to the property in the State, but not to the appropriation of it to public use." This was followed in 1846, by *Hankins* v. *Lawrence*, 8 Blakf., 256. That was a case in which the White Water Valley Canal Company had acquired the title of the State to the White Water Canal, one of the works the board of internal improvements was authorized to construct under the Act of 1836, and the question was whether it could, under its charter, enter upon lands to complete that canal, for the purposes of its incorporation, without first having made just compensation to the owner. Upon this the court said: "The question whether payment must be made before the land is taken and used * * * has been already decided by this court. * * * The possession and use of the land in question by the White Water Valley Canal Company are upon the condition subsequent, that they will not be in default with respect to the payment for the same, as prescribed by the charter, nor with respect to the erecting of the works for which the land is taken. It may be that, should any person claiming under the company remain in possession of the land after a default in such payment, or in erecting the works, he would be considered as a trespasser *ab initio*." So far as we have been advised, these cases are still the law of Indiana, and they are certainly supported by high authority. Thus, in *Rexford* v. *Knight*, 11 N.Y., 314, the Court of Appeals of New York, speaking of statutes similar to that of Indiana, says: "The construction upon those Acts has been that the fee did not vest in the State until the payment of the compensation, although the authority to enter upon and appropriate the land was complete prior to the payment." And so, in *Nichols* v. *R. R. Co.*, 43 Me., 359, the Supreme Court of Maine, in speaking of an article of the Constitution of that State which declared that private property should not be taken for public uses without just compensation, uses this language: "While it

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prevents the acquisition of any title to land or to an easement in it, and does not permit a permanent appropriation of it, as against the owner, without the actual payment or tender of a just compensation, it does not operate to prohibit the Legislature from authorizing a temporary exclusive occupation of the land of an individual, as an incipient proceeding to the acquisition of title to it, or to an easement in it for a public use, although such occupation may be more or less injurious to the owner. Such temporary occupation, however, will become unlawful unless the party authorized to make it acquire, within a reasonable time from its commencement, a title to the land, or at least an easement in it." And again, in *Cushman* v. *Smith*, 34 Me. 258: "The design seems to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others for public use, without compensation." Not to multiply cases further, it seems to us that both on prin-
[604] ciple and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete, as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him.

We proceed now to apply this rule to the facts. It is not contended that compensation in money was made for any of the land in dispute. Van Blaricum claimed money, but the tribunal to which, under the statute, his application was referred, decided against him. In effect he was told in answer to his application, the benefits he would receive from the construction of the canal would be "just compensation" to him for his property taken. The town and the lot owners adjoining Missouri street made no claim for compensation. Neither did Coe, the owner of lot 126. In this way these parties signified under the law their willingness to take as their compensation, the benefits which would result to them respectively from the construction of the canal. The appropriation was for public use by means of a canal, and the owners were to be paid their compensation for the land taken by the construction of a canal thereon. It would seem to follow that if the canal was constructed, the compensation which the Constitution guarantied the owner would be made; otherwise not. If the canal was in law built, therefore, the title passed to the State; if not, it remained in the owner. The failure to claim damages within the two years was no more than a waiver of all compensation except such as grew out of the benefits resulting from the construction of the work for which the appropriation was made. To hold that the title passed by mere appropriation, if no claim for damages was made within the two years, would be in effect to decide that if the State entered on land for a particular use and kept possession as against the owner for two years, it got a title in fee whether the property was actually put to the use or not. Such we cannot believe to be the law.

Was there, then, such a canal constructed over and upon the lands in question as the Internal Improvement Act, under which the appropriation was made, contemplated? A canal, in the sense that term implies in this connection. [605]
means a navigable public highway for the transportation of persons and property. It must not only be in a condition to hold water that can be used for navigation, but it must have in it, as part of the structure itself, the water to be navigated, ready for use. Such an instrumentality for "The advancement of the wealth, prosperity and character of the State" (*Rubottom* v. *McClure*, *supra*, 507) might confer benefits that would be a just compensation for the private property taken for its use, but until such a structure is actually furnished complete, it can in no proper sense be said that the works have been constructed from which the benefits that are to make the compensation can proceed. A mill-race carrying water for hydraulic purposes is not enough. There must be a canal fitted in all respects for navigation and open to public use, before the benefits can accrue to the owner which are under the law to overcome his claim for damages. No authority was given the board of improvements to appropriate lands for the use of the water-power created by the canal. That could only be acquired by donation or purchase (sec. 16), and no power could be leased until there was a surplus of water. The canal was to be built for navigation. If, when built, there was found to be more water than was wanted as a means of transportation, it might be leased, but until there was a canal for navigation there was in law none for power. The use of the water for hydraulic purposes was but an incident to the principal object of the work to be done.

There can be no pretense that this canal was ever navigated below Market street, or put in a condition for navigation. It was accepted from the contractor, and may have had all its banks and its bed complete, but it is evident from the testimony that it was never finished so that it could be actually used as a navigable canal, and it certainly was never opened by the State to public use in that way. More work had been done on it than on some other parts of the line, but still it was unfinished when the abandonment of the enterprise took place.

We are aware that in the case of the *Waterworks Co.* v. *Burkhart*, *supra*, the Supreme Court of Indiana decided that the title to the land then in dispute had passed from the owner to the State, but that was on the level above Market street, which had been not only made navigable, but had actually been to some extent navigated. The owner, too, had been awarded [606]
and paid damages in money. So in *Nelson* v. *Fleming*, *supra*, the canal was completed and had been in actual use by the public as such, for a period of between thirty and forty years before the abandonment occurred. In both these cases, according to the rule that has been stated, the compensation was actually made, and the title passed. There the question was one of reversion after title once acquired. Here, as we think, the State never got title, since the requisite compensation was never made. Consequently, the State had no title to this property to convey, and the Railroad Company took nothing by its purchase. *It follows that the decree below was right, and it is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—9 Biss., 242.

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[756] INDIANA & ILLINOIS CENTRAL RAILWAY COMPANY, *Appt.*,

v.

HENRIETTA P. SPRAGUE.

(See S. C., 13 Otto, 756-764.)

Terms of bond control mortgage—unpaid coupons do not dishonor bond—notice to purchaser.

1. Where there is a difference between the terms of railroad bonds and of the mortgage given to secure them, as to the payment of interest, the terms of the bonds will control.
2. The mere presence upon the bonds when purchased, of two past due, unpaid interest coupons, did not make the bonds dishonored paper. Cromwell v. Sac Co., XXIV., followed. Parsons v. Jackson, XXV., limited.
3. Where the facts are sufficient to put a purchaser on inquiry, he can only be charged with knowledge of the facts which he might have learned by inquiry.

[No. 263.]

Argued Apr. 8, 1881. Decided Apr. 25, 1881.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The case is fully stated by the court.

Messrs. **James Emott,** *C. G. Kidder* and **Joseph E. McDonald,** for appellant:

Where there were several past due and unpaid coupons, their presence was held to be of itself an evidence of dishonor, and with the fact that an authority, which was given to the president of the company to designate the place of payment, had not been exercised, taken in connection with the low price at which the bonds were offered, was held abundantly sufficient to affect the purchaser with notice of invalidity in their issue.

Parsons v. *Jackson*, 99 U. S., 434 (XXV., 457).

Judge Bradley giving the opinion of the court, speaks of these circumstances, of which the past due coupons was the most marked, as being "so pointed and emphatic as to be *prima facie* inconsistent with any other view than that there was something wrong in the title." Pp. 440, 441 (460).

The respondent did not purchase the bonds in question in good faith. She had abundant cause to question their integrity, evidence of dishonor sufficient to put her on inquiry, and to show that Condict had no title in the bonds, or right to dispose of them to pay his own debts, or redeem securities which he was accused of misappropriating.

The law will hold a person, dealing with an agent and trustee, as Mrs. Sprague did, to diligence and the utmost good faith.

Smith v. *Ayer*, 101 U. S., 320 (XXV., 955); *Hoffman* v. *Ins. Co.*, 92 U. S., 161 (XXIII., 539); *Bk. of Genesee* v. *Patchin Bk.*, 13 N. Y., 309, *Pearce* v. *R. R. Co.*, 21 How., 441 (62 U. S., XVI., 184).

Green's Brice, *Ultra Vires*, 2d ed., p. 268, *note* and cases cited.

It has been held that a bond which is redeemable, although not payable, after a certain date, ceases to be negotiable at that date, although no notice of an option to redeem had been given by the obligor.

See *Texas* v. *White*, 7 Wall 700 (74 U. S., XIX., 227); and, on the general question of negotiability of bonds, *Vermilye* v. *Ex. Co.*, 21 Wall., 138 (88 U. S., XXII., 609); *White* v. *R. R. Co.*, 21 How., 575 (62 U. S., XVI., 221); *Mercer Co.* v. *Hackett*, 1 Wall., 83 (68 U. S., XVII., 548).

But the controlling provision as to this point, is that contained in the mortgage, the second of its covenants. A purchaser of these bonds is affected with this provision, and has notice of it as fully as if it were written out in full in the bond.

The bonds expressly refer to it, but this is not necessary.

The fact, that the bonds are, and are known to be issued under and secured by the mortgage, makes every purchaser and holder chargeable with notice of the contents of the mortgage.

McClure v. *Oxford*, 94 U. S., 429 (XXIV., 129); *Caylus* v. *R. R. Co.*, 49 How. Pr., 100; *Kennion* v. *Kelsey*, 10 Iowa, 443; *Schoonmaker* v. *Taylor*, 14 Wis., 313; *Plank R. Co.* v. *Murray*, 15 Ill., 336; *Tiernan* v. *Hinman*, 16 Ill., 400; *Benjamin* v. *R. R. Co.*, 49 Barb., 449; *Hunt* v. *Frost*, 4 Cush., 54; *Hanford* v. *Rogers*, 11 Barb., 18; *Gammon* v. *Freeman*, 31 Me., 243; *Brownlee* v. *Arnold*, 60 Mo., 79; *Texas* v. *White* (*supra*).

Messrs. **Clarkson N. Potter** and *Whitney*, for defendant in error:

First point. The unpaid coupons attached to the appellant's bonds when delivered to respondent, were not notice of the dishonor of the bonds.

Smith v. *Sac Co.*, 11 Wall., 150 (78 U. S., XX., 105); *Murray* v. *Lardner*, 2 Wall., 121 (69 U. S., XVII., 859.)

The usages of trade and the policy of the law alike favor the *bona fide* holder of such instruments.

Claflin v. *Bk.*, 25 N. Y., 293.

The interest is a mere incident to the debt; compensation for the deferred payment of the principal. The coupons are separate obligations for the interest, payable upon demand, and they are continuing securities, *Merritt* v. *Todd*, 23 N. Y., 28, not due until demanded.

Such securities have been used as a means of raising money, not only by railroad companies, but by the National Government, the States, Counties and Municipalities, by all descriptions of corporations, and largely by individuals.

To hold that the moment the debtor ceases to pay interest, the character and negotiability of such obligations is changed, would effectually put an end to the traffic in such securities.

No distinction in practice has been made between bonds on which interest is unpaid, and those on which it is promptly paid. Any other doctrine would defeat the whole purpose for which such securities are authorized.

None of the cases cited conflict with this.

Newell v. *Gregg*, 51 Barb., 263, was not analogous.

The court says. "The entire debt was evidenced by one written promise to pay, which had been broken when Gregg purchased the note, of which dishonor he had notice."

Neither is the case in Minnesota, parallel. It was the case of the purchase of bonds which had been stolen, and on which the coupons for many years had not been paid, although paid upon all the rest of the issue, which peculiarity the court considered notice of the invalidity of those bonds.

Directly the reverse has been held in Massa-

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chusetts and Wisconsin, and lately in this court.

Bk. v. *Kirby*, 108 Mass., 497; *Boss* v. *Hewitt*, 15 Wis., 260; *Cromwell* v. *Sac Co.*, 96 U. S., 51 (XXIV., 681).

Second point. But whether past due or not, a purchaser in good faith and without notice, of bonds payable to bearer, from an officer of the company, clothed with apparent authority to dispose of them, is entitled to be protected.

A shopkeeper might as properly ask me to return the goods I bought over his counter, because his clerk failed to put the money he took for the goods into the till, as for the Company to seek to now impeach Mrs. Sprague's title on like account; this is as true of securities not negotiable as of negotiable securities.

Bk. v. *Texas*, 20 Wall., 81 (87 U. S., XXII., 296); *Moore* v. *Bk.*, 55 N.Y., 41; *McNiel* v. *Bk.*, 46 N. Y., 333.

Mr. Justice **Woods** delivered the opinion of the court:

This case was an appeal from a part of the decree of the United States Circuit Court for the District of Indiana, made in a suit in equity [757] in which the Union Trust Company of New York was complainant and the Indiana & Illinois Central Railway Company and others were defendants. The suit was brought for the foreclosure of a mortgage upon the appellant's property, and resulted in a decree of foreclosure and sale. An interlocutory decree directed a master of the court to ascertain and report to the court the names of all persons who were holders of bonds and coupons, which had been duly issued under the mortgage, and which were entitled to share in the proceeds of the sale.

Under this order of reference, Henrietta P. Sprague, the appellee, presented a claim to be the owner and holder of 75 bonds, numbered from 629 to 703 inclusive, of $1,000 each, with coupons attached. The Railway Company, by its solicitor, objected to the allowance of the respondent's claim. The master heard the proofs of the parties and the arguments of their counsel, and reported that Mrs. Sprague had made sufficient proof of her ownership of the bonds in question, and that they were entitled to be paid out of the purchase money of the railroad. To this report the Railroad Company filed exceptions. The court, at the May Term, 1878, overruled the exceptions, and entered a decree directing, among other things, that the 75 bonds of the appellee, with the coupons thereto annexed, should be allowed as valid, and as secured equally with the other outstanding bonds by the mortgage foreclosed, and that said bonds be paid their *pro rata* shares out of the proceeds of the foreclosure. From this order, and this part of the foreclosure decree in the cause, the Railway Company brings this appeal.

Mrs. Sprague, the appellee, was the widow and administratrix of John H. Sprague, deceased. J. Elliot Condict had long been a friend of her husband, doing business in New York in railway securities, under the style of "Condict & Co., bankers and brokers."

In February, 1870, Mrs. Sprague loaned Condict $25,000, for which she took his note. Before its maturity he advised her to buy, and offered to sell her, $75,000 of the first mortgage bonds of the Madison & Portage Railroad Company. She made the purchase for the price of $60,000. She paid this sum partly by giving up to Condict his note to her for $25,000 money loaned, and the residue in securities at the market price. This purchase was made in November, 1870.

The Madison & Portage Railroad Company failing to pay interest on its bonds, Mrs. [758] Sprague, on June 24, 1871, at Condict's instance, returned to him the Madison & Portage bonds and received from him in exchange seventy-five bonds for $1,000 each of the Indiana & Illinois Central Railway Company.

These bonds were dated April, 1870. They were secured by a mortgage or deed of trust of the same date. At the time of the exchange by Mrs. Sprague of Madison & Portage bonds for these bonds, on June 24, 1871, the bonds which she received had attached to them all the coupons, beginning from the date of the bonds, 60 in number. Of these coupons two, the one payable October 1, 1870, and the one payable April 1, 1871, for $35 each, were past due and unpaid. The bonds contained this provision: "In case of the non-payment of any half-yearly installment of interest, which shall have become due and been demanded, and such default shall have continued six months after demand, the principal of this bond shall become due in the manner and with the effect provided for in the trust deed securing its payment." The bond also recited that it, together with the residue of 2,750 bonds, were secured by a deed of trust or mortgage, dated the first day of April, 1870. The mortgage contained the following clause "In case default be made for six months in the payment of any interest upon either of said bonds when the same shall become due and payable, the whole principal sum in all and each of said bonds shall forthwith become due and payable, and the lien or incumbrance hereby created for the security and payment of such bonds may be at once enforced, anything herein to the contrary notwithstanding."

Before making the exchange of bonds above mentioned, Mrs. Sprague had placed the management of the affair in the hands of Mr. John M. Whiting, as her counsel.

Mr. Whiting, in behalf of Mrs. Sprague, investigated not only the question of the value of the Indiana & Illinois Central Railway bonds, but also the right of Condict to sell them. At the time of this investigation the Indiana & Illinois Central Railway was not a completed, but only a projected road. Condict was its vice-president and acting president. There was an executive committee which consisted of three members besides the president. These were Condict, Seaman and Lazare.

Five hundred bonds of $1,000 each, secured by the mortgage of April 1, had been executed. Before they could be issued they had to be [759] countersigned by the Union Trust Company. They were so countersigned and delivered to the Railroad Company, whose obligations they were. They were in all respects regularly executed.

In June, 1871, three hundred of the bonds were delivered by the treasurer of the company to Messrs. Condict and Lazare, members of the executive committee. They delivered two hun-

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dred of them to parties to whom they belonged. The residue of the three hundred bonds remained in the possession of Condict.

Condict did not appear to have any express authority from the Company to sell or dispose of these bonds. He claimed, however, to have a lien on them for advances made to the Railway Company.

There was evidence tending to show, however, that the Railway Company never received consideration for the bonds transferred by Condict to Mrs. Sprague.

There was no evidence in the record that showed that Mrs. Sprague, so far as it regarded any direct notice to her personally, was not a *bona fide* purchaser.

Mr. Whiting, in his testimony touching what he learned of Condict's right to transfer the bonds, said: "He came to me with statements, and upon them I acted. He asserted his entire capacity to make the exchange; that he owned the bonds; that he had made advances to the Company; that they were his by the highest possible title, and made all the asseverations under my very sharp and close cross-examination. He claimed to own the bonds."

Mr. Whiting also testified as follows: "Seaman," the colleague of Condict on the executive committee, "assured me of Condict's right to assign them," the bonds. "My memory is very active on this point. He sustained him," Condict, "in every regard."

The error complained of in the part of the decree appealed from is this: It being established by the evidence and reported by the master that the Railway Company never received any value from their bonds either from Mrs. Sprague or from any other person, she was erroneously held to be a purchaser of the bonds for value and without notice, and the bonds were erroneously held to be instruments of such a character and in such a condition, as to enable her to enforce them against the Company, notwithstanding the fact that the Company had received no compensation for them.

It is not disputed that the bonds in question, when they were first executed and made ready [760] for circulation, had all the qualities of commercial paper. The contention of the plaintiff in error is, that Mrs. Sprague was not a purchaser in good faith and for value.

It seems to be conceded, and the evidence establishes, that no facts were known to Mrs. Sprague in relation to the bonds other than those which came to the knowledge of her agent, Mr. Whiting. Of course she was bound by what he knew. Does the knowledge of the facts learned by Mr. Whiting, and which it is presumed he communicated to her, make Mrs. Sprague a purchaser in bad faith?

Two facts must be taken as established: 1st, Condict's custody of the bonds was lawful. The plaintiff in error admits that it placed them in his possession for safe keeping. 2d, There can be no question that Mrs. Sprague paid full value for the bonds.

Possession of negotiable bonds carries with it the title to the holder. *Murray* v. *Lardner*, 2 Wall., 121 [69 U. S., XVII., 859]. Mrs. Sprague, therefore, bought the bonds of a person, presumptively the owner, and paid for them a full and valuable consideration.

Condict was an officer of the Company, and as such had possession of the bonds. If he had told Mrs. Sprague or her agent that he was selling the bonds for the Company and as its agent, and had then applied them to the payment of his private obligations to Mrs. Sprague, her purchase would have been made in bad faith. But this is not the case. Condict having possession of the bonds, and being *prima facie* their owner, asserted to Mrs. Sprague's agent, in the most positive manner, that they were his property. The fact that he was an officer of the Company did not of itself preclude him from dealing in the bonds, or throw the slightest suspicion on his title.

The question, therefore, and the only question in the case is, was there anything upon the face of the bonds and of the mortgage which secured them, to put the purchaser on notice? The plaintiff in error claims there was, that attached to each of the bonds sold to Mrs. Sprague were two coupons, due respectively October, 1870, and April, 1871, and unpaid, and that this fact, by the terms of the bonds and of the mortgage which secured them, rendered the principal of the bonds due and payable, and that, as a consequence, when Mrs. Sprague purchased the bonds they were dishonored paper.

There appears to be a difference between the terms of the bonds, and of the mortgage. The mortgage provided that, upon non-payment of [761] interest for six months, the principal of the bonds should become due, whether demanded or not. On the other hand, the bonds declared that in case of the non-payment of any half-yearly installment of interest which had become due and had been demanded, if such default should continue six months after demand, the principal of the bond should become due. A copy of the bond was set out in full in the mortgage.

The bond being the principal thing containing the obligation of the Company, and the mortgage a mere security to ensure the performance of that obligation, the terms of the bond should control.

Therefore a demand for the payment of her coupons and a failure to pay for six months were necessary to make the principal of the bonds payable. There having been no demand of the overdue coupons, it follows that by the terms of the bonds the principal sum was not due when Mrs. Sprague purchased.

The controversy, therefore, is reduced to this: Did the mere presence upon the bonds purchased by Mrs. Sprague of two past due, unpaid interest coupons make the bonds dishonored paper?

Coupons are separable obligations for the interest, payable upon demand. It constantly occurs that they are not demanded for weeks and months, and sometimes years after they are due. As they bear interest after maturity, it will frequently happen that the owner of a bond who holds the same as an investment will keep the coupon for the same purpose.

Bonds executed by a railroad company may not be put upon the market until one or more coupons have matured. The company may cut them off when it sells the bonds or leave them on to be accounted for in the purchase.

Negotiable bonds have been used as a means of raising money, not only by railroad companies but by the National Government, States, coun-

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ties and cities. To hold that the moment an unpaid coupon is left on a bond its character and negotiability are changed would greatly embar-
[762] rass the traffic in such securities, and lead to endless uncertainty and confusion.

The mere presence, therefore, of two unpaid coupons upon the bonds purchased by Mrs. Sprague, was not of itself sufficient evidence of the dishonor of the bonds to which they were attached.

This point has been expressly ruled by this court in the case of *Cromwell* v. *Sac Co.*, 96 U. S., 51 [XXIV., 681]. In that case the court, speaking by *Mr. Justice* Field, said: "The nonpayment of an installment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, the purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities." To the same effect, see *Bk.* v. *Kirby*, 108 Mass., 497, and *Boss* v. *Hewitt*, 15 Wis., 260.

In the case of *Parson* v. *Jackson*, 99 U. S., 434 [XXV., 457], the bonds which were the subject of controversy had never been issued but had been stolen from the office of the company. They were made payable either in New Orleans, New York or London, as the president of the railroad company might by his indorsement on the bonds determine. The bonds contained no indorsement of the president designating the place of payment; they were offered in the New York market and sold for a very small consideration, and coupons for several years, due and unpaid, were attached to them. The court held that all these circumstances affected the purchaser with notice of the invalidity of the bonds.

It is true the court said that the presence of the past due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry. But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds and the opinion must be restricted to the case before the court.

But conceding, for the sake of argument, that the possession of two unpaid coupons on the bonds purchased by Mrs. Sprague, had been sufficient to put her on inquiry, she can only be charged with knowledge of the facts which she might have learned by inquiry.

Investigation would have disclosed to her, as
[763] the record shows, that the construction of the road of the Company by which the bonds were issued was just begun; that of the twenty-seven hundred and fifty bonds, for $1,000 each, which the mortgage was issued to secure, only five hundred had been signed and prepared for circulation; that these bonds had not been put upon the market for sale, but that a part of them had been used as collateral security for debts due from the Company, and that those sold to Mrs. Sprague had not been put in general circulation, but, after their execution, had been turned over to Condict, the vice-president of the Company, who, on account of his advances to the Company, claimed to be their owner, and that none of the coupons on any of the five hundred bonds had been paid. If, therefore, Mrs. Sprague had investigated the reason why the two past due coupons, on the bonds which she purchased, had not been paid, these facts would have afforded a most satisfactory explanation.

"The party who takes negotiable coupon bonds, before due, for a valuable consideration, without knowledge of any defect of title and in good faith, holds them by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transaction, will not defeat his title. That result can be produced only by bad faith on his part." *Mr. Justice* Swayne, in *Murray* v. *Lardner* [*supra*].

"Bonds for the payment of money, with interest warrants attached, are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men; any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy.

Such instruments are protected in the possession of an indorsee, not merely because they are negotiable, but also because of their general convenience in mercantile affairs." *Smith* v. *Sac Co.*, 11 Wall., 150 [78 U. S., XX., 105].

The inference to be drawn from these authorities, when applied to the facts in this case, is that Mrs. Sprague was a *bona fide* purchaser for value of the bonds transferred to her by Condict.

Our conclusion, therefore, is that the decree of the Circuit Court directing a *pro rata* pay-
[764] ment to be made on the bonds of Mrs. Sprague out of the proceeds of the property in which they were secured *was right, and should be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

RICHMOND MINING COMPANY OF NEVADA, *Plff. in Errr.*, [839]
v.
EUREKA CONSOLIDATED MINING COMPANY.

(See S. C., 13 Otto, 839-847.)

Agreement for division of mining property.

Where two mining companies, having mines adjacent to each other, agreed on a line of division between themselves which should be continued downwards towards the center of the earth; held, that the line was to be extended downwards through the zones of the property in their course towards the center of the earth.

[No. 118.]

Argued Mar. 25, 30, 1881. Decided Apr. 25, 1881.

IN ERROR to the Circuit Court of the United States for the District of Nevada.

The case is fully stated by the court.

Messrs. P. Phillips, **S. M. Wilson** and **Thomas Wren**, for plaintiff in error.

Messrs. S. Heydenfeldt, Garber & **Thornton, Harry I. Thornton** and *T. T. Crittenden*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in ejectment, brought by the Eureka Company against the Richmond, to recover the possession of a valuable mining property. The facts appearing in the findings,

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which, in our opinion, are decisive of the case, may be stated as follows:

In Ruby Hill, a spur of Prospect Mountain, in the Eureka Mining District, Nevada, is a zone of limestone, running in a northwesterly and southeasterly direction for a distance of a little more than a mile. Underlying this zone, on the southerly side, is a well defined unbroken [840] foot-wall of quartzite, several hundred feet thick, and with a dip to the northward of about forty-five degrees. On the northerly side is an overhanging wall or belt of shale, also well defined and generally unbroken, which dips at an angle of about eighty degrees, and varies in thickness from less than an inch to seventy or eighty feet. At the easterly end of the zone these walls of quartzite and shale approach so closely as to be separated only by a seam less than an inch in thickness. From this point they diverge until on the surface, at the Eureka mine, they are about five hundred feet apart, and at the Richmond about eight hundred. At some depth below the surface they must come together; if they continue to descend on the same angle, and, on some of the levels that have been worked, they are already found to be only from two to three hundred feet apart. This zone of limestone, at some time since its original deposit, has been broken, fissured and disintegrated in all directions, so as to destroy, except in a few places of a few feet each, all traces of stratification. In this way its original structure and character became totally changed, and it was fitted to receive the extensive mineral deposits which are found in the numerous fissures, caverns and cavities, and in the loose material of the rock, in various forms. Sometimes the mineral appears in a series or succession of ore-bodies, more or less closely connected; sometimes in apparently isolated chambers, and again in small bodies and in scattered grains. Although barren limestone intervenes, the mineral is so generally diffused throughout the zone as to render the whole mineralized matter metal-bearing rock. Bodies of ore appear in croppings, on the surface at various points throughout the whole length of the zone, along which mining claims have been located. No mineral has been found either in the quartzite or the shale, and no considerable indications of any have been discovered within a mile north or south of the limestone.

In 1864 the miners of the district adopted a system of laws and regulations for their government. At that time provisions were made for ledge locations only, and in February, 1869, it was found necessary to add some amendments to meet the requirements of the district. This was done by a resolution which contained a [841] preamble as follows:

"Whereas, explorations have made it evident that the mineral in Eureka District is found more frequently in the form of deposits than in fissure-veins or ledges, and the laws of the district do not provide for the location of such deposits; and whereas, the deficiency in the law may give rise to expensive litigation * * * the miners of Eureka District have adopted the following amendments to the old laws of the district:"

The amendments were to the effect that deposit claims might be located; that a deposit claim should consist of a piece of ground one hundred feet square, and be designated as a "square;" that under certain circumstances such claims might be united; and that the owner should be entitled to all the mineral within his "ground to an indefinite depth."

On the 29th of May, 1869, after this amendment of the miner's laws, there was filed for record in the mining records of the district a "square" location of the Lookout claim, being four hundred feet northerly and southerly and two hundred feet easterly and westerly, that is to say, "one hundred feet on each side of the hill monuments for the center, and * * * on the north end of Ruby Hill." On the 20th of September, 1869, notice of a ledge claim, called the Tip-Top, was filed for record in the same records, and on the same day, by other parties, another claim, the Richmond, for "seven locations of one hundred feet square," and seven locations of two hundred feet each, on the Richmond ledge, more particularly described "as located and situated adjoining the Champion claim on the south, and running north from said Champion, and adjoining the claim known as the Tip-Top ledge." Both the Tip-Top and Richmond claims included "all dips, spurs and angles." The Tip-Top covered six hundred feet on the ledge, and one hundred feet on each side. The Lookout adjoined the Richmond on the north.

The Eureka Company, at some time before April 26, 1871, but at what precise date does not appear, became the owner of the Champion, Nuget, At Last, and Margaret claims. The Champion, At Last, and Margaret adjoined [842] the Richmond and Lookout on the west. The Nuget adjoined the Champion, but its westerly line did not extend to the Richmond, as originally located. The At Last adjoined the Champion, and the Margaret the At Last. The Nuget extended to and across the line between the zone of limestone and the quartzite, and the distance across the four claims from the Nuget, on its southerly side, to the Margaret, on its northerly side, is seven hundred feet. It was not found in terms by the court below whether these claims extended the entire distance across the zone between the quartzite and the shale, but as it was found that the width of the zone, at the Eureka mine, was five hundred feet, and at the Richmond eight hundred, the fair inference is that the four claims belonging to the Eureka, covered substantially the entire surface of the limestone between the end lines of the Champion extended.

On the 26th of April, 1871, the Eureka Company conveyed to the Richmond, a triangular piece of ground in the southwesterly corner of the Champion claim, described by metes and bounds, and in the deed the following provision was made:

"But it is expressly understood and agreed that this deed does not convey or quitclaim or release any ores, precious metals, veins, lodes, or deposits, dips, spurs or angles not embraced within the above-mentioned boundaries, and that the party of the second part [Richmond Company] agrees and covenants, for itself, its successors and assigns, to make no claim hereafter, to any ground or ore or metals therein embraced within the Nuget, Champion, Lookout, At Last, Margaret, and other mining claims and locations, now owned and possessed by the party

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of the first part [Eureka Company], except as to that contained within the limits of the above-described triangular piece of ground."

The Richmond Company, in working its mine on the Richmond location, and in following the vein which cropped out on that location, got under the surface of the Lookout, which was then owned by the Eureka Company. Controversies arose between the two Companies as to their rights under their respective claims, which resulted, on the 16th of June, 1873, in a compromise, by which a dividing line was established, and the Eureka Company agreed to convey to the Richmond all the mining ground and claim lying on the northwesterly side of this line, including the Lookout claim, and all veins, lodes, etc., and not to protest against any application by the Richmond Company for a patent for the Rich-
[843] mond or other claims, provided such applications did not cross the line which was fixed. The Richmond Company agreed to convey to the Eureka, with warranty against its own acts, all its right, title and interest in and to the mining ground situated on the southeasterly side of the line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs, or angles on, in or under the land or mining ground, or any part thereof. Then follows in the agreement, this clause: "It being the object and intention of the said parties hereto, to confine the workings of the said party of the second part [Richmond Company] to the northwesterly side of the said line, continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties." The line thus established was described as follows: "Commencing on the northeasterly corner of the Margaret mining ground or claim, * * * running thence in a southeasterly direction along the edge of said Margaret ground, the At Last ground, and the Champion ground, to a point marked W, on the map; thence southerly along the edge of said Champion ground to the northeasterly corner of the Nuget ground, and thence along the edge of the Nuget ground to the northwesterly corner thereof." The point W, was at the beginning of the triangular piece of ground, conveyed by the Eureka to the Richmond in 1871, and from there to the Nuget ground, the line was the boundary between that triangle and the Champion.

Deeds were executed to perfect the conveyances contemplated by this agreement, and on the 30th of April, 1874, the Richmond Company got a patent for its Richmond claim as surveyed, "Embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of five hundred and one and one half (501½) lineal feet of the said Richmond vein, lode, ledge or deposit, for the length hereinbefore described throughout its entire depth, al-
[844] though it may enter the land adjoining; and also of all other veins, lodes, ledges or deposits throughout their entire depths, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: *Provided*, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction, that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits."

Before this time, on the 16th of July, 1872, the Eureka Company got a similar patent for the Champion claim, and afterwards, on the 12th of December, 1876, for the At Last and the Nuget. This suit was begun on the 27th of March, 1877, and on the 30th of the same month, the Eureka obtained a similar patent for the Margaret.

The Richmond Company is also the owner of the Arctic and Utah claims, the first filed for record October 4, 1876, and the last, January 7, 1877.

The particular mining ground in dispute is situated within the zone of limestone which has been described, and within planes drawn vertically down through the end lines of the Champion claim, as patented to the Eureka Company, and within planes drawn vertically down through the extreme points of the patented locations of the At Last and the Margaret claims, at right angles to the course or strike of the zone, and produced so as to follow its dip. The top or apex of the zone is within the surface lines of the patents to the Eureka Company and the zone dips at right angles to its course, and on such a dip extends under the surface of the Arctic and Utah claims. The property also lies on the southeasterly side of the compromise line agreed on in the settlement of June 16, 1873, extended vertically downward so as to follow the dip of the zone. The end lines of the surveys of the At Last and Margaret claims as pa-
tented, are not parallel with each other. [845]

Upon these facts we have had no difficulty in reaching the conclusion that the judgment of the court below, sustaining the title of the Eureka Company, was right. To our minds there cannot be a doubt that the compromise line was intended to fix permanently, the boundary between the mining properties of the two Companies at that point. The Richmond was to confine its workings to the north and west of the line, and the Eureka to the south and east. The Eureka had already got its patent for the Champion claim, which must have been older than the Richmond, for the Richmond location was bounded on the Champion, and by this patent was permitted to follow throughout their entire depth all veins, lodes, ledges and deposits, the tops or apexes of which came to the surface within the lines of its survey. It is evident, also, that the Richmond Company was seeking a similar patent for its Richmond claim, as by the terms of the settlement the Eureka was to withdraw its opposition, and in due time such a patent was obtained. The Eureka Company also pushed forward its applications for patents to its other claims, and in the end got them all in the same form, and with grants of the same privileges. In this way the Companies secured from the United States the right to work the entire metal-bearing rock from the quartzite to the

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shale between the end lines of their patented surveys extended downwards and following the dip of the mineralized limestone zone. Their patents are all alike and their rights under them the same, save only that the Eureka is confined in its operations to the southeasterly side, and the Richmond to the northwesterly side of the agreed line.

In establishing this line it is to be presumed that the parties had in view the peculiar character of the property about which they had been [846] contending. They were settling, as between themselves, their rights to mining property and for the purpose of carrying on mining operations in that locality. They must have known perfectly well from the observations they had already made, that but a small part of the immense mineral deposit in that zone would probably be found between the exposed surface of the limestone and the quartzite immediately underneath. What they wanted was to fix as between themselves their rights in following what is called in the findings "the zone of metamorphosed limestone," so as to reach the anticipated deposits in the depths below. A compromise which only settled their controversies to what was directly under the surface would not have accomplished this. The Richmond wanted to be relieved from all embarrassments in getting under the Lookout, and it is to be presumed the Eureka wanted similar privileges under the surface for the Champion and its other claims. For this purpose the parties had to secure the necessary grants from the United States, and the fair inference from what was done is, that the Eureka was not to be interfered with in getting what it could on the south and east of the line, and the Richmond was to have the same privilege on the north and west.

The language used is to be construed with reference to the peculiar property about which the parties were contracting. Whether the limestone was or was not within the meaning of the Acts of Congress and the understanding of miners, a single vein, lode or ledge, it was all mineralized or metal-bearing rock as distinguished from the barren walls in which it was inclosed. It descended into the earth on an angle, and unless parties in working it could follow its course as it went down they could not avail themselves to the full extent of the wealth it contained. When, therefore, we find parties contending about their rights to its possession and finally agreeing on a line of division between themselves which shall be continued downwards towards the center of the earth, the conclusion is irresistible that the line was to be extended downwards through the property in its course towards the center of the earth. Anything less than this would make their settlement a mere temporary expedient to get rid of a present dif- [847] ficulty and leave their most important rights as much in dispute as ever. Such, we cannot believe, was the understanding.

This disposes of the case. The Richmond Company is in no condition to dispute the validity of the Eureka's patents for the At Last and the Margaret, because the end lines of the surveys are not parallel, as it has agreed with the Eureka, for a consideration, not to work in the limestone to the south and east of the compromise line. Upon the face of the patents the United States has granted to the Eureka the right to all veins, lodes and deposits, the tops or apexes of which lie on the inside of its surveys as patented, throughout their entire depth and wherever they may go, provided it keeps itself within the end lines of the surveys. The finding that the ground in dispute is within the end lines and that the apex is within the surface lines, settles the rights of the parties between themselves as well under their patents as under their compromise agreement.

The judgment of the Circuit Court is affirmed.

Richmond Mining Company of Nevada et al., Appts., v. Eureka Consolidated Mining Company, No. 116, and Same v. Same, No. 117.

Appeals from the Circuit Court of the United States for the District of Nevada.

These are suits in equity, and are dependent on the suit in ejectment between the same parties, which has just been decided. *The decrees of the Circuit Court are affirmed*, for the reasons stated in the opinion filed in that case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BENJAMIN D. WHITNEY ET AL., *Plffs. in Err.*,

v.

ALEXANDER H. COOK ET AL.

131 US cxcvii Appx.

Where there has been no appearance for plaintiffs in error, and the writ of error has operated to delay proceeding on the judgment for two years, during which the cause has been permitted to remain on the docket, the court affirms the judgment with interest and costs, and $250 damages for delay.

[No. 285.]

Submitted Apr. 22, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The writ of error in this case brought up a record which showed that the court below had found the facts, upon a plea of accord and satisfaction, against the defendant, who is here, the plaintiff in error. See *Whitney* v. *Cook*, 99 U. S., 607, (XXV., 446).

Messrs. Durant & Hornor, Benj. F. Butler and *N. Wilson*, for plaintiff in error.

Messrs. **P. Phillips** and *G. Gordon Adam*, for defendants in error.

Mr. Chief Justice **Waite** announced the judgment of the court:

There has been no appearance for the plaintiffs in error in this case. The writ of error has operated to delay proceedings on the judgment against Klein, the garnishee. There is nothing whatever in the record to justify him in staying execution. The security by Whitney, the judgment debtor, was for costs only. The cause has been permitted to remain on the docket for two years, notwithstanding what was said by us at the October Term, 1878, 99 U.S., 607 [XXV., 446], when we felt compelled to deny a motion to affirm, because it could not be brought under the operation of Rule 6, there being no color of right to a dismissal.

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We, therefore, affirm the judgments, with interest and costs, and award two hundred and fifty dollars damages against Klein on account of the delay.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[103] THE NATIONAL BANK OF GENESEE, *Plff. in Errr.*,

v.

EDWARD M. WHITNEY ET AL.

(See S. C., 13 Otto, 103, 104.)

Priority as between mortgages—costs not payable out of fund.

1. As between two mortgages, one for a past indebtedness and one for an indebtedness to be subsequently incurred, the one for the past indebtedness must have precedence, if first recorded.
2. In a contest about a fund in court, costs cannot be allowed out of the fund.

[No. 159.]

Petition filed May 2, 1881. Decided May 2, 1881.

IN ERROR to the Supreme Court of the State of New York.

On petition for a rehearing.

Mr. **Theodore Bacon,** for plaintiff in error.

Mr. **W. Harris Day,** for McCormick.

Mr. Justice **Field** delivered the opinion of the court:

By the decision in this case [*ante*, 448], we held, that in the distribution of the surplus moneys in court, the claim of McCormick should be paid before that of the Bank. He took his mortgage without notice of the one to the Bank, which had not been registered. The Bank now asks a rehearing of the case on this point, contending that, under the decisions of the New York courts, the priority of its mortgage cannot be displaced. It cites the statute of the State to show that the recording Act gives priority only to the mortgage first recorded, when that is executed for a valuable consideration, which, according to those decisions, means some new consideration advanced at the time; and that a mortgage for a pre-existing indebtedness is not protected by a prior record, against a non-recorded mortgage for value. Here the mortgage [104] to McCormick was given to secure—to the extent of $1,500—a previous liability and indebtedness, and such as might be subsequently incurred. The previous indebtedness at the time equaled the whole amount of the intended security.

There would be force in the position of the Bank if its own mortgage stood in any better condition. When the McCormick mortgage was executed, September 16, 1872, the indebtedness of Whitney to the Bank was paid and his mortgage remained in force only for any future indebtedness which he might incur. For such future indebtedness it could not cut out the mortgage to McCormick, executed for an existing indebtedness, and of which mortgage the Bank had notice. For advances afterwards made, the mortgage to the Bank was a subsequent incumbrance.

As between two mortgages—one for a past indebtedness, and one for an indebtedness to be subsequently incurred—the one for the past indebtedness must have precedence if first recorded.

The petition for a rehearing by the Bank, must, therefore, be denied.

The petition of McCormick to be allowed costs out of the fund in court must, according to the usual practice of the court in such cases, be also denied. His costs are chargeable against the Bank which contested his right to be paid out of the proceeds in court. If paid out of the fund they would reduce by their amount the moneys properly applicable to the indebtedness of Whitney.

Mr. Justice Swayne heard the argument of this cause and participated in its decision. The judgment will, therefore, be entered as of the date when he was on the bench after the decision was reached in consultation.

Rehearing denied; and ordered that judgment be entered as of the second Monday of January last.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 4; 19 Blatchf., 289; 98 N. Y., 272; 21 N. W. Rep., 855; 131 Mass., 275; 41 Am. Rep., 237.

Ex parte THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner.*

Mandamus—*when denied.*

1. *Mandamus* can only be resorted to when other remedies fail.
2. Where the party has ample remedy by appeal if he puts his case in a condition for such a form of proceeding, he must avail himself of that remedy. He cannot, under such circumstances, expedite the determination of his cause by *mandamus.*

[No. 8, Orig.]

Argued Apr. 21, 1881. Decided May 2, 1881.

APPLICATION for a writ of *mandamus.*

The case is stated by the court.

Messrs. **Isham & Lincoln,** *C. Beckwith* and **Edward S. Isham,** for petitioner.

Messrs. **George F. Edmunds,** *Henry S. Monroe, William R. Page* and **W. C. Goudy,** for respondent.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a petition for a writ of *mandamus* to compel the Circuit Court of the United States for the Northern District of Illinois to hear and determine whether a master of the court shall execute to the relator a deed for certain lands bought under a sale ordered by that court. It nowhere appears from the relator's own showing, that the court has expressly refused such an order. The court has refused leave to file a certain petition in the suit, and it has refused an order on the master to show cause why he should not make such a deed. From the whole case as presented by the parties we infer that the court below, as constituted when the application was made, thought the deed ought not to be executed, and it is possible the order now complained of may be the equivalent of a final decree in the cause to that effect, from which an appeal to this court may be taken. But whether that be so

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or not, we will presume the court below will not hesitate, on a proper application, to put the record in a shape to enable us to pass on that question in the ordinary course of proceeding to obtain our review. *Mandamus* can only be resorted to when other remedies fail. It is an extraordinary writ, and should only be used on extraordinary occasions. Here the parties have ample remedy by appeal, if they put their case in a condition for such a form of proceeding. As the relator presents his case on this application, he must avail himself of that remedy. We cannot, under the facts he states, expedite the determination of his cause by *mandamus*.

The application is, consequently, denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES H. WIGHT, Assignee of BYRON SHERMAN and PORTER SHERMAN, Bankrupts, *Appt.*,

v.

STEPHEN H. CONDICT.

Assignee of a partner—power over partnership matters

154 US 666 Appx.

1. The assignee of two bankrupts who had formerly been members of a partnership with a third person, is not the representative of the creditors of such partnership to enforce its rights.

2. Such assignee can reduce to his possession whatever is owing to the bankrupts and also what they have disposed of in fraud of the bankrupt law, but cannot question a transaction between members of the partnership, which was not forbidden by the bankrupt law.

[No. 280.]

Argued Apr. 22, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is sufficiently stated by the court.

Messrs. John E. Risley and **Daniel S. Riddle**, for appellant.

Mr. **William P. Chambers**, for appellee.

Mr. Chief Justice **Waite** announced the judgment of the court:

The decree in this case is affirmed. There can be no pretense that Condict owed the bankrupts anything. They bought his interest in the limited partnership of which he was once a member and paid him for it. If the creditors of that partnership have any just claims against him on account of what has been done, they must proceed as they may be advised to enforce their rights, but the assignee of the bankrupts is in no respect their representative for that purpose. He can reduce to his possession whatever is owing to the bankrupts, and also what they have disposed of in fraud of the bankrupt law; but Condict was not their debtor when the bankruptcy occurred, and there is no allegation that what they did, in respect to his interest in the limited partnership was forbidden by the bankrupt law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[298]

JOSEPH GOLDING, Master, etc., of THE STEAMER ELLEN HOLGATE, *Appt.*,

v.

THE STEAMSHIP ILLINOIS, JOHN W. SHACKFORD, Master, AMERICAN STEAMSHIP COMPANY, Claimant.

(See S. C., "*The Illinois*," 13 Otto, 298-300.)

Sailing Rules.

The responsibility of avoiding a collision between a steamer and a sailing vessel is, primarily, on the steamer. But the sailing vessel is under just the same responsibility to keep her course, if she can, and not embarrass the steamer by any new movement while passing.

[No. 275.]

Argued Apr. 20, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The libel in this case was filed by the appellant in the District Court of the United States for the Eastern District of Pennsylvania. A decree was entered in favor of the libelant, but was reversed by the Circuit; whereupon the libelant appealed to this court.

The case is fully stated by the court.

Mr. **J. Warren Coulston**, for appellant.

Messrs. **Morton P. Henry** and *Henry R. Edmunds*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a case of collision in the Delaware Bay, and the facts found are substantially as follows: The Illinois was a large steamship, three hundred and sixty feet in length, and of three thousand tons register. She was going up the bay at a speed of ten knots an hour. She had just rounded Dan Baker's shoal on a port wheel, and had got straightened on her course in about mid-channel. The schooner Ellen Baker was ahead of her, a little on the port bow, and bound for New Castle, Delaware. The wind was from the northeastward, and the schooner was by the wind, heading about north-by-west, or north-northwest, and pointing for Reedy Island piers. The vessels were on slightly diverging lines, which were about one hundred yards apart. The western or Reedy Island side of the bay was obstructed by ice, while the eastern side was open. When the vessels were probably three or four hundred yards apart the schooner went in stays and then tacked to the eastward to avoid the ice, which was ahead of and close under her port bow. There was no lookout astern on the schooner, and, until she had changed her course, no one on board had observed the steamer. The steamer had a sufficient lookout. Her master and pilot were on the bridge looking ahead, and they saw the schooner before she tacked. They so directed the steamer's course as to pass the schooner in safety on her starboard side, three hundred feet, or thereabouts, away, if she kept the course she was on. As soon as the maneuver of the schooner was seen on the steamer, orders [29

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting.* See, *note* to St. John v. Paine, 51 U. S. (10 How.), 557.

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were given to put the helm hard-a-starboard, to stop the engine, then to back at full speed, and to let go the anchor, with a view to passing under the schooner's stern. These orders were ineffectual to prevent a collision, and the steamer struck the schooner just abaft the main rigging, causing her to capsize and sink.

It seems to us the court below was right, on these facts, in holding the steamer free from blame. The responsibility of avoiding a collision with a sailing vessel is put by the Act of Congress and the Sailing Rules primarily on a steamer. But the sailing vessel is under just the same responsibility to keep her course, if she can, and not embarrass the steamer, while passing, by any new movement. A steamer has the right to rely on this as an imperative rule for a sailing vessel, and govern herself accordingly. Otherwise it would at times be impossible for a steamer to get ahead at all in the thoroughfares of navigation.

In the present case the steamer was in mid-channel. That was the proper place for a vessel of her size, and, under the circumstances, we cannot say her speed was unusual, since, so far as appears, there were no other vessels in the way. Had the schooner kept her course for a minute or two longer, there is scarcely a doubt that the steamer would have got by in safety. It was clearly a fault, therefore, for her to change her course, unless there was a necessity for it. Mere convenience was not enough. The schooner, in this court, has the affirmative. It rests on her to show error in the judgment of the court below, or we must affirm.

It is an important fact that the steamer was not observed from the schooner before the course was changed. While a man stationed at the stern as a lookout is not at all times necessary, no vessel should change her course materially without having first made such an observation in all directions, as will enable her to know how what she is about to do will affect others in her immediate vicinity. In the present case it is not found expressly, that the ice was so close under the port bow of the schooner as to make it dangerous for her to keep on as she was going until the steamer got by. She ought to have known that although the ice was an ob- [300] struction on the west side of the bay, she was not far from the place in the channel through which the large steamers which navigated there would be likely to pass, if following her. It is not found that there was anything in view from the steamer to indicate to her the necessity for any early change of the course of the schooner. So far as the findings show, the way was open for some distance ahead, and the steamer had the right to assume she might keep her place in mid-channel and go on with safety. We must also infer from what is actually found, as well as from what is not found, that if the schooner had known the circumstances in which she was placed, her change of course would have been delayed until it might be made without danger. Because a steamer must keep out of the way of a sailing vessel, it by no means follows that a sailing vessel may unnecessarily throw herself across the bow of an approaching steamer. It is as much the duty of a sailing vessel to be diligent in the performance of her duty, as it is that of a steamer to be mindful of her. In the case of *The Abbotsford*, 98 U. S., 446 [XXV., 170], it was distinctly found that the tack of the schooner was entirely proper, both for her own safety and in regard to the steamer. She had run out her course, and the steamer, which was yet a considerable distance away, ought to have known it. Consequently the steamer was in fault for getting so close as to put herself in the way of the schooner, while doing what the necessities of the navigation actually required her to do, and which a prudent and skillful navigator on the steamer ought to have known she must do at the time it was done. Such is not shown to have been the case here.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE BATY BLAKE ET AL., Exrs. of GEORGE BATY BLAKE, Deceased, *Plffs. in Errr.*, [336]

v.

JOHN W. McKIM, JUDGE OF THE PROBATE COURT FOR THE COUNTY OF SUFFOLK, MASSACHUSETTS.

(See S. C., 13 Otto, 336-339.)

Removal of cause.

*Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States, has not distinctly provided for the removal from a State Court of a suit in which there is a controversy not wholly between citizens of different States, and to the full and final determination of which one of the necessary or indispensable parties, plaintiffs or defendants, seeking the removal, is the citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked.

[No. 860.]

Submitted Jan. 11, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is fully stated by the court.

Messrs. **Joshua D. Ball,** *Benj. L. M. Towe* and *B. F. Brooks,* for plaintiffs in error.

Mr. **James C. Davis,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was commenced in one of the courts of Massachusetts, by a citizen of Massachusetts for the use of citizens of that State, against the executors of George Baty Blake, two of whom are citizens of Massachusetts and one a citizen of New York. It is upon a probate bond, executed in the penalty of $50,000, by James M. Howe, as trustee under the will of Henry Todd, with two sureties, one of whom was the testator of the defendants. Its object is to recover from the estate of the deceased surety the sum of $50,000 for alleged breaches, [337] upon the part of the trustee, of the bond sued on.

*Head note by *Mr. Justice* HARLAN.

NOTE.—*Removal of Causes under Act of 1875; citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 593.

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The executors filed a joint answer, which presented a common defense, and subsequently in proper time, filed their joint petition for the removal of the case into the Circuit Court of the United States for the District of Massachusetts. The petition was dismissed by the State Court. The transcript of the record was, nevertheless, filed in the Circuit Court. By the latter court the case, upon motion of plaintiff, was remanded to the State Court. From that order this writ of error is prosecuted.

We are of opinion that the case, as made by the plaintiffs, is not one of which the Circuit Court of the United States can take jurisdiction.

In the *Removal Cases*, 100 U. S., 468 [XXV., 597], we had occasion to construe the first clause of the 2d section of the Act of March 3, 1875, which declares that *either party* may remove to the Circuit Court for the proper district any suit of a civil nature, at law or in equity, pending in a State Court, where the matter in dispute exceeds, exclusive of cost, the sum or value of $500, and in which there is "a controversy between citizens of different States." We held that clause to mean, "That when the controversy, about which a suit in the State Court is brought, is between citizens of one or more States on one side, and citizens of other States on the other side, either party in the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants;" that, upon arranging the parties on opposite sides of the real and substantial dispute, if it appears that those on one side are all citizens of different States from those on the other, the suit may be removed—all those on the side desiring a removal uniting in the application therefor. In that case an Iowa corporation represented one side of the dispute, while the other was represented by citizens of Ohio and Pennsylvania. The controversy was as broad as the suit.

In *Barney* v. *Latham*, decided at the present Term [*ante*, 514], we held (construing the second clause of the 2d section of the Act of March 3, 1875) that one or more of the plaintiffs or defendants, actually interested in a controversy wholly between citizens of different States, and [338] which can be fully determined as between them, can remove from the State Court the entire suit of which that separable controversy forms a part, provided it involves the amount prescribed as necessary to federal jurisdiction.

The executors of Blake—each of them having qualified and acted in the execution of the trust—were all indispensable parties to the suit. Gould, Pl., sec. 73, ch. 4; Dicey, Parties to Actions, *s. p.* 322; 1 Chit. Pl., *s. p.* 52. They all appeared and submitted to the jurisdiction of the court. The present case is, therefore, one in which the suit embraces only one indivisible controversy. It is not wholly between citizens of different States, and fully determinable as between them, because some of the defendants are citizens of the same State with the plaintiffs.

The contention upon the part of counsel for the executors is, that the suit is removable upon their joint petition, under the first clause of the 2d section of the Act of 1875. We are unable to concur in that view. There is, undoubtedly, some ground for such a construction, but we are not satisfied that Congress intended to enlarge the jurisdiction of the Circuit Courts to the extent that construction would imply. The principal reason assigned in its support is, that the first clause of the 2d section of the Act of 1875 follows the words of the Constitution, when giving jurisdiction to the Circuit Court of a suit in which there shall be "a controversy between citizens of different States,"—language which, it is claimed, does not necessarily require that such controversy must be wholly between citizens of different States. But that consideration was pressed upon our attention in the *Case of Sewing Mach. Cos.*, 18 Wall., 553 [85 U. S., XXI., 914], which arose under the Act of March 2, 1867. 14 Stat. at L., 558. That Act authorizes the removal of a suit, involving the requisite amount, "In which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State," upon an affidavit by the latter, whether plaintiff or defendant, showing that he has reason to believe, and does believe, that, from prejudice or local influence, he would not be able to obtain justice in the State Court. The argument there, by counsel of recognized learning and ability, was that a controversy between citizens of different States is none the less a controversy between citizens of different States because others are also parties to it; that to confine the federal jurisdiction to cases wherein [339] the controversy is between citizens of different States *exclusively*, is to interpolate into the Constitution a word not placed there by those who ordained it, and one which materially limits or controls its express provisions. We declined to adopt that construction of the statute, and held that Congress did not intend by the Act of 1867 to confer the right of removal where a citizen of a State, other than that in which the suit is brought, is united, as plaintiff or defendant in the controversy, with one who is a citizen of the latter State. The construction for which counsel for plaintiffs in error here contend, cannot well be maintained without overruling the principles announced in the *Case of the Sewing Machine Companies.*

It is to be presumed that Congress, in enacting the Statute of 1875, had in view as well previous enactments, regulating the removal of causes from the State Courts, as the decisions of this court upon them. If it was intended, by that Act, to invest the Circuit Courts with jurisdiction of *all* controversies between citizens of different States, although others might be indispensable parties thereto, such intention would have been expressed in language more explicit than that found in the Act of 1875. We are not disposed to enlarge that jurisdiction by mere construction. We are of opinion that Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States, has not distinctly provided for the removal from a State Court, of a suit in which there is a controversy not wholly between citizens of different States, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same State with one or more of the plaintiffs or defendants, against whom the removal is asked.

The judgment of the Circuit Court remanding

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the cause to the State Court is, therefore, affirmed.
True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 409; 105 U. S., 578; 108 U. S., 194; 112 U. S., 739; 3 McCrary, 542; 6 Sawy., 222.

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[344] JOHN T. WEBBER, *Plf. in Err.*,
v.
STATE OF VIRGINIA.

(See S. C., 13 Otto, 344-351.)

Police powers—rights of inventors—license to sell patented invention — discrimination — interstate commerce.

1. Congress never intended that the patent laws should displace the police powers of the States, that is, those powers by which the health, good order, peace and general welfare of the community are promoted.
2. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits.
3. There is no objection to the law of Virginia requiring a license for the sale of sewing-machines, by reason of the grant of letters patent for the invention.
4. There is, however, an objection to its legislation arising from its discriminating provisions against non-resident merchants and their agents. The 45th and 46th sections of the revenue laws of the State are unconstitutional.
5. Commerce among the States in any commodity, can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority, by reason of its foreign growth or manufacture.

[No. 1136.]

Argued Mar. 11, 1881. Decided May 2, 1881.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

Statement of the case by *Mr. Justice* **Field:**

This case comes before this court on a writ of error to the Supreme Court of Appeals of the State of Virginia, and arose in this way: In May, 1880, the plaintiff in error, J. T. Webber, was indicted in the County Court of Henrico County, in that State, for unlawfully selling and offering for sale in that county, to its citi- [345] zens, certain machines known as Singer sewing-machines, which were manufactured out of the State, without having first obtained a license for that purpose from the authorities of the county, or having paid the tax imposed by law for that privilege.

The indictment was founded upon the 45th and 46th sections of the revenue law of the State, which are as follows:

"45. Any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States and Territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles through the agency of another; but a separate license shall be required from any agent or *employé* who may sell or offer to sell such articles for another. For any violation of this section, the person offending shall pay a fine of not less than $50 nor more than $100 for each offense.

46. The specific license tax upon an agent for the sale of any manufactured article or machine of other States or Territories shall be $25, and this tax shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of $10 in each of the counties or corporations where he may sell or offer to sell the same. All persons other than resident manufacturers or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section." Acts of Assembly 1875 and 1876, p. 184, ch. 162, secs. 45, 46.

To the indictment the accused pleaded "not guilty;" and on the trial it was proved that he had sold and offered to sell sewing-machines in Henrico County, as charged, but that at the time he was acting as agent or *employé* of the Singer Manufacturing Company, a corporation created under the laws of New Jersey; that this company had a place of business in Richmond, Virginia, where it was licensed as a resident merchant, for the year beginning May 1, 1880, and had paid the required license tax; and where it kept a stock of machines for sale; that the [346] machines sold by the accused were the property of the company, and were manufactured by it out of the State, and in accordance with specifications of a patent of the United States, granted in 1879, to one W. C. Hicks, and by him transferred to the company. It also appeared that the accused had not taken out a license to sell the machines in Henrico County, and was not himself taxed as a merchant, and had not taken orders for the machines on commission or otherwise.

On the trial his counsel requested the court to instruct the jury, that if they believed the Singer Manufacturing Company had paid for a general merchant's license for the year beginning May 1st, 1880, and received such license, or that the machines sold were constructed according to the specifications of the patent held by the company, and that the accused was acting in the sales made only as its *employé*, he was entitled to a verdict of acquittal. The court refused to give these instructions, and, at the request of the attorney for the Commonwealth, instructed the jury, in substance, that if they believed the accused had, at different times within the year, previous to the indictment, sold or offered to sell in Henrico County to its citizens Singer sewing-machines manufactured beyond the State, and at the time he was neither the manufacturer himself nor the owner of them, and was not taxed as a merchant in the county, and had not taken orders therefor on commission or otherwise, and had not obtained a license to sell the same in the county, and had not paid to the proper officer the tax imposed by law for selling the same in that county, they should find him guilty.

NOTE.—*Power of States to tax.* See, *note* to Providence Bk. v. Billings, 29 U. S. (4 Pet.), 514; and *note* to Dobbins v. Erie Co., 41 U. S. (16 Pet.), 435.

Power of Congress to regulate commerce; state licenses; power of States to tax commerce. See, *note* to Gibbons v. Ogden, 22 U. S. (9 Wheat.), 1; and *note* to Brown v. Maryland, 25 U. S. (12 Wheat.), 419.

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The jury found the accused guilty, and he was sentenced to pay a fine of $50 besides costs. On appeal to the Circuit Court of the county this judgment was affirmed, and on further appeal to the Supreme Court of Appeals of the State the judgment of the Circuit Court was affirmed. To review the latter judgment the case is brought here on writ of error.

Mr. C. V. Meredith, for the plaintiff in error.

Mr. James G. Field, Attorney-General of Virginia, *contra*.

[347]

Mr. Justice **Field** delivered the opinion of the court:

In the county court, where the accused was tried, the only defense presented by his instructions was, that he was acting as the agent of the Singer Manufacturing Company, which had a license from the State as a resident merchant in Richmond to sell the machines, and also held a patent of the United States, authorizing it to manufacture and sell them anywhere in the United States. To this defense the answer is obvious. The license, being limited to the City of Richmond, gave no authority to the company to sell the machines elsewhere, and of course gave none to its agent. Besides, the question as to the extent of the territorial operation of the license depended upon the construction given by the Court of Appeals of the State to the statute, and its decision thereon is not open to review by us. And the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State. The combination of different materials so as to produce a new and valuable product or result, or to produce a well known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the State, nor can the sale of the article or machine produced be restricted, except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted.

The patent for a dynamite powder does not prevent the State from prescribing the conditions of its manufacture, storage and sale, so as to protect the community from the danger of explosion. A patent for the manufacture and sale of a deadly poison does not lessen the right of the State to control its handling and use. The legislation respecting the articles which the State may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery, the incorporeal right, which the State cannot interfere with. Congress never intended that the patent laws should displace the police powers of the States, meaning by that [348] term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits.

These views find support in the language of this court in *Patterson* v. *Kentucky*, 97 U. S., 501 [XXIV., 1115]. There a party was convicted of violating a statute of the State regulating the inspection and gauging of oils and fluids, the product of coal, petroleum, or other bituminous substances. The statute provided that such oils and fluids should be inspected by an authorized officer of the State before being used, sold, or offered for sale, and required the inspector to brand, according to the fact, casks and barrels of the oil with the words "standard oil," or with the words "unsafe for illuminating purposes." It imposed a penalty for selling or offering for sale in the State such oils and fluids as had been condemned. A particular oil, known as the Aurora oil, which had been thus condemned, was sold by the accused. A patent for the oil had been issued by the United States to a party who had assigned it to him, and in defense to the indictment he asserted the right under the patent, to sell the oil in any part of the United States, and that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or obstruct its exercise. But the court held this construction of the Constitution and laws to be inadmissible, and that the right was to be exercised in subordination to the general powers which the several States possessed over their purely domestic affairs, whether of internal commerce or police. After some just observations upon the police powers of the State, their extent and object, and a reference to previous decisions, the court said, speaking through *Mr. Justice* Harlan: "These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery, must be enjoyed subject to the complete and salutary power, with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, [349] which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plates by which copies of a map are multiplied is distinct from the copyright of the map itself." And again, the enjoyment of the right in the discovery "may be secured and protected by national authority against all interference; but the use of the tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation simply because the patentee acquires a monopoly in his discovery."

In accordance with the views thus expressed, we can find no objection to the legislation of Virginia in requiring a license for the sale of the sewing-machines, by reason of the grant of letters patent for the invention.

There is, however, an objection to its legislation arising from its discriminating provisions against non-resident merchants and their agents, and this is presented by the instructions given to the jury, at the request of the attorney of the Commonwealth.

The 45th section of the revenue law declares "That any person who shall sell or offer for sale the manufactured articles or machines of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or take

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orders therefor, on commission or otherwise, shall be deemed to be an agent" for the sale of those articles, and shall not act as such without taking out a license therefor. A violation of this provision subjects the offender to a fine of not less than $50, nor more than $100 for each offense.

The 46th section fixes the license tax of the agent for the sale of such articles at $25. The license only gives him a right to sell in the county or corporation for which it is issued. If he sells, or offers to sell, in other counties or corporations, he must pay in each an additional tax of $10. The section then declares that "All persons, other than resident manufacturers or their agents, selling articles manufactured in the State shall pay the specific license tax imposed by this section."

By these sections, read together, we have this [350] result: the agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers, and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States.

In *Welton* v. *Missouri*, 91 U.S., 275 [XXIII., 347] we expressed at length our views on the subject, and to our opinion we may refer for their statement. No one questions the general power of the State to require licenses for the various pursuits and occupations conducted within her limits, and to fix their amount as she may choose, and no one on this bench—certainly not the writer of this opinion—would wish to limit or qualify it in any respect, except when its exercise may impinge upon the just authority of the Federal Government under the Constitution, or the limitations prescribed by that instrument. But where a power is vested exclusively in that government, and its exercise is essential to the perfect freedom of commercial intercourse between the several States, any interfering action by them [351] must give way. This was stipulated in the indissoluble covenant by which we became one people.

In a recent case we had occasion to consider at some length the extent of the commercial power vested in Congress, and how far it is to be deemed exclusive of state authority. Referring to the great variety of subjects upon which Congress, under that power, can act, we said that "Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale and exchange of commodities. Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases, with respect to any particular commodity or mode of transportation, is a declaration of its purpose, that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens and against the products and citizens of other States." *Mobile Co.* v. *Kimball* [*ante*, 238].

Commerce among the States in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens, imposed by local authority, by reason of its foreign growth or manufacture.

The judgment of the Supreme Court of Appeals of Virginia must, therefore, be reversed, and the cause remanded to it for further proceedings in accordance with this opinion, and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

Cited—105 U. S., 465; 4 Hughes, 229; 95 Ind., 12; 48 Am. Rep., 694; 96 Ind., 179; 49 Am. Rep., 160.

WILLIAM NEAL, *Plff. in Err.*,

v.

STATE OF DELAWARE. [370]

(See S. C., 13 Otto, 370-409.)

Fifteenth Constitutional Amendment—selection of jurors—duty of State—law excluding jurors on account of race or color—removal of case—jury on indictment—motion to quash.

*1. The petition of the plaintiff in error—a man of color, indicted for rape in one of the courts of Delaware—for the removal of the prosecution into the Circuit Court of the United States, was properly disregarded.

2. The Constitution of Delaware adopted in 1831, and the words of which have never been changed, gave the right of suffrage, with a few special exceptions, to free *white* male citizens. And the statute of the State, adopted in 1848, and never repealed, restricts the selection of jurors to those qualified to vote at a general State election.

3. The legal effect of the adoption of the Amendments to the Federal Constitution and the laws passed for their enforcement, was to annul so much of the State Constitution as was inconsistent therewith, including the provision confining suffrage to the white race; and thenceforward the jury statute was enlarged in its operation so as to render colored

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Fifteenth Amendment to U. S. Constitution; its construction and effect.* See, *note* to U. S. v. Reese, 92 U. S., XXIII., 563.

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citizens, otherwise qualified, competent to serve on juries in the State Courts.

4. The presumption should be indulged in the first instance that the State recognizes, as is its plain duty, an Amendment of the Federal Constitution from the time of its adoption as binding on all of its citizens and every department of its government, and to be enforced within its limits, without reference to any inconsistent provisions in its own Constitution or statutes.

5. In this case that presumption is strengthened and becomes conclusive not only by reason of the direct adjudication of the State Court, recognizing the modification of the State Constitution, by reason of the amendments to the National Constitution, but by the entire absence of any statutory enactments since the adoption of the Amendments indicating that the State, by its constituted authorities, does not recognize in the fullest legal sense their legal effect upon the Constitution and laws of the State.

6. Had the State since the adoption of the Fourteenth Amendment passed any statute in conflict with its provisions, or had its judicial tribunals by their decisions repudiated that amendment as a part of the supreme law of the land, or declared the Acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that the case was one embraced by section 641 of the Revised Statutes and, therefore, removable into the Circuit Court of the United States.

7. The alleged exclusion from the grand jury that found, and from the petit jury that was summoned to try this indictment, of citizens of the African race because of their race, did not result from the Constitution or laws of the State as expounded by its highest judicial tribunal; and consequently, the accused was not entitled to the removal of the prosecution into the Circuit Court. Such exclusion however, if made by the jury commissioners without authority derived from the Constitution and laws of the State, was a violation of the prisoner's rights under the Constitution and laws of the United States which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error to the State Court.

8. Upon the showing made by the accused, the motions to quash the indictment and the panels of jurors should have been sustained.

9. The doctrines announced in Strauder v. West Virginia, Virginia v. Rives, and *Ex parte* Virginia, 100 U. S., 303, 313, 339, reaffirmed.

[No. 865.]

Argued Mar. 21, 22, 1881. Decided May 2, 1881.

IN ERROR to the Court of Oyer and Terminer of New Castle County, State of Delaware.

The case is fully stated by the court.

Messrs. **Anthony Higgins,** *Edwin B. Smith* and **Charles Devens,** for plaintiff in error:

1. The exclusion from the juries in any prosecution of a person of African race and color by the Constitution or laws of a State, of persons of such race and color, because of their race and color, constitutes and operates as a denial of the equal protection of the laws, as forbidden by the 14th Amendment and by section 1977 of the Revised Statutes, and brings such prosecution within the provisions of section 641 of the Revised Statutes, authorizing the removal of such prosecution into the Circuit Court of the United States.

Strauder v. *W. Va.*, 100 U. S., 303 (XXV., 664); *Va.* v. *Rives*, 100 U. S., 313 (XXV., 667); *Ex parte Va.*, 100 U. S., 339 (XXV., 676).

2. By the Constitution and laws of Delaware, persons of African race and of color are excluded from the juries, because of their race and color.

The qualifications of jurors in Delaware are fixed by the Revised Statutes of Delaware, chapter 109:

"Sec. 1. All persons qualified to vote at the general election shall be liable to serve as jurors."

The qualifications of voters at the general election are fixed by the Constitution of Delaware, article IV., section I:

"And in such elections every free, white, male citizen," etc.

The 14th Amendment, the Civil Rights Act, the 15th Amendment, and the Acts of Congress passed to enforce it, did not repeal any provisions of the Constitution or statutes of Delaware, or amend by striking out the word "white."

The fallacy of the argument of the court below is, that it confounds the distinction between federal and state sovereignty. Each is as distinct as though separated by boundaries visible to the eye.

Ableman v. *Booth*, 21 How., 516 (62 U. S., XVI., 173).

In such case, the superior will prevails over the inferior. It does not annihilate the weaker purpose; it simply prevents its being carried into execution.

The Legislature of Delaware, in 1874, republished the Constitution and Revised Statutes of the State, and therein printed the above cited clause of the State Constitution (art. IV, sec. 1), without any change or alterations because of the 14th and 15th Amendments, and leaving the word "white" therein.

If colored men have been allowed to vote, it has been through the obedience of the election officers to the mandate of the 15th Amendment.

The fact is, as the court admits, that no colored man has ever yet been placed on any jury list in Delaware, and to their demand for that right it is but a poor answer, indeed it is no answer, to say that they are permitted to testify and to vote.

This court held in the case of *Strauder* v. *W. Va.*, that that cause should have been removed, under section 641 of the Revised Statutes, notwithstanding and because the Statute of West Virginia excluding colored persons from juries, was repugnant to the Constitution and laws of the United States.

The fact that the Constitution and Statutes of Delaware were passed before, while the Statute of West Virginia was passed after the adoption of the 14th and 15th Amendments and the Civil Rights Acts, including section 641, for the removal of causes, is a distinction without a difference, and does not weaken the binding force on this case, of the decision in *Strauder's case*.

The Court of Oyer and Terminer should have quashed the indictment and the panels of Grand Jurors and Petit Jurors, on the ground that the Levy Court of New Castle County had excluded from said juries, all persons of African race and color, because of their race and color, and should not have refused the motion to quash because the plaintiff in error produced no evidence *aliunde* in support of the allegations of his petition, verified by his own oath.

None but white men were selected by the levy court.

None but white men were drawn on the lists and panels of the Grand and Petit Juries.

None but white men had ever been selected or drawn on juries in the State.

The Constitution and laws of Delaware, in express language, prohibited the placing of any but white men upon the juries.

No court of the State had, up to that time,

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ever held that the Constitution, Statute and practice of the State excluding blacks from the juries had been abrogated or changed by the Amendments to the Constitution of the United States, and by the Acts of Congress.

The decision of the court below in this case, already quoted, was the first judicial determination, in the history of Delaware, to the contrary.

The Levy Court Commissioners, in selecting the lists of jurors, were merely administrative officers, not lawyers. They were acting in an executive, not a judicial capacity; and were discharging a mere executive, and not judicial function and duty.

It cannot be presumed that such officers, in selecting the lists of jurors, exercised the judicial function by construing and treating the Statute and Constitution of Delaware, in respect to the qualifications of jurors, as abrogated or changed by the 14th and 15th Amendments and the Acts of Congress.

It must be presumed, on the contrary, that they were governed by the text of the law of the State, rather than by that of the United States.

This court have held that even the judicial tribunals are presumed to be governed by the state, and not by the federal law.

Va. v. *Rives* (*supra*).

The court should have permitted the plaintiff in error to go into proof to support the allegations of his petition, on which the motion to quash was grounded, even after the motion to quash was argued and overruled.

Mr. **George Gray,** *Atty-Gen.* of Delaware, for defendant in error:

By the express requirement of the statute, the petition must set forth the facts upon which the defendant bases his claim to have his case removed. The mere filing of the petition is not enough, but the facts set forth must be such as to justify a removal, and the sufficiency of such facts is a material inquiry for the court.

Va. v. *Rives*, 100 U. S., 317 (XXV., 669).

The denial or inability to enforce, in the judicial tribunals of the State, rights secured by any law providing for the equal civil rights of all persons, citizens of the United States, of which section 641 speaks, is a denial of such rights, or inability to enforce them, resulting from the Constitution or laws of the State rather than a denial, first made manifest at the trial of the cause; "In other words, the statute has reference to a legislative denial, or an inability resulting from it."

Va. v. *Rives* (*supra*).

Were colored persons, at the time of the filing of this petition for removal, so excluded by the laws of Delaware?

We might rest the case on the answer to this question given by the court below:

"Because it is well settled that this court will take the decision of the State Court of last resort, not called in question by any conflicting decision, as conclusive evidence of what the law of the State is.

Randall v. *Brigham*, 7 Wall., 523 (74 U. S., XIX., 285).

There is nowhere on the statute-book of Delaware, any law expressly excluding colored persons from liability to serve as jurors. It is a matter of construction. Whose construction must we take as the correct one, that of the learned counsel or that of the State Court?

All voters may be jurors. Who are voters? The answer is plain since the 15th Amendment; all male citizens, twenty-one years of age and upwards, having certain other qualifications, may vote in Delaware, and therefore may be jurors.

To require that the court below should have granted this motion to quash, on the unsupported allegations of the prisoner at the bar, and when the facts alleged were such as could not possibly have been within his knowledge, and moreover imputed grave offenses against the law, to all the persons constituting the Levy Court of New Castle County, would be to reverse all the rules of evidence, overturn all orderly procedure in courts of justice, and contradict the settled maxims of ordinary human experience.

Va. v. *Rives* (*supra*).

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, a citizen of the African race, was, on the 11th May, 1880, indicted in the court of General Sessions of the Peace and Jail delivery of New Castle County in the State of Delaware for the crime of rape, an offense punishable, under the laws of that State, with death. The indictment, upon writ of *certiorari* sued out by the Attorney-General of the State, was removed for trial into the court of Oyer and Terminer for the same county, the highest judicial tribunal of Delaware in which the decision of such a case could be had. In the latter court, the accused, by counsel specially assigned for his defense, filed a petition, verified by his oath, for the removal of the prosecution into the Circuit Court of the United States for the District of Delaware.

The general grounds alleged for removal were that the grand jurors who returned the indictment, and the petit jurors who were summoned to try the case, were of the white race exclusively; that all citizens of the African race, though otherwise qualified, had, by virtue of the Constitution and laws of the State, been excluded from the lists of grand and petit jurors, because of their race and color; that, in fact, persons of that race, though otherwise qualified, have always, in said County and State, been excluded, because of their color, from service on juries; and, consequently, that the accused had been and, in the trial of his case, would be denied the equal protection of the laws, and the full and equal benefit of all laws and proceedings in that State for the security of his person as is enjoyed by the white race.

The removal was denied, as were motions, subsequently made in behalf of the accused, to quash the indictment and the panels of grand and petit jurors. A trial was had before a jury composed wholly of white persons, and a verdict of guilty having been returned, it was, on the 27th May, 1880, adjudged that the accused suffer death by hanging. From that judgment this writ of error has been prosecuted. [385]

The assignments of error are numerous, but they are all embraced by the general proposition that the court erred, as well in proceeding with the trial after the petition for removal was filed,

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as in denying the motions to quash the indictment, and the panels of jurors.

The first question to which our attention will be directed relates to the assertion, by the accused, of the right of removal under section 641 of the Revised Statutes. That section declares that, "When any civil suit or criminal prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State, where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of the citizens of the United States, * * * such suit or prosecution may, upon the petition of such defendant filed in said State Court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State Court shall cease," etc.

In *Strauder* v. *W. Va.*, 100 U. S., 303 [XXV., 664]; *Va.* v. *Rives*, 100 U. S., 313 [XXV., 667]; and *Ex parte Va.*, 100 U. S., 339 [XXV., 676]; that section of the Revised Statutes was the subject of careful examination, in connection with section 1977, which declares that "All persons within the jurisdiction of the United States shall have the same right, in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like pains, penalties, taxes, licenses and exactions of every kind and no other." We also considered the [386] validity and scope of the Act of Congress, approved March 1, 1875, which, among other things, declares that "No citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude." 18 Stat. at L. pt., 3, p. 336.

In those cases it was ruled that these statutory enactments were constitutional exertions of the power to pass appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment, which was designed, primarily, as we held, to secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that, while a State, consistently with the purposes for which that Amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, a denial to citizens of the African race, because of their color, of the right or privilege accorded to white citizens, of participating, as jurors, in the administration of justice, is a discrimination against the former inconsistent with the Amendment, and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which was excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and, that such exclusion of the black race from juries, because of their color, was not less forbidden by law, than would be the exclusion from juries, in the States where the blacks have the majority, of the white race, because of *their* color.

But it was also ruled, in the cases cited, that the constitutional Amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, [387] arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from juries because of their race.

The essential question, therefore, is, whether, at the time the petition for removal was filed, citizens of the African race, otherwise qualified, were, by reason of the Constitution and laws of Delaware, excluded from service on juries because of their color. The court below, all the Judges concurring, held that no such exclusion was required or authorized by the Constitution or laws of the State and, consequently, that the case was not embraced by the removal statute, as construed by this court.

The correctness of this position will now be considered.

The Constitution of Delaware, adopted in 1831 (the words of which upon the subject of suffrage had not been changed when the petition for removal was filed, nor since), restricts the right of suffrage at general elections to free *white* male citizens, of the age of 22 years and upwards, who had resided in the State one year next before the election, and the last month thereof in the county where he offers to vote, and who, within two years next before the election, had paid a county tax, which shall have been assessed at least six months before such election, the prerequisite of a payment of tax being dispensed with in the case of free white male citizens between 21 and 22 years of age, [388] having the prescribed residence in the State and county. The only persons excluded by that Constitution from suffrage are those in the military, naval or marine service of the United States, stationed in Delaware, idiots, insane persons, paupers and those convicted of felonies.

The Statutes of Delaware, adopted in 1848, and in force at the trial of this case, provided

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for an annual selection, by the levy court of the county, of persons to serve as grand and petit jurors, and from those so selected the prothonotary and clerk of the peace were required to draw the names of such as should serve for that year, if summoned. They further provided that all qualified to vote at the general election, being 'sober and judicious persons,' shall be liable to serve as jurors, except public officers of the State or of the United States, counselors and attorneys at law, ordained ministers of the gospel, officers of colleges, teachers of public schools, practicing physicians and surgeons regularly licensed, cashiers of incorporated banks, and all persons over 70 years of age.

It is thus seen that the statute, by its reference to the constitutional qualifications of voters apparently restricts the selection of jurors to *white* male citizens, being voters, and sober and judicious persons. And although it only declares that such citizens shall be *liable* to serve as jurors, the settled construction of the State Court, prior to the adoption of the Fifteenth Amendment, was that no citizen of the African race was competent, under the law, to serve on a jury.

Now, the argument on behalf of the accused is, that since the statute adopted the standard of voters as the standard for jurors, and since Delaware has never, by any separate or official action of its own, changed the language of its Constitution in reference to the class who may exercise the elective franchise, the *State* is to be regarded, in the sense of the Amendment and of the laws enacted for its enforcement, as denying to the colored race within its limits, to this day, the right, upon equal terms with the white race, to participate as jurors in the administration of justice; and this, notwithstanding the adoption of the Fifteenth Amendment and its admitted [389] legal effect upon the Constitutions and laws of all the States of the Union.

But to this argument, when urged in the court below, the State Court replied, as does the Attorney-General of the State here, that although the State had never, by a convention, or popular vote, formally abrogated the provision in its State Constitution restricting suffrage to white citizens, that result had necessarily followed, as matter of law, from the incorporation of the Fourteenth and Fifteenth Amendments into the fundamental law of the Nation; that since the adoption of the latter Amendment neither the legislative, executive nor judicial authorities of the State had, in any mode, recognized, as an existing part of its Constitution, that provision which, in words discriminates against citizens of the African race in the matter of suffrage; and, consequently, that the statute prescribing the qualification of jurors by reference to the qualifications for voters should be construed as referring to the State Constitution, as modified or affected by the Fifteenth Amendment.

The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty and property, and to the equal protection of the laws, was the primary object of the recent Amendments to the National Constitution. Its solution is confessedly attended by many difficulties of a serious nature, which might have been avoided by more explicit language in the statutes passed for the enforcement of the Amendments. Much has been left by the legislative department to mere judicial construction. But upon the fullest consideration we have been able to give the subject, our conclusion is that the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from its Constitution and laws.

Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualification of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an Amendment of the Federal Constitution, from the time of its adoption, as bind- [390] ing on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own constitution or statutes. In this case that presumption is strengthened, and, indeed, becomes conclusive, not only by the direct adjudication of the State Court as to what is the fundamental law of Delaware, but by the entire absence of any statutory enactments or any adjudication, since the adoption of the Fifteenth Amendment, indicating that the State, by its constituted authorities, does not recognize, in the fullest legal sense, the binding force of that Amendment and its effect in modifying the State Constitution upon the subject of suffrage.

This abundantly appears from the separate opinions, in this case, of the Judges composing the court of Oyer and Terminer. Comegys, *C. J.*, alluding to the Fifteenth Amendment, and the Act of March 1, 1875, 18 Stat. at L., 335, said:

"Returning to the point, that our laws forbid the selection of colored persons as jurors. We answer this by saying that we have no such laws. * * * The Fourteenth Amendment, therefore, and the Act of 1875 passed by Congress as appropriate legislation for its enforcement, or either, are superior to our State Constitution, and it had to give way to them, and it did so give way, and was repealed, so far as the word 'white' is mentioned therein as a qualification for a voter at a general election, as soon as the Amendment was proclaimed to be adopted, and has been so understood and treated by all persons in this State from that time forth. Ever since the last Civil Rights Bill was passed by Congress, negroes have been admitted as witnesses in all cases, civil and criminal, tried in our courts; whereas, before, they could give no evidence in any such cases against a white person except in case of crime, and to prevent a failure of justice, when no white person was present at the time of the transaction competent to give testimony. There is, then, an excision or erasure of the word 'white' in the qualification of voters in this State; and the Constitution is now to be construed as if such word had never been there. We have, then, no law of this State forbidding the levy court to select negroes as jurors, because they

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are negroes, if in their judgment they are otherwise qualified." Wales, J., said: "We know, [391] from actual and personal knowledge of the history of the times, that since the adoption of the Fifteenth Amendment to the Federal Constitution, the provision in the Constitution of Delaware limiting the right to vote to free white male citizens, has been virtually and practically repealed and annulled, and that persons of color, otherwise qualified, have exercised and continue to exercise the elective franchise in all parts of this State with the same freedom as the whites. It is not necessary to prove this fact. * * * But there is really no difficulty in reaching the conclusion that under the law regulating the selection of jurors the colored citizen is not excluded. That law was intended by its authors to be prospective in its operation and effect and to include all who would become voters after its passage, as well as the class of persons who were then entitled to vote. It was not a temporary statute, intended only to provide for the then existing state of things, but to reach forward and make one unvarying standard for the qualification of a juror, to wit: that he should be qualified to vote at the general election. This was not the sole standard, but it is the only one pertinent to the discussion of the motion to remove. Whoever, thereafter, might become qualified voters in the State, whether by virtue of amendment to its Constitution or by virtue of 'the supreme law of the land,' that overrides and supplants state constitutions and state laws, *eo instanti* became qualified for selection and service as jurors. * * * The right secured to the colored man under the Fourteenth Amendment and the civil rights laws, is that he shall not be discriminated against solely on account of his race or color, and it follows that no state law can for that cause alone exclude him from the jury box, nor can a state officer be permitted, in the performance of his official duties, to purposely keep the colored man off the jury lists." Houston, J., concurred in the opinion of the other Judges, and expressed his surprise that the petition for removal contained the statement that the colored man is not a voter in Delaware by its Constitution and laws. That, he said, "is not true, and ought not to be asserted; because there is not a lawyer of any political party, that has ever doubted, since the adoption of the Fourteenth Amendment to the Constitution of the United States, that the word 'white,' in our Constitution, was entirely stricken out. That [392] goes to the root of the whole matter, and there is no discrimination in the Constitution or laws of our State against colored men as jurors."

There is another consideration upon this branch of the case which is entitled to weight. In some of the States, particularly those in which slavery formerly existed, no alteration of the Constitution was possible except in the particular mode prescribed, unless, indeed, the people assumed to disregard the express limitations which their own fundamental law imposed upon the power of amendment. If the Constitution is obeyed, no alteration of its provisions could in some of the States, be effected short of several years. And if the position taken by counsel be correct, so long as the mere language of a State Constitution as originally framed and adopted, is inconsistent with that equality of civil rights secured by the recent Amendments to the Federal Constitution, every civil suit or criminal prosecution in that State, against a colored man, would be removable, under section 641 of the Revised Statutes, into the Circuit Court of the United States, although the State by all its organs of authority, legislative, executive and judicial, should recognize without reservation or qualification, the legal effect as well of the Amendments as of the statutes enacted to enforce them. We cannot believe that section was intended by Congress to be so far-reaching in its results, or that its reasonable construction requires us to hold that the *State* of Delaware, by its Constitution and laws, denies or prevents, or impairs the enforcement, in its judicial tribunals, of rights secured by any law providing for the equal civil rights of citizens of the United States. Had the State, since the adoption of the Fourteenth Amendment passed any statute in conflict with its provisions or with the laws enacted for their enforcement, or had its judicial tribunals, by their decisions, repudiated that Amendment as a part of the supreme law of the land, or declared the Acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them in the judicial tribunals of the State, as, under the Constitution and within the meaning of section 641, would authorize a removal of the suit or prosecution to the Circuit Court of the United States. No such case is presented here. The discrimination complained of does not result from the [393] Constitution or laws of the State, as expounded by its highest judicial tribunal; and, consequently, it could not be made manifest until after the trial commenced in the State Court. The prosecution against the plaintiff in error was not, therefore, removable into the Circuit Court, under section 641. In thus construing the statute we do not withhold, from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the State, his constitutional equality of civil rights, all opportunity of appealing to the courts of the Union for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied at the trial in the State Court, or in the execution of its judgment, any right, privilege or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review.

What we have said leads to the conclusion that the State Court did not err in disregarding the petition for removal.

The remaining question relates to the denial of the motions to quash the indictment and the panels of jurors. The grounds upon which the motions are placed were formally and distinctly stated, and are fully set out in the bill of exceptions. They were the same as those assigned in the verified petition filed by the accused for the removal of the prosecution into the Circuit Court of the United States, viz.: that from the grand jury that found, and from the petit jury that was summoned to try the indictment, citizens of the African race, qualified in all respects to serve as jurors, were excluded from the panels, because of their race and color; and that,

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in fact, persons of that race, though possessing all the requisite qualifications have always, in that county and State, been excluded because of their race, from serving on juries. That colored persons have always been excluded from juries in the courts of Delaware was conceded in argument, and was likewise conceded in the court below. The *Chief Justice*, however, accompanied that concession with the remark in reference to this case, "That none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity, to sit on juries." The exceptions, he said, were rare. [394]

Although, for the reasons we have given, the accused was not entitled to a removal of this prosecution into the Circuit Court of the United States, he is not without remedy if the officers of the State charged with the duty of selecting jurors were guilty of the offense charged in the defendant's petition. A denial, upon their part, of the right of the accused to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Va.* v. *Rives*, "The court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court," and, ultimately in this court upon review. 100 U. S., 322 [XXV., 671].

We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it *is* a right to which he is entitled, "That in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color." So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motions to quash the indictment and the panels of jurors.

We are informed by the bill of exceptions that when the motions to quash were made, it was agreed between the State, by its Attorney-General, and the prisoner, by his counsel, with the assent of the court, that the statements and allegations in the petition for removal "should be taken and treated, and given the same force and effect, in the consideration and decision" of the motions "as if said statements and allegations were made and verified by the defendant in a separate and distinct affidavit." The only object which the prisoner's counsel could have had in filing the affidavit was to establish the grounds upon which the motions to quash were rested. It was in the discretion of the court to hear the motions upon affidavit. No counter affidavits were filed in behalf of the prosecution. Nor does it appear that, at the trial, the State, by its Attorney-General, controverted, in any form, the allegation, made with the utmost directness, that the officers of the State had purposely excluded from the juries, because of their color, citizens of the African race, qualified to perform jury service. Nor does the bill of exceptions disclose any suggestion or intimation, upon the part of the State, of any objection to the prisoner's affidavit as evidence in support of the motions. Under these circumstances, without any evidence, by affidavit or otherwise, upon the part of the State, the motions to quash were submitted for determination. They were overruled, upon the ground that "no evidence had been produced, or offered by the accused" to prove that the alleged exclusion of colored persons from the juries was because of their color. The court said that such fact of exclusion could not be established by the circumstance that no persons of the African race were, in fact, on the panels; but "should have been proven affirmatively on the part of the defendant, and by competent testimony, outside of his affidavit, before said motions to quash could be granted." [395]

Thereupon—the bill of exceptions proceeds—before the trial commenced and before the accused had even been arraigned or had pleaded to the indictment, he further moved the court to permit him to produce, as witnesses, in support of the motions to quash, "The commissioners of the levy court, and the clerk and bailiff of said levy court, and that the court should issue by its clerk subpœnas for said persons as witnesses to testify as aforesaid." To the granting of that motion, the Attorney-General of the State objected, and his objection was sustained. The bill shows that the motion to go into further proof was denied "On the ground that full time to produce such witnesses to make such proof had existed before the motion was heard; that application for leave to summon witnesses to support a motion which had been argued and refused, because of want of proof, when sufficient time had existed for its production, was without precedent in the Court of Oyer and Terminer in this State and, therefore, in this case, the motion must be treated as coming too late to be granted."

It may be argued that the ruling of the court whereby the prisoner was denied the privilege, after the motions to quash were overruled and before the trial commenced, of making further proof in support of the charge that both grand and petit juries had been selected in violation of the Constitution and laws of the United States, is not the subject of review in this court. Without discussing that proposition, we may remark, with entire respect for the court below, that the circumstances, in our judgment, warranted more indulgence, in the matter of time, than was granted to a prisoner whose life was at stake, and who was too poor to employ counsel of his own selection. If it be suggested that the commissioners, when summoned, could not have been compelled to testify, it may be answered that they might not have claimed any such exemption. But that objection, however plausible or weighty, did not apply to the clerk and bailiff of the levy court. The clerk of the Court of Oyer and Terminer was himself, as we are advised by the opinion of the *Chief Justice*, the clerk of the levy court, attending its sessions and assisting in the transaction of its business. That officer, we may presume, was present in court when the application to examine him as a witness was made. He and the bailiff were in a position, perhaps, to clearly sustain or clearly dis- [396]

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prove the allegation that the grand and petit juries were organized upon the principle of excluding therefrom all colored persons, because of their race, a charge involving the fairness and integrity of the whole proceeding against the prisoner.

But passing by this ruling of the court below as insufficient, in itself, to authorize a reversal of the judgment, we are of opinion that the motions to quash, sustained by the affidavit of the accused—which appears to have been filed in support of the motions, without objection to its competency as evidence, and was uncontradicted by counter affidavits or even by a formal denial of the grounds assigned—should have been sustained. If, under the practice which obtains in the courts of the State, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the State could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made [397] by its Attorney-General at the trial. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit "in the consideration and *decision*" of the motions implied, as we think, that the State was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice. The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State Court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State Court to redress the wrong by them committed, was a denial of a right secured to the prisoner by the Constitution and laws of the United States. Speaking by *Mr. Justice* Strong, in *Ex parte Virginia*, we said, and now repeat, that "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning." *Ex parte Va.*, 100 U. S., 347 [XXV., 679].

The judgment of the Court of Oyer and Terminer is reversed, with directions to set aside the judgment and verdict, as well as the order denying the motion to quash the indictment and panels of jurors, and for such proceedings, upon a further hearing of those motions, as may be consistent with the principles of this opinion. [398]

Mr. Chief Justice **Waite**, dissenting:

I am unable to concur in this judgment. We said in *Va.* v. *Rives*, 100 U. S., 322 [XXV., 671], that the mere fact that persons of color had not been allowed to serve on juries where colored men were interested, was not enough to show that the defendants had been discriminated against because of their race. That is all that was shown in this case on the motions to quash, except that the accused swore in an affidavit that the exclusion of colored men from juries in Delaware had been because of their race. I cannot believe that the refusal of the court, on such an affidavit unsupported by any evidence, to quash the indictment and quash the panel of jurors because the defendant had been discriminated against, on account of his race, was such an error in law as to justify a reversal of the judgment. As the motions had once been submitted on the affidavit of the defendant alone and decided, it rested in the discretion of the court to allow a rehearing and permit further evidence to be introduced. The refusal of the court to do so cannot, as I think, be assigned for error here.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field**, dissenting:

I am unable to concur with the majority of the court in the decision in this case. It proceeds upon two assumptions, both of which, in my judgment, are erroneous: one, that on motions to the court, the averments of a party as [399] to matters not resting within his personal knowledge, if not specially contradicted, are to be taken as true; the other, that the clause in the 14th Amendment to the Constitution prohibiting the States from denying to any person within their jurisdiction the equal protection of the laws, requires them, in cases affecting the rights and interests of persons of the colored race, to summon persons of that race for jury service.

The defendant, who is a colored man, was indicted in May, 1880, in the Court of General Sessions for the County of New Castle, in the State of Delaware, for a rape upon a white woman, a crime punishable in that State with death. On motion of the Attorney-General of the State, the indictment was removed for trial to the Court of Oyer and Terminer of the county. The defendant then presented a petition praying for its removal to the Circuit Court of the United States, setting forth as grounds for the application that he was a citizen of the United States, and of the State of Delaware, of African race and descent; that, by the statutes of the State, all persons qualified to vote at its general elections were liable to serve as jurors, with certain exceptions, not important to be here mentioned; but that, by the Constitution of the

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State, the right of an elector was enjoyed only by free white male citizens over the age of twenty-one years; that the Levy Court of New Castle County was required, at its annual session in March, to select from the list of the taxable citizens of the county the names of one hundred sober and judicious persons to serve, if summoned, as grand jurors at the several courts to be held that year; and also the names of one hundred and fifty other sober and judicious persons to serve, if summoned, as petit jurors in such courts; that the levy court, at its session in March, 1880, in thus selecting persons to serve, if summoned, as grand and petit jurors in those courts, including that of the general sessions and that of oyer and terminer, had selected no persons of color or African race, but, on the contrary, had excluded them because of their race and color; that the prothonotary and clerk of the peace of the county had drawn from the list of those thus selected the grand jurors by whom the indictment against the petitioner was found, and the petit jurors by whom he was to be tried, and that persons of color and of African race, though otherwise qualified, had always been excluded from serving on juries, in the county and State, because of their race and color; that by reason thereof, the petitioner, in the finding of the indictment had been and in the trial thereof would be denied the equal protection of the laws; and further, that by the exclusion of all persons of [400] color and African race from the grand and petit juries of the State, by force of its Constitution and laws, the petitioner was denied, and could not enforce in its judicial tribunals, the right secured to him by the Act of Congress providing for the equal civil rights of citizens of the United States.

The Constitution of Delaware was adopted in 1831; and the counsel for the defendant in presenting the petition assumed that its limitation of the right of suffrage to white male citizens was still operative, notwithstanding the 15th Amendment, and that as white persons are there named as electors, only such were allowed to serve as jurors. But this view is clearly untenable. The 15th Amendment took effect upon its adoption and operated to strike out the word "white" from the Constitution of Delaware; and such has been the uniform ruling of the courts of that State. The court of oyer and terminer, accordingly, held that there was no law of the State forbidding the levy court to select persons of African race and color as jurors because of their race and color, if otherwise qualified; and further, that it did not appear that the grand and petit juries, though composed entirely of white persons, were so made up by the exclusion of colored persons on the ground of their race and color, or that the defendant was denied any right secured to him as a citizen of the United States through the selection of those panels. The application for a removal of the indictment to the United States Circuit Court was, therefore, denied. It is not necessary to justify this ruling by any extended argument, for it is held by a majority of this court that the removal was properly refused.

The defendant then moved to quash the indictment and the panel of grand jurors by which it was found, and the panel of petit jurors summoned for its trial; giving as reasons for the motion the action of the levy court in selecting persons to serve, if summoned, as grand and petit jurors, and the action of the prothonotary and clerk of the peace of the county in drawing the jurors from the list of those selected, and the consequent deprivation of the petitioner's rights; all of which are stated in the petition for the removal of the case. No additional affidavit was filed, but the Attorney-General of the State waived this omission and consented that the statements in that petition should be [401] taken and treated as of the same force and effect in the consideration of the motion to quash, as if presented by a separate affidavit. The motion was then heard, and after being retained under advisement for some days was denied, because, although in fact no persons of African race or color were on the panel either of the grand or petit jury, no evidence had been produced or offered by the defendant to prove his statement that the exclusion was by reason of their color or race; and the court could not accept such fact as established from the circumstance that no such persons were on either list or panel nor from the unaided affidavit of the defendant; but held that it should have been proved affirmatively by competent testimony outside of his own affidavit. This ruling constitutes, in the opinion of the majority of the court, reversible error.

It is obvious that the mere fact that no persons of the colored race were selected as jurors, is not evidence that such persons were excluded on account of their race or color. The law only required one hundred "sober and judicious" persons to be selected to serve as grand jurors, and one hundred and fifty such persons as petit jurors, out of the whole body of the county, and these numbers may have been selected without any other consideration than their merit and fitness to perform jury duty. There is no suggestion that the grand jurors by whom the indictment was found, or the petit jurors summoned for the trial, had not the prescribed qualifications, and were not "sober and judicious" men. It would seem, when the law has been obeyed, as in this case, that something more than the mere absence of colored persons from the panels should be shown before they can be set aside. And the fact that colored persons had never, since the Act of Congress of May 1, 1875, been selected as jurors may be attributed to other causes than those of race and color.

In *Va.* v. *Rives*, which was before us at the last Term, it was urged for the removal of the indictment against persons of the colored race from the State to the Federal Court, that the grand jury by which they were indicted and the [402] jury by which they were to be tried, were composed wholly of persons of the white race, and that none of their race had ever been allowed to serve as jurors in the County of Patrick, (where the indictment was found and the trial was to take place), in any case in which a colored man was interested; but the court, speaking through *Mr. Justice* Strong, said that this statement fell "Short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected." 100 U. S., 322

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[XXV., 671]. Upon this subject the court below said:

"That none but white men were selected, is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity to sit on juries. Exceptions there are, unquestionably, but they are rare; and so much so, that it is not often that more than one colored man appears upon a panel in the United States Courts which have a whole State to select from; whereas, in this case, the selection was confined to a single county. And in support of the suggestion of unfitness, we have the fact that though the constitutional Amendment and the legislation 'appropriate' to carry it into effect have been in force, the former for about fifteen years and the latter over five years, yet no instance has yet occurred where parties to a proceeding—and they are very often colored men—have ever selected a man of African descent as a referee. This fact is not to be disregarded in assigning a cause for the exclusion of negroes from juries, if such exclusion could be shown to have been made. With our knowledge, as men of the State, of the African race in Delaware, and of the circumstance just referred to, it would be wholly unwarranted in us to infer exclusion for the mere reason of color, because our juries are, in point of fact, composed of white men alone; or to entertain a suspicion of such cause unless it had better support than the wholly unsupported affidavit of the defendant. To impute to the levy court a purpose to do otherwise than perform their duty by the selection of 'sober and judicious' persons to serve upon the juries, as the law requires, would be a wrong on our part upon the well known principle that, in the absence of proof to the contrary, a public officer, discharging an official obligation or function, is to be presumed to have done it faithfully according to law." [403]

It also seems to me plain that the court below properly refused to accept as true the statements in the defendant's affidavit. If the unsupported statements of a party thus made could be taken as true, on a motion to quash, very few indictments would stand before the affidavits which would be offered. Here the affidavit was as to matters which could not possibly have been within the knowledge of the petitioner. However positive his averments, they must, therefore, be taken, like the averments as to the law of the State, as made upon information and belief only. It also imputed grave offenses to the officers of the levy court, if the Act of Congress, on the subject of jurors in State Courts, is valid. Under these circumstances, to accept as conclusive his statements would be—as was well observed by counsel—to reverse all the rules of evidence, overturn all orderly procedure in courts of justice, and contradict the settled maxims of ordinary human experience. It would be giving to his expression of opinion and belief, as to the criminal conduct of public officers, the force of positive proof.

After the decision of the motion, the defendant applied for leave to produce the commissioners and the clerk and bailiff of the levy court as witnesses to establish his statements, and that subpœnas be issued for them. This application was denied on the ground that sufficient time had existed to produce such witnesses before the motion was heard, the court observing that "Application for leave to summon witnesses to support a motion which had been argued and refused because of want of proof, when sufficient time had existed for its production, was without precedent in the Court of Oyer and Terminer of the State, and, therefore; in this case, the motion must be treated as coming too late." I may add to what is thus stated, that, so far as my knowledge extends, the application is without precedent in any court. Applications may be heard for a rehearing; but until a rehearing is had, it is not permissible to call witnesses for the motion already decided. Besides this consideration, there was no affidavit nor suggestion, by the defendant, that the officers named would support his statement. His motion was simply for permission to make the experiment by calling them to the stand. The prothonotary and clerk of the peace were not shown to have had any knowledge on the subject; and the commissioners of the levy court could not have been required to answer as to the asserted fact that persons were excluded by them from the jury list on account of their race or color. If the law of Congress prohibiting such exclusion be valid, the commissioners by such action would have subjected themselves to penalties. And, whilst it is true that a witness may not claim exemption from answering questions where the answer might subject him to a criminal prosecution, yet it would be an unusual thing to require parties to be summoned upon a suggestion that they might be willing to criminate themselves and thus furnish support to a motion. The refusal to allow the defendant to make such an experiment with the commissioners, and to enter on an exploring expedition with the others named, does not appear to be a harsh ruling, meriting animadversion, but one perfectly just and proper. And in this connection the statement of counsel of the defendant in their printed brief is not to be overlooked, that it was not in his power "to produce any evidence of the intent with which the levy court excluded men of his race and color from the jury lists, other than the presumptive evidence already discussed," that is, such as arose from the fact that they had always been excluded from jury service; a statement which is equivalent to an admission that the right for which counsel now contend, had it been allowed to the defendant, would have been of no avail to him. [404]

But, erroneous as I deem the ruling of the majority of this court in the weight accorded to the unsupported averments of the defendant, as to matters not within his personal knowledge, the meaning given to the concluding clause of the 14th Amendment presents a matter for consideration of far greater importance. True, the opinion only reaffirms the doctrine in the cases from Virginia decided at the last Term. I thought the doctrine erroneous then, and with great deference to my associates I must say, that after a careful and repeated perusal of their opinion, my conviction remains unchanged. The legislation of Congress, which requires persons of the colored race to be admitted to serve as jurors in State Courts, is contained in the 4th section of the Act of [405]

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March 1, 1875, 18 Stat. at L., 335, "to protect all citizens in their civil and legal rights," which declares: "That no citizen possessing all other qualifications, which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000."

Before the adoption of the 13th, 14th and 15th Amendments to the Constitution, no one would have pretended that Congress possessed any power to legislate with respect to jurors, grand or petit, in the State Courts. Upon no one subject would there have been a more general concurrence of opinion than that their selection was a matter entirely of state regulation; that it was for the States exclusively to determine who should be liable to serve as jurors in their courts, what qualifications they should possess, and in what manner they should be selected. Indeed, it was competent for the states to dispense completely with juries, and to require all suits, civil and criminal, to be determined without their aid.

Of the three Amendments, it is plain that the 13th and 15th have no bearing upon the selection of jurors. The 13th prohibits slavery and involuntary servitude, except in punishment for crime, within the United States, or in any other place subject to their jurisdiction. It makes everyone, within all our broad domain and wherever our jurisdiction extends, on land or sea, a freeman, with the same right to pursue his happiness as all others, and on like conditions. But it does not undertake to do anything more; it does not confer any political rights; it leaves the States with all their previous powers to determine who shall fill their offices and be intrusted with the administration of their laws. A similar provision was found in the Constitutions of all the free States, and it was never supposed that it impaired in any respect the sovereign right and power of the [406] people of every State to determine to whom they would confide the trusts of government.

The 15th Amendment only prohibits the denial or abridgment of the elective franchise to citizens by reason of their race, color or previous condition of servitude. It excludes from the power of the State one ground of limitation upon the qualification of voters; it touches upon no other subject. It is, then, to the 14th Amendment that the advocates of the congressional Act must resort to find authority for its enactment, and to the first section of that amendment, which is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the first clause of this section, declaring who are citizens of the United States, there is nothing which touches the subject under consideration. The second clause, declaring that "No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States," is limited, according to the decision of this court in the *Slaughter-House Cases* [83 U. S., XXII., 394], to such privileges and immunities as belong to citizens of the United States, as distinguished from those of citizens of the State. If this construction be sound—and, restricted as it is, it has not been overruled by those who approve of a loose and latitudinarian construction of another clause of the same section—it will not be contended that the privilege of persons to act as jurors is covered by the inhibition. But if a broader construction be given to the clause, such as was advocated by the dissenting Judges in the *Slaughter-House Cases*, the inhibition can have no application. The Constitution, previous to this Amendment, declared that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and it was never supposed or contended that jury duty or jury service was included among those privileges and immunities. The third clause, which declares that no [407] State shall deprive any person of life, liberty or property, without due process of law, has no reference to this subject. That is a provision found in all our State Constitutions from the origin of the government, and is intended to protect life, liberty and property from arbitrary legislation. It is upon the last clause of the section that the majority of the court are compelled to rely to sustain the Act of Congress. "No State shall deny to any person within its jurisdiction the equal protection of the laws." What, then, is meant by this provision, "equal protection of the laws?" All persons within the jurisdiction of the State, whether citizens or foreigners, male or female, old or young, are embraced in its comprehensive terms. If to give equal protection to them requires that persons of the classes to which they severally belong shall have the privilege or be subject to the duty—whichever it may be—of acting as jurors in the courts in cases affecting their interests, the mandate of the Constitution will produce a most extraordinary change in the administration of the laws of the States; it will abolish the distinctions made in the selection of jurors between citizens and foreigners, and between those of our race and those of the Mongolian, Indian and other races, who may be at the time within their jurisdiction. A Chinaman may insist that people of his race shall be summoned as jurors in cases affecting his interests, and that the exclusion is a denial to him of the equal protection of the laws. Any foreigner, sojourning in the country, may make a similar claim for jurors of his Nation. It is obvious that no such claim would be respected, and yet I am unable to see why it should not be sustained, if the construction placed upon the Amendment by the majority of the court in this case be sound.

It seems to me that the universality of the protection contemplated by the clause in question renders the position of the majority of the court untenable. No one can truly affirm that women, the aged, and the resident foreigner,

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whether Caucasian or Mongolian, though excluded from acting as jurors, are not as equally protected by the laws of the State as those who are allowed or required to serve in that capacity. To afford equality of protection to all persons by its laws, does not require the State to permit all persons to participate equally in the administration of those laws or to hold its offi- [408] ces, or to discharge the trusts of government. Equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the Amendment, when its courts are open to them on the same terms as to others, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty, and the pursuit of happiness, which do not equally affect others; when they are liable to no other nor greater burdens or charges than such as are laid upon others, and when no different nor greater punishment is enforced against them for a violation of the laws. When this condition of things exists in a State, there is that equality before the law which is guaranted to all persons within its jurisdiction. The Amendment, as I said in *Ex parte Virginia*, "secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration, as they stood previous to its adoption. It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals." "This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color or previous condition of servitude, a new Amendment was required." 100 U. S., 368 [XXV., 687].

The position that in cases where the rights of colored persons are concerned it is essential for their protection that individuals of their race should be summoned as jurors, is founded upon the assumption that in such cases white persons will be prejudiced jurors. "If this position," as I said in the case cited, "be correct, there ought not to be any white persons on the jury when the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considera- [409] tions than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other." *Id.*, 369 [687].

As I am unable to find any warrant in the 14th Amendment for the legislation of Congress interfering with the selection of jurors in the State Courts; or to perceive, even if that legislation be deemed valid, any error in the ruling of the court of Delaware, I am of opinion that its judgment should be affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 116, 118, 121, 123; 109 U. S., 49; 93 N. Y., 458.

[426]

ST. JOSEPH & DENVER CITY RAILROAD COMPANY, WILLIAM BOND, Receiver, *Plf. in Err.*,

v.

MATTHEW BALDWIN.

(See S. C., 13 Otto, 426–431.)

Railroad land grant—right of way over public lands—state power.

1. The Act of Congress of July 23, 1866, ch. 212, granting to the State of Kansas for the benefit of the St. Joseph and Denver City Railroad Company, the right of way over public lands, is a present absolute grant.

2. All persons acquiring any portion of the public lands after the passage of the Act in question, took the same subject to the right of way conferred by it for the proposed road.

3. Where Congress has conferred upon a railroad corporation of a State a right of way over the public lands of the United States in any one of the Territories, it may be doubted whether the State, subsequently created out of the Territory, can prevent the enjoyment by such corporation of the right conferred.

[No. 273.]

Submitted Apr. 20, 1881. Decided May 2, 1881.

IN ERROR to the Supreme Court of the State of Nebraska.

Statement of the case by *Mr. Justice* **Field**:

This was an action by the plaintiff, under the laws of Nebraska, to recover of the St. Joseph & Denver City Railroad Company, or its successor in interest, damages for entering upon his land in that State and appropriating, in the con- [427] struction of its road, a strip of the land two hundred feet in width and two hundred rods in length. The Company claimed a right of way over the land of that width under the Act of Congress of July 23d, 1866, entitled an "Act for a Grant of Lands to the State of Kansas to Aid in the Construction of the Northern Kansas Railroad and Telegraph Company." 14 Stat. at L., 210. The 1st section of the Act, so far as it is material in this case, is as follows:

"Be it enacted, etc., That there *is hereby granted to the State of Kansas*, for the use and benefit of the Saint Joseph & Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, *to construct and operate a railroad from Elwood, in Kansas, westwardly, via Maryville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude*, every alternate section of land designated by *odd* numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of route of said road is definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections, or parts of sections designated by odd numbers as shall be equal to such lands as the

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United States have sold, reserved or otherwise appropriated, or to which the rights of preemption or homestead settlements have attached as aforesaid, which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid."

The 4th section is as follows:

"And be it further enacted, That as soon as the said Company shall file with the secretary of the Interior maps of its line designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this Act in such manner as may be best calculated to effect the purposes of this Act [428] and subserve the public interest."

The 6th section is as follows:

"And be it further enacted, That *the right of way through the public lands be, and the same is hereby granted to said Saint Joseph & Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed*, and the right is hereby given to said Corporation to take from the public lands adjacent to the line of said road, material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, *where it may pass through the public domain;* also, all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables and water stations."

When the grant of Congress was made, the land claimed by the plaintiff was vacant and unoccupied land of the United States. But the line of the road over it was not definitely located until October, 1871. He acquired whatever rights he possesses in October, 1869. The defendant contends that the plaintiff took the land subject to its right of way. He contends that the grant of the right of way took effect only from the date at which the Company filed its maps designating the route with the Secretary of the Interior. The district court of the State agreed with him and gave judgment in his favor. The Supreme Court affirmed it, and to review it the cause is brought here.

Messrs. Doniphan & Reed, **John F. Dillon**, *Ashbel Green* and *A. J. Poppleton*, for plaintiff in error.

Mr. **E. E. Brown**, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The Act of Congress of July 23d, 1866, makes two distinct grants; one of lands to the State of Kansas for the benefit of the St. Joseph and Denver City Railroad Company in the construction of a railroad from Elwood in that State to its junction with the Union Pacific *via.* Maryville; the other of a right of way directly to the Company itself. The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. Their grant was subject to the condition that if, at the time the line of the road was definitely [429] fixed, the United States had sold any section or a part thereof, or the right of preemption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated, which should be held by the State for the same purposes. The limitations upon the grant are similar to those found in numerous other grants of land made by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the meantime any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and preemption, and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired. The language of the Act here, and of nearly all the congressional Acts granting lands, is in terms of a grant *in presenti*. The Act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. "There is hereby granted," are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the Act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this court to similar language in other Acts of Congress. *Mo., Kan. & T. R. R. Co.* v. *Kan. P. R. R. Co.*, 97 U. S., 497, 498 [XXIV., 1097]; *R. R. Co.* v. *U. S.*, 92 U. S., 733 [XXIII., 634].

But the grant of the right of way, by the 6th section, contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for [430] the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

The right of way for the whole distance of the proposed route, was a very important part of the aid given. If the Company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of the road is recognized throughout the Act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had

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a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed, is conclusive that none exists.

We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the Act in question, took the same subject to the right of way conferred by it for the proposed road.

The fact that the right of way over land in Nebraska was granted to a corporation in Kansas does not alter the case. Nebraska was at the time a Territory of the United States, and it was entirely competent for Congress to confer upon any corporation of a State a right of way for a railroad to be constructed by it through the lands of the United States situated in that Territory. And in February, 1869, after the Ter-
[431] ritory had become a State, its Legislature, by an express enactment, authorized railroad companies organized under the laws of Kansas, Missouri, or Iowa, to extend and build their roads into the State, and declared that, upon complying with certain conditions, they should possess all the powers, franchises and privileges of railroad companies incorporated under its laws. It is not shown that the Company here has not complied with the prescribed conditions, even if such an objection could be raised by any other party than the State itself. But independently of this consideration, where Congress has conferred upon a railroad corporation of a State a right of way over the public lands of the United States in any one of their territories, it may be doubted whether the State subsequently created out of the territory could prevent the enjoyment by such corporation of the right conferred. It could do so only on the same terms that it could refuse a recognition of its own previously granted right, for in such matters the State would succeed only to the authority of Congress over the territory.

The judgment of the Supreme Court of Nebraska must, therefore, be reversed and the cause be remanded to it, with directions that further proceedings be had in accordance with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Chief Justice* **Waite** and *Mr. Justice* **Miller.**

Cited—106 U. S., 369.

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[435] NEW YORK LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

EDSON C. BANGS.

(See S. C., 13 Otto, 435-441.)

Service of process on infant—judgment, when void.

1. The Statute of Michigan, requiring the general guardian of an infant to "appear for and represent his ward in all legal suits and proceedings," does not change the necessity of service of process upon such infant in a case before a court of the United States, where a personal contract alone is involved.

2. A decree or judgment in such a case can be collaterally attacked and is void, if rendered in a case where a guardian *ad litem* had been appointed without service of process on the infant.

[No. 227.]

Argued Apr. 6, 7, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

Statement of the case by *Mr. Justice* **Field:**

This was an action on two policies of insurance upon the life of James H. Bangs, each for $5,000, issued on the 22d of November, 1875, by the New York Life Insurance Company, and made payable to the plaintiff. It was originally commenced in a court of the State of Minnesota, and, on motion of the Company, was removed to the Circuit Court of the United States. The petition for the removal averred that the plaintiff was a citizen of Minnesota and that the Company was a corporation created under the laws of New York. To the complaint the Company answered and, in addition to a general denial of its allegations, set up that the assured had committed suicide by voluntarily taking poison with the intention of producing death; that when the policies were applied for and obtained, the assured was represented to the Company to be in sound health, correct in habits, to have every prospect of a long life, and to be a person who fully intended to live as long as possible in the course of nature; that the Company relied upon these representations and believed them to be true, and would not otherwise have accepted the risks and issued the policies, or either of them; but that, nevertheless, the representations were false and fraudulent and, at the time they were made and the policies were applied for and obtained, the insured intended to take his life within a short period and thereby to defraud the Company out of the amount of insurance, and that in execution of this fraudulent purpose he took his life. The action was commenced in June, 1876, and in July following, the order for its removal to the Circuit Court of the United States was made, but the proceedings were not, in fact, [436] transferred until the subsequent December, when the answer was filed. Nothing further was done in the case until June, 1877, when the Company obtained leave to file a supplemental answer setting up a decree which, during that month, it had recovered against the plaintiff in the Circuit Court of the United States for the District of Michigan. It appears that in March, 1876, the Company had commenced a suit in equity, in that court, against the plaintiff here and his mother, to obtain a cancellation of the policies of insurance and an injunction against instituting or prosecuting any action at law upon them. The bill averred—what is substantially stated in the answer above, but with much greater detail—that the assured obtained the policies with the intention, at the time, of taking his life soon afterwards and thereby defrauding the Company out of the amount of

NOTE.—*Service of notice to appear and defend, when necessary to validity of judgment.* See, *note to* Hollingsworth v. Barbour, 29 U. S. (4 Pet.), 466.

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the insurance, and that he carried out this intention by taking poison, which caused his death. The supplemental answer, after setting forth the institution of the suit, averred that subpœnas were issued and served upon the defendants; that Edson C. Bangs, the son of the assured, to whom the policies were payable, being a minor, one Henry A. Harmon was appointed by the court guardian *ad litem* for him; that by this guardian he filed an answer denying that the death of the insured was caused by poison, or that the policies were obtained for the purpose of defrauding the Company, or that death was effected in pursuance of any such fraudulent design, and all allegations of fraud in the bill; that afterwards proofs were taken and a decree was rendered therein adjudging the policies to be void and ordering their cancellation, and perpetually enjoining the defendants from instituting and carrying on any action at law upon them.

An exemplified copy of the record was annexed to and made part of the supplemental answer. To this answer the plaintiff demurred, on the ground, among other things, that the proceedings of the Circuit Court of the United States were void in that it appeared from the record that the court never had jurisdiction of the person of Edson C. Bangs, the plaintiff here, and no jurisdiction in equity over the action under the circumstances mentioned. [437] The demurrer was sustained, and subsequently the defendant obtained leave to withdraw the original answer, so as to rest his defense upon the supplemental answer and the matters therein pleaded. Judgment was accordingly rendered for the plaintiff for the amount claimed, and to review that judgment the case is brought to this court on writ of error.

The record of the equity suit in Michigan showed on its face that the subpœna issued in it was never personally served upon the defendant, Edson C. Bangs, the plaintiff in this action; that it was only served on his general guardian after he, Bangs, had left the State and gone to Minnesota to reside; that upon the affidavit of the complainant's solicitor, stating that the subpœna and injunction in the case had been a week in the hands of the marshal, who reported that he could not find the defendants in his district, that they had locked up the house where they resided and had temporarily left the State, and that he was unable to find any one in charge of the house, the court had made an order declaring that the service of the subpœna and injunction on the general guardian was a good service upon the infant; that afterwards the general guardian was appointed guardian *ad litem* for him, but not making any appearance for him, and not intending to submit the rights of the infant to the adjudication of the court, his appointment was revoked, and Henry A. Harmon was substituted as such guardian *ad litem* in his place, and that he subsequently acted in the case in that capacity for the infant.

Messrs. **Herbert L. Baker,** *H. H. Swan* and **William A. Maury,** for plaintiff in error.

Messrs. C. K. Davis, J. W. Stone and **Mark S. Brewer,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

As seen from the statement of the case, the only matter for our consideration relates to the validity of the decree of the Circuit Court of the United States for the District of Michigan, and that depends upon the solution of the question whether the court had jurisdiction of the person of the infant, Edson C. Bangs, the plaintiff here, and of the subject-matter of the suit upon which it acted.

From the view we take of the case, it will only be necessary to examine the proceedings to see whether the infant was ever brought before the court so as to justify the appointment of a guardian *ad litem* for him. The general authority of courts of equity over the persons and estates of infants, upon which counsel have so much dwelt, is not questioned. It may be exerted, upon proper application, for the protection of both. This jurisdiction in the English [438] courts of chancery is supposed to have originated in the prerogative of the Crown, arising from its general duty as *parens patriæ* to protect persons who have no other rightful protector. But partaking, says Story, as the prerogative does, more of the nature of a judicial administration of rights and duties in *foro conscientiæ* than of a strict executive authority, it was very naturally exercised by the court of chancery as a branch of its original general jurisdiction. "Accordingly," he adds, "The doctrine now commonly maintained is, that the general superintendence and protective jurisdiction of the court of chancery over the persons and property of infants is a delegation of the rights and duty of the Crown; that it belonged to that court and was exercised by it from its first establishment; and that this general jurisdiction was not even suspended by the Statute of Henry VIII., erecting the court of wards and liveries." The jurisdiction possessed by the English courts of chancery from this supposed delegation of the authority of the Crown as *parens patriæ* is more frequently exercised in this country by the courts of the States than by the courts of the United States. It is the state and not the Federal Government, except in the territories and the District of Columbia, which stands, with reference to the persons and property of infants, in the situation of *parens patriæ*. Accordingly provision is made by law in all the States for the appointment of such guardians, whose duties and powers are carefully defined. The authority of the Federal Courts can only be invoked within the limits of a State for such an appointment where property of the infant is involved in legal proceedings before them, and needs the care and supervision of an officer of that kind. In such a case, to preserve the property from destruction or waste, the Federal Courts may appoint a guardian to take care of it pending the proceedings. And those courts will always see that a proper guardian *ad litem* has charge of the infant's interests where his [439] property is involved in proceedings before them. This is the extent of their authority. Nothing is gained, therefore, in this case by reference to the general power of courts of equity over the persons and property of infants. The infant Bangs possessed no property in Michigan when the suit in equity was commenced against him. That suit did not concern any property, real or personal. It was brought to cancel a contract made with his father, and any decree respecting it would necessarily have been *coram non*

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judice, unless the parties interested were before the court upon the service of a subpœna or their voluntary appearance. The infant, being absent from the State, could not be personally served.

The Statute of Michigan requiring the general guardian of an infant to "Appear for and represent his ward in all legal suits and proceedings unless when another person is appointed for the purpose as guardian or next friend," does not change the necessity of service of process upon the defendants in a case before a court of the United States where a personal contract alone is involved. It may be otherwise in the state courts; it may be that, by their practice, the service of process upon the general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. We believe that in some states, such is the fact, but the state law cannot determine for the Federal Courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against non-resident or absent parties, allowed in some states in purely personal actions, is not permitted in the Federal Courts. Such service can only be resorted to where some claim or lien upon real or personal property is sought to be enforced, and the decision of the court will then only affect property of the party within the district. R. S., sec. 738.

In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants, or their voluntary appearance. And the equity rules qualify the statute only so far as to allow, in cases of husband and wife, a copy of the subpœna to be [440] delivered to the husband, and in other cases a copy to be left at the dwelling-house, or usual place of abode of the defendant, with some person who is a member of or resident in the family. In either mode, the defendant is to be served within the district, and until such service or his appearance, the court has no jurisdiction to proceed or to render a decree affecting his rights or interest. There being here no property of the infant defendant within the district of Michigan, which the court could lay hold of—and he being absent from it—there was no foundation laid for any progress by the court in the case. It never acquired jurisdiction over the infant; it could, therefore, appoint no guardian *ad litem* for him, and the decree rendered against him was ineffectual for any purpose.

Our attention has been called to several cases of the state courts, in which it has been held that a decree or judgment could not be collaterally attacked, though rendered in a case where a guardian *ad litem* had been appointed without service of process on the infant. Such are the cases of *Preston* v. *Dunn*, 25 Ala., 507, 513; *Robb* v. *Irwin*, 15 Ohio, 689, 699; and *Gronfier* v. *Puymirol*, 19 Cal., 629. All of them are illustrative of the position we have stated; they all relate to the interest of the infant in real property in the State.

In *Preston* v. *Dunn*, the bill was filed by an infant, suing by his next friend, to redeem a tract of land which had once belonged to his father, who had mortgaged it, and which had been sold under judicial decree in a foreclosure suit and purchased by the defendant. The father having died pending the foreclosure suit, and a posthumous child to him having been born, a bill of revivor was filed against the administrator and administratrix of his estate, and his infant son. A subpœna was served on the adult defendants and a guardian *ad litem* was appointed by the court for the infant, who appeared for him. It was held by the Supreme Court of Alabama that the decree rendered upon such appearance was irregular but not void, and that it could not be attacked collaterally.

In *Robb* v. *Irwin*, it appeared that a guardian *ad litem* for infant heirs had been appointed in a proceeding for the sale of certain real property in which they were interested. In an action of ejectment subsequently brought by the heirs, it was held by the Supreme Court of Ohio [441] that the proceeding was not vitiated by the appointment of the guardian *ad litem*, without previous service of process on the infant.

In *Gronfier* v. *Puymirol*, a general guardian of the estate of non-resident infants had been appointed by the probate court upon the representation that they were interested in certain real property in the State. In proceedings for a sale of such property the general guardian appeared for the infants without being appointed guardian *ad litem* for them, and it was held by the Supreme Court of California, that the court had jurisdiction to order the sale and that it passed a good title; and that under the practice of the State a general guardian could appear in legal proceedings for his ward when a guardian *ad litem* was not appointed by the court.

There is nothing in these cases which at all conflicts with the views we have expressed as to the jurisdiction of the Circuit Court for the District of Michigan in appointing a guardian *ad litem* for a non-resident or absent infant, in a case which did not touch any property in the district but was brought to cancel a personal contract.

There are, also, some cases in the state courts, in which a judgment upon a personal demand has been sustained against collateral attack, though rendered in an action where a guardian *ad litem* had been appointed without previous service of process upon the infant, but they are exceptional, and there has generally been in them some circumstance which rendered any disturbance of the judgment likely to lead to great hardship and injustice. Such is the case of *Bustard* v. *Gates*, in the Kentucky Reports, 4 Dana, 429. There an ejectment was brought for land more than twenty years after it had been sold, and which during the interval had greatly increased in value. But in none of the cases to which our attention has been called has a judgment been upheld where a guardian *ad litem* had been appointed for a non-resident infant against whom a purely personal demand was prosecuted. If such a case exists, the judgment in it can have no greater force than one rendered for a personal demand against a non-resident upon any other form of constructive service. And, that constructive service will not give jurisdiction in such cases, is the established doctrine of this court. *Pennoyer* v. *Neff*, 95 U.S., 714 [XXIV., 565].

It follows that the judgment below must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—108 U. S., 780.

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[515] COUNTY OF MORGAN, *Appt.*,

v.

JOHN ALLEN ET AL.

(See S. C., 13 Otto, 515.)

Rehearing, when not granted—contract not assumed.

1. A rehearing will not be granted in order that a record of another suit, the decree in which was not pleaded, may be embodied in the transcript, where such decree was not upon the merits and did not conclude any of the parties to it.
2. This court will not assume to make for the parties a contract which they did not choose to make for themselves.

[No. 78.]

Petition filed May 2, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

On petition for rehearing.

Same case on merits, *ante*, 498.

Messrs. **William M. Springer, Wm. Brown** and *E. P. Kirby*, for appellant.

Messrs. Luther Dearborn, **W. H. Campbell** and **H. S. Green**, for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

We do not perceive that the petition for rehearing in behalf of the County of Morgan contains any suggestion which was not pressed upon our attention in oral argument, as well as in the printed briefs heretofore filed. All that counsel said was carefully considered by us. But there were one or two matters, not distinctly covered by our opinion, to which we may properly refer. A rehearing is asked, to the end that a complete record of the suit, in the Circuit Court of the United States for the Southern District of Illinois, of *Studwell, Hopkins and Cobb, Trustees*, v. *Morgan County, etc.*, may be obtained and embodied in the transcript of the present case. If the record of that case were here, it could be of no use to the County. The decree therein is not pleaded for any purpose. Further, it is apparent, as well from the printed arguments filed in this court, for and against the County, as from the testimony of the witnesses who refer to the case in the circuit court, that the suit of *Studwell, etc.*, v. *Morgan County, etc.*, was dismissed *by the complainants therein, and that there was no adjudication upon the merits.* The decree of dismissal in that suit, therefore, concluded none of the parties to it, even were it conceded that the trustees had authority, in virtue of their position, to represent the present appellees in any litigation with Morgan County touching its liability to creditors of the Illinois River Railroad Company.

We did not, as counsel seem to suppose, overlook the argument based upon the subscription made by the City of Jacksonville. That subscription, as matter of law, was wholly disconnected from the subscription made by the County, and we could not regard the former as payment, in whole or in part, of the latter, without assuming to make for the parties a contract which they did not choose to make for themselves. If as urged, that the result is unfortunate for the County, we can only say, what cannot be too often repeated, that hard cases cannot be permitted to make bad law.

The rehearing is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Miller**, *Mr. Justice* **Field** and *Mr. Justice* **Bradley.**

WILLIAM ADAM ET AL., *Plffs. in Err.*, [591]

v.

JOHN R. NORRIS ET AL.

(See S. C., 13 Otto, 591-595.)

Patent for Mexican land—prior survey—second patent—technical question of pleading.

1. A patent based upon a Mexican grant is conclusive evidence, only as between the United States and the grantee, that the latter had established the validity of the grant.
2. Where defendants' survey and patent are based upon a superior Mexican grant, their rights are not concluded by a prior survey of the plaintiffs.
3. One survey and patent did not terminate the authority of the Land-Office; it could make another survey and issue another patent. The second patent is not void because for land not covered by the prior patent.
4. It is too late to raise a techical question of pleading, after a full hearing and finding by the court of all the facts pertinent to the case.

[No. 266.]

Argued Apr. 18, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Mr. **S. F. Leib**, for plaintiffs in error:

"The plat and survey so finally determined by publication, order or decree as the case may be, shall have the same effect and validity in law as if the patent for the land so surveyed had been issued by the United States."

12 Stat. at L., 34, sec. 5.

A patent conveys the legal title to all lands within its calls.

Lynch v. *Bernal*, 9 Wall., 320 (76 U. S., XIX., 715); *Henshaw* v. *Bissell*, 18 Wall., 268-9 (85 U. S., XXI., 840); *Fletcher* v. *Peck*, 6 Cranch, 132; *U. S.* v. *Arredondo*, 6 Pet., 738.

Long before the Gaudaloupe patent issued, the title of the public had passed to the plaintiffs' grantors under their survey, it having the dignity and effect of a patent; the public had nothing to convey, and "a patent cannot effect a prior right."

New Orleans v. *De Armas*, 9 Pet., 236; *Rice* v. *R. R. Co.*, 1 Black, 375 (66 U. S., XVII., 152); *Harold* v. *Simonds*, 9 Mo., 323; *Patterson* v. *Tatum*, 3 Sawy., 172; *U. S.* v. *Stone*, 2 Wall., 535 (69 U. S., XVII., 767); *Moore* v. *Robbins*, 96 U. S., 530 (XXIV., 848).

Messrs. **Benjamin S. Brooks** and **James K. Redington**, for defendants in error:

It has been expressly held by this court, that a final survey under this Act, merely settles the fact that a confirmed claim is *correctly located*,

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and does not affect the question of title in third persons, under other grants, or the correctness of their locations.

Miller v. *Dale*, 92 U. S., 476 (XXIII., 786).

The proceedings upon confirmation and patent relate to the date of the presentation of the claim to the Board of Land Commissioners. As the deed of the United States, the patent is effective from that date, and is a bar to all claims under the United States arising subsequently to such petition.

Moore v. *Wilkinson*, 13 Cal., 478; *Yount* v. *Howell*, 14 Cal., 465; *Stark* v. *Barrett*, 15 Cal., 361; *Ely* v. *Frisbie*, 17 Cal., 250; *Teschemacher* v. *Thompson*, 18 Cal., 11; *Leese* v. *Clark*, 18 Cal., 585; *Touchard* v. *Crow*, 20 Cal., 150; *McGarrahan* v. *New Idria Co.*, 49 Cal., 331; *Landes* v. *Brant*, 10 How., 378; *Beard* v. *Federy*, 3 Wall., 478 (70 U. S., XVIII., 88); *Grisar* v. *McDowell*, 6 Wall., 365 (73 U. S., XVIII., 863).

The patent for Gaudaloupe taking effect by relation, necessarily overrides the Laguna patent, later in date and founded on the prior grant and presentation.

Gibson v. *Chouteau*, 13 Wall., 101 (80 U. S., XX., 537); *Landes* v. *Brant*, 10 How., 373.

Mr. Justice **Miller** delivered the opinion of the court:

This was an action to recover possession of land originally brought by the plaintiffs in error in the District Court of the State of California for the County of Santa Barbara, and [592] was removed on the petition of defendants from that court into the Circuit Court of the United States for the District of California. In that court it was tried without a jury, by agreement of the parties. The court made a finding of the facts in the case, in which is set forth all on which the title of either party rests. The case is one dependent strictly on the legal title. Each party is supported by a patent from the United States, by a confirmation of a Mexican grant by the commissioners and by the district court, and by a survey approved by the land-office, each of which includes the land in controversy. The explanation of this is that while the original Mexican grants, which were duly confirmed, surveyed and patented, were in the main for different tracts of land, they have been found to interfere and overlap when the lines of each are clearly ascertained.

The defendants, who were in possession, held under a grant from the Mexican Government, dated March 21, 1840, to Teodoro Arrellanes and Diego Olivera, of the *Rancho* Guadaloupe, and a decree of the District Court of the United States for California confirming that claim May 12, 1857, and a patent from the United States, dated March 1, 1870.

The plaintiffs asserted title under a grant of the Mexican Government of December 29, 1844, to Louis Arrellanes and Eusides Miguel Ortega, of the *Rancho* La Punta de la Laguna, which was confirmed in the district court May 2, 1854, and on which a patent issued October 2, 1873.

If this were all it would seem clear that defendants, being in possession of the land under the older patent from the United States, and the older grant from the Government of Mexico, the judgment of the circuit court in their favor should be confirmed. To this view of the matter the plaintiffs assign several objections as errors, some of which we will notice.

1. It is said that the survey on which plaintiffs' patent was issued was approved by the Surveyor-General January 29, 1861, and publication of it, under the Act of June 14, 1860, was duly made in February and March, 1861, and as no objection was made to it, it became final and conclusive at that time, while the survey on which defendants' patent was issued was approved by the Surveyor-General in June, 1867.

The Act of Congress of June 14, 1860, 12 Stat. [593] at L., 33, required the Surveyor-General, whenever a survey of a confirmed Mexican grant had been approved by him, to make a publication of the survey for a prescribed time, which should be held to be notice to everybody of what it included. Anyone who desired to contest the correctness of this survey could, on a proper application, have it removed or filed in the District Court of the United States, where the objection to the survey should be heard and determined, and, if necessary, corrected by a new survey or otherwise. The Act then declared that "The plat and survey, so finally determined by publication, order or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States." 12 Stat. at L., 34, sec. 5.

Counsel for plaintiffs have argued that a patent from the United States is final and conclusive on everybody, and cannot be disputed in a court of law as to the title it confers.

And no doubt, where the patent is for land of which the government had an undisputed title, the proposition is generally if not always true. But the United States, in dealing with the claimants of lands under Mexican grants, which had come into the political control of our government by the Treaty of Mexico, never made pretense that it was the owner of the lands so granted by Mexico. When, therefore, guided by the action of the tribunals which the government had established to pass upon the validity of these alleged grants, it issued a patent to the claimant, it was in the nature of a quitclaim—an admission that the rightful ownership had never been in the United States, but at the time of the cession it had passed to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases are *Beard* v. *Federy*, 3 Wall., 478 [70 U.S., XVIII., 88]; *Henshaw* v. *Bissell*, 18 Wall., 268 [85 U. S., XXI., 839]; *Miller* v. *Dale*, 92 U.S., 478 [XXIII., 738].

Such a patent was, therefore, conclusive only as between the United States and the grantee, and was evidence that, as to them, the claimants had established the validity of the grant.

The last of the cases above cited gives the history of the Act of June 14, 1860, and holds that the effect of a compliance with the Act is limited to the establishment of the conformity of [594] the survey to the decree of confirmation, which fact could not afterwards be disputed by anyone who, under that Act, had opportunity to contest it before the district court.

We do not think, therefore, that if defendants' survey and patent are based upon a superior Mexican grant, their rights are concluded by the prior survey of the plaintiffs.

2. It is insisted that a patent was issued in

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1866, on a survey of the Guadalupe grant, which did not include the land in controversy; that this action terminated the authority of the land-office in the matter, and the subsequent survey and patent of 1870, which do include the land, are therefore, void.

It is not necessary to decide whether the refusal of the grantee to accept the patent in the present case, and its return by him to the Commissioner of the Land-Office, who ordered a new survey, remove the objection here made, though it is not easy to see why the refusal of the grantee to accept the grant, and his consent to the return of it to the office, before intervening rights had accrued to anyone, did not authorize a correction of any defect in that patent.

This is in effect what was done, and whether the patent of 1866 is still a valid patent, or is no longer of any force, cannot affect this case. If it be valid as to the land covered by it, that does not make void the patent of 1870 for land not covered by it.

If the conveyance of 1866 passed the title to the claimant of a part of the land covered by his confirmed grant, there is no reason why an additional patent should not convey the remainder when the proper officer became satisfied that the first did not convey all that had been confirmed to claimant. Nor is the last patent rendered invalid because, in addition to the land not conveyed by the first patent, it purports to convey also what was already patented.

In short, it is but the common case of a grantor who, having failed to convey what he was bound to convey, makes another deed to correct the wrong. The deeds are not in conflict. If the power of the land-office was exhausted by the first deed, it was only so as to the land which it included. The legal title to that alone could pass by that patent, and if the title to the land now in question remained in the government, the patent of 1870 was sufficient to convey it.

We think the error is not well assigned.

The only other assignment which requires notice is, that judgment should have been rendered for plaintiffs on the pleading. [595]

Plaintiffs averred that they were the owners of a certain large boundary of land. That held by defendants was but a small part of this. Defendants, by their answer, did not set out their own metes and bounds, or any description of what they held, but denied that plaintiffs were the owners and entitled to *all* the land described in the complaint.

It is said that this made an immaterial issue, for if plaintiffs owned the land in possession of defendants, it was not necessary to prove their ownership of what lay outside of that, though claimed in their petition.

This objection was not made in the case before the circuit court. The case was submitted to the court, which found all the facts necessary to decide the question of title to the land held by defendants. We think it is too late to raise this technical question after a full hearing and finding by the court of all the facts pertinent to the case. The pleading would be good after verdict. *Multo fortiori* is it good after this finding, and on appeal, with no attempt to correct it in the court below.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM S. HOYT, *Appt.* [613]

v.

AMASA SPRAGUE ET AL.

CHARLES G. FRANCKLYN AND SUSAN S. FRANCKLYN, his wife, *Appts.*,

v.

AMASA SPRAGUE ET AL.

(See S. C., 13 Otto, 613–637.)

Use of property of deceased to carry on partnership business—legislative power—investments by guardian—manner of investment—acquiescence.

1. Where the legal representative of a deceased partner and all the beneficiaries of the estate, consented to the continued employment of the partnership property in the business of the partnership subsequently carried on by the surviving partners, they ceased to have a lien upon the property as against the subsequent creditors of the concern.

2. The Legislature of the State where the property was situate, had power to pass laws for the appointment of guardians of the property of non-resident infants, situate in that State; and to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property.

3. The Legislature may pass a law authorizing a guardian to invest the property of his ward in the capital stock of a corporation engaged in manufacturing, trading or financial operations, or in a particular class of operations, as banking, insurance or any other that might be specified.

4. The guardian in this case had full power and authority to invest the said interest in the capital stocks of the corporations referred to in the opinion, and having done so, she was no further answerable therefor, but only answerable for the shares of capital stock and the dividends realized thereon.

5. Where such minor, after he came of age, acquiesced in such investment, he cannot maintain a bill to disaffirm such investment and for an account of the estate.

[Nos. 517, 518.]

Argued Jan. 12, 13, 14, 1881. Decided May 2, 1881.

APPEALS from the Circuit Court of the United States for the District of Rhode Island.

The case is fully stated by the court.

Messrs. James McKeen, Thos. H. Hubbard T. T. Crittenden, Thomas E. Stillman, **William Allen Butler** and **George F. Comstock,** for appellants:

The more frequent exercise of the legislative power in authorizing the sale of lands of infants and other persons under disability, for the purpose of promoting their interests, is upheld upon the ground of the parental or tutelary power of the Legislature, as *parens patriæ.*

But in all these cases the courts, in sustaining this doubtful legislative prerogative, proceeded upon the established necessity of the case, or the manifest benefit to the infant or other disqualified person.

Watkins v. *Holman*, 16 Pet., 25; *Ward* v. *N. E. Screw Co.*, 1 Cliff., 565; and see, *Cochran* v. *Van Surlay*, 20 Wend., 365; *Wilkinson* v. *Leland*, 2 Pet., 627; *Davison* v. *Johonnot*, 7 Met., 388; *Dorsey* v. *Gilbert*, 11 Gill. & J., 87; *Leggett* v. *Hunter*, 19 N.Y., 445; *Snowhill* v. *Snowhill*, 2 Green, Ch. (N. J.), 20; *Spotswood* v. *Pendleton*, 4 Call. (Va. Ct. of Appeals), 514; *Sohier*

NOTE.—*Partnership; rights and powers of surviving partners.* See, *note* to Moore v. Huntington, 34 U. S., XXI., 642.

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v. *Hospital*, 3 Cush., 483; *Clarke* v. *Hayes*, 9 Gray, 526.

But in the present case the infants were not citizens of the State or residents within it, or subject to its laws or its parental or tutelary power. They were foreigners to its jurisdiction. Moreover, it was not even made to appear, by any evidence, that their interests would be promoted by the conversion of their property, nor was such the fact.

Whether, therefore, the Resolution of March 9, 1863, is regarded as a usurpation of judicial power, or as an attempt to deal with and dispose of the property of the non-resident infants, without due process of law, it was wholly ineffectual and void, and is condemned by the highest authorities.

Sedg., Stat. and Const. L., 172; opinion of the Justices of the Superior Court of N. H., 4 N. H., 565-572; *Jones* v. *Perry*, 10 Yerg., 59; see, opinion of Green, *J.*, reviewing the cases and distinguishing *Wilkinson* v. *Leland* (*supra*), and *Rice* v. *Parkman*, 16 Mass., 326, in view of the peculiar latitude of legislative powers under the colonial charter of R. I., and the Constitution of Mass.; *Merrill* v. *Sherburne*, 1 N. H., 199; *Greenough* v. *Greenough*, 11 Pa., 489; *Powers* v. *Bergen*, 6 N. Y., 358; *In re Picquet*, 5 Pick., 65; *Lewis* v. *Webb*, 3 Me., 327; *Pryor* v. *Downey*, 50 Cal., 388.

The recent case of *Burke* v. *Bk.* (February, 1880), 12 R. I., 513, is expressly in point and, as we submit, decisive in this court as to the invalidity of the resolution.

Time does not run against complainants thus situated until after the discovery of the fraud or illegality complained of.

This court has never denied relief against the fraudulent or wrongful acts of guardians, trustees, or other persons standing in fiduciary relations to infants, because of mere lapse of time or delay in bringing suit.

Prevost v. *Gratz*, 6 Wheat., 481; *Michoud* v. *Girod*, 4 How., 503; *Meader* v. *Norton*, 11 Wall., 442 (78 U. S., XX., 184); *Hallett* v. *Collins*, 10 How., 174; *Lee* v. *Brown*, 4 Ves., 362; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; *Millar* v. *Craig*, 6 Beav., 433; *Parker* v. *Bloxam*, 20 Beav., 295; *St. Albyn* v. *Harding*, 27 Beav., 11; *Worrell's Appeal*, 23 Pa., 44; *Burrows* v. *Walls*, 5 DeGex, McN. & G., 233; *Godden* v. *Kimmell*, 99 U.S., 201 (XXV., 431); *Thomson* v. *Eastwood*, L. R., 2 App. Cas., 215.

Messrs. **Benj. F. Thurston,** *Jas. Tillinghast* and **Charles Hart,** for appellees:

The bills should be dismissed because of failure to prove fraud.

Price v. *Berrington*, 7 Eng. L. & Eq., 254; *Fisher* v. *Boody*, 1 Curt., 206; *Mount Vernon Bk.* v. *Stone*, 2 R. I., 129; *Ferraby* v. *Hobson*, 2 Phil. (22 Eng. Ch.), 255; *Glascott* v. *Lang*, 22 Eng. Ch., 310; *Eyre* v. *Potter*, 15 How., 42; *Wilde* v. *Gibson*, 1 H. of L., 605; *Tillinghast* v. *Champlin*, 4 R. I., 173.

The General Assembly had constitutional power to pass the resolution.

Every constitutional objection that ingenuity could devise has been invoked against its exercise.

The leading case, and one which has been more generally criticised and commented upon in all the later cases, but which has withstood all attacks, is *Rice* v. *Parkman*, 16 Mass., 326; which decides that the Legislature has power to license a sale of real estate of minors, notwithstanding the Legislature has delegated the same power to the judicial courts.

In re Picquet, 5 Pick., 64; *Davison* v. *Johonnot*, 7 Met., 388; *Sohier* v. *Hospital*, 3 Cush., 483; *Clarke* v. *Hayes*, 9 Gray, 428; *Cochran* v. *VanSurlay*, 20 Wend., 365; *Powers* v. *Bergen*, 6 N.Y., 358; *Thurston* v. *Thurston*, 6 R. I., 296; *Leggett* v. *Hunter*, 19 N.Y., 463; *Williamson* v. *Berry*, 8 How., 495; *Snowhill* v. *Snowhill*, 2 Green (Ch.), 20; *Dorsey* v. *Gilbert*, 11 Gill. & J., 87; *Spotswood* v. *Pendleton*, 4 Call., 514; *Watkins* v. *Holman*, 16 Pet., 63; *McComb* v. *Gilkey*, 29 Miss., 146; *Mason* v. *Wait*, 4 Scam., 127; *Florentine* v. *Barton*, 2 Wall., 210 (69 U. S., XVII., 783).

The next two cases relate to special enactments of the Rhode Island Legislature, prior to the adoption of the present Constitution.

Wilkinson v. *Leland*, 2 Pet., 627; *Ward* v. *Screw Co.*, 1 Cliff., 565.

Neither the allegations in the bills of complaint, nor the proof in support of the allegations, are sufficient to relieve the complainants from the effect of their laches.

Stearns v. *Page*, 7 How., 819; *Fisher* v. *Boody*, 1 Curt., 219; *Badger* v. *Badger*, 2 Wall., 87 (69 U. S., XVII., 836).

In *Upton* v. *Tribilcock*, 91 U. S., 55 (XXIII., 207), the party seeking to rescind, waited some three years. The court says that "The principle laid down in the charge of the Judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud, is a sound one." *Thomas* v. *Bartow*, 48 N. Y., 193.

Again; "If he is not held to be bound to know and accept all the consequences of this connection, he certainly is bound to use care and attention to ascertain his position and promptly to make his choice of retaining it with its advantages and responsibilities, or of abandoning it. * * * * A party must use reasonable diligence to ascertain the facts. *Buford* v. *Brown*, 6 B. Mon., 553."

And again; "Equity will not assist a man whose condition is attributable only to the want of diligence which may be fairly expected from a reasonable person. *Duke of Beaufort* v. *Neald*, 12 Cl. & F., 248, 286.

And again, "Parties who are shareholders and claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude."

Smith's Case, L. R., 2 Ch. Ap., 613; *Denton* v. *MacNeil*, L. R., 2 Eq., 532; *Peel's Case*, L. R., 2 Ch. Ap., 684; *Grymes* v. *Sanders*, 93 U. S., 62 (XXIII., 801), citing *Flint* v. *Wooden*, 9 Hare, 622; *Jennings* v. *Broughton*, 5 DeGex. M. & G., 139; *Lloyd* v. *Brewster*, 4 Paige, 537; *R. R. Co.* v. *Row*, 24 Wend., 74; *Minturn* v. *Main*, 7 N. Y., 220; 7 Rob. Pr., ch. 25, sec. 2, p. 432; *Campbell* v. *Fleming*, 1 Ad. & El., 41; Sugd. Vend., 14th ed., 335; *Diman* v. *R.R. Co.*, 5 R. I., 130; *Lawrence's Case*, L. R., 2 Ch. Ap., 424.

The complainants, after they became of full age, had full knowledge of all the material facts on which they base their claims to relief, for

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more than six years before the filing of their bills; and that upon the authorities which we have considered, the statute is a complete bar.

See, also, *Farnam* v. *Brooks*, 9 Pick., 212, 247; *Knox* v. *Gye*, L. R., 5 H. of L., 656; *Bk.* v. *Daniel*, 12 Pet., 32; *Brown* v. *Buena Vista Co.*, 95 U. S., 157 (XXIV., 422); *Wood* v. *Carpenter* (U. S. S. Ct.), 9 Reporter, 297; *Bk.* v. *Same* (U. S. S. Ct.), 9 Reporter, 300.

The creditors' rights are superior to the complainants' claims.

The creditors, and Mr. Chafee as their representative, thus stand as purchasers of this property for value, and cannot be affected by any secret trusts, equities or even fraud, if any existed between the complainants and other parties.

[614] *Mr. Justice* **Bradley** delivered the opinion of the court:

These cases come up on appeal from the decrees of the Circuit Court for the District of Rhode Island dismissing the complainants' bills. One of the bills was filed by William S. Hoyt and the other by Charles G. Francklyn and Susan, his wife, against Amasa Sprague, William Sprague, individually, and as guardian of the said Hoyt and said Susan; Fanny Sprague, widow and administratrix of Amasa Sprague, senior; Mary Sprague, widow and administratrix of William Sprague, senior, and formerly guardian of said Hoyt and said Susan; The A. & W. Sprague Manufacturing Company, and Zechariah Chafee, assignee of said company for the benefit of creditors, etc. The general object of the bills is, to establish a lien and trust in favor of the complainants, as grandchildren of William Sprague, senior, against the property of the A. & W. Sprague Manufacturing Company, now in the hands of Chafee, the assignee, each to the extent of one twenty-fourth part of the whole property; that being the amount of their interest in the property of the former firm of A. & W. Sprague, which was transferred to the corporation in 1865, whilst the complainants were infants, in fraud, as they allege, of their rights.

Many charges of fraud are made in the bills against the defendants, Amasa Sprague and William Sprague, who carried on the business of the firm after the death of William Sprague, senior, in 1856, in connection with Byron Sprague, until 1862, and after that by themselves. The cases are substantially the same in all respects, and will be considered together.

In order properly to understand the questions raised it will be necessary to take a summary view of the facts.

Amasa Sprague and William Sprague, brothers, under the name of A. & W. Sprague, carried [615] on the manufacturing business in Rhode Island until 1843, when Amasa died, leaving a widow, Fanny Sprague, and four children, two sons and two daughters. The widow took out letters of administration on her husband's estate. The value of the partnership property at that time was estimated at $100,000. William continued to carry on the business with the joint capital, under the same firm name, for the benefit of himself and his brother's family, for thirteen years, when, on the 19th of October, 1856, he died, leaving a widow, Mary Sprague, a son, Byron Sprague, and four grandchildren, who were the children of a deceased daughter, Susan, and her husband, Edwin Hoyt, of the City of New York. These children were at that time under fourteen years of age. Their names were Sarah, Susan S., William S., and Edwin Hoyt, junior. Sarah was 12; Susan, 11; and William S. was 9 years old at the time of their grandfather's death. William S. Hoyt is the complainant in one of the cases now under consideration, and Susan S. Hoyt, now wife of Charles G. Francklyn, with her husband, is complainant in the other case.

William Sprague largely extended the business of the firm, so that when he died, the property, real and personal, was estimated at about $3,000,000. Shortly before his death, and during his last illness, he took into partnership with him, evidently for the purpose of continuing the business and keeping it together, his own son, Byron, and his two nephews, Amasa and William, the sons of his deceased brother Amasa. The terms of this partnership, or the interest which the young men were to have in it, do not appear. They continued, after William Sprague, senior's, death, to carry on the business, as it had previously been carried on, under the name of A. & W. Sprague, without making a settlement with the representatives or beneficiaries of either Amasa Sprague's or William Sprague's estate.

William Sprague, senior, left no will; and his widow, Mary Sprague, took out letters of administration on his estate. Whilst, therefore, the three young men, Byron Sprague, Amasa Sprague and William Sprague, as surviving partners of William Sprague, senior, carried on the business of the firm of A. & W. Sprague, the persons really interested were, first, the two [616] widows and administratrices, Fanny Sprague and Mary Sprague, who were legally entitled respectively, by right of administration, to the several interests of Amasa Sprague, senior, and William Sprague, senior; and secondly, the beneficiaries, or distributees of the estates of Amasa and William respectively, namely: the widow and four children of Amasa Sprague, senior, and the widow and two children of William Sprague, senior, one of the latter, Mrs. Hoyt, being deceased, and being represented by her four children.

One of the daughters of Amasa Sprague had been settled with before William's death, and the other shortly afterwards, by her brothers purchasing her interest. This left the beneficial interest of the property divisible into six equal parts, belonging respectively to Fanny Sprague, widow of Amasa, and her two sons, Amasa and William, and Mary Sprague, widow of William, her son Byron, and the children of her daughter, Susan Hoyt. These persons were all of age, and otherwise *sui juris*, except the Hoyt children, and were all able to consent, and did consent, that the entire partnership estate should be continued in the business of the firm as it had been before. The Hoyt children, of course, could not give any such consent. They resided with their father, Edwin Hoyt, in New York, who was at the head of a commission house in that city by the name of Hoyt, Sprague & Co., which sold on commission a large portion of the goods manufactured by A. & W. Sprague. The partners of the firm were associated with him. Of course he must have been well acquainted with

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the business of the manufacturing establishment, and the large interest which his children had in the concern must have insured his attention to its management. Mr. Hoyt consented to and approved of the continuance of his children's portion in the business of the partnership; and his natural regard for their interests, in connection with his opportunities for observation, preclude the presumption that such continuance was the result of any fraudulent scheme. Had any such scheme been in contemplation he must [617] have detected and would have thwarted it.

In addition to the consent and acquiescence of their father, was that of their property guardian in Rhode Island. On the 9th of February, 1857, shortly after William Sprague, senior's, decease, letters of guardianship were issued by the Probate Court of the Town of Warwick, R. I., to Mary Sprague, grandmother of the Hoyt children, on the property of said children. Mrs. Sprague consented that both her own interest in the estate and that of her grandchildren and wards should be continued in the partnership business. At that time (1857) this business was no doubt regarded by most persons who had any acquaintance with it, as highly prosperous, and an investment in it advantageous and safe. And whilst, according to the strict rules of law, Mary Sprague should have drawn out the children's share, and should not have left it to the hazards of trade, it may be said in her excuse that she was following out the plan of her husband, who had for thirteen years induced his brother's widow to continue the interest of her children in the concern, and had thereby greatly increased their inheritance. At all events, we have no evidence that Mary Sprague was actuated by any other than the most worthy motives in permitting everything to remain in the business. Any charge of fraud against her cannot be entertained for a moment.

The business was conducted without change until 1862, when Byron Sprague sold out his interest to Amasa and William, and upon an account taken at that time said interest was valued at $605,722.78, which amount was accordingly paid to him. No other change in the situation of the parties interested took place until 1865, when it was proposed to place the property of A. & W. Sprague in a corporation, or corporations, charters having been obtained from the Legislature of Rhode Island for that purpose. One of these charters was passed in May, 1862, and constituted Byron Sprague, William Sprague and Amasa Sprague and their associates, successors and assigns, a body corporate and politic by the name of A. & W. Sprague Manufacturing Company, with a capital stock of $1,000,000 to be divided into shares of $100 each.

In view of such proposed corporate organization, Mary Sprague, as guardian of her grandchildren, and Edwin Hoyt, their father, in January, 1863, presented a petition to the Legisla- [618] ture of Rhode Island, in which, after stating the appointment of Mary Sprague as the guardian of the estate of said minors, and their interest in the property of A. & W. Sprague, they stated that they deemed it advisable to invest the same in such corporations as should be organized under the charters previously granted; and they asked that the said Mary, as such guardian, might be authorized to make such conveyance as would be necessary to that end. On the 9th of March, 1863, a Joint Resolution of the Legislature was passed, granting said petition, which resolution was in the following terms:

"Resolution authorizing Mary Sprague, of Warwick, guardian, to make conveyance of the interest of minors in and to the property of the firm of A. & W. Sprague.

Upon the petition of Mary Sprague, of Warwick, widow of William Sprague, late of Warwick, deceased, and of Edwin Hoyt, of the City and State of New York, representing that the said Mary is guardian of the estates; and the said Edwin, father of Edwin Hoyt, Jr., Susan S. Hoyt, Sarah Hoyt, and William S. Hoyt, minor children and heirs-at-law of Susan Hoyt, deceased, and praying, for certain reasons, that the said Mary may be authorized and empowered to make conveyance in her said capacity, of all the right, title and interest of said minor children, as heirs-at-law of their said mother, in and to all the estate and property, real, personal and mixed, now held, owned and managed by the firm of A. & W. Sprague, of Providence;

Voted and resolved; that the prayer of said petition be and the same is hereby granted; and the said Mary Sprague, in her capacity as guardian of the estate of Edwin Hoyt, Jr., Susan S. Hoyt, Sarah Hoyt and Wm. S. Hoyt, is hereby authorized and fully empowered, whenever any corporation or corporations shall be organized under either or any of the charters heretofore granted by the General Assembly of this State, and conveyance or conveyances shall become necessary to vest the title of the parties interested in any of said property so held, owned or managed by the firm of A. & W. Sprague, in any such corporation or corporations, to make, execute, seal, acknowledge, stamp and deliver all and any such conveyance and conveyances to any such corporation or corporations as shall be necessary to vest the right, title and interest of the said minors in and to said property, or [619] any portion thereof, in any such corporation or corporations; and that any such conveyance or conveyances so executed, acknowledged, stamped and delivered, shall be deemed and held as valid and effectual in law and in equity to vest the title of said minors in any such corporation or corporations as though the same were executed, acknowledged, stamped and delivered by said minors after attaining their majority.

Provided, That before the delivery of any such conveyance or conveyances, the said Mary shall have executed and delivered to the Court of Probate of Warwick every such bond or bonds, with herself in her said capacity, and said Edwin Hoyt, as principals, in such penal sum or sums and with such sureties as said probate court shall require, conditioned for the investment of the amount of the full value of the interests of said minors, which she shall then be about to convey in the capital stock of any such corporation or corporations to which the same shall be conveyed, in the names and for the use and benefit of said minors."

Further, in view of the proposed corporate organization, steps were taken by the parties in interest to ascertain the value of the partnership assets, and the relative interest of each shareholder. For this purpose an agreement was entered into on the first day of April, 1865, be-

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tween all the parties, Fanny Sprague signing individually and as administratrix of Amasa Sprague; Mary Sprague signing individually and as administratrix of William Sprague and as guardian of her grandchildren; and the other parties signing in their own behalf: by which it was agreed that John A. Gardner and Benjamin F. Thurston, the former of whom had been counsel for Amasa Sprague and William Sprague, and the latter counsel of Mary and Byron Sprague, should be and they were, appointed referees to examine into the entire assets and property of the firm, and to ascertain the value thereof, and each party's interest therein, and should make report of the result. The referees accordingly made such examination and made their report on the 1st day of July, 1865, by which they reported and found, that the cash value of the entire estate, exclusive of the Quidnick factory (which was estimated by itself, and was transferred to a separate corporation)—was..... $6,732,906 69

That there were liabilities to amount of	2,871,921 79
Leaving the net value of the estate equal to.....	3,860,984 90
[620] And after adjusting the accounts of the parties they found	
Mary Sprague's interest was....	624,984 69
Fanny Sprague's interest	625,511 69
William Sprague's interest.....	978,867 42
Amasa Sprague's interest.	978,867 42
Mary Sprague, guardian of the children of Susan Hoyt...	652,753 68
Due to Mary Sprague, as administratrix of her husband, on account of a dividend..	164,250 26
Making a total of.....	$4,025,235 16

This amount formed the capital stock of the corporation subsequently organized, and was represented by the nominal capital of $1,000,000 making each share equal to over $402. The proportions of William and Amasa were larger than the others, because they had purchased the share of Byron.

The referees also found due from the firm to Mary Sprague, as guardian of the Hoyt children, the sum of $188,333.33, explained to have been a balance credited to them to equal what the two families in Rhode Island had drawn out of the concern for current expenses.

The Quidnick property, which, as before stated, was kept separate from the rest on account of other persons being interested therein, was appraised in the same way as the A. & W. Sprague property, for the purpose of being transferred to a distinct corporation. The interest of the Hoyt children therein was appraised at $63,353.23.

The appraisement having been completed, Mary Sprague, as guardian of the Hoyt children, on the 5th of August, 1865, after advertising her intent so to do, presented her bond to the Probate Court of Warwick for approval, as required by the Joint Resolution of March 9, 1863, and prayed authority from the court to transfer the interest of her wards to the A. & W. Sprague Manufacturing Company, as authorized by said Resolution; and also prayed like authority to transfer the interest of the minors in the Quidnick property to the Quidnick Manufacturing Company.

A decree was made granting the prayers of the petition and conferring the powers desired. [621]

Thereupon, on the 9th day of August, 1865, all the parties in interest joined in a conveyance of the entire partnership property of the firm of A. & W. Sprague to the A. & W. Sprague Manufacturing Company; and the property of the Quidnick firm to the Quidnick Manufacturing Company; and each party became entitled to their several proportions of the shares of capital stock in those companies respectively. In executing the deed of conveyance Mary Sprague signed in her individual capacity, as administratrix of her husband's estate, and as guardian of the Hoyt children.

In the August Term, 1866, of the Probate Court of Warwick, appraisers were appointed to take an inventory and appraisement of the property of the several wards of Mary Sprague in her hands, and they performed their duty, and said inventories, verified by the oath of Mary Sprague, were filed and recorded, after being passed upon by the court. They amounted to the sum of $251,447.08 each. That of William S. Hoyt was composed of the following items, namely:

122 shares Nat. B'k of Commerce..	$6,222 00
1 U. S. 6-per-cent bond.....	108 09
2 N. Y., Prov. & Boston R.R. Bond, $950....	1,900 00
439 shares A. & W. Sprague M'f' Co., 402, 5,225.	176,707 82
123 shares Quidnick Co., stock, 155, 213.....	19,091 20
Cash.....	334 23
	$204,363 75
Dividend due from A. & W. Sprague as cash, March 31, 1865, with interest from that date.....	47,083 33
	251,447 08

The others were nearly identical with this.

The dividend of $47,083.33 was William S. Hoyt's one-fourth part of the sum of $188,333.-33, awarded to the Hoyt children as an offset to the sums drawn out by the Rhode Island families for current expenses.

At the same term Mary Sprague presented an account as guardian of each ward, which being verified, and due notice having been published, was received and allowed by the court, and ordered to be recorded.

Sarah Hoyt having now arrived at full age, received the amount of her interest and gave an acquittance for the same. [622]

At the same term of the court, on the petition of Mary Sprague, and her resignation of the guardianship of the three remaining minors, and on the written application of Edwin Hoyt, and due notice given, Mary Sprague was discharged from the guardianship, and William Sprague was appointed guardian in her stead. The same appraisers were appointed to make an inventory and appraisement of the property of each ward in the hands of William Sprague, guardian; and such inventory and appraisement were duly made, filed and recorded; showing that the estate of William S. Hoyt amounted, on the first day of September, 1866, to the sum of $255,885.04, consisting of the items before mentioned, with the addition of another dividend of the companies.

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The estate of Susan S. Hoyt amounted to about the same sum.

Susan S. Hoyt came of age in October, 1866, and William S. Hoyt in January, 1868; and Susan married Charles G. Francklyn in 1869.

The evidence in the case exhibits several annual accounts rendered by William Sprague, as guardian to the complainant W. S. Hoyt, after he came of age, in 1870, 1871, 1872 and 1873. These accounts show on the credit side the money due and accruing to the complainant, including the sum of $47,083.33 before mentioned, and the dividends made from time to time on the stocks of the A. & W. Sprague Manufacturing Company, the Quidnick Manufacturing Co., and on the bank and other stocks in the guardian's hands. On the debit side they show the moneys drawn by and paid to the complainant, amounting, from the date of Mr. Sprague's appointment as guardian in 1866, to October 31, 1870, to the sum of $5,282.45:

thence to Oct., 1871.....	$8,606 72
" to Oct., 1872.....	18,500 00
" to Oct., 1873.....	5,000 00

Leaving a balance still in the guardian's hands of $68,905.18, besides the stocks and bonds forming the *corpus* of the estate in ward.

William S. Hoyt, some time in 1873, received [623] his stocks and interest in the Quidnick Company, and makes no complaint in regard to the same.

A number of letters of the complainant, asking for, and acknowledging the receipt of money from his guardian, after coming of age, were put in evidence. One of these, dated November 9, 1870, was directed to Mr. Greene, bookkeeper of the A. & W. Sprague Manfg. Co., asking for a memorandum of the bank stock, shares, and whatever there might be belonging to him. In his testimony the complainant states that this information was furnished to him. A similar statement had been furnished to Mrs. Francklyn in March of the same year; and annual accounts were rendered to her from October, 1869, to October, 1873.

In the fall of 1873, Hoyt, Spragues & Co., and the A. & W. Sprague Manufacturing Company suspended payment, and the latter, by deed of assignment, dated Nov. 1, 1873, assigned to Zechariah Chafee all its property, in trust for the benefit of creditors—in which deed Amasa and William Sprague, and Fanny and Mary Sprague also joined. In April, 1874 a more full assignment was made.

The bills in this case were filed in June and July, 1875, and their general object has already been stated. They respectively state most of the facts of which the foregoing is an outline; but interlarded with reiterated charges of fraudulent design and concealment on the part of the Spragues; whereby, as is alleged, the complainants were kept in ignorance of their rights and of the state of their property, and the transformations under which it went, until shortly before the filing of the bill.

The defendants severally answered the bills, denying all fraudulent motives and any intentional concealment; averring that they acted according to their best judgment as to what was for the interest of all the parties interested in the estate; insisting upon the legal validity of their proceedings respectively, and especially of the transfer of the minors' interest to the corporations; setting up the laches and acquiescence of the complainants, and pleading the Statute of Limitations to the relief sought by the bill.

The first question to be determined is, the nature of the complainant's rights, with regard to the partnership effects of A. & W. Sprague [624] in 1865, at the time when the property was transferred to the A. & W. Sprague Manufacturing Company.

At the death of William Sprague, senior, in 1856, there is no doubt that each party in interest was entitled to call for a liquidation and settlement of the partnership affairs and a division of the surplus property, and had a lien on the entire property and effects for that purpose. In the real estate and corporal chattels they were tenants in common with the surviving partners, and over the entire property, including the credits and other assets, they had the lien referred to, which they had a right to enforce at once if the surviving partners refused to make a settlement. These partners had the right of possession, and, in the choses in action, the right of property, to enable them to settle up the concern. But these rights of survivorship were subordinate to the lien of those beneficially interested, who, thereby, had a right to enforce the due appropriation of the partnership effects.

But who were the parties beneficially interested in this case? Primarily, the personal representatives of Amasa Sprague, senior, and William Sprague, senior, namely: the two widows, Fanny Sprague and Mary Sprague, administratrices respectively of the estates of Amasa and William. The ultimate beneficiaries could only reach the property through them. If they abused their trust they would be liable to their respective *cestuis que trust*. They had the power, if they saw fit, unless restrained by their beneficiaries, to allow the estates of their deceased intestates to be continued in the business of the partnership; and if it was continued by their allowance and consent, the property became liable to the partnership debts subsequently incurred as well as to prior debts; but with this qualification, that the property which remained unchanged was still subject to the partnership lien in preference to after-incurred debts; whilst new property which, in the course of business, took the place of the old, was not subject to said lien in preference to such debts.

This seems to be the result of the cases, though they are apparently somewhat in conflict. A cursory reading of the opinion in *Skipp* v. *Harwood* (1747) 2 Swanst., 586, and *Lord* Hard- [625] wicke's opinion in the same case on appeal, *West* v. *Skipp*, 1 Ves., Sr., 239, and the opinions in *Stocken* v. *Dawson*, 9 Beav., 239, and same case on appeal, 17 L. J., Ch. 282, would lead to the conclusion that the executor's lien in such cases attaches to the whole property, as well that newly acquired as that which remains of what was in existence at the testator's or intestate's decease. But this is inconsistent with the decisions in *Nerot* v. *Burnand*, 4 Russ., 247, and *Payne* v. *Hornby*, 25 Beav., 280, *Payn* v. *Hornby*, 4 Jur. (N. S.), 446, which hold that where the business is carried on with the consent of the out-going partner, or the representative of the deceased partner, debts incurred during that period have a preference over the partnership lien upon all newly acquired property. A compari-

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son of the cases will show that the rule laid down by *Lords* Hardwicke and Cottenham in *West* v. *Skipp* and *Stocken* v. *Dawson*, was applied by them to cases in which the property of the retiring or deceased partner was used in the business against the will, or without the consent, of the persons entitled thereto. The law is laid down with much accuracy in the last edition of Lindley on Partnership, pp. 700-702, where it is said: "Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not, therefore, lost by the substitution of new stock for old. Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or assignees, and does not terminate until his share has been ascertained and provided for by the other partners. But after the partnership is dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business."

Sir John Romilly, in giving judgment in *Payn* v. *Hornby*, cited above, after admitting that, by a mortgage of his stock in trade, a man might bind after-acquired property, as to which see *Holroyd* v. *Marshall*, 10 H. L. Cas., 191, said: "But on the death of a partner the case is altogether different. There is, as Lord Eldon very accurately expresses it, 'a *quasi* lien;' there is, in point of fact, only a right to the specific property. The executors of the deceased partner are joint tenants with the surviving partners, and accordingly they are entitled to require the surviving partners to do one of two things—either to wind up the partnership business at once, or to fix the value of the testator's property and secure payment of the amount. * * If the executors do not apply for a receiver, but simply file a bill for the winding up of the partnership, I apprehend that the new stock which has been acquired during the time that the business has been carried on by the surviving partner belongs, in the first place, to the creditors who have been created by such subsequent dealings, and not to the creditors of the old partnership; and that it is the duty of the executors, if they wish to prevent any dealings with the stock, to come at once to this court for the appointment of a receiver, otherwise they, in fact, sanction the commission of a fraud, by leading the subsequent creditors to believe that they are dealing with a person who is liable out of his stock in trade to discharge their debts." 4 Jur. (N. S.), 446.

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These remarks of the Master of the Rolls have respect to the rights of creditors. As between the surviving partners themselves and the representatives of the deceased partner, the lien of the latter will extend to after-acquired property resulting from the employment of the partnership stock, so as to entitle them, at their option, either to demand a share of the profits, or interest on the value of the decedent's share at the time of his death; unless the transactions between them have been such as to indicate a sale of the deceased partner's share to the survivors. A sale, however, can hardly be inferred where no steps have been taken to ascertain the value of the share.

Recurring now to the circumstances of the case before us and the proceedings of the parties, we find that the legal representatives of the deceased partners, and all the beneficiaries of the two estates who were in law capable of acting, entirely acquiesced in, and consented to, the continued employment of the partnership property in the business of the partnership subsequently carried on by the surviving partners; and this state of things continued for the eight or nine years that intervened between the death of William Sprague, senior, and the transfer of the property to the corporations. And as to the share of the Hoyt children, it was not only consented to by Mary Sprague as administratrix of her deceased husband's estate, but as guardian of the property of the said children.

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It seems to have been an understood thing between all the parties, from the beginning, that, without any formal settlement of the estates of Amasa and William Sprague, senior, the several beneficiaries entitled to distribution should be and were considered as interested in the common partnership property in the proportional amount of their beneficial interest. The active partners represented their own respective shares. Mary Sprague as administratrix and as guardian of the Hoyt children represented her own share and theirs It is objected to her that she omitted to file any inventory or account; but as there was no difficulty or dispute between the parties in interest as to the extent of the several shares, there was no imperative necessity of presenting accounts to the probate court as long as it was deemed expedient to continue all the property in the joint business. An inventory could settle nothing, because the property in which all were equally interested was constantly changing, and an account would have had no practical value, because no immediate settlement of the estate was proposed. The cardinal question, so far as these cases are concerned, was that which related to continuing the shares of the minors in the concern, and keeping the property together. Conceding that to have been the proper course to take, the omission on the part of Mary Sprague to exhibit the accounts prescribed by statute cannot be regarded in the same light as it would have been if she had had possession of the property and was devoting it to her own use. It may have been unwise, but, under the circumstances, it can furnish no evidence of want of good faith, or a desire to do other than the best that could be done for the interests of her grandchildren and wards.

And as to the question of fraud, we may at once state, that we entirely agree with the court below, that the case furnishes no evidence to sustain that charge, either as against Mary Sprague or any of the other parties concerned. They may have judged unwisely, but we see no ground for believing that they were actuated by any desire to cheat or defraud the children of Susan Hoyt out of anything that justly belonged to them We are sure that such a thought could not be attributed to their grandmother, and we have no evidence to believe that it was ever entertained by Amasa Sprague or William Sprague. We must regard the decision of Mrs. Sprague, and of Edwin Hoyt, the father, to keep the property of the children in the concern, as an error of judgment only, rather than as the result of any design or intent to defraud. We may well conceive that the supposed wishes of William Sprague, senior, who, by his energy

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and talent, had created the estate, and who had persistently kept it together as a common property for the equal benefit of his brother's family and himself, had great weight with Mrs. Sprague and her son-in-law, as well as with the surviving partners, in leading them to adopt the conclusion they did. And for many years the result seemed to justify the conclusion to which they came.

But whatever may have been the responsibility which Mary Sprague, as administratrix and guardian assumed, it cannot be doubted that she had the power to keep the property in the business, for it was subject to her disposal. And as it was kept in the business by her consent and allowance, she ceased to have a lien upon the property as against subsequent creditors of the concern. And, as she in her representative capacity ceased to have such lien, it is difficult to see how the minors themselves, when they arrived at full age, could have any such lien, whatever remedy they may have had against Mary Sprague. If the ultimate beneficiaries of a deceased partner's estate could thus revive a lien which has become extinguished as against creditors, there would be little safety in dealing with commercial partnerships, in which any partner has ever died.

This consideration is conclusive against the claim made by the bills to be paid out of the assets in the hands of Chafee, the trustee, in preference to, or even *pari passu* with the creditors of the corporation. For where the representative of a deceased partner allows the interest of his decedent to be used in the business by the surviving partner, and thereby loses his lien upon the partnership property, he does not thereby become a creditor of the new firm, and cannot come into concourse with the creditors thereof; but the property of the firm is first subject to the claims of such creditors, and after they are satisfied, the representative's right to [629] have an account against the surviving partner remains as before.

But whilst the rights of creditors are thus protected against the lien of a deceased partner's representatives, who have consented to the continuance of the business without a settlement, the beneficiaries standing behind those representatives are entitled to call them to an account for the manner in which they have dealt with the estate. And where, as in this case, they depart from the ordinary mode prescribed by law, and expose the property to the hazards of trade, they run the risk of making themselves answerable for any loss that may occur. In the present case, however, we have no evidence that loss occurred during the period under consideration. The estimated cash value of the minors' share of the property on the 31st of March, 1865, as appeared by the appraisement then made, was..... $652,753 68

Allowance to offset family expenses of the other parties...	188,333 33
Interest in Quidnick property, including E. Hoyt's curtesy...	116,112 93
Total.....	$957,206 94

As gold was then 150, the specie value of this total would be $638,137.96. No satisfactory proof has been adduced to show that this amount was not fully equal to what the interest of the minors ought to have been, in view of the value of the estate in 1856, at the time of William Sprague, senior's, decease.

Up to the time of organizing the corporations, therefore, and the transfer of the property thereto, we have no evidence that any loss or diminution of value had occurred.

Still, if the matter stood there, the defendants, or at least Mary Sprague, might be called upon to render an account, and to show by affirmative proof, that all the property which came into her hands as administratrix, or guardian, for the use and benefit of her daughter Susan's children was forthcoming and ready to be paid over to them. It is necessary, therefore, to take into view what occurred in 1865 and afterwards, in relation to the disposition made of the property to the corporations before referred to, and to the conduct of the complainants after coming of age, in order to determine whether they [630] are entitled to any portion of the relief sought by the bills.

It is contended by the defendants that the authority given to Mary Sprague, as guardian of the Hoyt children, by the Joint Resolution of 1863, to transfer all the property of her wards to the corporations indicated, was a complete justification for her acts in that behalf; and releases her from all further obligation except that of accounting for the shares of capital stock received therefor and any dividends accruing thereon whilst in her possession.

It is contended by the defendants, secondly, that the complainants, after coming of age, had so long acquiesced in the arrangements made in 1865, before bringing suit or taking any steps to set them aside, that they are now precluded by their own laches and by the lapse of time from having the relief which they seek.

As to the first point, it seems to be beyond doubt, that if the Legislature had the power to pass the Resolution referred to, it was a complete authority and justification for the conveyance by Mrs. Sprague of the interests of her wards to the corporations mentioned. The Resolution itself is sufficiently broad to give the requisite authority. The question is as to the legislative power.

With regard to the general legislative power of a State to act upon persons and property within the limits of its own territory, there can be no doubt. *Mr. Justice* Story lays down three fundamental rules on the subject of private international law; the first of which is expressed thus: "I. The first and most general maxim or proposition is that which has been already adverted to, that every Nation possesses an exclusive sovereignty and jurisdiction within its own territory." And he adds: "The direct consequence of this rule is, that the laws of every State affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it." The second rule declares that no State or Nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident [631] therein. The third is, that whatever force and obligation the laws of one country have in another, depend solely upon the laws of the latter, that is, upon the comity exercised by it. Story, Confl. L., secs. 18-23.

One of the ordinary rules of comity exer-

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cised by some European States is, to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicil in other states. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. *Justice* Story, speaking of a decision which favored the ex-territorial power of a guardian in reference to personal property, says: "It has certainly not received any sanction in America, in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators." Story, Confl. L., secs. 499, 504, 504 *a*; and see Whart. Confl. L., secs. 259-268, 2d ed.; 3 Burge, Colon. and For. L., 1011. And some of those foreign jurists who contend most strongly for the general application of the ward's *lex domicilii*, admit that when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward's property, and not his person. Whart., secs. 267, 268.

But whilst the English and American laws require a guardianship where the property is situated, it is conceded that in the due exercise of comity, preference would ordinarily be given to the person already clothed with the authority of guardian in the minor's own country. Phillimore, Vol. IV., 381; Whart., sec. 266. In the case before us it does not appear that the minors had any other guardian in New York than their natural guardian, Edwin Hoyt, who applied for the appointment of Mary Sprague [632] as guardian of their estate in Rhode Island.

As the question before us is one of power and not of comity, we think there can be no doubt that the Legislature of Rhode Island, where the property was situate, had power, first, to pass laws for the appointment of guardians of the property of non-resident infants, situate in that State; and, secondly, it had power to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the State.

Not only did the power exist, but we find that it was exercised. The laws of Rhode Island gave explicit power to the probate court to appoint a guardian of the property of non-resident infants. The Act of Oct. 31st, 1844, declared that, "The courts of probate of the several towns are hereby authorized and empowered to appoint guardians, when occasion shall require, over the property or estate of persons who reside out of the State and possess property therein." The previous Act of January 6th, 1837, had authorized the same courts, in case of incapacity of parents of any minors, or for other sufficient cause, to appoint a guardian of the property of such minors, without connecting therewith the guardianship of such minors' persons.

There is no force in the objection made to these laws, that they gave chancery powers to the probate court, contrary, as contended, to section 2 of article 10 of the Constitution of Rhode Island adopted in 1843, which says "Chancery powers may be conferred on the Supreme Court, but on no other court, to any greater extent than is now provided by law." The answer to this objection is obvious. The appointment of guardians is not, and never has been, peculiarly a chancery power. Guardians at common law became such by their relation to the minor, without any judicial appointment. Guardians were also appointed by testament by the father of any minor from time immemorial in the province of York, and on failure to thus appoint, the ordinary had the power of appointment. Swinburne, Wills, 282. In this country the power to appoint guardians and to pass upon their accounts has generally by statute been conferred upon the probate courts. In Rhode Island the power was exercised by these courts, long before the Constitution of 1843 was [633] adopted.

Assuming, then, that the probate court had the power to make the appointment, we have been unable to see anything informal or improper in the appointment of Mary Sprague as the guardian of her infant grandchildren. The petition for her appointment was made by the most suitable persons in the world, their father, Edwin Hoyt, and Byron Sprague, their mother's only brother.

It is true, as suggested, that the duties of Mary Sprague as administratrix might clash with her duties as guardian; but this was not a necessary consequence. The same person is often appointed executor of a will and guardian of the testator's children. It is seldom that any practical difficulty arises from the joinder of the two capacities. We do not perceive that their joinder in the present case had or was likely to have any deleterious effect upon the interests of the infants concerned. At all events it did not avoid or vitiate the appointment.

The guardian having been duly appointed and no deterioration of the estate being shown prior to the conveyance to the corporations, the next inquiry relates to the authority for making such conveyance, given by the Joint Resolution of 1863. As already intimated, it cannot be doubted that the legislative power extends to the regulation of the investments and the management of minors' estates by their guardians. The Legislature certainly might, if it saw fit, pass a general law authorizing a guardian to invest the property of his ward in the capital stock of a corporation engaged in manufacturing, trading, or financial operations, or in a particular class of operations, as banking, insurance, or any other that might be specified. Usually, such authority, if given, would be required to be exercised under the allowance and supervision of a court; but that would be a matter of legislative discretion. That such an authority could be conferred by law there can be no doubt. Analogous powers have been conferred from time immemorial.

But it is objected that the Resolution of March 9th, 1863, under which the guardian in this

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case derived her authority to make the investment under consideration, was not a legislative, but a judicial act, and beyond the legislative power.

The only provision in the Constitution of Rhode Island which bears upon this question is [634] the usual one which distributes the powers of government into three departments, legislative, executive and judicial, and assigns to each the powers appropriate to it. Thus, "The legislative power shall be vested in two Houses, etc." "The judicial power shall be vested in one Supreme Court, and in such inferior courts as the General Assembly may, from time to time, ordain and establish."

The question of the power of a Legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country; and it would subserve no useful purpose to go over the whole ground of controversy on this occasion. Suffice it to say, that laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every State in the Union, and have received the sanction not only of this court but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the Legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed, and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts, the power exercised is of a legislative character, the Legislature making a law for the particular case. In some modern constitutions the exercise of this power has been prohibited to the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the State, we cannot deny to the Legislature the right to exercise it in those cases in which it has been accustomed to be exercised, amongst which we think the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.

The only cases in Rhode Island decided since the adoption of the Constitution of 1843, which have been cited as having a bearing on the sub- [635] ject are *Taylor* v. *Place*, 4 R. I., 324, and *Thurston* v. *Thurston*, 6 R. I., 296. The general conclusion to be derived from these cases is favorable to the view we have taken.

In the first of these cases, the Legislature having passed a vote for opening a judgment, allowing new affidavits to be filed on the ground of accident and mistake, setting aside a verdict and granting a new trial, the court very properly held this to be an exercise of judicial power, and declared the vote to be void. But they distinguished the case from those laws passed to confer special powers upon executors, etc.; as in *Watkins* v. *Holman*, 16 Pet., 60, where an Act authorizing an administratrix residing in another State to sell land in Alabama for the purpose of paying debts was held by this court to be within the legislative power and valid. In the other case cited, *Thurston* v. *Thurston*, the court held that it was beyond the power of the court of chancery in that particular case to decree a sale of infants' lands; that the power, if possessed by any court, was vested by statute in the probate court; but added: "If a case should arise within the spirit, though not within the letter of such or a similar statute, a special authority to a trustee to convert the real estate of his infant, lunatic, or otherwise incapable *cestui*, would seem to partake, as intimated by this court in *Taylor* v. *Place*, more of a legislative than of a judicial character, and would be, having been long exercised and not prohibited by the Constitution, within the constitutional competence of the General Assembly. *Watkins* v. *Holman*, 16 Pet., 25; *Davison* v. *Johonnot*, 7 Met., 388; *Snowhill* v. *Snowhill*, 2 Green's Ch. (N. J.), 20; *Norris* v. *Clymer*, 2 Pa. St., 277; *Spotswood* v. *Pendleton*, 4 Call. (Va.), 514; *Dorsey* v. *Gilbert*, 11 Gill & J., 87." This is certainly a very clear intimation of the constitutionality of the class of laws to which that now under consideration belongs.

But another objection made to the validity of the Joint Resolution is that it was not in proper form, in not being preceded by the proper enacting clause. The Constitution declares that the style of the laws shall be: "It is enacted by the General Assembly as follows." If this requirement is anything more than directory, it cannot be decreed to apply to that species of enactments which are usually denominated [636] joint resolutions, and which are often used to express the legislative will in cases not requiring a general law. The practice of the Congress of the United States, and of almost every legislative body in the country, may be adduced to show that a resolution of the nature now under consideration, could not have been within the intent of the provision referred to.

It is unnecessary to enter upon a particular review of the proceedings taken by the parties to effect a transfer of the partnership estate to the corporations chartered for that purpose. We have given them our careful attention, and are satisfied that they were substantially regular. We have no doubt of the guardian's power to submit to referees the ascertainment of the value of the minors' interest in the property; nor of the binding effect of the award made by the referees. Our conclusion is that the guardian, Mrs. Mary Sprague, had full power and authority to invest the said interest in the capital stocks of the corporations referred to; and that having done so, she was no further answerable therefor, but only answerable for the shares of capital stock and the dividends realized thereon, respecting which we do not understand that any complaint is made.

But aside from the legality and binding effect of the proceedings for investing the minors' interest, as here stated, the acquiescence of the complainants, after they came of age, effectually precludes them from obtaining the relief sought by their respective bills. The bills were not filed until June and July, 1875, in the one case nearly nine years, and in the other more than seven years after the minors became *sui juris*, and could have known, if they did no

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know, the exact position and history of their property. Notwithstanding all the asseverations to the contrary, the evidence fails to show that they were not allowed every opportunity of which they chose to avail themselves of obtaining this knowledge. And the fact is clearly demonstrated, that they did have sufficient knowledge to leave them without any excuse for lying by and giving no sign of dissatisfaction. For several years they received regular annual accounts. These accounts showed the character of the property and in what it [637] consisted. It further appears that in 1870 each of the complainants received from the bookkeeper in Rhode Island a list of all the stocks and securities in which they were respectively interested. It also appears that they accepted the stock of the Quidnick Company, and they make no complaint of that part of the settlement.

Without further discussion, it suffices to say, that the complainants came into the court too late to obtain relief, even if when they came of age they could have justly complained of the conversion of their property into the stock of the corporations. In such cases, it is not merely a question as to what information respecting their rights parties do actually obtain, but as to what information they might have obtained had they used the means and opportunities directly at their command. Others, acting in good faith, also have rights; the world must move; and it is the interest of the community that controversies should have an end.

We think that the decrees of the court below were right, and they are, therefore, affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 470, 472; 95 N. Y., 588.

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[637] JOHN S. WILLIAMS ET AL., *Plffs. in Errr.*,

v.

STATE OF LOUISIANA, CHARLES CLINTON, Auditor, etc., ET AL.

(See S. C., 13 Otto, 637-645.)

Jurisdiction—void state bonds—void state Act.

1. This court has jurisdiction to determine whether an amendment of the Constitution of a State, as construed by the State Court impairs the obligation of a contract of the State previously made.

2. Bonds of the State of Louisiana, issued under the State Act of 1871, to relieve the State from its obligation to guaranty bonds of a R. R. Co., held void, as forbidden by the Amendment to the Constitution of that State.

3. The state Act was itself void because in conflict with the provision of the Constitution of the State, and the bonds are equally void as being in excess of the amount of debt which the State could constitutionally create.

[No. 7.]

Argued Apr. 13, 14, 1881. Decided May 2, 1881.

IN ERROR to the Supreme Court of Louisiana.

The case is fully stated by the court.

Messrs. W. W. Howe, **A. Sidney Biddle, George W. Biddle, Simon Sterne,** *Matt. H. Carpenter, F. J. Lippitt* and *John H. Kennard,* for plaintiffs in error.

Messrs. **Gus. A. Breaux, James Lingan,** *Jno. McEnery, J. Q. A. Fellows* and *Durant & Hornor,* for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

[638] This case comes before us by a writ of error to the Supreme Court of the State of Louisiana. It originated in a suit brought by the Attorney-General in the name of that State in the Superior Court of the District for the Parish of New Orleans against Charles Clinton, State Auditor, and Antoine Dubuclet, State Treasurer. The petition enumerated a great number of claims against the State which it declared to be illegal and void, and which it was feared the Auditor would allow, and the Treasurer would pay, against which action the petition prayed for an injunction. Among these claims, the only one which demands our attention was one for $2,500,000 of state bonds issued under the Act of the Legislature of April 20, 1871, entitled an Act to relieve the State from its obligation to guaranty the Second Mortgage Bonds of the New Orleans, Mobile and Chattanooga Railroad Company. While there were several grounds of objection stated in the petition, the only one which concerns us is the allegation that the issue of these bonds was an attempt to create a debt of $2,500,000, when the limit to the state debt of $25,000,000 as fixed by the amendment to the State Constitution of 1870, had already been exceeded. In this suit the New Orleans, Mobile and Texas R. R. Co., successors to the New Orleans, Mobile and Chattanooga R. R. Co., intervened and the temporary injunction was dissolved.

On appeal to the Supreme Court of the State, the order dissolving the injunction was reversed, and when the case came back to the court of original jurisdiction for further proceedings, Williams and Guion were permitted to intervene for their interest as holders of three of the bonds of $1,000 each, the payment of which was sought to be enjoined in the suit.

The superior court decreed the bonds to be void and perpetually enjoined the Treasurer from paying them or their interest coupons, and on appeal to the Supreme Court that decree was affirmed. It is this final judgment of the Supreme Court of the State that the present writ of error sued out by Williams and Guion seeks [639] to review.

The reason why the State Court held these bonds void is that by an amendment of the Constitution of the State, adopted in 1870, no debt should be thereafter created which, added to the debt of the State then existing, would swell the total amount above $25,000,000; and that amount had been reached before the issuance of the bonds in question and before the Act of the Legislature under which they were issued had been passed.

Counsel for defendants in error insist that the writ of error shall be dismissed for want of jurisdiction in this court.

They say that the suit is one in the courts of their own State, to which the State itself is a party plaintiff, against its own officers, and the decision rested entirely on the construction of the Constitution and laws of the State, and that no question of federal law is involved in it. If this be strictly true, their contention should be sustained.

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In answer to this, it is said that the bonds held by the interveners were founded on an obligation which existed prior to the constitutional amendment, and did not, therefore, add to the debt which existed when that amendment was adopted. This is denied by the counsel for the State, and upon the solution of this question the whole case depends, both as to its merits and as to the jurisdiction of this court. For it is insisted by plaintiffs in error, that if their contract existed in effect before the amendment, the amendment as construed by the State Court impairs the obligation of that contract, and this court can review that question; while if the bonds constitute a new and independent contract, the constitutional provision was properly applied to them and the judgment is right. As this is the question we are to decide, and as it was raised and insisted on by the plaintiffs in error in the court below, we think this court has jurisdiction.

The bonds in question were, as we have already said, issued under an Act of the Louisiana Legislature, approved April 20, 1871, which was after the constitutional amendment had become operative. That amendment, which went [640] into effect in December, 1870, declares "That, prior to the first day of January, 1890, the state debt shall not be so increased as to exceed $25,000,000."

That the state debt already exceeded that sum when the bonds were issued and, indeed, when the Act was passed under which they were so issued, is not denied. But, as already stated, the effect attributed to these facts is denied, on the ground that they were issued in lieu of and in extinguishment of an obligation of the State existing when the constitutional amendment was adopted.

To determine the soundness of this proposition it is necessary to examine the statute which authorized their issue, and the nature of the supposed obligation on which the later transaction is said to be founded. The statute reads as follows and is here given in full:

"An Act to relieve the State from its obligation to guarantee the second mortgage bonds of the New Orleans, Mobile & Chattanooga Railroad Company, under an Act of the General Assembly approved February 21st, 1870, by subscription on the part of the State to the capital stock of said corporation, and to regulate the conditions of such subscription, and to secure the construction of the road of said corporation from Vermilionville to Shreveport.

SECTION 1. (*a*) *Be it enacted, by the Senate and House of Representatives in General Assembly convened*, That the Governor of this State be and is hereby authorized to subscribe for twenty-five thousand shares of $100 each of the capital stock of said corporation on behalf of this State, and to receive the certificates of stock therefor as payment shall be made for the same, which certificates shall be deposited by him in the office of the Treasurer of this State, and shall not be assignable or transferable except by authority of the General Assembly.

(*b*) *And be it further enacted, etc.*, That, whereas, the subscription for stock and the issue of bonds therefor herein provided are intended to extinguish the obligation of the state to indorse or guaranty the second mortgage bonds of said corporation, under the Act of the General Assembly relative to said corporation, approved February 21, 1870, and as a discharge of either party from all obligations for the issue, indorsement, guaranty and security of said mortgage bonds, as provided in the 4th section of said Act; the said corporation shall be required, at or before the complete issue of said bonds, to file with the Secretary of [641] State a full release and acquittance of the obligations of the State so created to guaranty said mortgage bonds, and for which the provisions of this Act are designed as a substitute and discharge; and the said corporation shall, by its express agreement made and entered into by the vote of its board of directors, and attested by its seal and the signature of its secretary, obligate itself to commence that part of its railroad from Vermilionville to Shreveport within six months, and to complete the same within the time limited therefor in said Act of the General Assembly; *Provided*, That the said corporation may purchase from this State the said shares of stock at their par value, at any time prior to the maturity of the bonds issued therefor, and may pay for the same in lawful money, or in any of the bonds of this State at their par value.

SEC. 2. *Be it further enacted, etc.*, That, for the payment of said subscription, bonds of this State shall be issued, signed by the Governor and Secretary of State, and sealed with the seal of the State, payable not less than thirty five, nor more than forty years from their date, with interest at the rate of eight per cent per annum, payable semi-annually in the City of New York, on the first days of January and July of each year, for which interest coupons bearing a *fac simile* of the signature of the Treasurer of the State shall be attached to the bonds, and annually from and after the issuing of the said bonds or any part thereof, there shall be imposed for each fiscal year a state tax of one mill on each dollar of the valuation, for each year, of the real and personal property in the State, subject to taxation, which tax shall be assessed, levied and collected in current moneys by the annual assessment and collection of taxes for each year, in the manner prescribed by law for the collection of other taxes, and the moneys derived therefrom shall, immediately on collection, be paid into the Treasury of this State, as a distinct fund, and kept as a separate account; and such moneys and all moneys received from said company for dividends on said stock shall be applied in each and every year, first, to the payment of the interest as it shall accrue on the said bonds, and the balance, in each year, shall be applied to the purchase of said bonds; such tax shall continue to be so assessed, levied and collected in each and every year until all the interest and principal of said bonds, which shall from time to time remain outstanding, shall be fully paid; and all bonds and coupons so purchased and paid, shall be immediately canceled by the said Treasurer.

SEC. 3. *Be it further enacted, etc.*, That, from [642] and after the subscription aforesaid and the issue of the certificates of stock, and during the time the State shall own the same, the State shall be represented at the corporate meetings of the stockholders; and in the board of directors to be chosen by the other stockholders under

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the charter of their incorporation by the Governor of the State for the time being, or by his proxy or by another director to be designated by the Governor, whose duty it shall be to attend all the meetings, and perform all the duties incident to the office of directors; but that the directors thus appointed shall not vote in the elections of the board of directors provided for in the Act of incorporation."

The Act of Feb. 1870, here referred to, is an Act of many sections and subsections for the benefit of the New Orleans, Mobile and Chattanooga Railroad Co., giving it increased privileges in the City of New Orleans, authorizing extensions of its projected road, and unlimited issue of its own bonds.

The 4th section, in addition to this grant of the unlimited right to issue its own bonds, authorizes the company to construct and maintain a road from any point on the main line of its road in the Parish of St. Martin or Lafayette northwardly to Shreveport *via* Alexandria; and also from Iberville on the main line to the Mississippi at any point in the Parish of West Baton Rouge, and all the powers, privileges, grants, *guaranties* and franchises heretofore granted to said company for the construction, maintenance and use of its main line of railroad within the State of Louisiana westerly from the City of New Orleans, shall be and are hereby made applicable to the said lines of railroad to Shreveport and to said point in the Parish of West Baton Rouge; *Provided, however*, That such provisions of the Act entitled "An Act to Expedite the Construction of the Railroad of the New Orleans, Mobile and Chattanooga Railroad Company, in the State of Louisiana," approved February 17, 1869, as relates to the guaranty of the second-mortgage bonds of said company, shall be applicable only to such parts or portions of the said lines of railroads to Shreveport and to said point in the Parish of West Baton Rouge, as shall be surveyed, located and constructed within five years from and after the acceptance of this Act by said company; and the said provisions of said Act shall be applicable to such parts or portions of said last mentioned lines of railroad as shall be [643] surveyed, located and constructed within the time last aforesaid.

The Act of 1869 authorized the company to issue its bonds payable to the State of Louisiana, at the rate of $12,500 for every mile of railroad actually constructed and accepted by commissioners to be appointed by the Governor. The payment of these bonds was to be secured by a mortgage on the road, subject to a prior mortgage of the same amount, and the bonds are, therefore, designated in the statute, second mortgage bonds. It was declared also that the failure to pay the coupons of interest on these bonds, or if any of the sinking fund required by the Act should be in arrears for sixty days, the whole of the principal of the bonds should become due and the mortgage should contain a provision for the sale of the road by the trustee in that case.

These conditions being complied with, and the construction of forty miles of the road being completed to the satisfaction of the Governor, he was directed to indorse on the bonds of the company, to the amount of $12,500 per mile for such forty miles, the guaranty of the State of Louisiana of the payment of these bonds, and deliver them to the company. This Act also required the company to survey and locate the whole of the main line within eight months after acceptance of the Act, a section of forty miles to be completed within twelve months after such survey, and the whole of the line within the State to be completed within three years after such survey and location; and a failure to comply with these requirements as to any part of said road, released the State from the obligation to guaranty as to that part of the line. It is argued that the proviso to section 4 of the Act of 1870, making the provisions of the Act of 1869 applicable to the new lines, if constructed within five years instead of three, as in that Act, does away with the provisions for requiring specific Acts as to location and construction of forty miles, to be performed within shorter periods, and that the obligation of the State to guaranty the bonds continued for five years, though nothing had been done in the meantime.

We do not think this is a sound construction of the proviso, but that the period of five years is there mentioned instead of three in the former Act for the final completion of the road, a failure to comply with which released the State [644] from its promise of any further guaranty of the bonds.

This, however, is not very material, as it only adds to the force of the argument that when the State bought $2,500,000 of the stock of the company, and gave its own bonds for that sum, it was incurring a new debt, and was not discharging an old one of equal amount.

What was the obligation of the State in this matter prior to the Act of 1871, and at the time the constitutional limitation of its debt became effectual? And what obligations are assumed by the issue of these bonds?

The State, by the former law, was to become surety, without any other consideration than desire for the construction of the road, for the bonds of the company.

By the new amendment, she became absolute debtor and gave her own bonds.

By the former law she had a very stringent provision to secure her from loss for the use of her name as indorser of the bonds of the company.

By the new amendment she agrees unconditionally to pay $2,500,000 of money, with no security for its repayment and no indemnity against loss.

Under the former Act she might never have been called on to indorse the bonds, as the conditions might never have been complied with and if so called on, would perhaps have been held secure against loss, by the provision for mortgage and sinking fund on a road to be constructed before the guaranty was indorsed on the bonds. And, in fact, it now appears very improbable that she would ever have been called on to indorse any bonds not already indorsed when the present bonds were issued.

Instead of a mere promise to indorse bonds of the company, with a fair security against loss, with a reasonable ground of belief that the right to call for this guaranty would never arise, the State, by the new statute, subscribes for and purchases $2,500,000 of the stock of the company, gives its bonds for it and becomes the debtor of the company for that amount.

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By the new arrangement, the State became transformed from a possible creditor of the company, [645] with security for its debt, into a debtor of the company with nothing to show for it but some worthless stock.

It seems impossible to hold that this is in any just sense a redemption of a former obligation. It is equally impossible to hold that the issue of these bonds, if valid, did not for the first time create a debt in regard to this transaction. There was no debt before this. There was no fixed obligation; no certain liability; no strong reason to believe that her promise would ripen into any absolute debt on her part.

The new arrangement was the creation of an unconditional debt of $2,500,000.

We are unable to discern the force of the reasoning by which validity is supposed to be imparted to these bonds by the Act of the Legisture.

The constitutional provision against an increase of the state debt was mainly if not solely intended to operate as a limitation on the power of the Legislature. We do not know of any increase of the debt which could be lawfully made without its authority, unless it was by the nonpayment of interest on what already existed. Certainly no new debt beyond the $25,000,000 could be made and be valid without such authority. It is, therefore, vain to say the Legislature did it. It is equally vain to say that the Legislature professed to be satisfying an old obligation, while on the face of the transaction it is quite apparent that it was a new debt, based on a new consideration, with only an incidental reference to an old contract liability to make it colorable.

We concur, therefore, with the Supreme Court of the State, in holding that these bonds constituted a new debt issued on a new consideration under a new Act of the Legislature, which was itself void because in conflict with the provision of the Constitution of the State, and the bonds are equally void as being in excess of the amount of debt which the State could constitutionally create.

The judgment of that court is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—103 U. S., 646.

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[646] HARRISON DURKEE ET AL., *Appts.*,

v.

BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

(See S. C., 13 Otto, 646-648.)

Case followed—a proposal is no contract.

1. Williams v. Louisiana, *ante*, followed.
2. An offer on the part of the State to issue new bonds for all its valid bonds outstanding, whenever the holders chose to accept the terms on which the exchange was to be made, created no contract with the holders of the bonds that this should be done, even if they were valid, and the offer may be withdrawn.

[No. 265.]

Argued Apr. 13, 14, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. W. W. Howe, James Lowndes, A. Sydney Biddle, **George W. Biddle, Simon Sterne** and *J. H. Kennard*, for appellants.

Messrs. **Gus. A. Breaux, James Lingan,** *Jno. McEnery* and *Whitacre*, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court for the District of Louisiana.

The bill was filed by the appellants as holders of a large number of the bonds issued to the New Orleans, Mobile & Texas R. R. Co., which are part of the $2,500,000 represented by *Williams and Guion* in the case in which they were plaintiffs in error v. the *State of Louisiana*, just decided in this court [*ante*, 595]. The object of the present suit, as declared in the prayer for relief, is to have these bonds declared legal and valid obligations, and for such other relief as the case may require and to equity may seem just.

The case was heard in the circuit court on the bill, answer and evidence, and the bill was dismissed.

In the case of *Williams* v. *State*, to which we have already referred, the Supreme Court of Louisiana held all the issue of bonds of the class on which appellants' bill is founded to be void because they were in excess of the $25,000,000 of indebtedness to which the State was limited by the constitutional amendment of 1870.

That amendment forbids the creation of any [647] debt beyond that sum until the year 1890. The Act under which the bonds now in question were issued was passed in 1871, and the Supreme Court of the State held them void because the debt in existence when that Act was passed already exceeded the $25,000,000 limited by the Constitution.

This decision of the State Court has just been affirmed by this court, and in doing so we have expressed our concurrence in the grounds on which the State Court acted.

Though neither of these decisions are binding on the appellants as an estoppel, because they were not parties to that suit, the principle on which that case was decided necessarily governs this. The same objection to the validity of the bonds is taken in the present case by defendants and set up in the pleading, on which the decision in the former case was supported. The cases have been brought to this court and argued together by the same counsel and on the same ground as regards the validity of the bonds. We refer to that case for the reasons which satisfy us that the bonds are void.

There is another reason, however, why the present decree should be affirmed.

The Board of Liquidation is a mere agent of the government to enable it to carry into effect a plan of consolidating all its outstanding debt and converting it, with the consent of its creditors, into a uniform bond, with the same rate of interest, and providing additional security for its payment. The law under which this liquidating process was to take place and which created this Board of Liquidation, the present defendant, was passed in 1874, some time after all these bonds were issued. It did not, there-

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fore, enter into the contract on which the bonds were issued. It was an offer on the part of the State to issue new bonds for all her valid bonds outstanding, whenever the holders chose to accept the terms on which the exchange was to be made.

In 1876 the Legislature of the State passed an Act declaring the bonds now in question void and forbidding the Board to receive them as valid in the scheme of liquidation. The Legislature undoubtedly had the right to forbid its own agent to receive these bonds. This law may not have affected the validity of the bonds. It certainly could not make them void if they were valid before. But it could prevent the Board from exchanging them for other bonds. [648] There was no contract with the holders of these bonds that this should be done, even if they were valid. To make such a contract, there is needed the acceptance of the proposition of the State by the holder, and a good consideration. Neither of these existed in this case, when the Legislature simply withdrew its proposition as to these bonds.

The decree of the Circuit Court dismissing the bill is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[667] JAMES W. SCHAUMBURG, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 13 Otto, 667.)

Case followed—direction to jury.

1. Case affirmed on the authority of U. S. v. Eckford, XVIII.
2. While sometimes the jury have been permitted to certify to a balance they found due from the Government to a defendant sued by it, a refusal of the court to direct that it be done cannot be reviewed here.

[No. 274.]

Argued Apr. 20, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. **Charles Henry Jones,** *William Wheeler Hubbell* and **George W. Biddle,** for plaintiff in error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed on the authority of *U. S.* v. *Eckford*, 6 Wall., 484 [73 U. S., XVIII., 920]. Claims for credit can be used in suits against persons indebted to the United States to reduce or extinguish the debt, but not as the foundation of a judgment against the government. In the present case the court instructed the jury as matter of law that the plaintiff in error, from July 1, 1836, until March 24, 1845, was in the military service of the United States as a first lieutenant of dragoons or cavalry; and that he was entitled as such to credit for the pay and emoluments that accrued during that period, and this was admitted to exceed the debt sued on by the United States. The jury thereupon brought in a verdict for the defendant. Had the jury gone further and struck the balance that would be due from the United States, no judgment could have been rendered for it. Any verdict, therefore, beyond the one actually given would have been fruitless. The court itself decided that the plaintiff in error was entitled to his pay and emoluments from July 1, 1836, to March 24, 1845. While sometimes the jury have been permitted to certify to a balance they find to be due from the government in cases of this kind, and under some circumstances it may be proper they should do so, a refusal of the court to direct that it be done cannot be reviewed here.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE SHIP CIVILTA, CASIMIR CASULICH, [699]
Claimant, *Appt.*,

v.

AUGUSTUS B. PERRY ET AL.

THE STEAM TUG RESTLESS, JOHN G. BAKER, Claimant, *Appt.*,

v.

AUGUSTUS B. PERRY ET AL.

(See S. C., "*The Civilta and The Restless*," 13 Otto, 699-703.)

Collision—vessel in fault.

1. Where a schooner was injured by a ship while towed by tug; held, that the ship and the tug were in law one vessel; and that, a vessel under steam. It was their duty, therefore, to keep out of the way.
2. Both were responsible for the navigation, and both were in fault for the collision.
3. The tug was in fault because she did not of her own motion change her course, so as to keep both herself and the ship out of the way; and the ship, because her pilot, who was in charge of ship and tug, neglected to give the necessary directions to the tug.

[Nos. 278, 296.]

Argued Apr. 22, 1881. Decided May 2, 1881.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The appellees filed the libel in this case in the District Court of the United States for the Southern District of New York against The Civilta and The Restless. A decree was rendered in favor of the libelants and affirmed upon appeal by the circuit court; whereupon the claimants appealed to this court.

The case is fully stated by the court.

Messrs. **Butler, Stillman** and **Hubbard,** in No. 278, and **Lucius E. Chittenden,** in No. 296, for appellants.

Messrs. **Benedict,** *Taft* and *Benedict*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit for damage by collision, begun

NOTE.—*Collision; damages where two vessels are at fault for injury to a third.* See, *note* to The City of Hartford v. Rideout, 97 U. S., XXIV., 930.

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by the owners and master of the schooner Magellan against the ship Civilta and the tug Restless. The libel alleges that the schooner was heading about northeast, having her booms on her port side, and making about two and a half or three knots an hour, and that "The tug was towing the ship at the rate of about eight or nine knots an hour and headed for the schooner until she was very near to her, when she suddenly sheered to port across the bows of the schooner and just cleared her, but brought the ship down on the schooner."

The answers, both of the tug and the ship, state that the course of the tug with the ship [700] following in her wake was southwest and that of the schooner about northeast, which if kept would have carried her at a safe distance on the starboard side of the tug and ship; that the tug and ship kept steadily on their course, until the tug passed the schooner, when the schooner suddenly kept away to the right between the tug and the ship, ran on to the hawser, and was sunk. In this way was presented the principal issue of fact in the case.

The findings were substantially as follows: The ship was being towed from New Haven to New York by the tug at the end of a hawser about two hundred and seventy feet long, leading astern from the tug. The ship had on board a pilot and the tug was subject to his orders. The night was clear and pleasant and lit by the moon. The wind was light and a little to the west of south. The ship and tug were going between seven and eight knots an hour. The collision occurred a little to the westward of Sand's Point.

The schooner was bound to Boston. She was sailing free with her booms off to port, and was making from two to three knots an hour. Her lights were properly set and burning brightly, as required by law. She had a competent man at her wheel and a competent lookout, and each of them faithfully performed his duty. Her course was about northeast and it was not changed before the collision.

The ship and tug were seen by those on the schooner bearing a little on their port bow, and the schooner was seen by those on the ship and tug bearing a little on their starboard bow. The courses of the schooner and the ship and tug crossed each other just ahead of the tug or between the tug and the ship. The tug did not slow her engine until the schooner had got up to her, and did not stop till the schooner was just striking the hawser. The tug did not change her course until the schooner was up to her, or nearly so, and the tug and the ship had changed their course about a point to the south before the collision.

The ship struck the schooner on her port side at about the fore-rigging and sunk her. The lights of the schooner were not observed by those on board the tug or those on board the ship, and those on board the tug and ship mis- [701] took the course of the schooner. The pilot on the ship gave no orders to the tug.

Upon these facts the court below gave a decree against both the ship and tug and apportioned the damages, one half to each, with a provision that if either of the vessels should prove insufficient to pay its share the residue might be collected from the other.

The ship and the tug have taken separate appeals.

It was substantially conceded in the argument, that upon the findings the schooner is entitled to recover her damages either from the ship or tug. The effort of each of the respondents has been to throw the entire responsibility for the loss on the other. On the part of the tug, however, it was contended that the findings do not meet the issues raised by the pleadings, but in this we think counsel are in error. It is quite true the finding is that the courses the vessels were on crossed each other just ahead of the tug, or between the tug and the ship, when there is no express averment to that effect either in the libel or the answer, but the finding is certainly not inconsistent with anything that is alleged. A southwest course would be parallel with a northeast course, and the two could not cross, but in the libel it is averred that the schooner was heading about northeast. Such, also, is the statement in the answers, and the finding is the same. A course which varied even a little from northeast might cross one that was southwest. The libel charges the tug with suddenly sheering to port, while the tug and ship say the schooner suddenly kept away to the right. The finding is that the schooner did not change her course, and that the ship and tug only went off their course one point to the south. Upon the findings, the collision seems to have occurred because the original courses crossed each other with the vessels in dangerous proximity, and not because of a sudden change of course by the tug as alleged. This we think [702] sufficient.

Upon the findings as they stand, we think the decree below was right. The ship and the tug were in law one vessel; and that a vessel under steam. It was their duty, therefore, to keep out of the way. Whether the one vessel, which the two constituted for the purposes of the case, was the ship or the tug or both, is the important question.

The tug furnished the motive power for herself and the ship. Both vessels were under the general orders of the pilot on the ship, but it is expressly found as a fact that the tug actually received no orders from him. Being on the ship, which was two hundred and seventy feet astern of the tug, it is not to be presumed that he was to do more than direct the general course to be taken by the ship in getting to her place of destination. The details of the immediate navigation of the tug, with reference to approaching vessels, must necessarily have been left to a great extent to those on board of her. She was where she would ordinarily see an object ahead before those on the ship could, and having all the motive power of the combined vessels under her own control, she was in a situation to act promptly and do what was required under the circumstances. That this was expected is clearly shown by the fact that down to the time of the collision the pilot on the ship had found no occasion to direct her movements. Her own pilot or master seems to have managed the navigation satisfactorily. We do not entertain a doubt that, situated as the tug was, in the night, so far away from the ship, it was her duty to do what was required by the law of a vessel under steam, to keep herself and the ship

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out of the way of an approaching vessel, particularly if the pilot of the ship did not assume actual control for the time being of the navigation of the two vessels.

Such being the case, we think it clear both vessels were in fault. Both mistook the course of the schooner, and neither those on the ship nor those on the tug observed the lights on the schooner, although they were properly set and burning brightly. It was for this reason, undoubtedly, that neither those on the ship nor those on the tug took any steps in time to avoid the collision. They evidently thought the course they were on would take them by in safety, until it was too late. Both vessels were responsible for the navigation, as has already been seen. The ship, because her pilot was in general charge, and the tug, because of the duty which rested on her to act upon her own responsibility in the situation in which she was placed. The tug was in fault because she did not on her own [703] motion change her course so as to keep both herself and the ship out of the way; and the ship because her pilot, who was in charge both of ship and tug, neglected to give the necessary directions to the tug, when he saw or ought to have seen that no precautions were taken by the tug to avoid the approaching danger. Had either the ship or tug done its duty under the circumstances, there could have been no collision.

The decree is in the form sanctioned by this court in the case of *The Alabama and Gamecock*, 92 U. S., 695 [XXIII., 763].

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[707] SCHOOL DISTRICT NO. 56, OF RICHARDSON COUNTY, NEBRASKA, *Plff. in Err.*,

v.

ST. JOSEPH FIRE AND MARINE INSURANCE COMPANY.

(See S. C., 13 Otto, 707-710.)

Void Nebraska Act—general statutes.

1. The Nebraska Act, authorizing School District Number 56, of Richardson County, to issue bonds for the purpose of erecting a school building, etc., under which the bonds sued on in this action were issued, is in conflict with the Constitution of the State, and is, therefore, void.
2. The bonds cannot be held valid under the powers conferred on school districts by the general statutes of the State.

[No. 406.]

Submitted Jan. 6, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The case is fully stated by the court.

Messrs. **E. Esterbrook** & *Geo. P. Uhl*, for plaintiff in error.

Messrs. **Willard P. Hall**, *H. E. Barnard* and *B. R. Vineyard*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The defendant in error recovered a judgment in the Circuit Court of the United States for the District of Nebraska against the plaintiff in error for the sum of $2,554.70. The Judges of the Circuit Court certified a difference of opinion on three questions of law arising in the case, only one of which is necessary to be considered here, namely: "Whether the said Act of the Legislature of Nebraska, approved February 2, 1875, recited in the bonds (the coupons of which are in suit), is in conflict with section 1 of article 8 of the Constitution of the State, because the same is a special Act conferring corporate powers: and also whether it is in conflict with section 19 of article 2 of the Constitution of the State because it contains more than one subject."

Indeed, we only propose to consider the first branch of this double question. Section 1, article 8, of the Nebraska Constitution reads thus: "The Legislature shall pass no special Act conferring corporate powers."

The Act of February 2, 1875, is entitled "An Act Authorizing School District No. 56, of Richardson County, to Issue Bonds for the Pur- [708] pose of Erecting a School Building, Procuring a Site Therefor, and for Setting Apart a Fund to Pay the Same."

It authorized the school board to issue bonds to the amount of $20,000, payable in ten or twenty years, with ten per cent per annum interest, for that purpose, and required a vote of a majority of the electors of the district before they could be issued. It forbid the sale of these bonds at less than eighty-five cents on the dollar. It also enacted that all the penalties and forfeitures thereafter imposed, for any breach of the ordinances of Falls City, and all money for licenses to sell or traffic in liquors, or any other commodity or license to transact other business, should be paid over to the board of trustees of the School District, as well as all fines imposed by the police judge of said city.

The bonds on which the judgment in this case was rendered were issued under this Act, and it was so recited on their face. That this was a special Act is not denied. Nor can it be controverted successfully that it confers corporate powers. The power to make a contract of this character, to collect the taxes necessary to pay the debt, to contract for and superintend and pay for the building, to receive the fund mentioned from the authorities of Falls City, are all in their nature corporate acts when performed by a body possessing corporate powers.

The Statutes of Nebraska then in force declare that "Every duly organized school district shall be a body corporate, and possess all the usual powers of a corporation for public purposes," * * * "and may sue and be sued, purchase, hold and sell such personal and real estate as the law allows." The power conferred by the Act of 1875 on School District No. 56 was conferred on a corporation, and was to be exercised by it as a corporation and is, therefore, corporate power and was conferred, if at all, by a special Act.

In response to this it is said that a school district is only a *quasi* corporation, and does not come within the constitutional provision. What is meant by the words *quasi* corporation, as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special.

Such is not the case here, for the language of

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the Nebraska Statute makes school districts cor-
[709] porations in the fullest sense of the word.

It is next argued that the constitutional provision was only intended to apply to private corporations, as distinguished from those which are part of the body politic, such as counties and towns.

But we see no warrant for this distinction.

There is certainly nothing in the words of the provision to suggest any such distinction or limitation. Nor do we see any reason why the local corporate bodies discharging public functions should not be governed by general and uniform laws as well as those for private enterprises. In fact the weight of the argument seems to be the other way, for it can very well be seen that the aggregation of individual capital and energy into an associated organization may require different powers for each enterprise so established, while the powers to be exercised by cities, towns, townships and school districts in the same State may or should be uniform in character all over the State. If any such rule is defensible at all, of which it is not our province to judge, its application to the latter class of corporations seems the more appropriate of the two.

The Constitution of the State of Ohio has a provision similar to that of the State of Nebraska relied on in this case. In the case of *State* v. *Cincinnati*, 20 Ohio St., 18, the Supreme Court of that State held that in the purview of the constitutional provision there was no distinction between private and municipal corporations. To the same effect is the decision of the same court in *Atkinson* v. *R. R. Co.*, 15 Ohio St., 21. The Supreme Court of Nebraska, in the case of *Robert Clegg* v. the present plaintiff in error [8 Neb., 178], has held the statute under which these bonds were issued void, because it was forbidden by this clause of the State Constitution.

We are of opinion that this is a sound construction of the Constitution, and that, as to the first question certified to us, it must be answered that the Act of February 2, 1875, under which these bonds issued, is in conflict with the Constitution of the State and is, therefore, void.

We are asked, however, to affirm the judgment because the bonds may be held valid under the powers conferred on school districts by the general statutes.

We are, however, of a different opinion. The general statute had other conditions for creating a debt than the special Act mentioned on the face of these bonds. This statute provided a fund which might of itself be sufficient to pay the
[710] debt without resort to taxation. The vote of the electors might not have been obtained under the general statute. And as the bonds recite that they were issued under this Act, and that the vote was taken under it, we cannot see that power purposed to be exercised under other and very different circumstances, can be invoked to give validity to an Act which is void by the authority under which it professed to be acting.

These views render it unnecessary to answer the other questions certified to us, and the judgment of the Circuit Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[714]

NELSON VIAL, Jailer, CHARLES S. PERHAM AND WILLIAM TWEEDLE, Committing Creditors, *Plffs. in Err.*,

v.

LUCIUS S. PENNIMAN.

(See S. C., "*Penniman's Case*," 13 Otto, 714-720.)

Statutes, abolishing imprisonment for debt, constitutional.

1. Statutes that are constitutional in part only will be upheld, so far as they are not in conflict with the Constitution, provided the allowed and the prohibited parts are severable.
2. A State Legislature can pass a law abolishing imprisonment for debt on contracts made or judgments rendered, when imprisonment of the debtor was one of the remedies to which his creditor was by law entitled to resort.
3. The abolition of imprisonment for debt is not of itself such a change in the remedy as impairs the obligation of the contract.

[No. 281.]

Argued Apr. 22, 1881. Decided May 2, 1881.

IN ERROR to the Supreme Court of the State of Rhode Island.

Refer to the opinion of the court for full statement of the case.

Messrs. C. H. Hill, Henry D. Hyde and **Harvey N. Shepherd,** for plaintiffs in error:

Previous to the enactment of chapter 600, the liability of the stockholder in said corporation was original, direct and absolute; substantially that of a partner, as though the debt had been created in their name by some agent acting for them.

Conant v. *Van Schaick*, 24 Barb., 89; *Corning* v. *McCullough*, 1 N. Y., 47.

Nor can this liability be a surprise to them, if they exercise due diligence in examining the public records.

Curtis v. *Harlow*, 12 Met. (Mass.), 3.

Chapter 600 changes and lessens the liability of the stockholders in said corporation, by making it derivative, secondary and conditional, substantially that of a surety or guarantor and, indeed, somewhat less than that of an ordinary surety.

The 1st section of chapter 600 completely abolishes the remedy at law given by previous statutes for the enforcement of a stockholder's liability, a remedy convenient and summary, and substitutes for it a remedy which is dilatory, expensive and uncertain. The obligation of the contract is thereby impaired, notwithstanding the new remedy and the retention of the former remedy in equity.

Guild v. *Rogers*, 8 Barb., 502; *Van Rensselaer* v. *Snyder*, 9 Barb., 302; S. C., 13 N. Y., 299; *Conkey* v. *Hart*, 14 N.Y., 22, 30; Pomeroy, Const. L., sec. 609.

The remedy or means of enforcement is a part of the obligation which a State cannot, by legislation, impair.

Lapsley v. *Brashears*, 4 Litt. (Ky.), 65; 1 Bac. Abr., tit. Actions in General, letter B.

The remedy is inseparable from the obligation, as otherwise the contract would be of the nature of those imperfect obligations or moral duties which are subject to the mere caprice of the individual.

Townsend v. *Townsend*, 1 Peck (Tenn.), 1; *Riggs* v. *Martin*, 5 Pike (Ark.), 506.

The State, if it modifies the remedy, must

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provide one as speedy, efficient and substantial as that subsisting when the contract was made.

1 Kent, 12th ed., sec. 456, *note a;* Sedg. Stat. and Const. Law, 630; Pomeroy, Const. Law, sec. 609; *Jones* v. *Crittenden*, 1 Car. L. R., 385; *Johnson* v. *Duncan*, 3 Mart., 531; *Bailey* v. *Gentry*, 1 Mo., 164; *Bumgardner* v. *Circuit Court*, 4 Mo., 50; *Stevens* v. *Andrews*, 31 Mo., 205; *Willard* v. *Longstreet*, 2 Doug. (Mich.), 172; *Mundy* v. *Monroe*, 1 Mich., 68; *Cargill* v. *Power*, 1 Mich., 369; *Nevitt* v. *Bk.*, 14 Miss. (6 Sm. & M.), 513; *Scobey* v. *Gibson*, 17 Ind., 572; *Inglehart* v. *Wolfin*, 20 Ind., 32; *Rosier* v. *Hale*, 10 Ia., 470; *Malony* v. *Fortune*, 14 Ia., 417; *Lockett* v. *Usry*, 28 Ga., 345; *Taylor* v. *Stearns*, 18 Gratt., 244; *Jones* v. *McMahan*, 30 Tex., 719; *Bunn* v. *Gorgas*, 41 Pa., 441; *Penrose* v. *Canal Co.*, 56 Pa., 46; *Edwards* v. *Kearzey*, 96 U. S., 607 (XXIV., 798).

While the State may prescribe the mode of suit and forms of process, it cannot clog the remedy with conditions and restrictions, so as materially to impair its efficiency.

Cooley, Const. Lim., sec. 284; *Oliver* v. *McClure*, 28 Ark., 555; *Fletcher* v. *Peck*, 6 Cranch, 87; *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Green* v. *Biddle*, 8 Wheat., 1; *Ogden* v. *Saunders*, 12 Wheat., 213; *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Hayward*, 2 How., 608; *Gantly* v. *Ewing*, 3 How., 707; *Bk.* v. *Sharp*, 6 How., 301; *Curran* v. *Ark.*, 15 How., 304; *Hawthorne* v. *Calef*, 2 Wall., 10 (69 U. S., XVII., 776); *Von Hoffman* v. *Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403); *White* v. *Hart*, 13 Wall., 646 (80 U. S., XX., 685); *Gunn* v. *Barry*, 15 Wall., 610 (82 U. S., XXI., 212); *Walker* v. *Whitehead*, 16 Wall., 314 (83 U. S., XXI., 357).

Chapter 600 is a connected whole; its provisions are dependent upon each other and operate together for the same purpose, and it is not to be presumed that the General Assembly would have passed one provision without the other. Therefore, the chapter being unconstitutional in its other provisions, it is also unconstitutional in so far as it prohibits imprisonment on an execution against the corporation.

Cooley, Const. Lim., 78; *Wynehamer* v. *People*, 13 N. Y., 442; *Warren* v. *Charlestown*, 2 Gray, 84; *Ootman* v. *Bond*, 15 Wis., 20; *Meshmeier* v. *State*, 11 Ind., 484; *Eckhart* v. *State*, 5 W. Va., 515.

Even supposing the different clauses of the chapter are not so interdependent and that the provision against imprisonment may be separated from the rest, the provision in itself is unconstitutional.

It utterly takes away the right of imprisonment on an execution against the charter, even on proof of fraud.

It is settled that a State may authorize the liberation of a debtor upon judicial proof of his insolvency. If a debtor has no property wherewith to pay his debt, imprisoning him cannot oblige him to pay it, and therefore it does not impair the obligation of his contract to exempt or release him from imprisonment.

Bk. v. *Freeze*, 6 Shep., 109; *Kendall* v. *Dodge*, 3 Vt., 360; *Woodfin* v. *Hooper*, 4 Humph., 13; *Bronson* v. *Newberry*, 2 Doug. (Mich.), 38; *Newton* v. *Tibbetts*, 7 Ark., 150; *Donnelly* v. *Corbett*, 7 N. Y., 500; *In re Nichols*, 8 R. I., 50; *Sturges* v. *Crowninshield* (*supra*); *Mason* v. *Haile*, 12 Wheat., 370; *Beers* v. *Haughton*, 9 Pet., 329; *Gray* v. *Monroe*, 1 McLean, 528; *Terry* v. *Anderson*, 95 U. S., 632 (XXIV., 366); *Edwards* v. *Kearzey* (*supra*).

In all the above cases the statute abolishing imprisonment contains ample provisions to compel a discovery of the debtor's property, or takes effect after the prisoner had taken the poor debtor's oath. They are not applicable to a case like the present, where the law allows the debtor to go at large without any evidence of his insolvency, and does not allow the creditor to detain him, even upon proof that he is abundantly solvent, and when the defendant in error had agreed that he would be liable in his person as well as in his property, on an execution against the corporation.

Hawthorne v. *Calef* (*supra*).

Mr. **Benj. F. Thurston,** for defendant in error:

It was decided at an early day by the Supreme Court of the United States, that those Acts did not impair the obligation of a contract, which extended only to the modification or variation of a remedy, even though the new remedy was less convenient and speedy; provided that some substantive remedy was left; and that imprisonment is no part of the contract, and that the release of the prisoner does not impair its obligation.

Sturges v. *Crowninshield*, 4 Wheat., 122; *Mason* v. *Haile*, 12 Wheat., 370.

In affirmance of the same doctrine are the following decisions of this court:

Ogden v. *Saunders*, 12 Wheat., 230; *Beers* v. *Haughton*, 9 Pet., 359; *Von Hoffman* v. *Quincy*, 4 Wall., 553 (71 U. S., XVIII., 409); *Tennessee* v. *Sneed*, 96 U. S., 69 (XXIV., 610).

Mr. Justice **Woods** delivered the opinion of the court:

The General Statutes of Rhode Island, chapter 142, contain the following provisions:

"SEC. 11. Every manufacturing corporation included within the provisions of this chapter, shall file in the town clerk's office of the town where the manufactory is established, annually on or before the 15th day of February, a certificate, signed by a majority of the directors, truly stating the amount of its capital stock actually paid in; the value, as last assessed for a town tax, of its real estate; the balance of its personal assets, and the amount of its debts.

SEC. 12. If any of said companies shall fail to do so, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given, unless such company shall have been insolvent and assigned its property in trust for the benefit of its creditors, in which case the obligation to give notice by the filing of such certificate shall cease." [715]

"SEC. 20. Whenever the stockholders of any manufacturing company shall be liable, by this provision of this chapter, to pay the debts of such company or any part thereof, their persons and property may be taken therefor on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions issued against them for their individual debts.

SEC. 21. The person to whom such officers or stockholders may render themselves liable as

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aforesaid, may, instead of the proceedings aforementioned, have his remedy against said officers or stockholders by bill in equity in the Supreme Court."

While these provisions of the statute law were in force William Tweedle, of Providence, one of the plaintiffs in error, recovered judgment against the American Steam and Gas-Pipe Company, a manufacturing corporation created by the General Assembly of Rhode Island, which was subject to the provisions above recited.

The defendant in error was a stockholder in that corporation. The certificate required by section 11 had not been filed. He was, consequently, individually liable in person and property for the satisfaction of the judgment above mentioned. Therefore, the sheriff, to whose hands the execution issued on the judgment of Tweedle against the corporation came, for want of goods and chattels of the corporation or of Penniman, the defendant in error, arrested Penniman and committed him to jail.

While he was in jail, under the commitment, the General Assembly of Rhode Island, on March 27, 1877, passed an Act "Defining and Limiting the Mode of Enforcing the Liability of Stockholders for the Debts of Corporations." It was as follows:

"SECTION 1. No person shall hereafter be imprisoned or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.

SEC. 2. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, [716] or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action, such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered.

SEC. 3. All Acts and parts of Acts inconsistent herewith are hereby repealed.

SEC. 4. This Act shall take effect from and after the date of the passage thereof."

Penniman did not take or offer to take the poor debtor's oath, on the taking of which he would have been entitled to discharge from imprisonment, but while he was still in jail under said commitment, applied to the Supreme Court of the State for his release by virtue of the provisions of the Act just recited.

His discharge was opposed by Tweedle, the committing creditor, on the ground that the 1st section of the Act, by virtue and force of which he claimed to be discharged from imprisonment, was repugnant to and in violation of section 10, article I., of the Constitution of the United States and was, therefore, null and void, because it impaired the obligation of the judgment upon which said commitment had been made, and of the contract on which the judgment was founded.

It was adjudged by the Supreme Court that said section was constitutional and valid and that, by virtue thereof, Penniman was entitled to be discharged from further custody under said commitment, and the court discharged him accordingly.

This judgment of the Supreme Court is brought here on error for review.

It is only necessary to consider that part of section 1 of the Act above recited which relieves a party from imprisonment upon an execution issued on a judgment obtained against a corporation in which he is a stockholder. The defendant in error invokes that provision of the statute and no other. He was merely relieved from imprisonment, and it is that and that only of which the plaintiff in error complains. "Statutes that are constitutional in part only will be upheld, so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable." *Packet Co.* v. *Keokuk*, 95 U. S., 80 [XXIV., 377]. So that, if so much of the section under consideration as [717] relieves a debtor from imprisonment for debt is constitutional, and can be severed from the other parts of the enactment, the judgment of the Supreme Court of Rhode Island should be affirmed.

That part of the section of the law assailed by plaintiff in error, which relates to imprisonment of the debtor, and that which relates to the seizure of his property, are entirely distinct and independent, and either one can stand and be operative, though the other should be declared void. We may, then, in deciding this case, consider section 1 as if it read: "No person shall hereafter be imprisoned, or be continued in prison * * * upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder."

The only question, therefore, which we are called on to decide is, whether this provision of the law, which was enacted after the recovery of the judgment against the corporation, by virtue of which the defendant in error was imprisoned, is a law which impairs the obligation of contracts.

In other words, can a State Legislature pass a law abolishing imprisonment for debt on contracts made or judgments rendered when imprisonment of the debtor was one of the remedies to which his creditor was by law entitled to resort?

This court has repeatedly and pointedly answered this question in the affirmative, holding such an enactment not to impair the obligation of the contract.

In *Sturges* v. *Crowninshield*, 4 Wheat., 122, this court, speaking by *Chief Justice* Marshall said: "The distinction between the obligation of a contract and the remedy given by the Legislature to enforce that obligation, has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract the remedy may certainly be modified, as the wisdom of the Nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

The precise question raised in this case came

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before this court in *Mason* v. *Haile*, 12 Wheat., [718] 370. The case was an action of debt, brought in the Circuit Court of Rhode Island, upon two several bonds given by the defendant Haile to the plaintiff Mason and one Bates, whom the plaintiff survived; one of which was executed on the 14th and the other on the 29th of March, 1814.

The condition of both bonds was the same, and was as follows:

"The condition of the above obligation is such that if the above-bounden Nathan Haile, now a prisoner in this State's jail in Providence, within the County of Providence, at the suit of Mason and Bates, do and from henceforth continues to be a true prisoner in the custody, guard and safe-keeping of Andrew Waterman, keeper of said prison, within the limits of said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

To the declaration upon these bonds the defendant pleaded in substance: that in June, 1814, after giving the bonds, he presented a petition to the Legislature of Rhode Island, praying for relief and the benefit of an Act passed in June, 1756, entitled "An Act for the Relief of Insolvent Debtors;" that in February, 1816, the Legislature, upon due hearing, granted the prayer of his petition and passed the following Resolution:

"On petition of Nathan Haile, of Foster, praying for the relief therein stated, that the benefit of an Act passed in June, 1756, for the relief of insolvent debtors, may be extended to him. Voted, that the prayer of the petition be and the same is hereby granted;" that the defendant afterwards, in pursuance of said Resolution and of the laws of the State, received, in due form, from the proper court, a judgment that he should be and was thereby fully discharged from all the debts, duties, contracts and demands, * * and from all imprisonment, arrest, and restraint of his person therefor."

To this plea a demurrer was filed, and the Judges of the Circuit Court being divided in [719] opinion as to the suppressing of the plea, the question was certified to this court for final decision.

The case was argued by Mr. Webster for the plaintiff. He urged that the Act of the Legislature of Rhode Island of February, 1816, liberating the person of defendant from imprisonment and reviving in his favor an obsolete insolvent Act of the colonial Legislature passed in 1756, and which was no longer in force, was, in the strictest sense, a law impairing the obligation of contracts; that it interfered with an actually vested right of the creditor acquired under existing laws and entitling him to a particular remedy against the person of his debtor; that, upon the narrowest construction which had ever been given to the prohibition in the Constitution of the United States, it impaired the obligation of the bonds; that the obligation of these bonds was entirely destroyed by the legislative Act, which was not a general law but a private Act, professedly intended for the relief of the party in the particular case.

But this court held the plea good, and the Resolution of the Legislature of Rhode Island by which the defendant was discharged from imprisonment, a valid and constitutional enactment.

The court said: "Can it be doubted but the Legislatures of the States, so far as relates to their own process, have a right to abolish imprisonment for debt altogether and that such law might extend to present as well as future imprisonment? We are not aware that such a power in the States has ever been questioned. And if such a general law would be valid under the Constitution of the United States, where is the prohibition to be found that denies to the State of Rhode Island the right of applying the same remedy to individual cases? Such laws merely act on the remedy, and that in part only. They do not take away the entire remedy but only so far as imprisonment forms a part of such remedy. The doctrine of this court in the case of *Sturges* v. *Crowninshield*, 4 Wheat., 200, applies with full force to the present case."

Mr. Justice Washington dissented from the opinion in the case but concurred in so much as related to the discharge of the defendant from imprisonment. He remarked: "It was stated [720] in *Sturges* v. *Crowninshield* that imprisonment of the debtor forms no part of the contract and, consequently, that a law which discharges his person from imprisonment does not impair its obligation. This I admit, and the principle was strictly applicable to a contract for money. * * * I admit the rights of a State to put an end to imprisonment for debt altogether."

So in *Beers* v. *Haughton*, 9 Pet., 359, this court said: "There is no doubt that the Legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and the discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects." See, also, *Von Hoffman* v. *Quincy*, 4 Wall. 558 [71 U. S., XVIII., 409], and *Tennessee* v. *Sneed*, 96 U. S., 69 [XXIV., 610].

The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract, the Legislature has the control and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right. *Bronson* v. *Kinzie*, 1 How., 311; *Von Hoffman* v. *Quincy*, 4 Wall., *supra; Tennessee* v. *Sneed, supra.*

The result of the decisions of this court above quoted is that abolition of imprisonment for debt is not of itself such a change in the remedy as impairs the obligation of the contract.

Our conclusion is, therefore, that the judgment of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES H. MARSHALL ET AL., [730]
v.
THE STEAMSHIP ADRIATIC, Her Engines, etc., OCEANIC STEAM NAVIGATION Co., Limited, Claimant.

(See S. C., "*The Adriatic*" 13 Otto, 730, 731.)

New rule in admiralty cases.

This court promulgates the following as an addi-

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tional paragraph, numbered 6, to Rule 8: "The record in causes of admiralty and maritime jurisdiction, where, under the requirements of law the facts have been found in the court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case."

[No. 727.]

Argued, Apr. 18, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Motion to strike from the transcript the depositions and oral testimony taken in the progress of the cause in the several courts below.

The case is stated by the court.

Mr. **E. P. Wheeler,** in support of motion.

Mr. **William Allen Butler,** *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 698 of the Revised Statutes provides that, upon the appeal of any cause of admiralty and maritime jurisdiction, a transcript of the record shall be transmitted to this court "And copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal." While the Act of February 16, 1875, 18 Stat. at L., pt. 3, 315, ch. 77, sec. 1, limits the review by this court of the judgments and decrees on the instance side of courts of admiralty and maritime jurisdiction, to the questions of law arising on the record, and to [731] such rulings of the court below excepted to at the time, as may be presented by a bill of exceptions, and requires the court below to find the facts, no change has been made in the law prescribing what should be included in the transcript sent here on an appeal. For that reason, we will not order the testimony which has been sent up in this case to be stricken out. As under our repeated decisions, *The Abbotsford*, 98 U. S., 440 [XXV., 168], and *The Benefactor*, at this Term [*ante*,157], the facts as found are conclusive on us, it is clear the testimony may not be "necessary on the hearing of the appeal." For this reason it may, with propriety, by consent of counsel, be omitted from the printed record. We will not, however, make any order in that behalf, but if it shall be unnecessarily printed against the wishes of either of the parties, we will, on the final determination of the case, give such directions in respect to costs as may seem proper.

The section of the Revised Statutes referred to, however, requires only copies of such of the proofs to be sent up "as may be necessary on the hearing of the appeal." This gives us power to prescribe by rule what shall be done in cases where the Act of 1875 applies. For the guidance hereafter, of parties appealing and the officers of the courts below in such a case, we, therefore, now promulgate the following as an additional paragraph, numbered 6, to Rule 8:

"6. The record in causes of admiralty and maritime jurisdiction, where under the requirements of law the facts have been found in the court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case."

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE W. WILLIAMS ET AL., *Appts.*, [753]

v.

CALVIN CLAFLIN ET AL.

(See S. C., 13 Otto, 753, 754.)

New bond on appeal.

If, after security on an appeal which operates as a *supersedeas* has been accepted, the circumstances of the case or of the parties or of the sureties on the bond have changed, so that the security, which was sufficient at the time it was taken, does not continue to be so, this court may, on proper application, so adjudge and order as justice shall require.

[No. 1095.]

Argued Apr. 25, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the District of South Carolina. On motion.

The case is stated by the court.

Mr. **James Lowndes** and *Mr.* **Geo. F. Edmunds,** for appellees, in support of motion.

Messrs. **P. Phillips** and **Samuel Lord, Jr.,** for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

In *Jerome* v. *McCarter*, 21 Wall., 31 [88 U. S., XXII., 516], we said that if, after security on an appeal, which operated as a *supersedeas*, had been accepted, the circumstances of the case or of the parties or of the sureties on the bond had changed, so that security which at the time it was taken was sufficient, did not continue to be so, we might, on proper application, so adjudge and order as justice should require. The present appellants are interested only in preserving their security for a debt of the railroad company, amounting, when the decree was rendered, to about $152,000. When they took their appeal, execution of the whole decree had been stayed by another appeal of the present appellees, who were the complainants below. Consequently the amount of security to be given then [754] by these appellants was a matter of but little importance comparatively. The other appeal has been dismissed, and in this way the circumstances of the case are materially changed. It is easy to see that what was sufficient security on this appeal when taken, is probably not so now. The bonds secured by the mortgage according to the decree amount to several millions of dollars, and the value of the security is necessarily subject to the fluctuations of trade. The appellants are, to a considerable extent, interested in the same bonds, but if their debt is paid in full they cannot complain at the execution of the decree.

It is, therefore, ordered that the supersedeas *herein be so far modified as to allow a sale of the mortgaged property to be made under the decree,* but that the court below retain in its registry, subject to the order of this court until the final

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determination of the present appeal, so much of the proceeds as shall be sufficient to satisfy and discharge any balance that may remain of the debt due these appellants, after the proportionate share they receive under the decree upon the bonds and coupons they hold as collateral, shall have been applied thereon.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[764] FRANCIS HINCKLEY, *Appt.*,
v.
LEVI P. MORTON ET AL.

(See S. C., 13 Otto, 764-766.)

Motion to dismiss and motion to affirm, when united.

A motion to affirm may be united with a motion to dismiss a writ of error or appeal, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

[No. 895.]

Petition filed May 2, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

On petition for rehearing.

Mr. Leonard Swett, for appellant.

Mr. R. Biddle Roberts, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Rule 6, paragraph 4, as amended November 4, 1878, 97 U. S., VII. [see Rule 6, par. 5, XX., 902], provides that there may be united, with a motion to dismiss a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument. This is a modification of the rule as originally promulgated May 8, 1876, 91 U. S., VII., when it was confined to motions to dismiss writs of error to a state court. In *Whitney* v. *Cook*, 99 U. S., 607 [XXV., 446], we held that to justify a motion to affirm under this rule there must be a motion to dismiss and at least some color of right to a dismissal.

[766] In *Stewart* v. *Salamon*, 97 U. S., 362 [XXIV., 1045], we decided that if an appeal was taken from a decree entered on our mandate upon a previous appeal, we would, on the application of the appellee, examine the decree entered and if it conformed to the mandate, dismiss the case with costs. The motion to dismiss in this case was apparently based upon that ruling. It seemed to us when it was up for hearing, to have been made in good faith; and while we did not think it ought to be sustained, we could not say it was without any color of right. For that reason we felt at liberty to look into the motion to affirm.

The record in this case showed that Hinckley was appointed receiver in the Kelly suit November 24, 1879, and that his receivership ended by his turning over the property to the trustees of the mortgage on the 12th of August, 1875. The record of the former appeal, to which we think we may with propriety look, as the order now appealed from was made upon a petition of intervention filed in that cause, shows that, in the settlement of accounts then made, Hinckley was paid for his services during the whole period of his receivership, that is to say, from the date of his appointment in the Kelly suit until his final discharge.

We are still of the opinion that the case is a proper one for the application of our rule in respect to motions to affirm and, therefore, deny the petition for a rehearing.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WM. E. CLARK, *Appt.*, [766]
v.
JOHN GEORGE KILLIAN, Admr., etc., of WILLIAM SCHLORB, Deceased, ET AL.

(See S. C., 13 Otto, 766-769.)

Settlement on wife—bill of review—errors.

1. Lands conveyed by a husband in trust for his wife, when he is free from debt and in prosperous circumstances, cannot be subjected to debts of subsequent creditors, where there is no fraud.
2. A bill of review is the proper mode of correcting an erroneous decree declaring the conveyance to the wife void, and is filed in time, if within two years from such decree.
3. This court cannot notice errors assigned in the brief of counsel for appellees.

[No. 264.]

Argued Apr. 12, 1881. Decided May 2, 1881.

APPEAL from the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Mr. **Francis Miller**, for appellant

Mr. **W. J. Miller**, for appellees. [767]

Mr. Justice **Harlan** delivered the opinion of the court:

On the 24th of June, 1873, the present appellant obtained a judgment at law against John Killian, administrator of Wm. Schlorb, deceased, for the sum of $3,819.25, the balance due from decedent upon dealings with appellant, commencing on 22d day of November, 1865. An execution upon the judgment having been returned no property found, Clark exhibited his bill in equity in the Supreme Court of this District against the *administrator de bonis non*, the widow, and infant children of Schlorb, for the purpose of reaching certain real estate which stood in the name of the wife and an infant son of Schlorb, and the transfers of which were alleged to have been fraudulent and void as to Clark and other creditors of decedent.

The real estate thus sought to be subjected to the satisfaction of Clark's judgment is thus described in the bill: 1. Lots 6 and 9, in square 654, of the City of Washington, conveyed August 18, 1858, by Schlorb to John Killian, since

NOTE.—*Settlements or conveyance for benefit of wife and child; when good or void as to creditors.* See, *note* to Sexton v. Wheaton, 21 U. S. (8 Wheat.), 229.

Bill of review; nature of; when may be brought; who may maintain; time within which; what should contain. See, *note* to Bk. of U. S. v. Ritchie, 33 U. S. (8 Pet.), 128.

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deceased, in trust for the use of his wife, and free from liability for the debts of the grantor. 2. Lots 5 and 8, in the same square, conveyed October 23, 1858, to the same person in trust for the sole and separate use of the wife, and free from liability for the husband's debts. 3. Lot 2, in the same square, purchased by Schlorb from Baker and by the latter, in pursuance of directions from the father, conveyed October 5, 1865, to his infant son George L. Schlorb. 4. Lot 3, in the same square, purchased by Schlorb from Brown, and by the latter, in pursuance of directions from the husband, conveyed, December 21, 1865, to Killian, in trust for the sole and separate use of the wife, and free from the control of the husband. 5. The north half of lot 7, in the same square, purchased by Schlorb from Budle, and by the former's direction conveyed, May 3, 1866, to Killian, in like trust for the sole and separate use of the wife, and free from the husband's control. 6. Lot 1, in the same square, conveyed by Schlorb, December 23, 1868, to Killian in trust for the benefit of the wife, and free from the husband's control.

The bill alleged that these several conveyances were by Schlorb made and caused to be made with the intent to hinder, delay and defraud his creditors.

The answer of the widow was explicit in its denial of the fraud charged, and alleged that |768| decedent, at the making of the several conveyances, was free from debt, in comfortable circumstances and engaged in a prosperous business; that of the property so conveyed in trust for her, only one piece was after the dealings between Clark and decedent commenced and were in progress. The infant children made a formal answer, by their mother, as *guardian ad litem*, submitting their rights to the protection of the court. An answer containing full denials was also filed by the *administrator de bonis non* of Schlorb. Clark filed his joinder of issue on the answers to his bill, and the cause was submitted *on bill and answers and replications, without proof.*

On the 17th of February, 1875, the court rendered a decree adjudging that the conveyances for lots 1, 3, and the north half of lot 7 were null and void, and they were sold under the decree for the sum of $1,403.47.

Subsequently, on 18th June, 1875, a similar decree was rendered as to lots 2, 5, 6, 8, and 9. They were also sold, and at the commencement of this suit the title was in appellant Clark.

On 4th Jan., 1877, a bill of review was filed by the *administrator de bonis non*, the widow, and infant children of Schlorb against Clark, for the purpose of setting aside the foregoing decree for errors of law apparent on the face of the record. The bill set out all of the foregoing facts, including the pleadings in the original suit, and Clark demurred. The demurrer was sustained and the bill dismissed. Upon appeal to the General Term the decree of dismissal was reversed and the demurrer was overruled. The cause was then submitted *on the bill of review.* Judgment was rendered setting aside the former decree as to lots 2, 5, 6, 8, and 9, and affirming the one as to lots 1, 3, and the north half of 7.

From the last decree both sides prayed an appeal to this court.

The decree of the court below, so far as it relates to lots 2, 5, 6, 8, and 9, is in all respects right. Upon the face of the bill, answers, and other pleadings in the case of *Clark* v. *Killian*, there was no ground whatever to assail the conveyances of those lots. They were all made before Clark had any dealings with Schlorb, and when, so far as the pleadings in that case disclose, there were no creditors who could com- [769] plain of any such disposition by Schlorb of his property. The answers denied the allegations of fraud, and there was no evidence to overcome the denials. Clark's dealings with Schlorb were all subsequent to those conveyances and, therefore, he could not have given credit to Schlorb upon the faith of his ownership of that property. The pleadings in that case did not authorize the conclusion, as matter of law, that Schlorb had conveyed or caused to be conveyed the title to that property with the fraudulent intention of thereafter engaging in business, or having business transactions and, in the event of financial embarrassment arising therefrom, to withhold it from his creditors. Taking all the circumstances to be as they are set out in the pleadings, it is perfectly clear that the court, in adjudging the conveyances of the lots above named to be null and void, and ordering them to be sold in satisfaction of Clark's judgment, erred in point of law. Consequently a bill of review was the proper mode of remedying that error. The present bill was filed in time. *Thomas* v. *Harvie*, 10 Wheat., 146.

The appeal prayed by appellees in the court below from so much of the decree as confirmed the original decree as to lots 1, 3, and north half of 7, has never been perfected. We cannot, therefore, notice the errors assigned in the brief of counsel for appellees.

The decree below, so far as appealed from by Clark, is affirmed, but without prejudice to any right which appellees may have to an appeal.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 302.

NEW YORK LIFE INSURANCE COMPANY, *Appt.*, |780|

v.

EDSON C. BANGS ET AL.

(See S. C., 13 Otto, 780-783.)

Defense when must be pleaded—suit in equity.

1. When an action at law is brought upon a contract, the defendant who denies its obligation, either from fraud, payment or release, or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration.
2. A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law, where there is no pretense that any fraud was committed or unconscientious advantage taken, or that there is any newly discovered matter not known when the trial took place.

[No. 693.]

Argued Apr. 6, 7, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is fully stated by the court.

Messrs. **H. L. Baker** and **W. A. Maury**, for appellant.

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Messrs. C. K. Davis and **M. S. Brewer**, for appellees:

The Company, notwithstanding this bill, elected to rely upon its defense in the action at law, and waived defenses therein, which are the identical substance of this bill. The proceedings at law became an estoppel against the suit in equity.

Durand v. *Essex Co.*, 7 Wall., 107 (74 U. S., XIX., 154); *Beloit* v. *Morgan*, 7 Wall., 621 (74 U. S., XIX., 206).

Mr. Justice **Field** delivered the opinion of the court:

In the case of the *Ins. Co.* v. *Bangs* [*ante*, 580], recently decided, we had occasion to mention and comment upon a suit in equity, commenced in March, 1876, by the same Company against these defendants, in the Circuit Court of the United States for the District of Michigan, to obtain the cancellation of two policies of insurance, issued in November, 1875, upon the life of James H. Bangs. That case was an action at law upon the policies, to which the Company pleaded the decree obtained in the equity suit. This decree was held to be void as against the infant defendant, because rendered by the court without having obtained jurisdiction over him. As all other defenses, except such as arose upon this decree, were withdrawn, judgment was rendered in favor of the plaintiff for the amount claimed.

The present suit is similar in its character and object to the one brought in the Michigan district. It seeks a cancellation of the two policies of insurance obtained by the deceased and an injunction against the enforcement of the judgment recovered in the action at law. The bill avers that the policies were obtained upon representations that the insured was a person of good health and not subject or predisposed to any bodily infirmity; that at the time he applied [781] for the policies he had conceived the design to commit suicide, but first to obtain an insurance upon his life in favor of his son in order to leave a large amount to him and to his wife; that in pursuance of this design the policies were obtained and soon afterwards he committed suicide by taking poison; and that the wife and son were cognizant of the design of the deceased and conspired with him for its execution.

The bill charges a fraudulent purpose on the part of the insured to rob the Insurance Company, and then that he committed suicide to carry the purpose into execution. It charges a conspiracy between him and his wife and son to effect this robbery and death, a conspiracy on the part of the wife to aid in the death of her husband, and on the part of the son to aid in the death of his father. These charges are of such dreadful crimes as to call for the clearest proof before a decree canceling the policies could be based upon them. Instead of such proofs there is nothing of importance established which is not consistent with the integrity of all the parties: insured, wife and son. The main and essential fact averred in the Company's case is the contemplated suicide of the insured. The evidence to establish this, and it is stronger than the evidence produced upon any other material averment, is that he had inquired for insurance companies whose policies did not except death by suicide; that his death occurred not long after the policies were obtained and was accompanied by convulsions stated to be similar to those attending death by strychnine. There is no evidence that he ever had any strychnine. The only evidence produced was that he was once seen in a druggist's store looking at jars containing various medicines and, among others, one that contained this poison. There was no poison found in his body when submitted to a *post-mortem* examination. And as to the convulsions at his death, the wife attributed them to injuries which he had received in his back a few days before. That is all. Everything else consisted of mere suspicions, growing out of the action of the wife in refusing to consent to a *post-mortem* examination of the deceased, and her departure from the State, both of which might have been, and according to her answers to the interrogatories of the bill, were prompted by worthy considerations. The transactions with which she is charged as proof of guilty complicity, viewed [782] in the light of her explanations and the evidence produced, merely evince a very natural sensitiveness to the imputations cast upon the character of her husband by suspicions thrown out by agents of the Insurance Company, and a great repugnance to having his remains, after interment, disturbed and subjected to the knife of the surgeon and the analysis of the chemist. It is sufficient to say that no case is presented which would justify any court in holding that a conspiracy existed to defraud the Insurance Company, the execution of which involved the suicide of the insured, and the assent of wife and son to the death of husband and father.

Aside from this, the judgment in the action at law was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies. A fraudulent purpose in procuring them, subsequently carried into execution, would have been a good defense. It was in fact originally pleaded and afterwards withdrawn. Its withdrawal did not authorize a suit in another forum for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or release or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action. The contract is merged in the judgment. *Cromwell* v. *Sac Co.*, 94 U. S., 351 [XXIV., 195].

A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practiced upon the court or some unconscientious advantage taken of the defendant without any fault or negligence on his part; or there must be some newly discovered evidence which could not have been obtained at the trial and which, if produced, would have changed the result, before a court of equity will interfere with the judgment rendered or the contract upon which it was recovered. There is no pretense here that any such fraud was committed or unconscientious advantage taken, or that there is any newly dis- [783] covered matter not known when the trial took place. *Ins. Co.* v. *Stanchfield*, 1 Dill., 424; *Ins.*

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Co. v. *Hodgson*, 7 Cranch, 336; and *Ins. Co.* v. *Bailey*, 13 Wall., 616 [80 U. S., XX., 501].

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[786]

HOPKINS AND DICKINSON MANUFACTURING COMPANY, *Appt.*,

v.

P. CORBIN ET AL.

(See S. C., 13 Otto, 786-792.)

Void letters patent.

Re-issued letters patent, which include a broader claim than the original letters, are void.

[No. 241.]

Argued Apr. 21, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The case is stated by the court.

Messrs. **Edmund Wetmore,** *Jenner & Thompson* and *Chas. F. Blake*, for appellant.

Messrs. O. H. Platt, **C. E. Mitchell** and *B. F. Thurston*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

This is a suit in equity, brought for the infringement of certain re-issued letters patent, dated October 11, 1875, for an improvement in sash locks. The original patent was issued to George Voll and George McGregor as joint inventors, and the re-issue was granted to their assignee, the Hopkins & Dickinson Manufacturing Company, the appellant.

In the years 1868 and 1869 George Voll was the foreman of George McGregor, a locksmith of Cincinnati, who kept a shop where he sold sash locks. Prior to February, 1868, McGregor had been selling a self-locking sash lock made [787] by Robert Lee, of Cincinnati, under a patent granted to him dated May 30, 1865.

Sash locks are a contrivance which, by fastening the top rail of the lower sash to the bottom rail of the upper sash, prevent the opening of windows from the outside, either by lowering the upper or raising the lower sash. Their general construction and operation is as follows: a lever is pivoted upon the top rail of the lower sash. When the lock is open, the direction of this lever is the same as the rail of the sash. To fasten the sashes, it is necessary to turn this lever on its pivot to a position across and at right angles to the division line between the impinging rails of the two sashes, when it engages with a catch on the bottom rail of the upper sash. This catch, if, as has generally been the case, it consists of a simple hook, under the projection of which one end of the lever remains when in the locking position, is sufficient to prevent the opening of the window by any direct pressure on the sashes exerted in the ordinary way to open a window, but there would be nothing to prevent the pushing aside of the locking lever by inserting from the outside, between the impinging rails of the sashes, a knife blade, paper-cutter, or other similar instrument, and thus opening the lock. To prevent this, various devices have been used to hold the locking lever fast when in the locking position, so that it could not be moved sideways from the outside, but only from the inside, by disengaging it from the catch in the ordinary process of unlocking.

This object was accomplished in the sash lock of Lee, by giving the lever a certain amount of play on its pivot, so that when it was turned to the locking position its end not only passed under the catch, but also behind a lip in the catch, thereby forming, with the latter, a latch which prevented any lateral movement of the lever. This was, therefore, called a self-locking sash lock. As in most sash locks, the pivoted locking lever was secured to a bed plate fastened upon the top of the upper rail of the lower and inner sash. This plate was designated the base plate. The catch was attached to a similar plate on the bottom rail of the upper sash, which was called the striking plate.

McGregor was unable to furnish the Lee sash lock to fill a large order which he had received, [788] and mentioned the fact to Voll, who in a short time produced the model of a self-locking sash lock. In this lock, the locking lever was pivoted on a cylindrical stump upon the base plate, the base plate being fastened upon the upper rail of the lower sash. There was a round hole in that part of the cylindrical stump nearest the inner edge of the sash rail, fitted to receive a small cylindrical pin or bolt. That part of the locking lever which, when it was in the locking position, was over the rail of the inner sash, had a longitudinal hole extending through it to the pivotal stump. Through this hole, a cylindrical pin extended from the outer end of the lever to the stump, and was pressed by a spiral spring against the stump. When the locking lever was turned around into the locking position, the end of the pin, by the action of the spring, entered the hole by a horizontal motion, and thus the lever was prevented from turning sidewise. When it was desired to unlock the lock, the pin which projected beyond the end of the locking lever and ended in a knob was pulled back out of the hole, and the lever was turned sideways into its unlocked position.

This sash lock was made about February, 1868, and on the 24th of that month Voll applied for a patent for his invention, describing it as an improvement in sash locks, the object of which was to prevent the lock from being unfastened from the outside by inserting a knife or other thin instrument between the sashes, and pushing aside the locking lever. The claim was thus set forth in his specification: "Having thus fully described and set forth the nature of my invention, what I desire to secure by letters is: The pin F, operating in hole in stump A, preventing the fastener from being turned, as described and set forth."

This application was refused because the invention had been anticipated by a patent issued to Brockseller & Sargent, May 11, 1858. Reference was also made by the examiner in his refusal to the patent of Robert Lee, dated May 30, 1865. This application was reheard and again rejected, and the rejection was acquiesced in by Voll. Not long after his application and before its final rejection, Voll made a small lot of silver-plated sash locks according to his plan, which were sent in full working order to McGregor's shop for sale.

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After this rejection, Voll made another sash lock, omitting the hole and pin features and using a pivoted piece at the outer end of the [789] lever which worked vertically by a flat spring, locking the lever as before by an engagement on the base plate. Voll sent a working model of this contrivance to Munn & Co., of New York, with the view of having a patent applied for, but they informed them that it was not patentable.

Thereupon Voll and McGregor went to work and made the improvement in sash locks for which a patent was issued to them dated March 30, 1869.

The original specification described by letter references the separate parts of the sash bolt, and their operation, and the claim was stated as follows: "In a sash bolt the arrangement and combination of the base plate C with the segment c thereon, cam D, springbolt F, arm G, and catch H, as shown and described for the purpose specified."

On July 1, 1870, Voll and McGregor sold this patent and the invention thereby secured to the appellant.

On August 6, 1875, the appellant applied for a re-issue of this patent.

In the application for a re-issue the claim was thus stated: "A vibrating lever provided with a bolt, in combination with a striking plate or hook and with a catch segment, behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash fastener, and the parts enumerated in the claim being and operating substantially as specified."

The re-issue was granted the appellant on October 11, 1875, as prayed for.

The essential distinction between the original invention of Voll, for which a patent was refused, and that covered by the re-issue to the appellant of the letters patent to Voll and McGregor, is this: in the contrivance first named the locking lever when in locked position was held fast in its place by a bolt which was driven by a spiral spring into a hole in the stump on which the lever was pivoted. In the contrivance covered by the patent to Voll and McGregor the bolt which holds the locking lever in its place, instead of entering a hole in the post is forced by the spiral spring past the end of a segment raised upon a base plate, which prevents a sidewise movement of the locking lever until the bolt is retracted.

[790] The sash lock manufactured by appellees, which appellant alleged was an infringement on its re-issued patent, had placed on the end of the locking lever a pivoted latch provided with a downward projection which, when the locking lever was placed in a locking position, entered a hole or socket in the base plate.

The court below dismissed the bill. Its decree is brought here for review.

The defense insisted on is, that if the claim of appellant's re-issued patent be construed to cover the appellees' sash locks it is void, because it embraces the previous invention made by Voll alone, which had been abandoned to the public after it had been rejected by the Patent Office, and which was not the invention of Voll and McGregor jointly, and that if the re-issue is so construed as to cover the sash locks made by appellees it is for a different invention from that which the original patent to Voll and McGregor covered.

We think this defense is sustained by the evidence.

It is perfectly clear that the sash lock manufactured by the appellees was as much an infringement of the device invented by Voll for which a patent was refused, as it was of the re-issued patent of appellant. In both Voll's contrivance and the patented device of Voll and McGregor which appellant claims, the catch to prevent the sidewise motion of the locking lever was on the base plate and not on the striking plate, and in Voll's invention the catch consisted of a bolt driven by a spiral spring into a hole, and in Voll and McGregor's invention the bolt was driven by a similar spring past the end of a segment raised on the base plate.

A pivoted latch on the end of the locking lever, with a downward projection entering a socket in the base plate to prevent a lateral movement of the locking lever, does not appear to us to be the equivalent of either the contrivance of Voll or of Voll and McGregor. The difference between them is as clear and distinct as the difference between a door latch and a door bolt.

But if the sash lock of appellees is held to infringe the Voll and McGregor patent, it beyond question or controversy includes the separate device of Voll for which he made application for a patent. The only ground upon which ap- [791] pellees' sash lock can be held to embody any part of the device of either, is that the catch to prevent the sidewise motion of the locking lever is on the base plate and not on the striking plate. But this was the important part of Voll's separate invention, and he was refused a patent for it and abandoned his application therefor. He made locks according to his device and put them on sale.

Construed in the light of the fact that the application of Voll for a patent for his device was refused, the invention of Voll and McGregor is reduced to very narrow limits. Their improvement would consist solely in the fact that the bolt in the locking lever, instead of being driven by the spiral spring into a hole in the post upon which the lever is pivoted, is driven past the end of a segment raised on the base plate. So construed it is perfectly plain that there is no infringement.

Conclusive evidence to establish the defense is found in the amendments made by the appellant in its application for re-issue. If the re-issue had been granted as applied for, it might with some plausibility have been claimed that the re-issued patent was infringed by the sash locks made by the appellees. But the application in its original form was not granted. The specification for the re-issued patent was amended by striking out wherever they occurred, the words "socket or depression in the base plate," and substituting the words "catch segment or segment."

This shows beyond controversy that in asking for a re-issue the appellant sought to make its patent cover sash locks like those made by appellees, but was not able to do so, and the re-issue was restricted to a sash lock in which the locking lever was made fast by a bolt driven past the end of a segment raised on the base plate.

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These conclusions warrant the inference that if the re-issued patent is to be construed as appellant insists it should be and as it must be, to include the sash locks of appellees, it is broader than the original patent and, therefore, void. *Wood Paper Pat.*, 23 Wall., 566 [90 U. S., XXIII., 31]; *Russell* v. *Dodge*, 93 U. S., 460 [XXIII., 973]; *Powder Co.* v. *Powder W.*, 98 U. S., 126 [XXV., 77]; *Ball* v. *Langles* [*ante*, 104], [792] and *Swain Turbine Co.* v. *Ladd*, decided at the present Term [*ante*, 184]; *Wicks* v. *Stevens*, 2 Woods, 312.

We are of opinion that the decree of the Circuit Court dismissing appellant's bill was right. It is, therefore, affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.S.

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[806] TOWN OF THOMPSON, *Plff. in Err.*,

v.

ORLANDO PERRINE.

(See S. C., 13 Otto, 806-820.)

Purchaser of bonds—legislative power—case disapproved—former adjudication.

1. This court holds following the New York decisions, that a purchaser of bonds of a town in that State, with notice that they were exchanged for stock in a railroad company, in violation of a statute requiring them to be sold at par, was not a *bona fide* holder, and could not enforce the payment of them.
2. The Legislature can overlook the defective execution of the power conferred, and, by retroactive legislation, cure defects in the action of municipalities under such statutes.
3. Horton v. Thompson, 71 N. Y., disapproved.
4. A judgment of the Supreme Court of the State, in an action commenced by the Attorney-General of the State, against the commissioners of the town and the railway company, and the town, by which the bonds were declared to be null and void, could not affect a *bona fide* purchaser for value of the bonds, who had no knowledge of the action.

[No. 282.]

Argued Mar. 30, 31, 1881. Decided May 2, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

Statement of the case by *Mr. Justice* **Harlan:**

This action, commenced, on the first day of May, 1876, in the Circuit Court of the United States for the Southern District of New York, involves the liability of the Town of Thompson, a municipal Corporation in Sullivan County, New York, for the amount of coupons attached to certain bonds, signed by G. M. Benedict, N. S. Hamilton and W. H. Cady, county commissioners, and issued by them in the name of the Town under date of May, 1, 1869. Each bond recites that it "Is a valid security, being issued by virtue of an Act entitled 'An Act to Authorize Certain Towns in the Counties of Sullivan and Orange to Issue Bonds and Take Stock in Any Company Now Organized, or That May Hereafter Be Organized within Three Years after the passage of This Act, for the Purpose of [807] Building a Railroad from the Village of Monticello in the County of Sullivan through the Towns of Thompson and Forestburgh in said County, and the Town of Deerpark in the County of Orange, to Port Jervis, Orange County,' passed May 4, 1868, and of the Act amendatory thereof passed April 1, 1869." The bonds are negotiable in form, and state that the promise to pay the sum therein specified is "By virtue and in pursuance of the Acts above entitled and referred to, and for value received in the stock of the Monticello & Port Jervis Railway Company."

Those Acts authorized the commissioners who might be appointed, in the mode therein prescribed, on behalf of any town, along the route of the proposed road from Monticello to Port Jervis, to borrow, on its credit, such sums of money, not exceeding thirty-three per cent of the valuation of the town, to be ascertained by its assessment rolls for 1867, for a term not exceeding thirty years, at not exceeding seven per cent interest per annum, and "to execute bonds therefor under their hands and seals;" such debt not, however, to be contracted, and such bonds not to be issued until there was obtained the written consent of the majority of the tax payers, appearing upon the last assessment roll, as shall represent a majority of the taxable property, not including lands owned by non-residents; nor until a certain amount of the capital stock of the company had been subscribed in good faith and paid, by individuals or corporations. The statute required the fact, that the persons so consenting, represented the proper number of tax payers, should be supported by the affidavit of one of the town assessors or the town clerk; the consent and the affidavit to be filed in the offices of the county and town clerks respectively, a certified copy whereof "shall be evidence of the facts therein contained and certified in any court of this [that] State, and before any judge or justice thereof."

The 3d section of the original Act provided that the commissioners thereby authorized "may, in their discretion, dispose of such bonds or any part thereof, to such persons or corporations and upon such terms, as they shall deem most advantageous for their said town, but not for less than par, *and the money that shall be received by any loan or sale of such bonds shall be invested in the stock of such company*, now organized, or that may hereafter be organized, within two years after the passage of this Act, for the [808] purpose of building or aiding in the building of a railroad," from Monticello to Port Jervis.

The entire issue of bonds, under the Acts referred to, was $148,000, of which $15,000 were delivered to the company on the 4th of May, 1869, and $133,000 on the 12th of May, 1869.

Prior to the delivery of the bonds to the railroad company, it had made a construction contract with Crowley and Colts, by which the latter were to be paid partly in bonds of towns along the line of the road. In September, 1869, Gulick and Van Kleeck purchased eight of the bonds from the National Bank of Port Jervis, at ninety cents on the dollar, for cash. In November of the same year, the Atlantic Savings Bank of the City of New York, subsequently known as the Bond Street Savings Bank, purchased $50,000 of the bonds, at eighty-two and one half cents on the dollar and accrued interest, for cash. The Town, by means of taxation in conformity with the provisions of the original and amendatory Acts, met the installments of interest due March 1, 1870, and September 1, 1870. And in January, 1871, the road was completed, and has been in operation ever since.

Such was the condition of the enterprise, and

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such the relations which the town held to the holders of its bonds, when, on the 28th April, 1871, the Legislature of New York passed an Act entitled "An Act to Legalize and Confirm the Acts of the Commissioners of the Towns of Thompson and Forestburgh, in the County of Sullivan, and of Deerpark, in the County of Orange, in Issuing and Disposing of the Bonds of Their Respective Towns, to Build a Railroad from the Village of Monticello, in the County of Sullivan, to the Village of Port Jervis, in the County of Orange, under Chapter Five Hundred and Fifty-Three of the Laws of Eighteen Hundred and Sixty-Eight, and to Legalize and Confirm all Bonds Heretofore issued by Such Commissioners under Said Chapter of Laws, Now Held by or Owned by *Bona Fide* Purchasers."

Since the present case largely depends upon the construction and effect of that Act, it is here given in full:

"Section 1. The Acts of Nathan S. Hamilton, Giles M. Benedict and William H. Cady, commissioners on the part of the Town of Thompson, and Silas T. L. Norris, Edwin Hartwell and James Ketcham, commissioners of the Town of Forestburgh, in the County of Sullivan, and of Orville J. Brown, Samuel O. Dimmick and Augustus B. Goodale, commissioners of the Town of Deerpark, in the County of Orange, appointed in pursuance of an Act entitled 'An Act to Authorize Certain Towns in the Counties of Sullivan and Orange to Issue Bonds and Take Stock in Any Company Now Organized or That May Hereafter Be Organized, within Three Years after the Passage of This Act, for the Purpose of Building a Railroad from the Village of Monticello, in the County of Sullivan, through the Towns of Thompson and Forestburgh, in said County of Sullivan, and the Town of Deerpark, in the County of Orange, to Port Jervis,' passed May 4, 1868, in issuing bonds upon the faith and credit of their respective towns, *and in exchanging them for the stock of the company*, organized for the purpose of constructing the railroad, contemplated by said Act, are hereby ratified and confirmed.

Sec. 2. No bond or bonds issued or purporting to have been issued under the said Act, and now held, owned or possessed by any person or persons, guardian, trustee or corporation, in good faith or for a valuable consideration, shall be void or voidable by reason of any defect or omission in the consents in writing, of the taxpayers of the said Towns of Thompson, Forestburgh and Deerpark, upon which such bonds were or purport to have been issued, in or by reason of said consents not stating the name of the railroad company in which the taxpayers so signing such consents, desired the bonds or the money arising from the sale thereof to be invested. But that the said bonds shall be as valid and effectual for every purpose, as if such defect or omission had not occurred; *Provided*, That such or any exchange of bonds by said commissioners for the stock of said company was made at the par value of the said bonds; and *Provided*, further, that the respective issues of the said bonds by their commissioners, do not exceed the amount authorized by said Act.

Sec. 3. No action or proceeding at law, commenced or pending at the time of the passage of this Act, shall abate or be discontinued or be in any way affected by reason thereof; but the same may be prosecuted or defended and judgment entered therein, and all proceedings taken to enforce the same, in the same manner as now provided by law and with the like effect as if this Act had not been passed.

Sec. 4. This Act shall take effect immediately."

Messrs. **T. B. Bush** and *H. A. Nelson*, for plaintiff in error:

These bonds were issued without regard to important provisions of the statute, and in direct violation of these provisions.

The highest court of the State has given this construction to the statute, and has adjudged the action of the commissioners based upon these consents, void and of no effect.

Horton v. *Thompson*, 71 N. Y., 513.

Other statutes, similar to the one in question or presenting the same question, have uniformly received the same construction by the courts of the State.

People v. *Van Valkenburgh*, 63 Barb., 109, 1872; *People* v. *Hughitt*, 5 Lans., 97, 1871; *People* v. *Franklin*, 5 Lans., 135, 1871; *People* v. *Adirondack Co.*, 57 Barb., 661, 1870; *People* v. *Spencer*, 55 N. Y., 1, 1873; *People* v. *Knowles*, 47 N. Y., 415, 1872; *People* v. *Smith*, 55 N. Y., 137, 1873.

These bonds were illegally issued in exchange for the stock of the Railroad Company, and were, therefore, void in their inception.

Horton v. *Thompson*, *supra*.

This construction was directly approved by this court at the October Term, 1879. *Scipio* v. *Wright*, 101 U. S., 665 (XXV., 1037). See, also, *Ill.* v. *Delafield*, 8 Paige, 528; S. C., 2 Hill, 159; S. C., 26 Wend., 192, 221. In this case (2 Hill, 172) *Justice* Bronson said: "It is a question about par value, and if that does not mean in this case a dollar in money for every dollar of security, the wit of man cannot tell us what it does mean."

Starin v. *Genoa*, 23 N. Y., 439; *Gould* v. *Sterling*, 23 N. Y., 456; *People* v. *Mead*, 24 N. Y., 124, 1861.

They were issued under the hands and seals of the commissioners.

It will be noticed that the Statute of 1868 does not confer upon the town, as a corporate body, power to contract a debt. It provides an arbitrary manner in which the bonds of the town shall be issued. The commissioners are, in no sense, town officers.

Sheboygan Co. v. *Parker*, 3 Wall., 96 (70 U. S., XVIII., 34); *Wilson* v. *Salamanca*, 99 U. S., 504 (XXV., 331); *Horton* v. *Thompson*, *supra*.

A seal is necessary when required by statute.

Koehler v. *Iron Co.*, 2 Black, 715 (67 U. S., XVII., 339).

A statutory power cannot be delegated.

Bk. v. *Neal*, 22 How., 96 (63 U. S., XVI., 323).

The defendant in error is not entitled to protection as a *bona fide* holder.

McClure v. *Oxford*, 94 U. S., 429 (XXIV., 129).

There is absolutely no case which holds that where the defects are apparent upon the face of the record, a purchaser is not bound by a knowledge of them.

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The want of a seal is shown by the bond itself, and the fact of the illegal exchange of the bonds for the stock of the company is recited in the bonds, which are absolutely void, and negotiability could not impart validity to them.

East Oakland v. *Skinner*, 94 U. S., 255 (XXIV., 125); *Anthony* v. *Jasper Co.*, 101 U. S., 693 (XXV., 1005).

These bonds being void, it was not within the power of the Legislature of New York to impose them as a debt upon the Town.

Chapter 809 of the Laws of 1871, termed the validating Act, is void and of no effect. It was so adjudged by the highest court of the State.

Horton v. *Thompson*, *supra*.

This decision settles the law in New York applicable to the bonds in question. They, being solely the creatures of statutory enactments, must be judged exclusively by the law of the State where it is claimed they were created.

Green v. *Neal*, 6 Pet., 291; *Shelby* v. *Guy*, 11 Wheat., 361; *Gelpcke* v. *Dubuque*, 1 Wall., 175 (68 U. S., XVII., 520); *Christy* v. *Pridgeon*, 4 Wall., 203 (71 U. S., XVIII., 324); *Elmwood* v. *Marcy*, 92 U. S., 292 (XXIII., 713); *S. Ottawa* v. *Perkins*, 94 U. S., 260 (XXIV., 154); *E. Oakland* v. *Skinner*, 94 U. S., 258 (XXIV., 126); *Fairfield* v. *Gallatin Co.*, 100 U. S. 47 (XXV., 544); *Lippincott* v. *Mitchell*, 94 U. S., 770 (XXIV., 316).

At the time of the passage of this Act, the action of *The People* v. *Benedict* was pending in the Supreme Court of the State, in which the General Term of that court had rendered a decision upon a demurrer adjudging these bonds void. (May 31, 1870, p. 104. See opinion of the court not reported.)

Upon the doctrine of *lis pendens*, which is well grounded in the common law, and which has been universally recognized by the courts of this country, both State and Federal, the purchaser of these bonds was bound by the decree of *People* v. *Benedict*.

Messrs. **William M. Evarts** and *Henry T. Wing*, for defendant in error:

Upon very recent decisions of this court, the alleged defect in the consent disappears, and the consent must be adjudged sufficient under the original enabling Act.

Venice v. *Murdock*, 92 U. S., 494 (XXIII., 583); *Scipio* v. *Wright*, 101 U. S., 665 (XXV., 1037).

If, however, corroboration of the bondholder's right to recover, is needed, from the remedial Act of 1871, the terms of that Act are precise and efficacious to that end.

There is no pretense, if the quality of *bona fide* holder without notice of this defect in the consent and for value, is important to the bondholder's recovery, that the plaintiff below does not occupy that position.

Indeed, the case in the Court of Appeals of New York, relied on by the plaintiff in error to defeat the present action, concedes that the defect in the consent is cured by the remedial Act, which is valid to that effect.

In *Horton* v. *Thompson*, the court says:

"This consent was fatally defective in not naming the railroad company, to the construction of which the fund should be applied. Inasmuch, however, as the consent was sufficiently comprehensive in its terms to embrace the road in question, and the Legislature might legally have authorized it to be in the form in which it was actually given, the validating Act of 1871 probably cured the defect in its form."

Horton v. *Thompson*, 71 N. Y., 522.

But, under the uniform tenor of the decisions of this court, the recitals of the bond itself overreach, in the hands of a *bona fide* holder, the original infirmity, if it should be so held by this court, and dispenses with any necessity of recourse to the Act of 1871 for its cure.

The People v. *Mead*, 24 N. Y., 114, holds that the exchange for stock instead of sale, is not a defense against one who purchased in good faith for a good and valid consideration.

Upon the remedial Act of 1871, the exchange of bonds for stock is expressly and effectually ratified. Of this no question has been, or can be made.

In a single case, however, the competency of the Legislature of New York to pass the Act is denied.

Horton v. *Thompson*, 71 N. Y., 525-6.

The incompetency of the Legislature is not put upon any prohibition or restriction in the Constitution of the State of New York, but upon the proposition that the tax payers not having consented to an exchange of bonds for stock, it is beyond legislative power to ratify the exchange by authority of law.

This proposition will not approve itself to the reason of this court. It is wholly unsupported by authority. It is flatly at variance with recent decisions of the Commission of Appeals, and of the Court of Appeals itself. It cannot stand consistently with the settled jurisprudence of the State as to this familiar exercise of legislative power, and it does not assume to overrule these settled doctrines.

It was decided by a divided court, four to three judges, reversing a unanimous decision of the Supreme Court, and overruling a cotemporaneous decision of other Judges of the Supreme Court in the same litigation.

Rogers v. *Smith*, 5 Hun, 475; *Horton* v. *Thompson*, 7 Hun, 452.

An examination of the two cases of *Duanesburgh* v. *Jenkins*, 57 N. Y., 177, and of *Williams* v. *Duanesburgh*, 66 N. Y., 129, and of the leading cases there cited and commented on, will show that the case in 71 N. Y. is without reason or authority in the judicial history of the State.

The statutes original and remedial, which are considered in these cases, are, perhaps, sufficiently cited in the cases. They are:

Stats. 1856, ch. 64; 1857, ch. 401; 1859, ch. 384; 1864, ch. 402.

The earlier cases in the New York reports, which maintain the legislative authority as established by these recent cases, are too numerous to cite. The leading ones are:

Bk. of Rome v. *Village of Rome*, 18 N. Y., 38; *People* v. *Mitchell*, 35 N. Y., 551; *Maryland* v. *R. R. Co.*, 3 How., 534; *Guilford* v. *Supervisors*, 13 N. Y., 143; *Darlington* v. *Mayor, etc.*, 31 N. Y., 164; *People* v. *Mayor, etc.*, 4 N. Y., 419; *Brewster* v. *Syracuse*, 19 N. Y., 116; *People* v. *Mead*, 24 N. Y., 114.

The effect of the judgment in the case of *The People* v. *Benedict*, given in evidence by defendant below, as a bar to plaintiff's recovery, as *res judicata*, or its operation as a *lis pendens* does not require much attention. Nor does the

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3d section of the ratifying Act, of 1871, give it any value in this litigation. Probably that equity suit for injunction was not included in the description "action or proceeding at law," used in that section.

The proceedings in that case seem to have been as upon default, the parties not having been brought in. And no results have followed from the judgment obtained.

No decision in New York has paid any consideration to the proposition that the ratifying Act was thus defeated by this stultification, and that the Attorney-General was the master of the Legislature and able to subvert its declared will.

In this court it is well settled that the doctrine of *lis pendens* does not affect holders of such securities as those in suit.

Lee Co. v. *Rogers*, 7 Wall., 181 (74 U. S., XIX., 160); *Warren Co.* v. *Marcy*, 97 U. S., 105 (XXIV., 980); *Brooklyn* v. *Ins. Co.*, 99 U. S., 362 (XXV., 416); *Block* v. *Comrs.*, 99 U. S., 686 (XXV., 491); *Orleans* v. *Platt*, 99 U. S., 676 (XXV., 404).

[810] *Mr. Justice* **Harlan** delivered the opinion of the court:

Although the Act of 1868 required all bonds issued under its authority to be disposed of for not less than par, and their proceeds invested in the stock of the company, the commissioners exchanged those issued by the Town of Thompson directly with the railroad company for an equal amount of the latter's stock. This was in violation of the statute as construed by the Court of Appeals of New York, in several cases to which we had occasion to refer in *Scipio* v. *Wright*, 101 U. S., 676 [XXV., 1040]. We there held, following the decisions of the state court, some of which were made long prior to the passage of the particular enactment now under examination, that a purchaser of town bonds, having notice that they were exchanged for stock in a railroad company, in violation of a statute similar to that of 1863, was not a *bona fide* holder, and could not enforce payment against the town. We perceive no reason to qualify our ruling in that case and, therefore, proceed to the consideration of other questions not embraced by that decision.

It is apparent, upon the face of the Act of 1871, that the Legislature was advised of the fact that the commissioners had departed from the Statute of 1868, in exchanging the bonds for stock in the railroad company. And its manifest intention was not only to ratify and confirm such exchange, but to protect any holder of the bonds, who became such in good faith, for a valuable consideration, against any defense arising out of defects or omissions in the consents of taxpayers, provided the exchange was at the par value of the bonds and the issue did not exceed the amount authorized by law.

[811] The main argument of counsel for the Town is embraced by the following propositions: *first*. That the consents of taxpayers were not such as the Acts of 1868 and 1869 required; *second*. That the bonds were exchanged for stock, in violation of the statute; and since they recite, upon their face, that they were issued "For value received in the stock of the Monticello & Port Jervis Railway Company," there could be no *bona fide* holders thereof in the commercial sense; *third*. That they were not issued under the seals of the commissioners, as required by the statute; *fourth*. It was beyond the power of the Legislature, by subsequent enactment, to make them valid obligations against the Town, without its assent given in proper form; *fifth*. That no such assent was given.

If it be conceded that the consents were insufficient; that a seal was necessary as evidence of the official authority of the commissioners; that the recitals on the bonds, reasonably construed, gave notice to purchasers that they were illegally exchanged for stock, when they should have been disposed of or sold, at not less than their par value, and their proceeds invested in the stock of the company; the Town is, nevertheless, liable, if the curative Act of April 28, 1871, was within the constitutional power of the Legislature to pass. While this question, in some of its aspects, may be one of general jurisprudence—involving a consideration of the limits which, under our forms of government, are placed upon legislative and judicial power—it is proper to inquire as to the course of decisions in the highest court of New York upon the authority of the Legislature to pass such an Act as that of April 28, 1871. This becomes necessary in view of the fact that the Court of Appeals of New York have adjudged that statute, in its main features, to be unconstitutional. That adjudication, it is contended, is conclusive of the rights of parties in this case. As we are unable to give our assent to this view, it is due to that learned tribunal that we should state, with some fullness, the reasons for the conclusion we have reached.

Prior to the year 1858, the question arose in several cases pending in different inferior courts of New York as to the constitutional power of the Legislature to authorize or require municipal corporations to subscribe for stock in railroad companies, or to issue bonds therefor. [812] The decisions in those cases disclosed a conflict of opinion among judges of recognized ability. The question finally came before the Court of Appeals of the State in the year 1858 in *Bk.* v. *Rome*, 18 N. Y., 38. It was there ruled that the State Constitution did not, in terms or by necessary intendment, restrain the Legislature from conferring upon municipal authorities the power to subscribe to the stock of a railroad corporation, and by taxation to raise the necessary funds for the payment thereof. That decision was approved in 19 N. Y., 20. In the subsequent case of *People* v. *Mitchell*, 35 N. Y., 552, decided in 1866, the court quote, with approval, our decision in *Thomson* v. *Lee Co.*, 8 Wall., 330 [70 U. S., XVIII., 178], where, speaking by *Mr. Justice* Davis, we said that although a county or other municipal corporation had no inherent right of legislation, and could exercise no power not conferred upon it, in express terms or by fair implication, the Legislature, "Unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan," and, that such authority "can be conferred in such a manner that the objects can be attained, either with or without the sanction of the people."

The decision in 35 N. Y. is important in other aspects of the present case. The main question

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before the court there was as to the validity of a confirmatory statute, the object of which was to cure the defects in certain affidavits which had been filed in proof of the consent of tax payers to a proposed municipal subscription of stock in a railroad company. The statute declared that the affidavits should be valid and conclusive proof, in all courts and for all purposes, to authorize and uphold the respective subscriptions of the stock and the issue of bonds to the amount specified therein; and that the bonds should be valid and binding on the municipality issuing them, without reference to the form or sufficiency of the affidavits. The court, referring to the confirmatory statute, said that "It was within the scope of legislative authority *to modify the limitations and restrictions in the antecedent Acts on this subject, to dispense with prior conditions*, and to charge the commissioners with defined and *imperative* duties." [813] And it quotes with approval our language in *Thomson* v. *Lee Co.*, where, referring to a curative statute passed by the Iowa Legislature, we further remarked that "If the Legislature possess the power to authorize an Act to be done, it can, by a retrospective Act, cure the evils which existed, because the power thus conferred has been irregularly executed."

Thus stood the doctrines of the state court upon the question of municipal subscriptions, and as to the power of the Legislature, by retrospective enactment, to cure defects in the exercise of powers granted to municipal corporations, when the Act of April 28, 1871, was passed. But in 1873, the Court of Appeals decided *People* v. *Batchellor*, 53 N. Y., 131. That was a case of municipal subscription to a railroad corporation under an Act passed in 1867, similar, in its main features, to the one passed in 1868 in reference to the Monticello and Port Jervis Railroad Company. It was claimed that the statute had not been complied with in obtaining consents from tax payers. A subsequent Act of the Legislature *required* the subscription to be made upon the consents which were filed, and which the court found were not such as were prescribed by the statute under which the consents had been obtained from taxpayers. Without any subscription having been made, or bonds issued, a *mandamus* was sued out to compel the town to become a stockholder in the railroad company, and to issue its bonds in payment of the subscription price of the stock. The court held that the consent of the tax payers did not embrace such an issue of bonds as were required by the subsequent Act; and that the Legislature could not compel a municipal corporation to subscribe stock or issue bonds in aid of the construction of a railroad which, although public as to its franchise, was private as to the ownership of its property, and its relations to its stockholders. The opinion was concurred in by four of the Judges, one concurred in the result, one dissented, and one did not vote.

In *Duanesburgh* v. *Jenkins*, 57 N.Y., 188, decided in 1874 by the Commission of Appeals—of concurrent jurisdiction and equal authority with the court of appeals—the court, by Johnson, *J.*, reviewed the prior decisions of the court of appeals upon the question discussed in *People* [814] v. *Batchellor*. In reference to the latter case it was intimated that the language of the court upon some of the questions discussed was not in harmony with its previous decisions, and that the opinion should be limited to the point adjudged upon the facts existing in that case. The conclusions announced in *Duanesburgh* v. *Jenkins*, after a careful analysis of previous decisions in New York, were, that the authority of the Legislature to enable towns and other civil divisions of the State to subscribe for stock and issue bonds in aid of a railroad company, was established by numerous decisions of the highest court of the State; that there was no distinction in principle between a law *authorizing* a town, upon a popular vote, to subscribe for such stock and issue bonds therefor, and a law *directing* the same thing to be done; that when the authority to subscribe was made to depend upon the consent of the town, it was in the discretion of the Legislature to prescribe how such consent shall be given; and that, if it originally rested with the Legislature to fix the terms on which the towns might act, the same power could remit a part of the conditions imposed, or heal any defects which may have occurred in the performance by the town of those conditions. Much of the language in that case is strikingly applicable to the one in hand. Said the court: "In this case a commissioner has been regularly appointed under the statute, by whom bonds were to be issued and stock subscribed for, provided certain consents were obtained and proofs filed according to the requirements of the several Acts upon the subject. Consents were obtained and proofs were made and filed, which are now on the one side claimed to be and on the other are denied to be in conformity to the law. The commissioner meanwhile executed the bonds, subscribed for stock and delivered the bonds to the company in payment of the subscription; complying with the requirements of the statute in all respects, if the requisite consents had been given and proof made. The only officer of the town who had any duty in the premises acted by signing the bonds; and the Legislature, seeing the whole matter, released the conditions which it had imposed, and declared his assent binding upon the town, if the bonds had been issued and the road had been built, and the bonds in that case obligatory. As it might have authorized action in this way and on these conditions by the town originally, I see no objec- [815] tions to giving effect to its ratification of the action of the town, and holding its consent thus expressed effectual." Again, said the court: "In this case, the proper officer of the town has acted, the bonds have been issued, and the stock subscribed for. The objection is that the proof of preliminary consents by tax payers is defective. The action of the Legislature is, in my judgment, sufficient to heal this defect and to sanction the action of the town commissioner in binding the town, the whole consideration to the town having been received in the completion of the road and the issuing of the stock for its benefit."

In the subsequent case of *Williams* v. *Duanesburgh*, 66 N. Y., 129, decided in May, 1876, the Court of Appeals of New York recognizes the correctness of the principles announced in *People* v. *Mitchell*, and in *Duanesburgh* v. *Jenkins*, citing, among other authorities, *Gelpcke* v. *Dubuque*, 1 Wall., 175 [68 U.S., XVII., 520]; *Thomson* v. *Lee Co.*, 3 Wall., 327 [*supra*]; *Beloit* v.

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Morgan, 7 Wall., 619 [74 U. S., XIX., 205]; and *St. Joseph* v. *Rogers*, 16 Wall., 663 [83 U. S., XXI., 338]. Alluding to the statutes for bonding towns in aid of railroads, the court, in *Williams* v. *Duanesburgh*, said that the Legislature could overlook the defective execution of the power conferred and, by retroactive legislation, cure defects in the action of municipalities under those statutes. The Legislature may, said the court, "By subsequent legislation, when there has been a failure to perform conditions precedent, and the bonds have been issued, dispense with such conditions, and ratify and confirm, and make valid and obligatory upon the municipality, bonds issued without such performance; at least it may do so in cases where the municipality has, through the construction of the road, or by the receipt of the stock of the company in exchange for the bonds, received the benefit which the statute contemplated as the equivalent for the liability it was authorized to incur. The officers authorized under these statutes to issue the bonds are public agents, and the Legislature, looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts, which otherwise would be valid. In this case, the Legislature could originally have authorized the bonds of the Town of Duanesburgh to be issued under the precise circumstances existing when they were issued; and if the acts of the commissioner have, by subsequent legislation, been ratified, it is equivalent [816] authority to do what has been done." It is worthy of remark, in this connection, that Allen, *J.*, had held in *Clark* v. *Rochester*, 13 How. Pr., 204, decided in 1856, that the Legislature had no power under the Constitution to delegate to, or confer upon, municipal corporations, authority to subscribe for or to hold stock in railroad corporations and to issue bonds in payment therefor. Nevertheless, in *Williams* v. *Duanesburgh* (Church, *Ch. J.*, concurring with him), he recognized *Duanesburgh* v. *Jenkins* as authority, and as declaratory of the law.

But it is contended that the Court of Appeals of New York, in the later case of *Horton* v. *Thompson*, 71 N. Y., 520, has decided the identical statute under examination to be unconstitutional, and that this court is bound to accept the decision as conclusive of the present case. That action was commenced about the time the Circuit Court of the United States for the Southern District of New York sustained the validity of the confirmatory Act of April 28, 1871, and gave judgment against the Town of Thompson for the amount of some of the bonds embraced in the issue of $148,000. *Cooper* v. *Thompson*, 13 Blatchf., 434. *Horton* v. *Thompson* was decided in the Supreme Court of the State after the present action was instituted. It was a suit upon two interest coupons of $35 each, belonging to the same issue of bonds. It was finally determined in the Court of Appeals shortly before the trial of this case in the court below. The questions raised in the case were, whether the consent of the tax payers was defective in not naming the railroad to the construction of which the fund should be applied; and, whether the validating Act of April 28, 1871, in so far as it declared the exchange of bonds for stock to be legal, was not unconstitutional. Upon the first question, the court said that, as the consent was sufficiently comprehensive in its terms to embrace the road in question and, inasmuch as the Legislature might legally have authorized it to be in the form in which it was actually given, the Act of 1871 "probably cured the defect in its form." But the court, passing that question as one that need not be finally determined, held, upon the authority of *People* v. *Batchellor*, that the Legislature had no power to authorize or direct the commissioners originally to contract the debt without any consent or action upon the part of the Town; and that, since the consent of the [817] tax payers was not given for an issue of bonds to be exchanged for stock, the Legislature could not validate the bonds and make them binding obligations upon the Town, in the hands at least of those who were informed, by their recitals, that, in violation of the statute, they were exchanged for stock in the railroad company. Four of the judges concurred in the opinion, and three dissented.

It is to be observed that the court does not refer to or overrule *Bk.* v. *Rome*, *People* v. *Mitchell*, *Duanesburgh* v. *Jenkins*, nor *Williams* v. *Duanesburgh*, *supra*.

We are unable to reconcile *Horton* v. *Thompson*, upon the points now raised, with the doctrines of those cases or of others decided in the Court of Appeals prior to *People* v. *Batchellor*. It certainly cannot be said that there is such an established, fixed construction by that court, of statutes similar to those of 1868 and 1869, or to the confirmatory Act of 1871, as obliges us to follow *Horton* v. *Township*, or that will justify anyone in saying that the present question is finally at rest in the courts of that State. But, independent of any such consideration, there are conclusive reasons why we cannot, in opposition to our own views of the law, as expressed in numerous cases, accept the principles of that case as decisive of the rights of the present parties. When the Act of April 28, 1871, was passed, it was the established doctrine of the highest court of New York, as it was of this court, that the Legislature, unless restrained by the organic law of the State, could authorize or require a municipal corporation, with or without the consent of the people, by a subscription of capital stock, to aid in the construction of a railroad, having connection with the public interests of the people within the limits of such municipality and to provide for payment by an issue of bonds or by taxation; that defects or omissions, upon the part of such municipal corporation or its officers, in the execution of the power conferred, or in the performance of the duty imposed, could be cured by subsequent legislation; certainly, where the corporation had received the benefits which the original subscription was designed to secure. As, therefore, the Legislature might, in [818] the original Act under which these bonds were issued, have authorized or required the bonds to be exchanged directly with the railroad company for capital stock, it could ratify and confirm such exchange, even where originally illegal, so as to make the bonds binding obligations upon the Town in favor of all who then held them, or might thereafter acquire them, in good faith or for a valuable consideration. It is, thereafter, an immaterial circumstance that the recitals in the bonds may have fur-

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nished notice that they were issued originally in violation of the statute. That was the very difficulty which the Act of 1871 was designed to remove and, as matter of law, it was removed, if regard be had to the settled doctrines of this court, or to the decisions of the highest court of the State, rendered previous to and which were unmodified at the passage of that Act. It results that from that moment the bonds, by whomsoever held, whether by the railroad company or by others, became binding obligations upon the Town, as much so as if the bonds had originally been sold and their proceeds invested in the stock of the railroad company, as required by the Acts of 1868 and 1869. If the rights of those holding the bonds were in any degree affected by the subsequent decision in *People* v. *Batchellor*, the later decision in *Duanesburgh* v. *Jenkins* restored the law, so far as the courts of New York were concerned, as it undoubtedly was declared to be at the time the Act of 1871 was passed. The defendant in error acquired the bonds in suit in 1875, before the decision in *Horton* v. *Thompson*, and when, according to the principles announced in *Duanesburgh* v. *Jenkins* and many prior cases in the Court of Appeals, the Act of 1871 must have been sustained as a valid exercise of legislative power. He purchased them for value at public auction in the City of New York, without notice of any defense thereto, or of the pendency of any suit involving their validity. If the recitals in the bonds gave notice that the Acts of 1868 and 1869 forbade their exchange for stock, and required them to be sold and their proceeds invested in such stock, the purchaser is also presumed to have known, not only that such exchange had been legalized by the Act of 1871, but that the authority of the Legislature to pass that Act was sustained by the decisions of the highest court of the State rendered prior to its passage. His [819] rights, therefore, should not be affected by a decision rendered after they accrued, which decision is in conflict with the law, as declared not only by this court in numerous cases, but by the highest court of the State, at and before the time he purchased the bonds.

The assignments of error present another question which it is our duty to notice.

The Town pleaded in bar of the action a judgment of the Supreme Court of the State in an action commenced in June, 1869, by the Attorney-General of the State, on the relation of Charles Kilbourne and others, tax payers, against the commissioners of the Town of Thompson, F. C. Crowley, C. L. Colt, Wm. D. Colt, the Monticello & Port Jervis Railway Company, and the Town of Thompson. A temporary injunction was obtained on 24th June, 1869, restraining the respondents and each of them from using, loaning or selling the bonds and from executing any other bonds based upon the consents given by the tax payers. But that injunction was vacated and set aside on 27th July, 1869. A final decree was rendered in 1872 by which the bonds were declared to be null and void, and they, as well as the certificates of stock exchanged therefor, directed to be delivered up, by the respective parties and canceled. The general ground upon which the decree rested was, that the provisions of the Act under which they were issued were not complied with. From that judgment no writ of error or appeal seems to have been prosecuted. We have already seen that the entire issue of bonds was delivered to the railroad before the commencement of that action, that is, in May, 1869; and that after the dissolution of the injunction, to wit: in September and November, 1869, a large portion of the bonds had found their way into the hands of others who purchased them for value and without any notice of the pendency of the suit in the supreme court.

There is an insuperable difficulty in the way of plaintiff in error using the judgment in that case to defeat the present action. The bonds were negotiable securities, which had passed from the Town before the action in the Supreme Court of the State was commenced. Those who purchased them, in the market, pending that litigation or after it terminated, without notice of the suit and in good faith, for [820] value, could not be affected by the final decree. Had the complainants caused them to be surrendered to the custody of the court, pending the suit, they could have been canceled in pursuance of the directions contained in the final decree. But the actual custody of the railroad company was never disturbed nor sought to be disturbed. The knowledge by its officers of the objects of the action, or of the terms of the final decree, could not affect a *bona fide* purchaser for value who had no such knowledge. Our decision in *Warren Co.* v. *Marcy*, 97 U. S., 105 [XXIV., 980], which is partly based upon adjudications in the courts of New York. *Murray* v. *Lylburn*, 2 Johns. Ch., 441, and *Leitch* v. *Wells*, 48 N. Y., 585, is conclusive upon this branch of the case.

It is scarcely necessary to say that the decree of the Supreme Court of the State can derive no special force, as against the defendant in error, by reason of the 3d section of the Act of April 28, 1871. That section only protected from the operation of the Act, any action or proceeding at law, commenced or pending at the time of its passage. That provision furnishes, perhaps, an explanation of the failure of the Supreme Court, in its opinion, to refer to the Act of 1871, which had passed before its final decree was entered. The purpose of the 3d section was only to require existing actions or proceedings at law to be determined without reference to that Act, and does not affect the rights of a *bona fide* purchaser who was not a party to the suit, and was without notice of its pendency.

We perceive no error in the record, and the judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 589; 107 U. S., 35.

TALMADGE E. BROWN ET AL., *Appts.*, [828]

v.

JOHN D. F. SLEE ET AL., EXRS.

(See S. C., 13 Otto, 828-839.)

Contract for repurchase of land—effect of non-performance—failure of both—offer to perform.

1. Where executors sold the interest of the testator in partnership property and received part pay

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therefor in land, and the purchaser agreed that he would in five years thereafter, if the executor so desired, purchase back the land and pay the executors therefor the price at which he received it on the sale, and before the expiration of the time the executors made their election that he should do so and signified it to him in proper form, the rights of the parties respectively under the contract were fixed; the purchaser became bound to repurchase and pay the money, and the executors to receive the money and reconvey.

2. Where neither party offered to perform on the day and, therefore, one was as much in default as the other, either party, after relieving himself from his own default, by performance or an offer to perform, could require the other to do so within a reasonable time.

3. Neither could insist that the other had lost his rights under the contract until he had himself done what he was bound to do. The failure of both parties to perform on the day was equivalent to a waiver by each of the default of the other.

4. Where the executors did offer to perform within a reasonable time after the day, they are entitled to recover the stipulated price.

[No. 269.]

Argued Apr. 14, 1881. Decided May 2, 1881.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is fully stated by the court.

Messrs. **Chester C. Cole, George G. Wright** and *Wm. M. Randolph*, for appellants.

Messrs. **Charles C. Nourse** & *Kauffman*, and *Seymour Dexter*, for appellees.

[829] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a suit in equity and presents the following facts: Prior to August 6, 1870, Talmadge E. Brown and Jarvis Langdon were partners in business. On that day Langdon died, leaving a will, in which he appointed John D. F. Slee, Charles J. Langdon, Theodore W. Crane, Olivia L. Langdon and Samuel L. Clemens executors. On the 25th of April, 1871, the executors and Brown entered into the following agreement in writing:

"The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over, and transfer unto Talmadge E. Brown, all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

Subject, however, to all taxes and assessments thereon, now made or hereafter to be made, to all indebtedness therefor, and to all liabilities of said firm or any of the members thereof, for transactions in the business of the firm in tort and contract, and subject to all judgments against the said firm or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liability for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability of, from, and against all of which real or possible liabilities, and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased.

And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon, deceased, individually, and to fully indemnify and save harmless the executors, heirs and next of kin of said Langdon of, from and against any such claim; all the aforesaid agreements of indemnity to apply not only to the liability growing out of the transactions of said firm but also to any possible liability growing out of the transactions of the predecessors of said firm. [830]

Said Brown agrees to pay for such interest as follows:

First. Upon the assignment of the interest above mentioned twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily indorsed by B. F. Allen or other satisfactory indorsers, and running from three (3) to eighteen (18) months at a fair average time from these extreme points of time mentioned.

Second. A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the City of Des Moines, Iowa, and also a certain plantation situated on the White River, in Arkansas, consisting of sixteen hundred (1600) acres of land, and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash.

This agreement is upon condition that the aforesaid two tracts of land are owned by said Brown in fee simple, absolute, free and clear of all taxes, assessments and incumbrances of whatever nature, and that they shall, before this assignment shall be operative, be conveyed by full covenant deeds to the executors of said J. Langdon, deceased; said conveyances to be executed also by the wife of said Brown, and said executors to be furnished with properly authenticated abstracts of title thereof, showing the title thereof to be perfect and that they are free and clear of all incumbrances.

The executors further agree that, upon the final performance of this contract, they will surrender certain notes now held by the estate against T. E. Brown, amounting to the sum of seventeen thousand dollars ($17,000), the aforesaid interest shall be assigned upon the execution of said contract and the delivery of notes, money and deeds of the land as afore-mentioned.

Said Brown is to have sixty (60) days within which to make the delivery and payments described in this contract.

Dated 25th April, 1871.

The estate of J. Langdon, per

J. D. F. SLEE, *Executor and Attorney.*

T. E. BROWN."

On the 25th of June, 1871, Brown paid the cash called for by the contract, gave his notes, and conveyed the Des Moines land to Charles J. Langdon. Thereupon the executors made to him the following assignment: [831]

"In consideration of $100,000 this day received of T. E. Brown, as by the terms of our contract made with him, bearing date April 25, 1871, we, the executors of the last will of Jarvis Langdon, deceased, do hereby sell, assign and transfer to said T. E. Brown, all our rights and

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all the right, title and interest Jarvis Langdon had in his lifetime in and to the property and assets of the firm of T. E. Brown & Co., at Memphis, Tennessee, subject to the terms and conditions of our said contract of April 25, 1871, above mentioned.

J. D. F. SLEE, *Executor.*
C. J. LANGDON, *Executor.*
T. W. CRANE, *Executor.*
SAMUEL L. CLEMENS, *Executor.*
OLIVIA L. LANGDON, *Executrix.*"

On the 3d of July, Brown took from Charles J. Langdon a lease of the Des Moines land for five years and, for the use, agreed to pay the taxes and keep the premises in repair. Langdon, however, retained the right to sell the property, or any part of it, in which case the lease was to terminate, so far as it related to the property sold.

On the 30th of August the following supplemental agreement was entered into by the parties:

"It is hereby mutually agreed by and between Talmadge E. Brown and J. D. F. Slee and others, executors of the estate of Jarvis Langdon, deceased, that said Brown need not perfect his conveyance to the plantation on White River, in Arkansas, as he is required to do by contract with said executors, dated April 25, 1871, but may, in lieu thereof, transfer and assign to said executors a certain judgment now owned by him against the County of Buena Vista, State of Iowa, on which there is due to him five thousand ($5,000) dollars, for the purposes named in said contract of April 25, 1871, said Brown to guarantee the collection of said judgment.

It is further understood and agreed that if said executors desire it, said Brown shall, at the expiration of the five (5) years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the City of Des Moines at $25,000, the same as though the plantation aforesaid was included therein.

And it is further understood that if any of said Buena Vista judgment shall within said five (5) years be paid to said executors, they will allow interest thereon at the rate of seven (7) per cent per annum, and the principal so paid may be deducted from the $25,000 to be paid by said Brown for the repurchase of the Des Moines property.

In witness whereof, said parties have hereunto set their hands this 30th day of August, 1871.

J. D. F. SLEE, *Executor,*
And attorney for the executors of the estate of J. Langdon, deceased.
TALMADGE E. BROWN."

On the 30th of October, 1875, Charles J. Langdon wrote the following letter to Brown, which reached him in due course of mail:

"ELMIRA, *Oct. 30, 1875.*
T. E. BROWN, ESQ., *Des Moines, Iowa.*

DEAR SIR: My wife's health is so poor that I am obliged to go away with her, and I shall sail for Europe Saturday next, for an absence of four, six, or eight months. I have left all necessary papers for the closing of our matters, the re-deeding of the Des Moines land and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on Buena Vista County judgment, will be due April 25, 1876, and we shall desire the money at that time as per contract.

Yours truly,
C. J. LANGDON, *Executor.*"

To this letter Brown made no reply until May 26, 1876, when he wrote as follows:

"DES MOINES, *26th May, 1876.*
CHAS. J. LANGDON, ESQ., *Elmira, N. Y.*

DEAR SIR: Your letter to me last fall in regard to the land did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose: 25th April, '77, $5,000.00 and a like sum on the 25th day of each April following, all unpaid sums to draw six per cent per annum from April 25, '76, the land to remain in your name until it is paid. The last payment will be fractional part of $5,000, of course. This is small interest, but interest must in future be [833] less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since remittance to you. The county are trying to have the same set aside for some informality or fraud, and may succeed, but I think not.

Very truly yours, etc.,
T. E. BROWN."

On the 31st of May, Langdon answered this letter, declining the proposition, and on the 4th of June Brown wrote him as follows:

"DES MOINES, *4 June, '76.*
C. J. LANGDON, ESQ., *Elmira, N. Y.*

DEAR SIR: I am in receipt of your favor of the 31st May. You say the proposition does not suit you. This does not surprise me. I did not think it would. I am very sorry I cannot pay this money and take the land now. You must take such course in the matter as seems to your interest. I do not ask or expect you to be governed by what may seem to be mine.

Yours, etc., T. E. BROWN."

On the 26th of June, 1876, the executors caused to be tendered to Brown a deed for the Des Moines land and demanded the payment of $23,381.14, and again on the 17th of July they tendered the deed accompanied with an assignment of the Buena Vista County judgment. The money not being paid, this suit was begun on the 19th of July to obtain a sale of the property to pay the balance that was due of the agreed sum of $25,000, and if the proceeds were not sufficient to pay the whole debt, to obtain execution for what remained unsatisfied.

Among the assets of the firm was a debt against one John S. Baldwin. This debt was originally contracted to Langdon, but afterwards, at the request of Langdon, the amount was transferred to the firm, Baldwin being charged and Langdon credited with it on the books. Baldwin became insolvent and a part of his debt has never been paid. By way of defense to the original bill by the executors, Brown filed a cross-bill, in which he alleged in substance that when this account against Baldwin was transferred to the firm, Langdon individually guarantied its payment in writing, and [834] that in consequence he was permitted while in life to draw large sums from the partnership. It was then averred "That the guaranty of the said Langdon was always recognized and treated by

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him (Langdon) as an individual guaranty, made upon his own personal account, and not as any part of the firm's business, or as necessarily or properly connected therewith. That at the time of the purchase of the interest of said Langdon's estate from his executors as hereinbefore stated, it was believed, or, at all events, there was a hope and a probability that something, at least, upon the balance due from said Baldwin's account, and possibly all might be collected, or in some manner realized from said Baldwin. And that said claim against said Baldwin was spoken of, and was the subject of conversation between the parties at the time of the purchase, and the same was not settled or adjusted or understood to be embraced in the terms of the settlement for the reason among others, of the hope that the same might be realized in whole or in part from the said Baldwin.

And your orator, therefore, distinctly avers, as a substantive and existing fact, that the claim upon Langdon's executors, by reason of that guaranty, was not embraced in said settlement, nor intended to be embraced, but was omitted therefrom for adjustment between the parties in case the said Baldwin should fail to pay any portion of said balance against him."

The contract between Brown and the executors, on which the original suit was brought, was made an exhibit to the cross-bill, and the prayer was that the estate of Langdon might be charged with what was due on the debt. The executors demurred to the cross-bill, and on the final hearing in the circuit court this demurrer was sustained and a decree rendered on the foregoing facts, finding due from Brown $26,320.37 for the repurchase, and ordering a sale of the property to pay the debt. From that decree Brown appealed.

There are two principal questions in this case, to wit: 1, whether, on the facts, Brown is bound to purchase back the Des Moines property and pay the balance of the $25,000 which remains after deducting the collections on the Buena Vista County judgment; and 2, whether the demurrer to the cross-bill was properly sustained.

[835] To our minds the fair construction of the contracts on which the case depends is that Brown purchased the interest of the estate of Langdon in the partnership property for $100,000, payable $25,000 in cash, $50,000 in notes, and $25,000 in the Des Moines land and Buena Vista County judgment, unless the executors concluded not to keep the land and the judgment, in which event he was at the end of five years to purchase them back and pay in money the $25,000 for which they were taken, the executors crediting him with what had in the meantime been collected on the judgment, with interest at the rate of seven *per centum* per annum.

This is not only the fair inference from the language of the contracts themselves, but it seems to have been the understanding of the parties as shown by their conduct at the time and since. Thus, on the 25th June, although Brown did not then convey the Arkansas lands, the executors made their transfer of the partnership property "in consideration of $100,000" that day received. And when the Buena Vista County judgment was taken in lieu of the Arkansas lands, it was stipulated that all collections made within the five years should be credited with interest on the $25,000 if the executors desired the repurchase to be made. So when Langdon wrote Brown on the 30th of October, 1875, he said "The balance of $25,000, less what has been paid on the Buena Vista County judgment, will be due April 25, 1876, and we shall desire the money at that time as per contract." He thus treated what was to be paid, as a debt which the executors desired to have met at maturity. Brown evidently looked on the transaction in the same way, for in his letter written a month after the time for repurchase had expired, he made no objection to the failure to tender a reconveyance on the day, and demand the payment of the money, but said "I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose." Under these circumstances all that was necessary to put on Brown the obligation to take back the land and pay the money instead, was for the executors to signify to him in some appropriate way that they had concluded not to keep it in satisfaction of the sum for which it was to be taken. This need not necessarily be done on the day the repurchase was, under the contract, [836] to be made. It was enough if at any time before the expiration of the five years the conclusion was finally reached and Brown properly notified. The reasonable presumption is that the parties expected the election would be made before the end of the time, because as the money was to be paid on the day, some preparation would ordinarily be required to meet so large a demand. Time was material in the sense that the election must be made within the five years. If that was not done the obligation of Brown to take back the property was gone. He was not bound to repurchase unless the desire that he should do so was expressed in proper form before the time elapsed.

We proceed now to consider whether the executors did, in fact, make their election in proper form and within the time. This depends entirely on the letter of Langdon under date of the 30th of October, 1875, and the reply of Brown of the 26th of May following. No particular form of election was provided for in the contracts. All they required was that the proper representatives of the estate should, within the time, express to Brown their desire that he "purchase back" the lands under the contract.

The letter of October 30 was written by Charles J. Langdon in his own name as executor, but he held the title to the property evidently with the assent of his co-executors. He wrote that he had left all the necessary papers with Mr. Slee, another of the executors, and concluded by saying that "*we* shall desire the money at that time as per contract." In what he did he was evidently acting for the estate, and as his acts have been adopted by all the executors as the basis of this suit, it is clear that his letter was at the time the expression of their will, and bound them so far as necessary to enable Brown to get the title from him if the money was paid as the contract required.

This letter did not in so many words say to Brown that the executors desired him to repurchase under the contract; but it did tell him they desired the money, which the contract called for only in the event of his repurchase. This could not be understood otherwise than

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[837] as an expression of a desire that he purchase back the property under the contract. And evidently it carried that idea to Brown, for he immediately began to treat for terms, not because he claimed not to be bound, but because, to use his own words, he was "not able to pay." His conduct corresponded in all respects with that of the executors, and his letter is not to be treated as a waiver of the neglect of the executors to make their election at the day, but as a recognition of the fact that a proper election had been made and accepted.

It is claimed on the part of the appellants, however, that to enable the executors to recover they must prove "both an election to sell and the delivery or tender of a deed on the day fixed for performance." As we have already shown, it needed no tender of a deed on the day to require Brown to repurchase. It was enough if, before the expiration of the time, the executors made their election that he should do so, and signified it to him in proper form. That being done, the rights of the parties respectively under the contract were fixed. Brown became bound to repurchase and pay the money, and the executors to receive the money and reconvey. Either party could then require the other to perform, and neither could insist on the default of the other, so long as he was himself behind in his own performance. Brown could not demand a deed until he tendered the money, and the executors could not require the money until they had offered a deed. Neither party offered to perform on the day and, therefore, one was as much in default as the other. Such being the case, either party, after relieving himself from his own default by performance or an offer to perform, could require the other to perform within a reasonable time. Neither could insist that the other had lost his rights under the contract until he had himself done what he was bound to do. The failure of both parties to perform on the day was equivalent to a waiver by each of the default of the other. The executors did offer to perform within a reasonable time after the day, and we think are entitled to recover.

As to the cross-bill. Upon this part of the case it must be assumed as a fact admitted of record, that when Langdon, the deceased partner, transferred his debt against Baldwin to the firm and got credit for it, he guarantied in proper and legal form its ultimate collection, and that it was taken on the faith of this obligation on [838] his part. The only question, therefore, is, whether under the contract between Brown and the executors, that obligation was assumed by Brown or, in effect, discharged. Brown took the assignment of the estate's interest in the firm property, subject, among other things, to all possible liabilities of Langdon for the transactions of the firm, and he agreed to indemnify the estate against all liability growing out of such transactions. The acceptance of the transfer of the Baldwin debt was a firm transaction. and the guaranty of Langdon grew out of that transaction. If the debt should not in the end be paid, the balance might be charged back to Langdon when the affairs of the partnership were closed up, and his interest in the good assets would be diminished to the extent of such a charge. The firm, as a firm, could not sue him on his guaranty. All that could be done would be to take his liability into account when settlements and divisions were made between the partners. This liability occupied a position in no material respect different, so far as winding up the affairs of the partnership were concerned, from an ordinary overdraft in the progress of the business. It was a liability to which Langdon was bound to respond at the proper time. If, instead of buying out the interest of the estate, Brown had wound up the affairs of the partnership and divided the proceeds, the balance due from Baldwin might have been set off to the estate as so much cash, but he could not have sued the estate directly on the guaranty. The liability was one that could only be enforced as an incident to the settlement of the business, and a statement of the accounts between the partners. The contract between Brown and the executors made such a settlement and such a statement of accounts unnecessary. Brown took the place of the estate in the partnership, assumed all its liabilities to or for the firm, and agreed to pay $100,000 to the estate for what would be distributable to it from the assets on a full and final adjustment of the accounts of the individual partners, and the reduction of all the assets to money. That was the evident purpose of the parties as expressed by the contract they made. The averments of Brown as to the obligations of the estate are [839] contradicted by the terms of the written instrument to which he refers, and on which the rights of the parties depend. There is no allegation of fraud or mistake in reducing the contract to writing. It follows that the demurrer to the cross-bill was properly sustained.

The decree of the Circuit Court is affirmed.

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END OF VOL. 108.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1881.

Vol. 104.

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THE DECISIONS

OF THE

Supreme Court of the United States.

AT

OCTOBER TERM, 1881.

[1] NEW HAVEN AND NORTHAMPTON COMPANY, *Plff. in Err.*,

v.

WILLIAM HAMERSLEY.

(See S. C., 14 Otto, 1-5.)

Statute impairing contract.

Where the Railroad Commissioners of Connecticut consented that a railroad in that State might discontinue one of its stations; held, that a subsequent statute of the State, requiring the Company to stop its trains at that station, impaired no contract obligation of the State.

[No. 93 of 1880.]

Submitted Dec. 2, 1880. Decided Feb. 28, 1881.

IN ERROR to the Supreme Court of Errors of the State of Connecticut.

The case is fully stated by the court.

Messrs. **R. D. Hubbard & C. E. Perkins,** for plaintiff in error:

The proceedings referred to between the Railroad Commissioners and the Company, and the acts of the Company thereunder, constituted a contract between the State and the defendant.

A contract may be made by a general statute and acts done under it, as well as by a special Act.

N. J. v. *Yard*, 95 U. S., 114 (XXIV., 354).

In this case a general law provided that no railroad should abandon a station without the consent of the railroad commissioners, upon an application and hearing as provided by the Act. This is clearly equivalent to a direct provision that any railroad might abandon with such consent or, to make it apply to this case, it is the same thing as if the Act provided that the New Haven and Northampton Company might abandon the station at Plantsville, with the consent of the commissioners.

The State, itself, is an impersonal, imaginary body, and can act only through agents.

In this case it gave this power in question to the railroad commissioners, whose decision was to be final, as no appeal was given from their determination.

In *Bradley* v. *R. R. Co.*, 21 Conn., 305, the court, in speaking of the power of eminent domain, and the exercise of such power, says: "The defendants in that case would have acted merely as the constituted agents or instrumentality of the Legislature, which would itself have been only the representative or instrumentality, so to speak, of the People or sovereign power of the State, and within the scope of the authority conferred by the law under which they thus acted, would be invested with all the rights and powers of the State."

Com. v. *Essex Co.*, 13 Gray, 239; *State* v. *R. R. Co.*, 37 Conn., 153; *Waterbury* v. *R. R. Co.*, 27 Conn., 154.

In *Bridge Co.* v. *Ferry Co.*, 29 Conn., 210, 221, speaking of the claim that legislative contracts are to be construed with extraordinary strictness in favor of the State, the court says: "We doubt very much the propriety of any such general rule of law. We know not why such stringency is to be applied to a legislative grant, more than to any other grant. In every other case where we looked to a contract to learn what are the rights of the parties, we seek to know what the contracting parties intended by the contract, or what the language and scope of the instrument mean to express, and it is the same whether it is a public or private agreement. This case settles the rule of construction in Connecticut, and the State certainly cannot complain if the rules of its own courts are applied.

If my neighbor has a right of way across my land, and I want it to be abandoned by him, and he says he will abandon it if I will build him a road elsewhere and I do so, is not that a contract binding upon him? Can he say: O, I meant that I would abandon it for a little while. A month has passed, I have abandoned the old road and now I will resume it again.

If such contracts would be binding between individuals, and they clearly are, why should they not be equally binding upon a State?

The claim that "abandoned" here only means abandoning until the State sees fit to make the Company stop again, is a most forced, unreasonable construction, contrary to the clear intent of the parties.

In *Home of the Friendless* v. *Rouse*, 8 Wall., 437 (75 U. S., XIX., 497), it was held that a provision that the property of a corporation should be exempt from taxation, meant that it should be "forever" exempt.

So in the similar case of *Nichols* v. *N. H. & N. Co.*, 42 Conn., 103.

"Can it be justly believed that it was intended by either party to this contract, that after it was signed by both parties, one was bound forever and the other only for a day; that it was

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intended to be a part of the contract, that the State of New Jersey was at her option to be bound or not?"

N. J. v. *Yard* (*supra*).

It will be admitted that the Legislature did not in terms give the Railroad Commissioners any power to make any contract. The power is implied from the fact that the State substituted the approval of the Commissioners for its approval. It made them its agents as to this matter. As is said heretofore, citing *Bradley* v. *R. R. Co.*, 21 Conn., 305, the Commissioners, within the scope of the law under which they acted, were invested with all the rights and powers of the State; and again, in *State* v. *R. R. Co.*, 37 Conn., 153, and *Waterbury* v. *R. R. Co.*, 27 Conn., 154.

The whole power of the State relating to abandoned railroad stations was given to the Railroad Commissioners, and it was, we submit, clearly within the apparent and real scope of their authority to fix and prescribe the terms and conditions of such abandonment.

To hold otherwise would be attributing to the State a course of conduct which, between private persons, would be fraud and the foundation of an est oppel.

The statute, as interpreted by the Supreme Court of Connecticut, 37 Conn., 153, 165, provides that all questions of private and public interest, connected with the continuance of abandonment of railroad stations, are to be determined by the railroad commissioners.

The Act itself endeavors to shelter itself under this claim by saying, that it shall be an amendment to its charter.

But this contract was not made by the charter of the Company, and has no relation to it. It was entirely outside of the charter, as much as a legislative grant of land for a consideration would be.

But in all the cases it is expressly stated that this principle does not apply to contracts outside of the charter.

"Rights and interests acquired by the Company, not constituting a part of the contract of incorporation, stand upon a different footing."

R. R. Co. v. *Maine*, 96 U. S., 511 (XXIV., 841); see, also, *N. J.* v. *Yard*, 95 U. S. (*supra*); *Tomlinson* v. *Jessup*, 15 Wall., 454 (82 U. S., XXI., 204); *Com.* v. *Essex Co.*, 13 Gray, 239; *Detroit* v. *Plank Road Co.*, Wis. Sup. Ct. 22 Alb. L. J. No. 5, p. 95, July 31, 1880; *Sinking Fund Cases*, 99 U. S., 700 (XXV., 496); *R. R. Co.* v. *Brownell*, 24 N. Y., 345.

It may be said that there are many cases where Legislatures have imposed additional burdens upon corporations by virtue of this clause, and have been sustained by the courts, as in *Com.* v. *R. R. Co.*, 103 Mass., 254; *Mayor* v. *Norwich & Worcester Co.*, 109 Mass., 103, and others.

We do not dispute the doctrine laid down by these cases, but in none of them was there a contract outside of the charter.

Messrs. **Wm. Hamersley** and **John R. Buck**, for defendant in error:

The plaintiff was not obliged to abandon the old station at Plantsville, nor to establish the new one at Southington, by virtue of any act of the commissioners; hence its action was voluntary in both cases.

It must be remembered that the commissioners had no jurisdiction to act in regard to the new station.

The Company cannot complain of having expended money in reliance upon an act of the commissioners unwarranted by law.

The counsel for the plaintiff has relied upon a decision rendered in the case of *Com.* v. *Essex Co.*, 13 Gray, 239, to sustain their position. But on examination of that case, it will be seen that it does not sustain the claim of the plaintiff.

The contract claimed in the case at bar as entered into by the State, has none of the requisite elements of a civil contract, within the meaning of the obligation clause.

It is not claimed that there was any verbal agreement, but that an agreement resulted by operation of law from the acts of the parties.

The abandonment of the station without permission was illegal.

"No railroad company shall abandon any station on its road in this State after the same has been established for twelve months, except by the approval," etc., Gen. Stat. Conn., 327.

The State licensed the Corporation, at its own request and for its own benefit, to cease the performance of a public duty.

But the plaintiff in error claims that the State did more; that it ordered the Corporation to erect a passenger station in a particular manner.

This claim is not true.

The State acted through its agents, the Railroad Commissioners.

Those agents had no authority, except that conferred by law. Their powers are defined by statute.

They had no power to order the establishment of a new station in the manner claimed.

They had no power to order the building of a new station-house, nor to have it built in a particular manner.

The only Act of the State, therefore, was a license to the Corporation to abandon the existing station at Plantsville and Southington a license not in order; the Corporation being free to act under the license or not.

What did the Corporation do?

It established a new station in Southington, and expended $10,000 in the building of the necessary station-house.

The plaintiff claims that from these two acts, the law infers a contract with a binding obligation on the State.

Several state courts have held that contracts between railroad corporations and individuals, to locate the road upon a certain line, to build a depot at a certain place, to leave a certain distance along the line of road destitute of depots, are against public policy and void.

Holladay v. *Patterson*, 5 Oreg., 177; *R. R. Co.*, v. *Seely*, 45 Mo., 212; *R. R. Co.* v. *Ryan*, 11 Kan., 602.

But even if the subject-matter were such as to support a valid contract, the terms of the contract are too indefinite.

The passage of the Act complained of, was clearly within the power of the Legislature, as it is the imposition of an additional burden which the plaintiff agreed might be imposed when it received its charter.

The restoration of an abandoned station by legislative enactment, is within the reserved power to amend, alter or repeal, because it is

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an additional burden, which the Legislature might have originally imposed.

Pennsylvania College Case, 13 Wall., 213 (80 U. S., XX., 553); see, also, *Miller* v. *State*, 15 Wall., 488 (82 U. S., XXI., 101); *Com.* v. *R. R. Co.*, 55 Pa., 452; *Hyatt* v. *McMahon*, 25 Barb., 457; *Fitchburg R. R. Co.*, v. *Grand Junction Railroad and Depot Co.*, 4 Allen, 198; *Olcott* v. *Supervisors, etc.*, 16 Wall., 694 (83 U. S., XXI., 388); *Comrs., etc.*, v. *Holyoke Water Power Co.*, 104 Mass., 446; *State* v. *Mayor, etc.*, 31 N. J. L., 580; *Sherman* v. *Smith*, 1 Black, 593 (66 U. S., XVII., 167); *People* v. *Hills*, 46 Barb., 348.

A leading case on this subject is the case of *Mayor* v. *R. R. Co.*, 109 Mass., 108; *Atty-Gen.* v. *R. R. Co.*, 35 Wis., 425.

The plaintiff seems to be under the impression that the permission granted it by the commissioners to abandon the station, was a vested right to forever abandon it.

This is not so, because the Law of 1866, conferring this power on the commissioners, only gave them power to permit the Company to abandon the station. It did not delegate to them the reserved power to impose additional burdens whenever the Legislature might see fit to do so. The Legislature must determine for itself what state of facts call for their interference, and the courts are bound to acquiesce in that determination.

Crease v. *Babcock*, 23 Pick., 344; *Story* v. *Jersey City*, 16 N. J. Eq., 22; *State* v. *Miller*, 30 N. J. L., 378; *Bk.* v. *U. S.*, 1 Greene (Ia.), 563; *R. R. Co.* v. *Casey*, 26 Pa., 300; *Munn* v. *Ill.*, 94 U. S., 113 (XXIV., 77).

The claim which we make in regard to the construction of the contract contained in the plaintiff's charter, and in regard to the power of the Legislature to impose additional duties and burdens, is sustained by the following authorities:

Proprietors, etc. v. *Haskell*, 7 Me., 474; *Read* v. *Bk.* 23 Me., 318; *Roxbury* v. *R. R. Co.*, 6 Cush., 424; *Fitchburgh R. R. Co.* v. *Grand Junc. R. R. Co.*, 4 Allen, 198; *Com.* v. *R. R. Co.*, 103 Mass., 254; *Matter of Gibson*, 21 N. Y., 9; *Matter of the Reciprocity Bk.*, 22 N. Y., 9; *White* v. *R. R. Co.*, 14 Barb., 559; *Story* v. *Jersey City, etc. & P. R. Co.*, 16 N. J. Eq., 13; *State* v. *Miller*, 30 N. J. Law, 368, affirmed in *State* v. *Mayor*, 31 N. J. Law, 575; *Perrin* v. *Oliver*, 1 Minn., 202; *R. R. Co.* v. *Reynolds*, 3 Wis., 287; *Whiting* v. *R. R. Co.*, 25 Wis., 167; *Sherman* v. *Smith*, 1 Black, 587 (66 U. S., XVII., 163); *Pennsylvania College Cases* (*supra*); *Tomlinson* v. *Jessup*; 15 Wall., 454 (82 U. S., XXI., 204); *State* v. *Hoeffinge*, 31 Wis., 262; *R. R. Co.* v. *Iowa*, 94 U. S., 155 (XXIV., 94); *Peik* v. *R. Co.*, 94 U. S., 164 (XXIV., 97); *R. R. Co.* v. *Ackley*, 94 U. S., 179 (XXIV., 99); *R. R. Co.* v. *Blake*, 94 U. S., 180 (XXIV., 99); *Stone* v. *Wisconsin*, 94 U. S., 181 (XXIV., 102).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The New Haven and Northampton Company is a Connecticut corporation, authorized to construct and operate a railroad from New Haven, through the Town of Southington, to the Massachusetts state line. It has full power to erect and maintain toll houses and other buildings for the accommodation of its concerns as it may deem suitable for its interest, but its charter may "Be altered, amended or repealed [2] at the pleasure of the General Assembly." In 1848, after the road was built, three stations were established in the Town of Southington, named respectively Southington, Plantsville and Hitchcocks, at which trains stopped for freight and passengers.

In 1866 the Legislature of the State passed a statute which contained the following provision in respect to the abandonment of railroad stations:

"Sec. 50. No railroad company shall abandon any station on its road in this State after the same has been established for twelve months, except by the approval of the railroad commissioners, given after a public hearing held at said station, notice of which shall be posted conspicuously in said station for one month prior to the hearing."

In November, 1873, the Company became desirous of abandoning one or more of its stations in Southington, and for that purpose presented a petition to the Railroad Commissioners, representing that two stations properly located would be ample for the public convenience, and asking that the matter might be inquired into, and that the Southington or Plantsville station, or both, might be discontinued, and two stations, and only two, located in the town, where the common good of all parties in interest would be most promoted. The requisite notice was given, and the commissioners having heard the application, on the 3d of February, 1874, made the following order:

"After a careful and full examination of the locality and business surroundings of the present located stations, and an extended hearing of all the appearing parties in interest, with their evidence and arguments of counsel, the Railroad Commissioners do find and approve, and do hereby order, that the New Haven and Northampton Company may discontinue and abandon the present stations of Southington and Plantsville, as at present located, under and by complying with the following provisions and conditions, viz.:

"The New Haven and Northampton Company shall provide and erect a passenger station-house near their new freight depot, as shown on the map exhibited and submitted, and after and in compliance with the plans and profiles also submitted for said passenger station building, and provide suitable and convenient approaches thereto; also suitable, convenient and easy approaches to their new freight [3] depot; all of which shall be done to the acceptance of the Railroad Commissioners. Said Company shall also continue the same facilities for receiving and shipping freight by the car load and unbroken, as at present enjoyed, to each and all of the parties who patronize their railroad by receiving and shipping freight thereby."

Before this time the Company had bought the ground and erected buildings adapted to freight business at the place indicated in the order. It afterwards, at an expense of $10,000, put up a building for passenger purposes, as required by the commissioners. This being acceptable to the commissioners, the stations of Southington and Plantsville were abandoned by the Company, and both passenger and freight trains stopped at the new place only.

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At the succeeding Legislature, in May, 1875, an Act was passed "Establishing a Depot at Plantsville," as follows:

"Sec. 1. That if at any time within six months after the passage of this Act, any of the petitioners and others who may act with them for that purpose, shall erect at Plantsville, contiguous to the railroad, a depot building, and convey the same with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains, to the New Haven and Northampton Company, to be used for railroad purposes, it shall thereupon become the duty of said Company, and it is hereby ordered, to stop at such depot thereafter its regular passenger and freight trains passing over said railroad, for the purpose of receiving and discharging passengers and freight. And all the provisions of the Revised Statutes applicable to railroad depots and stations shall be applicable to said depot in the same manner as though said depot had been erected and established by said Company.

Sec. 2. Said order may be enforced by *mandamus* by the attorney for the State for the County of Hartford, or at the relation of any inhabitant of the Town of Southington, in said county, and the charter of the New Haven and Northampton Company is hereby amended according to the provisions of this Act."

The petitioners named complied with the provisions of the Act and, having tendered the Company a conveyance of suitable depot grounds and buildings at Plantsville, demanded that the regular passenger and freight trains running on [4] the road be stopped there. This the Company refused to do, and the attorney for the State for the County of Hartford now seeks by *mandamus* to enforce the law. The court below gave judgment against the Company, holding, among other things, that the Act of 1875 did not impair the obligation of any contract rights which the Company had acquired from the State. Upon this ground the case has been brought here by writ of error.

It was conceded in the argument that there is nothing in the charter to prevent the State from passing the law complained of. Confessedly, the power of amendment, which was reserved meets this part of the case, but it is claimed that by the action of the Railroad Commissioners the State has become bound by a contract not to exercise its legislative power so as to require the establishment of a depot at Plantsville.

As it seems to us, the Court of Errors of the State took the right view of the statute under which the commissioners acted, when they said, in *State* v. *N. H. & N. Co.*, 37 Conn., 163, its object was "To prevent railroad companies from arbitrarily changing their places of business on the road, to the prejudice of those who, relying on the permanency of such places, shape their business accordingly." The powers of the commissioners, as agents of the State, in this particular, are confined to such as are necessary for the accomplishment of that object. They may, after a public hearing, approve of, that is to say, give the assent of the State to the abandonment of a station which has been established twelve months or more, and that is all they can do. They may, as was held by the court of errors in *State* v. *N. H. & N. Co.*, 42 Conn., 59, direct that their approval take effect only when the Company shall have provided suitable accommodations for the public at some other place, but that is only a conditional approval of the abandonment. When the new accommodations have been provided and the old station abandoned, nothing more has been accomplished, so far as the Company is concerned, than a lawful abandonment of an old place of business. The powers of the State over the charter remain just as they were before. Until the Act of 1866, the Company could abandon its stations at will, and the State by charter amendment, or even by a general law, might require their restoration. After that Act [5] the power of abandonment by the Company was restricted, but the State retained all its old authority. The commissioners were given no power to *contract* for the State or the public. All they could do was to say yes or no, to a simple request by the Company for leave to abandon an old station. If they said yes, the abandonment might be made; if no, the station must be continued. In this case the commissioner said "yes, when the new accommodations are furnished." The new accommodations were furnished and the station was abandoned accordingly. Such was the view taken of what was done by the court of errors in the case last cited, 42 Conn., 59, and we think it is correct. The commissioners entered into no agreement with the Company. They simply said, complete your proposed accommodations at the new station and we will assent for the State to your abandonment of the old one. It follows that the new law impaired no contract obligation of the State, and *the judgment of the Court of Errors is, consequently, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PEOPLE, *ex rel.* JOHN P. HANEMAN, *Plff. in Err.*,
v.
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK. [466]

(See S. C., 14 Otto, 466–468.)

Valid assessment.

Where capital was in fact in money, the owner cannot escape an assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries.

[No. 209, of 1880.]

Argued Jan. 26, 1881. Decided Feb. 28, 1881.

IN ERROR to the Supreme Court of the State of New York.

The case is fully stated by the court.

Mr. **H. Charles Ulman,** for plaintiff in error.

Messrs. William C. Whitney, **J. A. Beall,** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The only question presented upon the writ of error is, whether an assessment made by the Board of Tax Commissioners for the City and

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County of New York, of the personal estate of the plaintiff in error, was in violation of the Constitution of the United States. The statute, under the authority of which the assessment was made, provides that, "All lands and all personal estate within this (that) State, whether owned by individuals or by corporations, shall be liable to taxation," subject to certain exemptions thereinafter specified. 1 R. S. N. Y., ch. 13, tit. 1, sec. 1. It also declares that "The terms 'personal estate' and 'personal property,' whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels; debts due from solvent debtors, whether on account, contract, note, bond or mortgage; public stocks, and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies liable to taxation on their capital, as shall not be invested in real estate." 1 R. S., N. Y., ch. 13, tit. 1, sec. 3.

[467] Haneman, being a resident of the City, County and State of New York, was assessed for taxation, as of January 1, 1876, upon his personal estate, exclusive of bank stock, to the amount of $60,000. He made application, supported by affidavit, for the reduction or remission of such assessment, upon these grounds: That the value and amount of all his personal estate, on the first day of January, 1876, and during the period covered by the assessment, did not exceed $125,000, of which $4,500 was invested in railroad bonds, and $1,000 in household furniture; that the remainder was "Continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the Customs Department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different States of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports," and that the only portion of his estate upon which he is liable to be assessed and taxed is the sum of $5,500. In his examination before the Tax Commissioners, upon the occasion of his application for reduction or remission, he further stated that "His said capital is invested uniformly and continuously in cotton, the product of, and having a *situs* in, various States outside of New York, and in transit to the Port of New York, and other Atlantic ports, for the sole purpose of exportation, and no portion of such cotton is intended to be, or is, sold in New York, or any other United States market; that deponent purchases cotton largely upon credit, and that of his capital as much as $115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house and is on shipboard in course of exportation to some foreign State or country."

The reduction and remission were both denied. Upon writ of *certiorari* the proceedings of the Tax Commissioners were affirmed in the Supreme Court of the State, and its judgment was affirmed by the Court of Appeals.

The assessment in excess of $5,500, it is claimed by plaintiff in error, was in violation as well of article 1, section 10, and clause 2, as of article 1, section 8, clause 3, of the National Constitution. The main propositions advanced by his counsel are that products of the United States which have passed the Customs Department, and are on shipboard in the course of exportation to a foreign market, have become exports, and are no longer within the taxing [468] power of the State; that to tax money invested in such products is, in effect, laying an impost or duty on exports; that a tax on capital invested in the products of the United States, in transit from one State to another for purposes of exportation, or on money used and employed in exporting such products, is an unauthorized interference by the State with the regulation of commerce.

Although these propositions are deemed by counsel to be very easy of solution, we do not feel obliged to determine them in this case. The plaintiff in error was assessed, upon his personal property, as of January 1st, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from the United States to foreign countries, through the Customs Department, was, in fact, in money on the first day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries. Neither in his affidavit nor in his examination before the Tax Commissioners does he distinctly claim (and, perhaps, could not) that the capital which he thus employed in the business of purchasing cotton for exportation was, in fact, so invested on the first day of January, 1876. His capital may have been, in a business or mercantile sense, continuously so employed, and yet it may not have been, in fact, so invested at the date to which the assessment, whenever made, relates. We have no occasion, therefore, in the present case, to consider or determine the questions of constitutional law discussed by counsel. It will be time enough to consider them when they come before us in such form as to require their determination.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

FREDERICK VIETOR ET AL., *Plffs. in Err.*
v. [498]
CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK.

(See S. C., 14 Otto, 498-500.)

Duty act.

Stockings of worsted, or worsted and cotton, made on frames, imported after the Revised Statutes went into effect, June 22, 1874, are dutiable under section 2504 as stockings, under schedule M.

[No. 223 of 1880.]

Argued Jan. 28, 1881. Decided Mar. 14, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Mr. **Stephen G. Clarke,** for plaintiffs in error.

Mr. **Edwin B. Smith,** *Asst. Atty-Gen.*, for defendant in error.

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Mr. Chief Justice **Waite** delivered the opinion of the court:

The question in this case is, whether stockings of worsted, or worsted and cotton, made on frames, and worn by men, women and children, imported after the Revised Statutes went into effect, June 22, 1874, are dutiable as knit [499] goods, under schedule L, class 3, section 2504, or as stockings, under schedule M. The two provisions under which the parties make their respective claims are as follows:

Sched. L.—"Flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound: twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound: thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound: forty cents per pound; valued at above eighty cents per pound: fifty cents per pound; and in addition thereto, upon all the above named articles, thirty-five *per centum, ad valorem.*"

Sched. M.—"Clothing, ready-made, and wearing apparel of every description, of whatever material composed, except wool, silk, and linen, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, not otherwise provided for, caps, gloves, leggins, mitts, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, except silk and linen, worn by men, women or children, and not otherwise provided for, articles worn by men, women, or children, of whatever material composed, except silk and linen, made up or made wholly or in part by hand, not otherwise provided for: thirty five *per centum, ad valorem.*"

In *U. S.* v. *Bowen*, 100 U. S., 513 [XXV., 632], we held that the Revised Statutes must be treated as a legislative declaration of what the statute law of the United States was on the first of December, 1873, and that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision. That could only be done when it was necessary to construe doubtful language. We applied this rule in *Arthur* v. *Dodge*, 101 U. S., 36 [XXV., 949], to the construction of the revision of the tariff laws.

It is also well settled that when Congress has designated an article by its specific name, and imposed a duty on it by such name, general terms in a later Act, or other parts of the same [500] Act, although sufficiently broad to comprehend such article, are not applicable to it. *Movius* v. *Arthur*, 95 U. S., 144 [XXIV., 420]; *Arthur* v. *Lahey*, 96 U. S., 112 [XXIV., 766].

It is conceded that stockings made on frames have been dutiable *eo nomine* since 1842, and by four different statutes; 5 Stat. at L., 549, ch. 270, sec. 1, subd. 7 and 9; 9 Stat. at L., 44, ch. 74, sec. 11, sched. C; 12 Stat. at L., 191, ch. 68, sec. 22; 12 Stat. at L., 558, ch. 163, sec. 2. Now, when we find, as we do in schedule M of section 2504, "stockings * * * made on frames, of whatever material composed, except silk and linen, worn by men, women and children," it seems to us clear beyond question that goods coming within that specific description are dutiable in the way thus provided, rather than as "knit goods * * * composed wholly or in part of worsted." It may be true, as suggested, that if there had been no revision, and we had been required to construe the statutes as they stood before December 1, 1873, a different conclusion might have been reached. We have not deemed it necessary to institute such an inquiry, for it would be contrary to all the rules of construction to say that where in one part of a section of a statute it was provided that "stockings made on frames, of whatever material composed, except silk or linen," should pay duties at a certain rate, it was not *plain* such articles were not in any just sense "otherwise provided for" in a preceding clause of the same section fixing the duties to be paid on "knit goods composed wholly or in part of worsted." The judgment below was before *U. S.* v. *Bowen*, *supra*, was decided here.

The judgment is reversed and a venire de novo *awarded.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

DAVID C. PRICE, *Appt.*,
v.
JAMES E. KELLY.

154 US 669 Appx

In an action by a patentee for infringing letters patent, the burden of proving the infringement is on the patentee.

[No. 13.]

Submitted Oct. 12, 1881. Decided Oct. 25, 1881.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is sufficiently stated by the court.

Messrs. **J. J. Noah** and *C. K. Davis*, for appellant.

No counsel appeared for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case is very imperfectly presented. No one appears for the appellee, and the record is incomplete. The bill charges the appellee with an infringement of certain letters patent issued to and owned by the appellant. The answer attacks the validity of the patent, and denies the infringement. The court below, without passing on the other questions, held there was no infringement. The appellee evidently claimed under a patent to himself, which, with the accompanying drawings and certain models, was in evidence. This evidence is not before us. Neither the patent nor the drawings are in the record, and the models have not been brought up. Nor have we been able to find anywhere in the record a satisfactory description of the structure which the appellee uses. The burden of proving the infringement is on the appellant. The necessary proof in this respect has not been made, and *the decree below is, consequently, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[18] DAVID C. SHANKS, Exr. of JOSEPH H. JOHNSTON, Deceased, *Appt.*,

v.

JOHN A. KLEIN ET AL.

(See S. C., 14 Otto, 18-24.)

Partnership real estate—sale by survivor.

*1. Real estate, purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the copartners.

2. For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated; and, though he cannot convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate and the right to compel a conveyance of the title from the heir or devisee in a court of equity.

[No. 20.]

Argued Apr. 4, 5, 1881. Decided Oct. 25, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. **William B. Pittman** and *J. Z. George*, for appellant.

Mr. **Edward D. Clark**, for appellees.

[19] *Mr. Justice* **Miller** delivered the opinion of court:

This is a bill in chancery filed by John A. Klein and many others in the Circuit Court of the United States for the Southern District of Mississippi against David C. Shanks, the appellant, as executor of the last will and testament of Joseph H. Johnston.

The substance of the bill is, that in the life time of Johnston there existed between him and Shepperd Brown a partnership, the style of which was Brown & Johnston. That their principal place of business was at Vicksburg, in the State of Mississippi, where they had a banking house. That they had branches and connections with other men in business at other places, among which was New Orleans. That they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent civil war. That this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business. That early in the war, namely: in 1863, Johnston died in the State of Virginia, where he then resided, and left a will by which all his property, including his interest in the partnership, became vested in Shanks, who was made the executor of the will.

It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war, the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown, who had become surviving partner, returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston, and the other firms with which that was connected. He found that suits had been commenced against him as surviving partner by creditors of the firm, and, in some instances, attachments levied, and became satisfied that unless he adopted some mode of disposing of the property of these partnerships, and applying the proceeds of such sale to the payment of the debts in their just order, the whole would be wasted or a few active creditors would absorb it all. Under these circumstances, acting by advice of counsel, he conveyed all the property of the firm of Brown & Johnston to John A. Klein, in trust for the creditors of that partnership, with remainder, if any, for the use of the partners and their heirs or devisees. [20] Klein accepted the trust, and sold the lands and paid debts with them, or with the proceeds of sale, as directed by the deed of trust.

There is an allegation that Shanks, while acting as executor of the will of Johnston, about the time the deed of trust was made by Brown to Klein, had an interview with Brown, and being fully informed of the condition of the affairs of the partnership, expressed his approval of what Brown intended to do. This is denied in the answer, and some testimony is taken on the subject. Other questions of bad faith on the part of Brown are raised. But in the view which we take of the case the record establishes the facts, that Brown acted in good faith, that the best that could be done was done for the creditors of the partnership of Brown & Johnston, and for those interested in the property of the firm.

It appears that after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will, instituted in the circuit court in which this bill is filed, actions of ejectment against these purchasers, who filed this bill to enjoin him from further prosecuting the suits, and to compel a conveyance from him of the legal title to the real estate which came to him by the will of Johnston, his testator.

Being satisfied, as already stated of the fairness and honesty of the proceedings of Brown and Klein and of the purchasers from them, and waiving as of no consequence, in regard to the principal question in the case, the allegation of Shanks' concurrence in or ratification of Brown's action, there remains the question of law, raised by the counsel on the part of Shanks, of the power or authority of Brown, as surviving partner, to bind him by the conveyance to Klein, and by the sales made under that deed.

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes within the rule of equity on that subject. Nor is it denied by the counsel who have so ably argued the case for the appellant, that the creditors of the partnership had an equity superior to that of the devisee of Johnston, to have their [21] debts paid out of this property. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a court will enforce against Shanks as the holder of the legal title.

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Partnership realty; conveyance of; right of partners to convey.* See, *note* to Gibson v. Warden, 81 U. S., XX., 797.

See 14 OTTO.

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Counsel for appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided moiety which was originally in Johnston, maintain that Brown, as surviving partner, for the purpose of paying the debts of the partnership, had power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, and that the trust-deed which he made to Klein was effectual for that purpose. That by Klein's sales to the other appellees they became invested with this equitable title and with the right to compel a conveyance of the legal title from Shanks.

One of the learned counsel for appellant concedes that at the present day the doctrine of the English Court of Chancery "Extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of the deceased partner the land as personalty, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence, that partnership real estate was in fact, in all cases and to all intents and purposes, personalty." He denies that the principle has been carried so far in the courts of America, and asserts the extent of the doctrine to be that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the firm, and for any balance found due to either partner on a final settlement of the partnership transactions. Insisting with much earnestness that the right of the surviving partner, and of the creditors through him is no *more than a lien*, his right to enforce it by a sale, as if it were personal property, is denied, and the necessity of a resort to a court of equity to enforce the lien is insisted on.

We think the error which lies at the foundation of this argument is in the assumption, that the equitable right of the surviving partner and the creditors is nothing but a lien.

[22] It is not necessary to decide here that it is not a lien in the strict sense of that word, for if it be a lien in any sense it is also something more.

It is an equitable *right* accompanied *by an equitable title*. It is an *interest in the property* which equity courts will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English Court of Chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject.

We think, also, that the preponderance of authority in the American courts is on the same side of the question.

In the case of *Dyer* v. *Clark*, 5 Met., 562, that eminent jurist, *Ch. J.* Shaw, of the Supreme Court of Massachusetts, while using the word lien in reference to the rights now in controversy, asks, "What are the true equitable rights of the partners as resulting from their presumed intentions in such real estate? Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the parties who advanced the capital, before it shall be applied to the separate use of either? The creditors have an interest indirectly in the same appropriation, not because they have any lien, legal or equitable, upon the property itself, but on the equitable principle that the real estate so held shall [23] be deemed to constitute a part of the fund from which their debts are to be paid before it can be legally or honestly diverted to the private use of the parties. Suppose this trust is not implied, what would be the condition of the parties? etc." "But treating it as a trust, the rights of all the parties will be preserved." It is clear that in the view thus announced the right of the creditors is something more than an ordinary lien.

In the case of *Delmonico* v. *Delmonico*, 2 Sandf. Ch., 366, where the precise question arose which we have in the present case, the Vice-Chancellor held that "Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John, he had an absolute right to dispose of it, for the payment of the debts of the firm, in the same manner as if it had been personal estate."

In so deciding he followed the English authorities and cited *Fereday* v. *Wightwick*, 1 Russ. & M., 45; *Phillips* v. *Phillips*, 1 M. & K., 649; *Id.*, 663; *Broom* v. *Broom*, 3 *Id.*, 443; *Cookson* v. *Cookson*, 8 Sim., 529; *Townsend* v. *Devaynes*, 11 Sim., 498, *note*.

In the case of *Andrews' Heirs* v. *Brown's Adm'r*, 21 Ala., 437, the Supreme Court said that, "Inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of paying the debts and at the same time take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts and the survivor is charged with this duty, his deed will convey the equity to the purchaser, and through it he may call on the heir for the legal title and compel him to convey it."

In the case of *Dupuy* v. *Leavenworth*, 17 Cal., 262, *Chief Justice* Field, in the name of the court, said: "In the view of equity it is immaterial in whose name the legal title of the property stands, whether in the individual name of the copartner, or in the joint names of all; it is first subject to the payment of the partnership debts, and is then to be distributed among the copartners according to their respective rights The [24] possessor of the legal title in such case holds the property in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty

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of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title."

If the case could be neld to be one which should be governed by the decisions of the courts of Mississippi, because the principle is to be regarded as a rule of property, which we neither admit or deny, the result would still be the same.

In one of the earliest cases on that subject in the high Court of Errors and Appeals of that State, *Markham* v. *Merritt*, 7 How. (Miss.), 457, *Chief Justice* Sharkey, in delivering the opinion of the court, concurs in the general doctrine that "When land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel." A careful examination of the Mississippi cases cited by counsel has disclosed nothing in contravention of this doctrine, nor anything to support a denial of the authority of the surviving partner to dispose of such property for the payment of the debts of the partnership.

We are of opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, that they had a right to the aid of a court of chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston, and *the decree of the Circuit Court to that effect is affirmed.*

True copy. Test:

James H. McKenney, Clerk Sup. Court, U. S.

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[25] ELIJAH SMITH, Receiver of BURLINGTON AND SOUTH WESTERN RAILWAY COMPANY, *Appt.*,

v.

WARREN McCULLOUGH ET AL.

(See S. C., 14 Otto, 25-30.)

Railroad mortgage—construction of—receiver in foreclosure action—extent of authority.

1. Where a mortgage executed by a railroad company mortgages "all its present and future to be acquired property, that is to say," and then enumerates its road, right of way and other property, held, that county bonds belonging to the company, not enumerated in the mortgage, are not embraced in and do not pass by it.

2. The rights, privileges and franchises mortgaged were only such as had direct connection with the management and operation of the road after it was constructed and put in use as a public highway.

3. A receiver in a foreclosure action is not receiver of any property except that covered by the mortgage, and has no authority to contract for municipal aid in the construction by him, as receiver of the unfinished portion of a branch road.

4. Where his action, in that regard, was never approved nor ratified by the court from which he derived his authority, he can take nothing by his unauthorised contract with a county, whereby, in consideration of his finishing the road, he was to receive a portion of its bonds.

[No. 10.]

Argued Oct. 11, 1881. *Decided Oct. 25, 1881.*

APPEAL from the Circuit Court of the United States for the Western District of Missouri.

The case is stated by the court.

Messrs. **P. Henry Smyth, L. T. Hatfield** and **H. M. Pollard,** for appellant:

If the mortgage covered the bonds in question, the Receiver is entitled to them.

2 Blackstones Com., 313; *Jackson* v. *Housel*, 17 Johns., 283; *Soulard* v. *U. S.*, 4 Pet., 511; *Pond* v. *Bergh*, 10 Paige, 140; *Wilson* v. *Boyce*, 92 U. S., 324 (XXIII., 609); *Whitehead* v. *Vineyard*, 50 Mo., 30; *Scott* v. *R. R. Co.*, 6 Biss., 534.

If, therefore, according to these authorities, these bonds became property when the Receiver complied with the conditions of the subscription, then they at once became subject to the mortgage. If they did not become property, how could the attachment process, relied upon by respondents, take effect upon them? The mortgage having been executed in 1872, and the garnishee process not levied until 1874, there can be no controversy that the mortgage lien, if it exists at all, is prior to the attachment.

Messrs. **John P. Butler,** *F. M. Cockrell,* and **A. W. Mullins,** for appellees:

The bonds in question were not embraced in nor conveyed by the deed of trust or mortgage to the Farmers' Loan and Trust Company.

All the property conveyed or intended to be conveyed thereby, is particularly mentioned, designated and described by apt and specific terms of description; and there is no term used nor language employed that is broad enough to include the Sullivan County Bonds, or any county securities whatever. Even if it were proper to separate and disconnect the first part of the granting clause in the mortgage "All the present and future to be acquired property of, or in any manner pertaining to, the said Linneus branch of the Burlington and Southwestern Railway Company," from the language that immediately follows, and consider that alone, it would require a strained, and indeed unwarranted construction to include the bonds in question. But the entire granting clause or clauses must be read and construed together. "General words of description may be modified and restricted by particular words following them." Jones, Chattel Mort., sec. 77. The general words of description here are defined, limited and restricted by the particular words following them: "That is to say, all the branch railroad * * * including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes," etc.

Farmers' Loan and T. Co. v. *Bk.*, 11 Wis., 207; *S. C.*, 15 Wis., 424; *Farmers' Loan and T. Co.* v. *Cary*, 18 Wis., 110, 119; *Parish* v. *Wheeler*, 22 N. Y., 494; *Seymour* v. *R. R. Co.*, 25 Barb., 284; *Mississippi Valley Co.* v. *Chicago, etc., R. Co.*, Sup. Ct. of Miss., April Term, 1881; *S. C.*, 18 Cent. L. J., 66; *Calhoun* v. *R. Co.*, 9 Cent. L. J., 66; 2 Story, Cont. secs. 631-634; 2 Pars. Cont., 499.

In giving construction to the mortgage, the intention of the parties to it should be arrived at if possible, and as an aid thereto, the object in view, the situation of the parties and all the attending circumstances should be considered.

Farmers' Loan and T. Co. v. *Bk.*, 15 Wis., 424, and authorities *supra;* also, Jones, Chattel Mort., secs. 55, 62; *Partridge* v. *White*, 59 Me., 564; *Curtis* v. *Phillips*, 5 Mich., 112.

It is quite clear that it was not within the contemplation of the parties to the mortgage that the county securites should be embraced in

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it. All property that was conveyed or intended to be conveyed by the mortgage is designated with great particularity and precision by specific terms of description, and no reference whatever is made to the county bonds.

Mr. Justice **Harlan** delivered the opinion of the court:

The case presented on this appeal, is an outgrowth of a suit in equity, instituted in the court below, for the foreclosure of a mortgage, executed on the first day of April, 1872, by the Burlington and Southwestern Railway Company, to the Farmers' Loan and Trust Company, to secure the payment of certain bonds issued by the mortgagor corporation. A decree of foreclosure having passed, the appellant, who was Receiver in that suit, filed his petition therein (to which the necessary parties defendant were made), asserting his right, as such Receiver, to certain county bonds (or their proceeds), constituting a part of an issue of $200,000 by Sullivan County, Missouri, in payment of its subscription, made in 1871, in aid of the construction of the Linneus Branch of the Burlington and Southwestern Railway. The entire issue of county bonds, conformably to the contract of subscription, was originally deposited in the hands of the appellee, McCullough, as trustee for the county and the railway company, with authority to deliver them, in installments of $40,000, as the work of construction progressed. By the terms of that contract, the railway company was entitled to receive the last installment when the branch road was completed and paid for by the company, with the iron and rolling stock thereon. Prior to appellant's appointment as Receiver in the foreclosure suit, all of the $200,000 of bonds had been delivered, except the last installment of $40,000, which the railway company had not earned, and which, by reason of its insolvency, it had, as is claimed, become unable to earn.

It appears from the transcript before us, that sundry creditors of the railway company, in the year 1874, commenced actions at law against it in the courts of the State to recover the amount of their respective claims. They sued out attachments, which were served upon McCullough, the custodian of the undelivered county [26] bonds, and he was summoned in each action as a garnishee. The attaching creditors subsequently, in 1876, obtained final judgments for the sale of the bonds, and for the application of the proceeds in satisfaction of their respective judgments. In some of the cases in the state courts the garnishee proceedings were brought to a conclusion the day before appellant filed his petition in the foreclosure suit, asserting a claim to the bonds, as against the creditors of the railway company. And it may be remarked as to all of those actions, that appellant, although not made a party thereto, was informed of the proceedings by garnishment. But he did not appear in the state court, although the order designating him as Receiver in the foreclosure suit authorized him "To prosecute and defend all suits in law or in equity, in which the interest of the property or parties were involved."

The case made by appellant, in his pleadings and proofs, proceeds mainly upon these grounds: 1. That the mortgage of the railroad company, executed April 1, 1872, embraced the bonds in question, and that, consequently, the claims of the creditors of the mortgagor corporation were subordinate to the rights of the mortgagee. 2. That after the railway company had forfeited all right to the remaining bonds, by reason of its failure to complete the branch road within the time prescribed by the contract of subscription, he made an arrangement with the County Court of Sullivan County, whereby, in consideration of the completion by him of the branch road, he, as Receiver, became entitled to the $40,000 of bonds remaining in the hands of McCullough. 3. That all the proceedings in the courts of the State, under which the bonds were sold, were without validity or binding force as against him.

Waiving any inquiry as to whether such property as that in question could have been conveyed by mortgage in any other way than that of estoppel against the mortgagor we will consider whether the bonds issued by Sullivan County are embraced, or were intended to be em- [27] braced, by the mortgage to the Farmers' Loan and Trust Company. That question is within a very narrow compass, and must be solved by reference to the words of the instrument, and, to some extent, by a consideration of the circumstances attending its execution.

The contention of the appellant is, that the bonds in question are embraced by the following language, describing the premises and property conveyed: "All the present and in future to be acquired property of, or in any manner pertaining to, the Linneus Branch of the Burlington and Southwestern Railway Company, and all the right, title, and interest and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises, *that is to say*, all the branch railroad, including the premises leased as aforesaid of the Lexington, Lake and Gulf Railroad Company, now made and to be constructed, extending from the main line of said Burlington and Southwestern Railway at or near Unionville, in the County of Putnam, in the State of Missouri, by way of, etc., including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station houses, depots, viaducts, bridges, timber, and materials and property, purchased or to be purchased, or otherwise acquired, for the construction and maintenance of said branch railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock, now owned or hereafter purchased by said party of the first part for and on account of said branch railroad, all the revenue and income of said Linneus Branch, and all the rights, privileges and franchises relating thereto, and property acquired by virtue thereof, now in possession or hereafter to be acquired, including machine shops, tools, implements and personal property used therein or along the line of said branch railroad, together with all the property of every kind acquired by said party of the first part by virtue of said lease of said Lexington, Lake and Gulf Railroad," etc.

It is quite true, as argued by learned counsel for appellant, that the word "property" is sufficiently broad and comprehensive to include every kind of possession or right. In its literal [28] acceptation, it might include such rights, whether

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legal or equitable, absolute or contingent, as the railway company acquired, under or by virtue of the subscription made by Sullivan County, to the bonds placed in the hands of McCullough. But we are all of opinion that such a construction of the mortgage is not imperatively demanded by the terms employed in describing the property mortgaged, nor, as we think, would that construction be consistent with the intention of the parties. Had the draughtsman of the instrument stopped, in his description of the mortgaged property, with the general words, "All the present and in future to be acquired property of, or in any manner pertaining to, the Linneus Branch, * * * and all the right, title, and interest * * * therein," there would be more force in the position taken by the appellant. But the rules established for the interpretation of written instruments will not justify us in detaching these general words from those of an explanatory character which immediately follow in the same sentence. The subsequent phrase "that is to say," followed by a detailed description of the different kinds of property which are embraced by the general words quoted, indicates that the mortgage was not intended to embrace every conceivable possession and right belonging to the railway company, but only the road and its adjuncts and appurtenances. It specifies different kinds of property, some of which would enter into the construction of the branch road, and some of which would be necessarily employed in its maintenance after completion. The "rights, privileges and franchises" mortgaged were, it seems to us, only such as had direct connection with the management and operation of the road after it was constructed and put in use as a public highway. There was no purpose, we think, to pass to the mortgagee any interest whatever in municipal subscriptions which had been previously obtained and accepted by the company for the purpose of raising money to build the road. The bonds which Sullivan County placed in the hands of McCullough for delivery to the company as the work progressed were certainly more valuable and could have been more readily utilized for purposes of construction than a like number of bonds issued by the railway company. We ought not to presume, from the general language used, that the railway company [29] intended to cripple itself in the use of salable municipal securities in order to place upon the market its own bonds of less value. Our conclusion is that the mortgage was not intended to deprive the mortgagor of the privilege of using, in any way it desired, bonds or other securities to which it had an absolute or contingent right and which it had obtained for the purpose of being used in building and equipping the road.

What has been said renders it unnecessary to consider the claim of the appellant based upon the alleged arrangement with the county court, further than to say that his action, in that regard, was outside of his functions as Receiver. Notwithstanding the broad terms of the order appointing him, we are satisfied that the court had no purpose to appoint him Receiver of any property except that covered by the mortgage. He was given express authority to borrow the sum of $200,000 upon Receiver's certificates of indebtedness, to be expended under the directions of the court, or of a special master, in building, completing and equipping the unfinished portion of the Linneus Branch. But he obtained no authority from the court appointing him to contract for municipal aid in the construction by him, as Receiver, of the unfinished portion of the branch road. His action, in that regard, was never approved or ratified by the court from which he derived his authority. He can, therefore, take nothing by his unauthorized contract with the county court.

But there is another view, of some force, upon this branch of the case. The original contract of subscription by the county prescribed, as one of the conditions precedent to the delivery of the bonds, that the work of construction shall have been paid for. The arrangement which the Receiver made with the county was, by its terms, subject to the terms and conditions of the contract of subscription. It is not, therefore, at all clear that the equities of the case are with the Receiver as against the judgment creditors whose debts were for the construction of the road.

Nor, in view of the construction which we have placed upon the mortgage, is it at all essential, on this appeal, to examine into the regularity or validity, as to the Receiver, of the proceedings in the state court. If, as we have ruled, [30] the mortgage did not cover the bonds in question, it is of no interest to the Receiver, in this case and upon the issues made by him, to inquire whether the state court transcended its jurisdiction when, in the actions at law, against the railway company, it subjected the bonds in the hands of the trustee, McCullough, to the demands of the judgment creditors of the railway company.

In one of the printed briefs before us some argument is made to show that the County of Sullivan has been injuriously affected by the decree in the circuit court. It is sufficient to say that the county has not appealed from the decree, and we need not consider any of the suggestions made in its behalf.

Perceiving no error in the decree, it is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

LEHIGH VALLEY RAILROAD COMPANY [112]
AND ASA PACKER, PRESIDENT OF SAID COMPANY, *Appts.*,

v.

EDWARD MELLON ET AL.

(See S. C., 14 Otto, 112-119.)

Scope of letters patent—extent of claim—infringement.

1. The scope of letters patent is limited to the invention covered by the claim. Although the claim may be illustrated, it cannot be enlarged, by the language used in other parts of the specification.
2. A patentee cannot go beyond what he has claimed and insist that his patent covers something not claimed, merely because it is to be found in the descriptive part of the specification.
3. Where the answer, under oath, denies infringement, it must be shown by satisfactory proof; it cannot be presumed.

[No. 21.]

Argued Oct. 12, 1881. Decided Oct. 25, 1881.

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APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

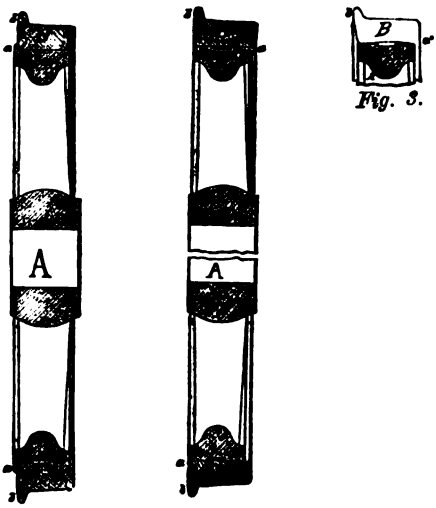

Fig. 1. *Fig. 2.* *Fig. 3.*

From Mellon's specifications.

Fig. 2.

From specification of N. Hodge, Nov. 18, 1851.

Messrs. James E Gowen, Andrew McCallum, **Alex. D. Campbell, Edward N. Dickerson** and *Edward N. Dickerson Jr.*, for appellants.

Messrs. Hector T. Fenton and **Furman Sheppard,** for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

On October 2, 1866, letters patent No. 58,447 were granted to Edward Mellon for an improvement in the mode of attaching tires to the wheels of locomotives. For the purpose of illustration, three figures, numbered, respectively, 1, 2 and 3, were appended to the specifications on which the application for the patent was based. The specifications were as follows:

113] "Figures 1 and 2 are central sections of a locomotive wheel having a tire applied to it according to my invention. Figure 3, a section of a portion of a locomotive wheel having its tire affected by wear, drawn with a view of showing the advantage of one feature of my invention. Similar letters of reference indicate like parts.

This invention has for its object the securing of tires on the wheels of locomotives without the aid of bolts, and in such a manner that the tire, in case of becoming loose, cannot casually slip off from the wheel.

The invention consists in having the wheel, or the tire which is to be fitted on the same, provided with a single flange, arranged in such a manner that said flange, in connection with the usual flange on the tire, will keep the latter on the wheel. The invention also consists in constructing the tire with a rounded edge at one side of its inner surface in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire becoming stretched by use.

A represents a locomotive wheel which may be constructed in the usual or any proper manner, and B is the tire fitted thereon. The periphery of the wheel A is provided at the inner edge with a flange *a*, as shown in figures 1 and 2.

The tire B is shrunk on the periphery of the wheel A, as usual, and it will be seen that the flange *a* prevents the tire, should it become loose on the wheel A, from slipping off at the inner side of the wheel, and the flange *b* of the tire will of course prevent the latter from slipping off at the outer side of the wheel.

By this arrangement no bolts or set screws are required to aid in fastening the tire on the wheel, for it is impossible for the tire to leave the wheel either at the right or left side thereof.

The same result may be attained by having the surface of the tire at its outer edge provided with a flange, *a'*, as shown at the upper part of figure 2.

The inner surface of the tire at its inner edge is rounded, as shown at *c*, in all the figures, in order to prevent said edge from indenting or sinking into the periphery of the wheel. The tires of locomotive wheels are, under the jars, concussions and wear to which they are subjected, considerably stretched, and they invariably become concave at their inner surface (see figure 3), the edges spreading over the sides of the wheel, and forming in a lock, in some cases, so as to render the cutting of the tire necessary, in order to detach it from the wheel. With my improvement the flange *a* would cause the inner edge of the inner surface of the tire to indent the periphery of the wheel, or form a [114] crease in it if the edge *c* were not rounded.

The great feature in this invention is, that I retain the tire on the wheel without the employment of bolts, rivets, keys or other like attachments. I heat my tire until it has expanded sufficiently to be slipped over the periphery of the wheel; it then cools and contracts, and holds or binds the wheel firmly.

After the wheel, as completed, has been in use a certain length of time, the tire will stretch and thus become loose on the wheel; then the pressure of the resistance against the rail will bear or force the tire inward against the flange *a* of the wheel.

Now, it is not intended to run the engine unnecessarily with a loose tire, but should this tire become loose while on the road, there is sufficient safety in running the engine until the depot is reached or until it will be convenient to repair or replace it by a new one.

The tire can be readily slipped off, there being no rivets or other fastenings to undo, and the convenience and utility of my improvement is apparent.

I am aware of the invention described in patent to N. Hodge, November 18, 1851, but I wish it to be understood that I do not claim the invention therein described, viz.: the angular flange upon the inner edge of the wheel and the

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flange upon the outer edge of the wheel, but I do claim as my invention the wheel with the curved flange upon the inner edge in combination with a tire with a rounded corner to fit said curved flange, as set forth."

The application for the pater ., as is shown by the file-wrapper, was made October 6, 1865. It was twice rejected; the last time on April 23, 1866.

The bill in this case charged that the Lehigh Valley Railroad Company, the appellant, had infringed the patent of the appellee and prayed for an injunction and an account of profits.

The answer of the appellant denied that the appellee was the first inventor of the mode of attaching tires to wheels of locomotives, described in his said letters patent.

The answer set up former patents and publications showing, as was claimed, tires and wheels such as the appellants use, and bearing date many years before the alleged invention of the appellee. [115]

Among them were the letters patent to Nehemiah Hodge, dated November 18, 1851, for a new and useful improvement in railroad car wheels. One of the drawings (that designated as figure 2) annexed to his specifications on which said letters patent were granted, shows a flange or shoulder from the rim of the wheel-center projecting over and overlapping the tire.

The answer, by way of further defense, denied infringement.

The circuit court, upon final hearing, found against the appellant upon both issues made by the answer, and by its decree perpetually enjoined it from further infringement and directed an account to be taken of profits derived by the appellant from the infringement of the patent, and upon the coming in of the master's report rendered a decree in favor of appellee for the sum of $3,018.

This appeal is taken to reverse that decree.

It appears from the evidence that railroad locomotive wheels are composed of two parts, the body of the wheel, called the wheel-center, and a tire which surrounds it, substantially in the same manner in which the tire surrounds the felloes of an ordinary wagon wheel.

The invention of the complainant Mellon relates solely to a method of fastening tires upon locomotive wheel-centers. It appears from the record that there are two ways, generally speaking, of fastening these tires upon their wheel-centers; one by making the tire a little smaller in diameter than the wheel-center, then heating it so that it will expand somewhat more than the difference between its diameter and the diameter of the wheel-center, and in that condition slipping it on the center and allowing it to cool, thus following the method of a blacksmith in shrinking a wagon tire upon a wooden wheel. Another method is to fasten the tire cold upon the wheel-center by means of screws or bolts.

The former method is now almost universally used. In shrinking the tires on the wheels it is the practice usually followed at present to turn the wheel-center and to bore the tire in a cylindrical form and to rely solely upon the contraction of the tire by cooling to retain it upon the wheel.

A modification of this method is, that in place of having the wheel-center and tire to meet each other in a cylindrical joint, to have some kind of a flange, lip or shoulder to project either from the circumference of the wheel-center or from the bore of the tire to fill a corresponding groove or recess in the opposite part, so that when the tire has been shrunk on the wheel-center it cannot be driven sideways off the wheel against the resistance of this flange. The wheels exhibited in the drawings of Mellon's patent belong to this latter class. [117]

The right of the appellee to the relief prayed for in the bill, depends in part upon the construction to be placed on his letters patent.

Counsel for appellee contend that his patent covers two things which he claims are in substance set forth in his specification, as follows:

First, in having the wheel, or the tire which is to be fitted on the same, provided with a single flange arranged in such a manner that said flange, in connection with the ordinary flange on the tire, will keep the latter on the wheel.

Second, in constructing the tire with a rounded edge at one side of its inner surface, in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire being stretched by use.

Conceding that the patent is to be construed according to the contention of the appellee, we are of opinion that he has not shown himself entitled to relief.

An inspection of the specifications and drawings which accompany the letters patent granted to Nehemiah Hodge under date of November 18, 1851, shows precisely the contrivance firstly described in the specifications of appellee's patent. The drawing representing a central cross section of a car wheel, appended to Hodge's specifications, accurately illustrates the first alleged invention described in the specifications of appellee's patent. His patent cannot, therefore, be held to include that contrivance. So far as that part of his alleged invention is concerned, the defense of want of novelty is conclusively established.

But there is another answer to this part of the appellee's case.

The Act of July 4, 1836, sec. 6, 5 Stat. at L., 117, under which this patent was issued, requires that an applicant for a patent shall not only "deliver a written description of his invention or discovery," but "Shall also particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery." This provision is substantially re-enacted in the Act of July 8, 1870 [16 Stat. at L., 198], R. S., sec. 4888, and remains in force. [118]

As a rule, therefore, the specifications filed with applications for letters patent contain a general description of the invention sought to be patented, which is followed by what is technically called the "claim." In reference to this latter part of the specifications, this court, speaking by *Mr. Justice* Bradley, has said: "It is well known that the terms of the claim are carefully scrutinized in the Patent Office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of previous inventions and the state of the art, determines the applicant is entitled to." *Burns* v. *Meyer*, 100 U. S., 671

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[XXV., 788]. See, also, *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S., 278 [XXV., 345].

In view, therefore, of the statute, the practice of the Patent Office, and the decisions of this court, we think that the scope of letters patent should be limited to the invention covered by the claim, and that though the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specifications.

We are, therefore, justified in looking at the "claim" with which the specifications of the appellee's invention conclude, to determine what is covered by his letters patent.

The claim, so far from covering an angular flange upon the wheel, expressly excludes such a flange and claims only a flange with a curved or rounded corner.

In this case the description of the appellee's invention is much broader than his claim. It seems quite clear, from the present form of appellee's specifications, and from the fact that his application for a patent was twice rejected, that he was compelled by the Patent Office to narrow his claim to its present limits before the commissioner would grant him a patent. In doing this he neglected to amend the descriptive part of his specifications. He cannot go beyond what he has claimed and insist that his patent covers something not claimed, merely because it is to be found in the descriptive part [119] of the specifications.

The appellee is, therefore, precluded from claiming relief against the appellant for the use of a flange with a square corner. He is, consequently, driven to the second branch of his alleged invention, as set out in his bill of complaint, as the basis of any relief against appellant.

This, as is clear from his claim, consists simply in rounding off that corner of the inner side of the tire which fits into the re-entrant corner made by the flange upon the rim of the wheel-center, so as to prevent the corner of the tire from indenting and sinking into the periphery of the wheel-center.

The charge in the bill, of infringement of this part of appellee's alleged invention, is not sustained by the proof. The answer, which is under oath, denies infringement. Infringement must, therefore, be shown by satisfactory proof; it cannot be presumed. The evidence for the appellee entirely fails to establish this part of his case. On the contrary, the proof adduced by the appellant is not only persuasive but conclusive to show that it never made or used the flange with the rounded corner.

We are of opinion, therefore, that the record discloses no case against the appellant.

The decree of the Circuit Court must, therefore, be reversed and the cause remanded with instructions to dismiss the bill; and it is so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[512] SAMUEL STRONG, *Appt.*,

v.

CHARLES F. WILLEY,

SAME *v.* SAME.

(See S. C., 14 Otto, 512-515.)

Reference of equity action.

The reference of the matter in dispute in an equity action to an arbitrator, coupled with the agreement that his award should be made the basis of a decree, is a waiver of the objection that the remedy was at law and not in equity.

[Nos. 18, 19.]

Submitted Oct. 12, 1881. Decided Oct. 25, 1881.

APPEALS from the Supreme Court of the District of Columbia.

The case is sufficiently stated by the court.

Messrs. **Nathaniel Wilson** and *Enoch Totten*, for appellant.

Messrs. **L. G. Hine** and **S. T. Thomas**, for appellee.

Mr. Chief Justice **Waite** delivered the opin- [514] ion of the court:

These are bills of review to correct alleged errors of law apparent on the face of a decree. The two original suits were in reality but one. They were considered and decided together, and both are included in the same decree. They relate to controversies growing out of a single contract between the parties. The nature of these controversies is fully disclosed in the pleadings. The case of the appellee against the appellant is so stated as to admit of alternative relief. The object of the appellee evidently was to have the amount due him ascertained, and to preserve his securities. His contract called for payment in a certain class of orders on the Board of Public Works of the District of Columbia, but if for any cause he could not get valid orders, or if, by the wrongful acts of the appellant, the payment of orders actually drawn was refused when presented, compensation might be decreed to him in money, under the prayer for general relief.

In the progress of the litigation the parties agreed to refer all the matters of difference included in their respective bills to the arbitrament of William B. Webb, whose decision was to be final and conclusive, and his award was to be made the basis of the decree of the court. Pursuant to this agreement the reference was formally ordered. The arbitrator, after hearing, decided that the sum of $15,413.21 was due the appellee from the appellant. To this award the appellant filed in court certain exceptions. What these exceptions were does not appear from the record, but it does appear that they were overruled, and a decree entered against the appellant for the sum named, to be collected by execution, as at law.

It is now contended that this decree is erroneous, because, 1, it does not dispose of the issues raised by the pleadings; and 2, it is for a sum in excess of that claimed by the appellee in his original bill. In our opinion neither of these objections is good. By decreeing the payment of money the court has, in effect, found, either that the appellant had no fund in the hands of [515] the district authorities on which he could draw, or that the appellant, by his improper interference to prevent the payment of the orders he drew, made himself liable personally for money.

It is not true that the amount of the decree is greater than the demand of the appellee in his original bill, if the orders theretofore issued to him were not paid. He expressly averred in the original bill that there was due him $27,670 under the contract, if his orders were not paid; and in his answer to the bill of the appellant, the amount is stated to be $16,899.93. It was

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only in the event of his holding the orders and getting payment thereon, that the balance was stated at a less sum.

The reference of the matter in dispute to the arbitrator, coupled with the agreement that his award should be made the basis of a decree in the suits, is clearly a waiver of the objection that the remedy was at law and not in equity, if any such objection in fact existed, which we are by no means inclined to admit.

The case is to be decided upon the face of the original record, and not upon the averment of new facts in the bills of review.

The decree of the court below is affirmed in each case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[5] BALTIMORE AND OHIO RAILROAD COMPANY, *Plff. in Err.*,

v.

GEORGE W. KOONTZ, Admr. of WILLIAM A. WEIGHTMAN, Deceased.

SAME

v.

MONROE FUNKHOUSER, Admr. of CHARLES L. NOEL, Deceased.

SAME

v.

MONROE FUNKHOUSER, Admr. of REUBEN E. HAMMOND, Deceased.

(See S. C., 14 Otto, 5-18.)

Residence of corporations—lease of railroad—removal of cause—effect of—proceeding in State Court—writ of error—entering and docketing the cause.

1. Corporations do not change their citizenship by doing business away from their legal residence; but simply extend the field of their operations.

2. A Maryland corporation, by taking from a Virginia corporation with the assent of Virginia, a lease of a railroad in Virginia, did not make itself a Corporation of that State.

3. When sued in a State Court of Virginia by a citizen of that State, it could, as a corporation of Maryland, remove the cause to the U. S. Circuit Court.

4. The State Court loses its jurisdiction and must stop proceedings in a case when the petition for removal and security are presented, and the Circuit Court must go on when the record is entered there.

5. If the State Court refuses to let go its jurisdiction, the petitioning party need not, in order to prevent his appearance from operating as a waiver, show to the State Court that he has entered the record and docketed the cause in the Circuit Court on the first day of the next term following the removal.

6. Whether a case is made for removal, is a federal question. If, after a case is made, the State Court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record; or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the State Court is going on.

7. If the petitioner fails to enter the record and docket the cause in the Circuit Court on the first day of the next term, the jurisdiction of that court is not lost; the court may allow it to be entered on a subsequent day, if good cause is shown.

8. If the petitioning party is kept in the State Court by his adversary, against his will, he may, after having obtained a reversal of the judgment and an order for the allowance of the removal, enter the cause in the Circuit Court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered.

[Nos. 30, 460, 788.]

Argued Oct. 14, 1881. Decided Oct. [illegible], 1881.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

The case is stated by the court.

Messrs. **Hugh W. Sheffey,** *John K. Cowen,* **E. J. D. Cross** and *J. H. B. Latrobe,* for plaintiff in error.

Messrs. **John R. Tucker** and **Moses Walton,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These cases are substantially alike and present the following facts:

The Baltimore and Ohio Railroad Company was incorporated by the State of Maryland on the 28th of February, 1827, to build and operate a railroad from Baltimore, in Maryland, to some suitable point on the Ohio River. By the terms of the charter the annual elections of directors were to be held in Baltimore. On the 2d of March following, the State of Virginia granted the Company the same rights and privileges in Virginia that had been granted to it in Maryland, except that no lateral road could be built in Virginia without the consent of the Legislature, and the road was not to strike the Ohio at a point lower than the mouth of the Little Kanawha. Under this authority from the two States a road was built from Baltimore to Wheeling, in Virginia. When the State of West Virginia was formed, it took from Virginia all the territory occupied by the road in that State, and from that time no part of the original line has been within the present State of Virginia. [6]

On the 20th of August, 1873, the Baltimore and Ohio Company took a lease from the Washington City, Virginia Midland and Great Southern Railroad Company, a Virginia Corporation, of all the railroad of the last named company lying between Strasburg and Harrisonburg, in Virginia. Under this lease the Baltimore and Ohio Company took the exclusive possession of and operated the leased property, using for that purpose the powers and franchises of the Virginia corporation. While so operating the leased road an accident happened to one of the passenger trains, by which the several persons whose administrators are defendants in error in these cases lost their lives. These suits were brought in a State Court of Virginia, under a statute of that State, to recover damages for the deaths of the persons named by the alleged wrongful acts of the Company. Each of the administrators suing was a citizen of Virginia.

On the 2d of September, 1876, which is conceded to have been in time, the Company filed its petitions in the State Court for the removal of the cases to the Circuit Court of the United States for the Western District of Virginia, the proper district, on the ground that the Company was a citizen of Maryland and the several plaintiffs, citizens of Virginia. The plaintiffs answered the petition in each case, denying that the Company was a citizen of Maryland, and claiming that for all the purposes of these suits it was a citizen of Virginia. After hearing, the State [7]

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Court refused to recognize the removal, because, as was held, by leasing and operating the road of the Virginia corporation under the Virginia charter, the Company became, for all the purposes of that business, a citizen of Virginia. To this ruling, exceptions were taken in due form and made part of the several records.

It nowhere appears that copies of the records in the State Court have ever been entered in the Circuit Court, but on the 19th of December, 1876, the Company asked and obtained from the State Court leave to plead, and in due time thereafter pleas of not guilty were put in. One case was tried in the State Court on the 6th of April, 1877; another on the 10th of April, 1878, and the other on the 9th of December afterwards. Judgment was given in each case for the plaintiff. The Company was represented at the trials, and exceptions of various kinds were taken. The causes were all carried to the Supreme Court of Appeals of the State, where the judgments were affirmed. The records show distinctly that errors were assigned on the rulings upon the petitions for removal, and that the decision was adverse to the Company. The cases are now here on writs of error to the Supreme Court of Appeals, and the questions presented [9] for our consideration are: 1. Whether a case for removal was made by the Company; and, 2, if it was, whether, as it does not appear affirmatively that copies of the records have been entered in the Circuit Court, the Company has lost its right to have the judgments reversed for the original errors in that behalf.

The Court of Appeals in Virginia held, as early as 1855, in the case of the *R. R. Co.* v. *Gallahue*, 12 Gratt., 655, that the Baltimore and Ohio Company could be sued in Virginia, and in the course of the opinion said that the effect of the enabling Act of Virginia was to make the Company a Virginia corporation as to its road within the territory of Virginia. Afterwards, in 1870, this court decided, in *R. R. Co.* v. *Harris*, 12 Wall., 65 [79 U. S., XX., 354], that the company could be sued in the District of Columbia, into which a lateral road had been built with the consent of Congress, given through an enabling Act much like that of Virginia. In that case we held the company to be a Maryland corporation only, and that no new corporation had been created by the enabling Act either of Virginia or the District of Columbia. The ruling in the Virginia case was followed by the Supreme Court of Appeals of West Virginia in the cases of *Goshorn* v. *Supervisors*, 1 W. Va., 308, and *R. R. Co.* v. *Supervisors*, 3 W. Va., 319, both of which were decided before *R. R. Co.* v. *Harris*, in this court. That question is, however, unimportant here, as it is conceded that the part of the road originally in Virginia is now in West Virginia, and that the Company no longer uses in Virginia any of the franchises conferred by the enabling Act of that State. Neither the Court of Appeals, nor counsel here, make any claim on account of that legislation. Even conceding that the Company was once a [10] Virginia corporation, so far as its original road in that State was concerned, the most that can be said of it now is, that in common with all citizens of the old State, residing on the ceded territory, its citizenship was transferred by the organization of West Virginia from the old State to the new. Consequently, if it was once a Corporation of Maryland and Virginia, it is now a Corporation of Maryland and West Virginia. Any citizenship it may have had in Virginia has been lost.

It is not contended that this enabling Act gave the Company a right to lease another Virginia road and operate it as a lateral road, nor that in running the leased road the Company uses any of the franchises conferred by the original grant. The present claim is that, by using the franchises of another Virginia corporation to run its leased road, it made itself a Corporation of Virginia, for all the purposes of that business, just as the lessor, was and is.

It is well settled that a corporation of one State doing business in another, is suable where its business is done, if the laws make provision to that effect. We have so held many times. *Ins. Co.* v. *French*, 18 How., 404 [59 U. S., XV., 451]; *R. R. Co.* v. *Harris* [*supra*]; *Ex parte Schollenberger*, 96 U. S., 369 [XXIV., 853]. This Company concedes that it was properly sued in Virginia. What it asks is, that being sued there it may avail itself of the privilege it has under an Act of Congress, as a Corporation of Maryland, and remove a suit which has been begun, into the proper court of the United States exercising jurisdiction within Virginia. The litigation is not to be taken out of Virginia, but only from one court to another within that State. So that the single question presented is, whether, by taking a lease of the road of a Virginia corporation, the Maryland Corporation, made itself also a Corporation of Virginia, for all purposes connected with the use of the leased property.

It is not denied that the Maryland Company derived all its power, so far as the operation of the Virginia road was concerned, from the Virginia corporation; nor that, in respect of the business of that road, it must do just what was required of the Virginia corporation by the laws of Virginia; but that does not, in our opinion, make it a Corporation of Virginia. It may be sued in Virginia, because, with the implied as- [11] sent of that State, it does business there; but, as we said substantially in *Schollenberger's Case*, the question of suability and jurisdiction is not so much one of citizenship as of *finding*. If a citizen of one State is *found*, for the purposes of the lawful service of judical process, in another, he may, ordinarily, be sued there. A citizen of Maine may be sued in California, if he happens to be there in person and the proper officer serves him personally with the lawful process of a California court. He is still a citizen of Maine, although, in the exercise of one of the privileges of a citizen of the United States, he has been found in California. An individual may, without asking permission of state authorities, do business where he pleases, and, if a citizen of one State, he is entitled to all the privileges and immunities of citizens of the several States. Const., Art. IV., sec. 2. Not so with corporations. Their rights outside the State, under the authority of which they were created, depend primarily on their charters. If the charter allows it, they may exercise their chartered privileges and carry on their chartered business in any other State which, by express grant or by implication, permits them to do so. They have no absolute right of recognition in any other State than their own, *Paul* v. *Virginia*, 8 Wall., 168 [75 U. S., XIX., 357], and

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the State which recognizes them can impose such conditions on its recognition as it chooses, not inconsistent with the Constitution and laws of the United States. If they are recognized and permitted to do business without limitation, express or implied, they carry with them wherever they go all their chartered rights, and may claim all their chartered privileges which can be used away from their legal home. Their charters are the law of their existence and are taken wherever they go. By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad.

In this case, a Maryland Corporation leased the railroad and the franchises of a Virginia corporation. Neither state Legislature acted [12] specially on the subject, so far as the record discloses. The Maryland Corporation assumed the right to take, and the Virginia corporation to grant, the lease which lies at the foundation of the rights of the parties. Under this lease possession was given and taken without objection from the authorities of either State, and the Maryland Corporation actually uses the franchises of that of Virginia. The question, therefore, presented to us is not one of *ultra vires*. No complaint is made that Maryland has never given its Corporation the right to go to Virginia and take a lease, nor that Virginia has never authorized its corporation to grant such a lease. For all the purposes of these cases, we must assume that the Maryland Corporation is rightfully using the leased road and with the consent of both States.

We can hardly believe, if an individual, a citizen of a State other than Virginia, went into that State and leased the property of a Virginia corporation, to use as the corporation did, it would be claimed that he made himself thereby a citizen of Virginia, within the meaning of the Constitution and laws of the United States. Citizenship in this connection has a special signification. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. Amend. 14, sec. 1. A corporation may, for the purposes of suit, be said to be born where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by and organized under the laws of a particular State, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that State, possessing all the rights and having all the powers its charter confers. It cannot migrate nor change its residence without the consent, express or implied, of its State, but it may transact business wherever its charter allows, unless prohibited by local laws. Such has been for a long time the settled doctrine of this court. "It must dwell in the place of its creation, and cannot migrate to another sovereignty," "but its residence in one State creates no insuperable objection to its contracting in another." *Bk.* v. *Earle*, 13 Pet., 520. With a long line of author- [13] ities in this court to the same effect before us, we cannot hesitate to say, with all due respect for the Court of Appeals of Virginia, that the Maryland Corporation, by taking a lease from the Virginia corporation, with the unconditional assent of Virginia, of a railroad which could only be operated by the use in Virginia of the corporate franchises of the lessor, did not make itself a corporation of Virginia or part with any of the rights it had under the Constitution and laws of the United States as a Corporation of Maryland. The State of Virginia has not granted to it any special powers or privileges, beyond allowing it to transact its corporate business in Virginia. Its powers within the State come from its Maryland charter and the Virginia corporation. That corporation had certain franchises and privileges which it held by grant from its State. These franchises and privileges were a species of property which, we must presume for all the purposes of this case, it had the right to allow the corporation of another State to use. The Virginia authorities have impliedly assented to all that has been done. This assent having been given and the contract entered into between the companies, all Virginia can now require is that the Maryland Company, in carrying on its business under the contract and using the franchises of the Virginia company, shall be subject to all obligations which the charter imposes on that corporation. The Maryland Corporation simply occupies the position of a company carrying on an authorized business away from its home, with the consent of its own State and of that of the State in which its business is done. For these reasons we must hold that the court of appeals erred in deciding that the removal of the suit to the Circuit Court was properly refused, because the Company, by taking the lease and using the road in Virginia, became, for all the purposes of that lease, a Corporation of Virginia.

The only remaining question is whether the Company can now claim a reversal of the judgments below on account of this error, since it does not appear that copies of the records in the State Court have been entered in the Circuit Court. The State Court of original jurisdiction directly decided, in accordance with the claims of the several defendants in error, that upon the showing made the Company was not entitled to a removal, but must remain and defend the suits in that court. It was conceded on the argument [14] that if the judgment had been rendered before the first day of the next Term of the Circuit Court of the United States, there could be a reversal, if the case was in fact removable. The position of the defendants in error seems to be, that as the Company appeared and went on with the causes in the State Court after the next Term in the Circuit Court, without showing that the copies of the records had been entered in that court, it in effect waived its right to a removal and submitted itself again voluntarily to the jurisdiction of the State Court.

We have uniformly held that if a State Court wrongfully refuses to give up its jurisdiction on a petition for removal, and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. *Ins. Co.* v. *Dunn*, 19 Wall., 223 [86 U. S., XXII., 69]; *Removal Cases*, 100 U.S., 475 [XXV., 600]; *R. R. Co.* v. *Mississippi*, 102 U. S., 135 [*ante*, 96]. It is, also, a well settled rule of decision in this court, that when a sufficient case for removal is made in the State Court, the rightful jurisdiction of that court comes to an end, and no further pro-

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ceedings can properly be had there, unless in some form its jurisdiction is restored. *Gordon* v. *Longest*, 16 Pet., 104; *Kanouse* v. *Martin*, 15 How., 209; *Ins. Co.* v. *Dunn*, *supra*; *R. R. Co.* v. *Mississippi*, *supra*. The entering of the copy of the record in the Circuit Court is necessary to enable that court to proceed, but its jurisdiction attaches when, under the law, it becomes the duty of the State Court to "proceed no further." The provision of the Act of 1875 is in this respect substantially the same as that of the 12th section of the Judiciary Act of 1789, and requires the State Court, when the petition and a sufficient bond are presented, to proceed no further with the suit; and the Circuit Court, when the record is entered there, to deal with the cause as if it had been originally commenced in that court. The jurisdiction is changed when the removal is demanded in proper form and a case for removal made. Proceedings in the Circuit Court may begin when the copy is entered. Such is clearly the effect of the cases of *Gordon* v. *Longest* and *Kanouse* v. *Martin*, where it does not appear that the record was ever entered in [15] the Circuit Court. In *Ins. Co.* v. *Dunn* and *R. R. Co.* v. *Mississippi*, the records were entered, but no point was made of this in the opinions. We are aware that in the *Removal Cases*, *supra*, and *Kern* v. *Huidekoper* [*ante*, 353], it is said, in substance, that after the petition for removal and the entering of the record the jurisdiction of the Circuit Court is complete, but this evidently refers to the right of the Circuit Court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction. The State Court must stop when the petition and security are presented, and the Circuit Court go on when the record is entered there, which is, in effect, docketing the cause. The question then is, whether, if the State Court refuses to let go its jurisdiction and forces the petitioning party to trial, he must, in order to prevent his appearance from operating as a waiver, show to the State Court that he is not in default in respect to entering the record and docketing the cause in the Circuit Court on the first day of the next Term following the removal.

As has just been seen, when the State Court has once lost its jurisdiction it is prohibited from proceeding until in some way jurisdiction has been restored. The right to remove is derived from a law of the United States, and whether a case is made for removal, is a federal question. If, after a case has been made, the State Court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error, the case is sent back to the State Court, with instructions to recognize the removal and proceed no further. Such was in effect the order in *Gordon* v. *Longest*, *supra*. The petitioning party has the right to remain in the State Court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the State Court is going on. This was actually done in the *Removal Cases*. When the suit is docketed in the Circuit Court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record and, after final [16] judgment, bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court, and direct that the suit be sent back to the State Court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. *Babbitt* v. *Clark* [*ante*, 507]. If, in such a case, we reverse the order of the Circuit Court to remand, our instructions to that court are, as in *Relfe* v. *Rundle* [*ante*, 337], to proceed according to law, as with a pending suit within its jurisdiction by removal. Should the petitioning party neglect to enter the record and docket the cause in the Circuit Court in time, we see no reason why his adversary may not go into the Circuit Court and have the cause remanded on that account. This being done, and no writ of error or appeal to this court taken, the jurisdiction of the State Court is restored, and it may rightfully proceed as though no removal had ever been attempted.

It is contended, however, that if the petitioner fails to enter his record and docket his cause in the Circuit Court on the first day of the next term, the jurisdiction of that court is lost, and there can be no entry on a subsequent day. Such we do not understand to be the law. The petitioner must give security that he will enter the record on that day, but there is nothing in the Act of Congress which prohibits the court from allowing it to be entered on a subsequent day, if good cause is shown. In the *Removal Cases*, *supra*, we used this language: "While the Act of Congress requires security that the transcript shall be filed on the first day of the next Term, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction if, by accident, the party is delayed until a later day in the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the Term, its jurisdiction will, as a general rule, be complete and the removal properly effected." This was as far as it was necessary to go in that case, and in entering, as we did then, on the construction of the Act of 1875 [18 Stat. at L., 470], it was deemed advisable to [17] confine our decision to the facts we had then before us. Now the question arises whether, if the petitioning party is kept by his adversary, and against his will, in the State Court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter his cause in the Circuit Court, notwithstanding the Term of that court has gone by during which, under other circumstances, the record should have been entered. We have no hesitation in saying that in our opinion he can. As has been already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the State Court. The entering of the record in the Circuit Court after that was mere procedure and in its nature not unlike the pleadings which follow

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service of process, the filing of which is ordinarily regulated by statute or rules of practice. The failure to file pleadings in time does not deprive the Court of the jurisdiction it got through the service of process, but inexcusable delay may be good ground for dismissing the cause for want of prosecution. So here, if the petitioning party, without sufficient cause, fails to enter his record and docket his cause, the suit may be properly remanded for want of due prosecution under the removal; but if sufficient cause is shown for the delay, there is nothing in the statute to prevent the court from taking the case after the first day of the Term and exercising its jurisdiction. Clearly it is within the judicial discretion of every court, on good cause shown, to set aside a default in filing pleadings on a statutory rule day, and allow the omission to be supplied. This case seems to be analogous to that. Undoubtedly promptness should be insisted on by the courts of the United States, and no excuse should be accepted for delay in entering a record after removal, unless it amounts to a clear justification or a waiver by the opposite party. It seems to us manifest that if the petitioning party is forced by his adversary to remain in the State Court, until he can in a proper way, secure a reversal of the order which keeps him there, the requirement of the law for entering the record in the Circuit Court at any time before the reversal actually takes place must be deemed to have been waived, and that for all the purposes of procedure in that court, the time when the State Court lets go its jurisdiction may be taken as the time according to which the docketing of the cause is to take place. Certainly the petitioning party ought not to be required to carry on his litigation in two courts at the same time. He may do so if he chooses, but if he elects to go on in the State Court after his petition for removal is disregarded, and take his chances of obtaining a reversal of any judgment that may be obtained against him because he was wrongfully kept there, he ought not to be deprived of a trial in the proper jurisdiction because of the unwarranted act of his adversary, or of the State Court.

[18]

The judgment of the Court of Appeals in each of these cases is reversed and the causes remanded to the Supreme Court of Appeals of Virginia, with directions to reverse the judgments of the Circuit Court of the county and transmit the cases to that court with instructions to vacate all orders and judgments made or entered subsequent to the filing of the several petitions for removal and approval of the bonds, and proceed no further therein unless its jurisdiction be restored by the action of the Circuit Court of the United States or this court.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 579; 106 U. S., 123, 356; 108 U. S., 216; 109 U. S., 537; 111 U. S., 137, 146, 774; 10 Biss., 127 (n.); 64 How. Pr., 199; 65 How. Pr., 456; 134 Mass., 341.

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[30]

JOHN H. MARTIN, *Plff. in Err.*,

v.

LUTHER A. COLE.

(See S. C., 14 Otto, 30-40.)

Parol evidence to release indorser—suit against maker of note.

See 14 OTTO.

1. In an action against an indorser by his immediate indorsee, upon an indorsement of a negotiable promissory note, made in blank, it is not competent to prove as a defense that, as part of the transaction, it was agreed between the parties, but not in writing, that the indorsement should merely have the legal effect of one expressed to be without recourse.

2. Under the Statute of Colorado, if the maker of the note is insolvent, so that a suit against him would be unavailing, the failure to institute it will furnish no defense to the indorser.

[No. 14.]

Submitted Oct. 12, 1881. Decided Oct. 31, 1881.

IN ERROR to the Supreme Court of Colorado Territory.

The case is stated by the court.

Messrs. S. E. Browne, Thos. G. Putnam and **H. M. Teller,** for plaintiff in error:

The ruling of the court on the demurrer to the special plea is the first error complained of.

We contend that the plea set up a perfect defense to the action and, in support of this view, we cite the following authorities:

2 Stark. Ev., 575 and *n.*; 2 Pars. N. & B., 24; *Hill* v. *Ely*, 5 Serg. & R., 363; *Cummings* v. *Fisher*, Anth. *N. P.*, 4; *Folger* v. *Douseman*, 37 Wis., 619; *Chaddock* v. *Vanness*, 35 N. J., 517; *Benton* v. *Martin*, 52 N. Y., 570; *Riddle* v. *Stevens*, 32 Conn., 378; *Schafer* v. *Bk.*, 59 Pa., 144; *Luellen* v. *Hare*, 9 Am. L. R. (N. S.), 611 and *notes*; *Tenney* v. *Prince*, 4 Pick., 385; *Perkins* v. *Catlin*, 11 Conn., 213; *N. Y. Exchange Co.* v. *De Wolf*, 31 N. Y., 282; *Rey* v. *Simpson*, 22 How., 341 (63 U. S., XVI., 260); *Bailey* v. *Cromwell*, 3 Scam., 71; *Scammon* v. *Adams*, 11 Ill., 575; *Downer* v. *Chesebrough*, 36 Conn., 39; *Dale* v. *Gear*, 38 Conn., 15; *S. C.*, 39 Conn., 89; *Barker* v. *Prentiss*, 6 Mass., 430; Story, Prom. N., sec. 459 and *notes*; *Lincoln* v. *Hinzey*, 51 Ill., 435.

This great question is settled by the Supreme Court of Colorado against us, and to support its opinion two causes from Illinois and one from Indiana are cited. *Mr. Justice* Stone then cites *Dale* v. *Gear* (*supra*), where he says a plea, substantially like this, was held ill, on demurrer, but fails to cite the authority in full. We call the especial attention of the court to the entire opinion, and also to the plea as amended and the very learned opinion of the same court on the same case in the 39th Conn., 89.

We are prepared to admit that the presumption *prima facie* from a blank indorsement of a promissory note is, "That the note is due and payable, according to its tenor; that the maker is of the ability to pay it when due; and that, by the use of due diligence, it is collectible." But we contend that the presumption is only *prima facie*, and may, therefore, be rebutted by parol. To this effect are many of the modern authorities cited *supra*, and not a few of the older cases. We contend that this is not contradicting a writing by parol, because the blank indorsement rests in parol only until it has been made full by the holders, and as we think, if this filling is done in violation of the contemporaneous verbal agreement of the parties, the person who so violates his agreement is guilty of a fraud upon the rights of the other, from which he may be relieved even at law.

Defendant in the district court offered to prove in defense, a contemporaneous agreement, such

NOTE.—*Party to note cannot vary his contract by parol; parol evidence, admissible for what purposes.* See, *note* to Bk. of U. S. v. Dunn, 31 U. S. (6 Pet.), 51.

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as was set up to his second plea and also to prove, under the general issue, "That, at the time the note was transferred by Martin to Cole, it was expressly agreed between Martin and Cole that Martin should indorse his name on the note in blank, to enable Cole to collect in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he, Martin, was never to be called upon as indorser or guarantor of its payment, in the event he failed to collect it from the maker of the note." To these offers Cole objected. The objection was sustained and Martin excepted.

This is the second error relied upon.

We cite the following authorities, showing that this fraud should have been received under the general issue.

Babcock v. *Trice*, 18 Ill., 420; *Murray* v. *Carlin*, 67 Ill., 286; *People ex rel. Fleming* v. *Niagara C. P.*, 12 Wend., 246.

(No counsel appeared for defendant in error.)

Mr. Justice **Matthews** delivered the opinion of the court:

This cause is brought into this court by a writ of error to the Supreme Court of the Territory of Colorado.

The defendant in error was plaintiff below, and brought his action of *assumpsit* against the plaintiff in error, as indorser of a promissory note in the District Court of the First Judicial District of Colorado Territory, for the County of Arrapahoe, the plaintiff below being the immediate indorsee.

A copy of the note sued on, with the indorsements, filed with the declaration, is as follows:

[31] "$1,414.15.

Georgetown, C. T., July 17th, 1868.

On or before eighteen months after date, I promise to pay to John H. Martin, or order, the sum of fourteen hundred and fourteen $\frac{15}{100}$ dollars, for value received, at George I. Clark & Co.'s bank at Georgetown, with interest at the rate of three per cent per month from date until paid.

(Signed) John Webb."

[Indorsed on back.]

"Pay to the order of Luther A. Cole. Value received. (Signed) John H. Martin."

The declaration, besides the common money counts, contained five special counts.

In the first of them it is averred that the note sued on being unpaid, on Feb. 5, 1870, the plaintiff instituted suit thereon against the maker, at the first term of the court in the county of his residence after the maturity thereof, and at the same Term, of April 7, 1870, recovered judgment thereon against him for $2,284, together with costs; that upon said judgment he afterwards, on May 9, 1870, caused to be issued, and placed in the hands of the sheriff, an execution, which, on June 6, 1870, he made return of, showing that on May 9, 1870, he had levied the same on certain mining claims of the defendant, which, on June 1, 1870, he had sold according to law for the sum of $5, besides the costs of the suit, amounting to $45.75; and it is also in the same count further averred that, from the time of the rendition of the judgment against Webb, the maker of the note, he had no other property, either real or personal, subject to execution, out of which the balance of the judgment or any part of it could have been made, and that the keeping of the execution in the hands of the sheriff for the period of ninety days from its date, or the issuing of a *pluries* or other execution to collect the balance of said judgment, would have been wholly unavailing. There is also the further averment in the same count that the plaintiff used all due diligence to collect said note from the maker.

The second count of the declaration contains the averment that, "At the time the said note became due and payable, and from that time [32] up to the time of the commencement of this suit, and up to the present time, the said John Webb ever has been, and still is, insolvent and unable to pay said note, and that the institution of a suit against the said John Webb at the time the said note became due, or at any time from the maturity of the said note until the present time, would have been, and was, and would be, entirely unavailing," etc.

These averments appear to have been made with a view to meet the requirements of section 7 of an Act, then in force, of the Territory of Colorado, relating to bonds, bills and promissory notes, which is referred to in the brief of one of the counsel as found on page 85 of the Revised Statutes of Colorado of 1868, but which, in disregard of the rules of this court, is not set out either in the record of the case or the brief of counsel. The volume referred to not being accessible, we find what we assume to be a republication of the same provision in the General Laws of the State of Colorado, published by authority in the year 1877. It is as follows:

"Sec. 7. Every assignor, or his heirs, executors or administrators, of every such note, bond bill or other instrument in writing, shall be liable to the action of the assignee thereof, or his executors or administrators; if such assignee shall have acted with diligence, by the institution and prosecution of a suit against the maker of such assigned note, bond, bill or other instrument of writing, or against his heirs, executors or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof; *provided*, that if the institution of such suit would have been unavailing, or if the maker had absconded or left the State, when such assigned note, bond, bill or other instrument in writing became due, such assignee, or his executors or administrators, may recover against the assignor, or against his executors or administrators, as if due dilgence by suit had been used."

The plaintiff in error, defendant below, in addition to the general issue, filed a special plea to the first and second counts of the declaration, the substance of which is as follows:

"And the said defendant avers that he made the said indorsement, when it was so made, in blank, that is to say, by writing his name across the back of said promissory note, and that he made said indorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said indorsement should never be filled up so as [33] to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary. And this defendant avers that, relying upon the assurance of the said plaintiff that his indorsement should not be filled up so as to

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render him liable as indorsee thereon, he signed his name upon the back of said note, which, without said assurance, he would not have done."

To this plea there was filed a general demurrer, which was sustained.

Afterwards, on June 6, 1874, the cause was submitted, by consent of parties, without the intervention of a jury, when the court found the issues in favor of the plaintiff and rendered judgment against the defendant for $2,478.17, damages and costs.

[33] A bill of exceptions was taken, which sets out all the evidence given and offered in the trial of the case. From that it appears that the defendant below, Martin, being on the stand as a witness in his own behalf, was asked to state under what circumstances the note in suit was transferred by him to the plaintiff, Cole. Objection being interposed, the defendant then stated to the court that he offered to prove in defense a a parol promise contemporaneous with the indorsement of the note; that he proposed to prove by the witness that the parol agreement set forth and stated in the defendant's second plea was made by the parties. The court sustained the objection and the defendant excepted.

Thereupon the defendant offered to prove that, at the time the note was transferred by Martin to Cole, it was expressly agreed between them that Martin should indorse his name on the note in blank to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note; to which offer an objection, interposed by the plaintiff, was sustained, and the defendant excepted.

The defendant had previously testified that his name on the back of the note was written [34] by him, but that the words "Pay to the order of Luther A. Cole, value rec'd," were not written at the time of the indorsement and delivery of the note, nor by him at any time.

The plaintiff below read in evidence the depositions of William L. Campbell, Levi H. Shepperd and John T. Harris, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity. Objections were made to their depositions and overruled; to which an exception was taken. The objections, however, do not appear to be of sufficient importance to require further notice.

The plaintiff also read in evidence the transcript of the record, judgment and proceedings in the action of Luther A. Cole against John Webb, the maker of the note, together with the execution, levy and return, being the same referred to in the first count of the declaration. From that it appears that the execution was issued on May 9, 1870, returnable in ninety days from date, and actually returned on June 7, 1870, showing the levy and sale referred to in the pleadings.

There was other testimony, also, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity and at the time of the bringing of this action.

An appeal was taken from the judgment of the District Court of the First Judicial District of the County of Arrapahoe to the Supreme Court of Colorado Territory, in which, at the February Term, 1875, errors were assigned, and the judgment was affirmed in that court on March 28, 1876.

To reverse that judgment is the object of the present writ of error.

The agreement set out and relied on, in the plea, was, that "The said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary." And the defendant averred that "He, relying upon the assurance of the said plaintiff, that his indorsement would not be filled up, so as to render him liable as indorser thereon, signed his name upon the back of said note, which, without said assurance, he would not have done." As the indorsement in blank, admitted by the defendant to have been made by him, without being filled up by the plaintiff [35] at all, rendered him liable for the payment of the note, as an indorser, the breach by the plaintiff of the alleged agreement was inconsequential, and could not, in law, result in any actionable injury; for filling up the blank indorsement, in the manner in which it was done, neither added to nor subtracted from the liability which the defendant assumed by merely writing his name on the back of the note.

The defendant below, however, further offered at the trial to prove that, at the time the note was transferred by Martin to Cole, it was expressly agreed between them that Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note. No question was made at the time, nor has been raised since, as to the admissibility of such proof, under a plea of the general issue; and waiving any objection on that account, the rejection by the court below of this offer, fairly raises the issue intended to have been made by the special plea, whether it is competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank of a negotiable promissory note, to prove, as a defense, that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse.

It has never been contended that such a defense, based on dealings between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper, acquired before maturity, in the usual course of business, and without notice; for the protection of such a title is of the essence of the policy of the law merchant, and inheres in the very definition of negotiability. Hence, in that case, a collateral, but contemporaneous written agreement, between two prior parties to a bill or note, would not affect its validity in the hands [36] of the holder, more than if the agreement were unwritten. Whereas, between the immediate parties, if the agreement relied on were in writing, its terms would fix and determine their rights and obligations, as was decided by this

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court in *Davis* v. *Brown*, 94 U. S., 427 [XXIV., 206]. The question is between them alone; and is, whether the same effect will be given to such an agreement, not reduced to writing.

The ground of decision must be found in some other principle or policy of the law than that which protects the title of a remote innocent holder of negotiable paper.

Accordingly, *Mr. Justice* Washington, in the case of the *Susque. Bridge and Bk. Co.* v. *Evans*, 4 Wash. C. C., 480, after admitting proof of such an agreement, in an action by the holder of a promissory note against his immediate indorser, said, in his charge to the jury:

"The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was, therefore, properly admitted."

It is upon this distinction between contracts, express and implied, that those judicial tribunals have proceeded, in which such proof is held to be admissible. It is declared, for example, by the Supreme Court of Pennsylvania, in the case of *Ross* v. *Espy*, 66 Pa. St., 483, that "The contract of indorsement is one *implied* by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an *express* agreement."

So in an early case in New Jersey—*Johnson* v. *Martinus*, 4 Halst. [9 N. J. L.], 144—it was held by the Supreme Court of that State that parol evidence was competent to overcome the implied contract which results from a blank indorsement, on the ground that such indorsement is an inchoate or imperfect contract and not a written instrument, nor entitled to its effect, protection or immunity.

This case, however, was expressly overruled by the same court in the case of *Chaddock* v. *Vanness*, 35 N. J. L., 517, in which it is plainly indicated that the distinction attempted to be made, in some of the cases, between indorsements in full and those which are in blank, is untenable.

The contract created by the indorsement and [37] delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less, on that account, perfectly understood. All its terms are certain, fixed and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full.

It is spoken of by Wharton, L. of Ev., etc., section 1059 as a contract *at short-hand*. The same view is taken in Daniels on Negotiable Instruments, section 718, where the author states, as a resulting conclusion that embodies the true principle applicable to the subject, that, "In an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him." If the commercial contract of indorsement is treated as a contract in writing, this conclusion is undoubtedly correct. If it is not, we have the anomaly of applying one rule between maker and payee, and a different one between payee becoming indorser and his immediate indorsee, without any difference to justify it, in the relation of the parties to each other in the two cases.

The rule is tersely stated in Benjamin's Chalmer's Dig. of L. of Bills of Exch., etc., art. 56, p. 63.

"The contracts on a bill, as interpreted by the law merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect." Citing *Abrey* v. *Crux*, L. R. 5 C. P., 37.

The rule as declared by *Mr. Justice* Washing- [38] ton in the case cited, was expressly rejected by this court in the case of the *Bk.* v. *Dunn*, 6 Pet., 51, one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement, citing the language of the court in *Renner* v. *Bk.*, 9 Wheat., 587: "For there is no rule of law better settled or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary *the legal import* of a written agreement."

The authority of this case on this point has never been questioned in this court, the explanation and qualification in *Davis* v. *Brown*, 94 U. S., 423 [XXIV., 204], having reference only to the rule as to the competency of an indorser as a witness to impeach the validity of a negotiable instrument to which he is a party. In the case last referred to, the agreement relied on to qualify the instrument was admitted because it was in writing and part of the transaction.

Tha case of *Bk.* v. *Dunn*, *supra*, is cited as an authority upon the point in *Phillips* v. *Preston*, 5 How., 291, "Because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports."

It is also referred to in terms and followed in the case of *Brown* v. *Wiley*, 20 How., 442 [61 U. S., XV., 965]. In delivering the opinion of the court in that case, *Mr. Justice* Grier used this language:

"When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases, but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill the

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owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should [39] not be presentable till a distant, uncertain or undefined period, tended to alter and vary, in a very material degree, its operation and effect. See *Thompson* v. *Ketchum*, 8 Johns., 192."

The action in this case, it is true, was between the payee and drawer, upon a bill of exchange; but the obligation on which it was founded, that the drawer would pay, in the event of non-acceptance by the drawee, notice of dishonor and protest, is one not actually expressed in terms in the bill itself, but imported by construction of law, as constituting the operation and effect of the contract.

In the case of *Specht* v. *Howard*, 16 Wall., 564 [83 U. S., XXI., 348], *Mr. Justice* Swayne, delivering the opinion of the court, quotes from Parsons on Notes and Bills, 591, that "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to or subtract from the absolute terms of the written contract."

The same quotation forms part of the opinion in the case of *Forsythe* v. *Kimball*, 91 U. S., 291 [XXIII., 352], with the addition, that in the absence of fraud, accident or mistake, the rule is the same in equity as at law.

The same principle upon the authority of these cases, was affirmed by this court in *Brown* v. *Spofford*, 95 U. S., 474 [XXIV., 508], and is assumed to be the law in *Cox* v *Bk.*, 100 U. S., 713 [XXV., 741] and *Brent* v. *Bk.*, 1 Pet., 89.

In view of this line of decisions, the question, as it arises in this case, cannot now be considered an open one in this court.

It coincides with the rule adopted and applied in most of the States, but the cases are too numerous for citation. They will be found collected, however, in Bigelow's Bills and Notes, 168; Byles, Bills, 6th Am. ed., Sharswood's *n.*, 157; 1 Dan. Neg. Inst., secs. 80, 717, *et seq.*; 2 Wharton, Ev., sec. 1058, *et seq.*; Benjamin's Chalmer's Dig. of L. of Bills of Exch., art. 56, p. 63.

Of course there are many distinctions which, upon the circumstances of cases, determine the applicability of the rule, and classes of cases which form apparent exceptions to it. It is not necessary to refer to them here, further [40] than to say that the limitations of the rule are perfectly consistent with it, and its application in this, as in other proper cases, will not be considered as encroaching upon them.

The opinion of the Supreme Court of Colorado Territory, affirming the judgment of the district court, expressly declines to pass upon the question whether the evidence showed that the property of Webb, the maker of the note, was exhausted or not, because no exception was taken to the finding and judgment of the court. Our attention is called by counsel to a stipulation, filed in the Supreme Court of Colorado, by which the omission to insert the exception agreed to have been taken at the time, in the bill of exceptions, was intended to be cured; which, it seems, could not have come to the knowledge of that court. But the consideration of the exception does not avail the plaintiff in error. The record shows abundant evidence to sustain the finding complained of. Even if the point made were well taken that where, under the Statute of Colorado requiring a prosecution of the maker to the end of an execution, it is necessary that the execution should be kept in force for the full period given by law for its return, in order to establish due diligence, nevertheless, in the present record, there is shown, in our opinion, evidence to justify a finding in favor of the plaintiff below, even although no execution had been issued against the maker of the note. It clearly appears that it would have been unavailing on account of his insolvency. In *Wills* v. *Claflin*, 92 U. S., 135 [XXIII., 490], under a Statute of Illinois, containing a provision identical with that in the Colorado Statute, from which, indeed, the latter is said to have been copied, it was held that if the maker of the note was insolvent, so that a suit against him would be unavailing, the failure to institute it would furnish no defense to the indorser.

That, indeed, is the plain language of the law itself.

We find no error in the record, and the judgment will be affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—40 Ark., 117; 48 Am. Rep., 6.

UNITED STATES, *Plff. in Err.*,
v.
GEORGE W. JACKSON ET AL. [41]

(See S. C., 14 Otto, 41-44.)

Judicial notice—collector's bond—insufficient declaration.

1. It is a matter of which this court will take judicial notice, that, by law, the country is divided into collection districts for internal revenue purposes.
2. A collector's bond is not void because it does not name the district of which he was appointed collector.
3. But where there is no averment in the declaration anywhere that he was or had ever been appointed collector of any particular district, the declaration is bad on demurrer.

[No. 25.]

Argued Oct. 13, 1881. Decided Oct. 31, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. H. H. Wells, **Samuel Shellabarger, Jeremiah M. Wilson,** *W. Willoughby* and *James Nelson*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The action in this case was brought by the United States against the defendants, on a bond in which Jackson was principal, and the other defendants were his sureties. Judgment was rendered for defendants on a demurrer to the declaration.

The declaration sets out the substance of the obligatory part of the bond, namely: the acknowledgment of an indebtedness to the United

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States in the sum of $50,000; to which it adds, there was annexed the following condition:

"Whereas, the President of the United States hath, pursuant to law, appointed the said George W. Jackson Collector of Taxes under an Act entitled 'An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt, and for Other Purposes':

Now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of the said office, according to law, and shall justly and faithfully account for and pay over to the United States, in [42] compliance with the regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy-collector appointed by said Collector shall truly and faithfully execute and discharge all the duties of such deputy-collector according to law, then the above obligation to be void and of no effect; otherwise it shall remain and abide in full force and virtue."

The circuit court was of opinion that this bond was absolutely void, because it did not state for what particular collection district the principal, Jackson, was Collector of Taxes, and for the proper discharge of the duties of which the defendants undertook to be responsible.

It is a matter of which this court will take judicial notice, that by law the country is divided into collection districts for internal revenue purposes, and in some States there are several of these districts with defined geographical boundaries. A collector is appointed for each of them, and his duties relate to the collection of internal revenue within that district. Because, therefore, the bond sued on in this case did not bind the parties on its face for the performance by Jackson of the duties of any particular district, the circuit court was of opinion it was void.

But it does bind the signers for the faithful performance of the duties of collector of taxes by George W. Jackson, according to the internal revenue law, and it avers that he had been duly appointed Collector of Taxes under that Act. The duties for the performance of which these parties bound themselves were well defined. The person who was to perform them, and for whose default they consented to become liable, was named in the obligation.

The only matter of importance left out of the writing obligatory was the place or district within which those duties were to be performed. He was Collector for but one district. It is fairly to be presumed that the obligors, of whom he was one, knew for what district he had been appointed, since they say he had already been appointed by the President when they signed the bond.

This appointment was a matter of public record. The evidence of it was the commission of Jackson, one of the obligors, signed and [43] sealed by the President. The district, therefore, for which he was appointed was known to them, and was a matter of public government record.

We do not see how such a bond can be held to be void. In any issue that could arise as to the district for which Jackson was appointed, and for the duties of which they became liable, it could be made certain by the production of this commission or the record of it in the proper department.

It would not depend on any parol proof. The production of the bond of the defendants, and of the commission of one of them, makes complete the obligation of the defendants. That is certain in law which can be rendered certain.

If, therefore, there had been an averment in the declaration of the district for which Jackson was appointed, we do not see why the declaration and the bond taken together would not have been good, when it was further averred that, in regard to the duties of that district, he had been guilty of a default covered by the terms of the bond. If to such a declaration the defendant had pleaded *non est factum* or *nil debet*, the production of the bond and of Jackson's commission would have been a sufficient answer, because the commission would have shown that he was appointed Internal Revenue Collector for that district by matter of record, and the undertaking of the defendants in his behalf, as Collector of Internal Revenue, would have been held to apply to his duties under that commission.

But there is no averment in the declaration anywhere that he was or had ever been appointed collector of any particular district. There is, therefore, no foundation for proof of that fact by the production of the commission or by any other evidence. On a judgment by default no such commission could be introduced, nor proof of non-performance in any district. No issue could be taken on the declaration as to his appointment or his obligation to perform the duties of any district, because there is no averment of any such obligation. The declaration affords no opportunity to render more specific the obligation of defendants by introducing the commission. It does not aver that this obligation for Jackson as Revenue Collector related to the duties of any particular district, so as to enable the court to apply the promise of the defendants to those duties.

We are of opinion, therefore, that, regarding [44] the demurrer (as we must) as referring to the declaration and to the bond set out on oyer, it was well decided that they were insufficient to sustain the action, and *the judgment is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EMILY A. KING, VERE BATES KING [44]
AND EMILY A. KING, Guardian of VERE B. KING, *Appts.*,

v.

RANDOLPH WORTHINGTON ET AL.

(See S. C., 14 Otto, 44-51.)

Removal of equity action—competency of witnesses—effect of removal.

1. In Illinois, where the decision of the Supreme Court, reversing and remanding a cause in equity, does not involve the merits, the case, upon the filing of the transcript in the court below, stands for rehearing in that court, and may then be removed to the U. S. Circuit Court.

2. Where there is a conflict between the Act of Congress and the law of the State in regard to the competency of witnesses, the United States Court is bound to follow the Act of Congress.

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2. The fact that, while a case was pending in the state court, witnesses were held by that court to be incompetent under the state law, does not preclude them from testifying in the case after its removal to the United States Court.

[No. 52.]

Submitted Oct. 20, 1881. Decided Oct. 31, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **Horace F. Waite,** for appellants.

Messrs. **Henry G. Miller** and **T. G. Frost,** for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

This was a suit in equity, which was originally brought in the Superior Court of Cook County, in the State of Illinois, on July 22, 1870, by George W. Worthington and John T. Avery, citizens of the State of Ohio, against Emily A. King, widow of John B. King, deceased, and Vere Bates King, his only child, a minor, and the said Emily A. King as guardian of said minor, the said defendants being citizens of the State of Illinois. During the progress of the case George W. Worthington died, and his legal representatives, who were also citizens of Ohio, were made parties complainant in his stead. The purpose of the bill was to remove a cloud from the title to certain real estate in Cook [45] County, Illinois, of which the original complainants alleged themselves to be the owners in fee, by a decree setting aside and avoiding a deed therefor, made to the said John B. King in his lifetime by one Heman Scott.

The bill averred that on and prior to June 1, 1843, Scott was the owner in fee of the lands in question, to wit: the west half of the southwest quarter of section 20, township 38, range 13, in Cook County, Illinois; that on the day and year just named he conveyed said land by deed of that date to one Isaac Bishop.

The bill then traced the title by successive conveyances from Bishop through Porter L. Hinckley, John R. Bartholomew, Corydon Weeks and others, to the orignal complainants, and averred that long before the commencement of the suit, they, by means of said conveyances, became and still were seised in fee, the said Avery of the north, and the said Worthington of the south half, of the lands in question.

The bill further averred that on June 21, 1861, Scott executed and delivered to the said John B. King, a quitclaim deed purporting to convey to him all the right and title which Scott then had in any lands in Cook County, Illinois, which by its terms included the lands above mentioned.

It was further averred that on October 2, 1864, said John B. King died, leaving the defendant Emily A. King, his widow, and the defendant Vere Bates King, who was a minor, his only child, of whom the said Emily had become the duly appointed guardian, and that the deed executed to John B. King by Scott had created a cloud upon complainant's title, in consequence of which they were unable to sell or dispose of said land.

The answer of Emily A. King, and Emily A. King as guardian, consisted of a general denial of the allegations of the bill, excepting the allegation of the conveyance from Scott to John B. King.

Among others, the depositions of Scott, Bartholomew, Hinckley and Weeks were taken. These witnesses severally testified to their ownership of the property in dispute, and proved the execution of the deeds of conveyance charged in the bill to have been executed by them respectively, and that all of said deeds contained full covenants of warranty.

Upon final hearing a decree was made by the Superior Court of Cook County in favor of the [46] complainants. The defendants took the case by appeal to the Supreme Court of the State. The Supreme Court reversed the decree because the testimony of Weeks, Hinckley and Bartholomew had been received by the superior court against the objection of defendants.

This decision was based on a construction of the Statute of Illinois, which declares: "No person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise." The exception is as follows: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or on his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as * * * heir * * * of any deceased person, or as guardian * * * * of any such heir.

The Supreme Court held that, by reason of the fact that Scott, Weeks, Hinckley, and Bartholomew had each conveyed the lands in question with covenants of warranty, they were interested in the event of the suit, and as it was defended both by the heir and the guardian of the heir, the persons above named were incompetent to testify in the case.

The opinion of the Supreme Court was filed, and its decree remanding the cause was made, October 11, 1875.

The statute of the State provides (sections 84 and 85, ch. 110, Revised Statutes of Illinois) that "When a cause or proceeding is remanded by the Supreme Court or appellate court, upon a transcript of the order of the court remanding the same being filed in the court from which the cause or proceeding was remanded, or in which the cause originated, as the case may require, and not less than ten days' notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be re-instated therein.

If neither party shall file such transcript within two years from the time of making the final order of the Supreme Court or appellate court, as the case may be, reversing any judgment or proceeding, the cause shall be considered as abandoned, and no further action shall be had therein."

In this case the mandate of the Supreme Court was filed in the superior court, November 11, [47] 1875, and the cause was re-docketed in the latter court, November 23, 1875. The Statute of Illinois (Hurd, page 331, sec. 54) prescribes that the terms of the Superior Court of Cook County shall begin on the first Monday of every month.

On December 4, 1875, the last day of the November Term, a petition and bond for the removal of the cause to the Circuit Court of the United States for the Northern District of Illinois were filed in the superior court by the

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complainants. The petition alleged that the then current Term of the court was the first Term at which said cause could have been tried since the date of docketing said cause in the superior court, as aforesaid, and since the passage of the Act of Congress under which the petition was filed.

On December 14th, against the objection of defendants, an order was made for the removal of the cause. The record was filed in the United States Circuit Court December 20, 1875.

Upon the final hearing of the case in the circuit court, among others, the depositions of Scott, Weeks, Hinckley and Bartholomew, who had been declared by the Supreme Court incompetent witnesses under the state law above recited, were admitted in evidence, and the circuit court made a final decree in favor of complainants, in accordance with the prayer of their bill.

The Act of Congress regulating the competency of witnesses, by virtue of which the circuit court admitted the depositions of the persons above named, is as follows:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried. *Provided*, that in an action by or against executors, administrators or guardians, in which judgment is rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." U. S. R. S., sec. 858.

[48] The defendants in the circuit court have appealed from the decree of that court, and as appellants in this court have assigned the following errors:

First. That the cause was not removable under the Act of Congress. The petition was not filed at the Term at which said cause could be first tried, and before the trial thereof, and the petition is insufficient for its removal.

Second. That the court erred in deciding that Heman Scott, Corydon Weeks, John R. Bartholomew and Robert Hinckley were competent to testify in this case; also, in deciding that the decision of the Supreme Court of the State of Illinois, holding them incompetent, was not *res judicata;* also, in admitting improper evidence on the hearing.

The Act of March 3, 1875 [18 Stat. at L., 470], under which the appellees claim that the cause was removed to the Federal Court, declares that the petition for removal must be filed "Before or at the Term at which said cause could be first tried and before the trial thereof." See vol. 1, Supplement to the U. S. R. S., p. 174, sec. 3.

At the date of the passage of the Act this suit was pending in the Supreme Court of Illinois. After its passage the case was reversed and remanded to the State Court. This court has construed the clause of the Act of 1875, just quoted, to allow the removal of a cause which was pending at the date of the passage of the Act, if the application therefor were made before trial and at the Term of the court, after the passage of the Act, at which the cause could be first tried, *Removal Cases*, 100 U. S., 457 [XXV., 593]; in other words, that the fact that the first Term of the court in which the cause could have been first tried had already passed when the Act went into effect, was not of itself an obstacle to the removal of the cause.

In the case just cited, it was further held that the fact that a final decree upon the default of defendants had been entered in the cause before the passage of the Act of 1875, did not prevent a removal of the cause under the Act, after such decree had been set aside and a rehearing granted.

In this case the parties complainant and defendant were citizens of different States. The petition and bond for removal were in due form, and the bond was sufficient.

The only ground, therefore, on which it can be urged that the attempt to remove the case to the circuit court was unwarranted by law and, [49] therefore, ineffectual, is that the petition therefor was not filed before or at the Term, after the passage of the Act of 1875, at which the cause could be first tried.

The appellee asserts that the decision of the Supreme Court of Illinois, reversing the decree of the superior court, having been made on October 11, while the October Term of the superior court was current, the cause might have been re-docketed and tried during that term of the superior court, and that the re-docketing of the cause, at the following November Term, and the filing of the petition for its removal during that Term, came too late.

The answer to this position is obvious. The cause could not have been tried in the superior court until the transcript of the order of the Supreme Court remanding it, had been filed therein.

Under the Statute of Illinois, both parties were allowed two years within which to file the transcript. Either party might file it, and no laches or default could be charged against either, if it were filed within two years.

It follows that when the appellees delayed the filing of the transcript from October 11 until November 23, they were exercising a privilege which the law gave them, and lost none of their rights thereby.

Therefore, where the transcript of the supreme court was filed within two years after the order remanding the case had been made, a petition for removal filed at the same Term must be held to have been filed at the term at which the cause could have been first tried, and to have been filed in due season.

If the decision of the state supreme court had finally disposed of the case, there could, of course, have been no removal of the cause to the Federal Court after such decision.

But according to the practice and jurisprudence of the State of Illinois, where the decision of the supreme court, reversing and remanding a cause in equity, does not involve the merits, the case, upon the filing of the transcript in the court below, stands for rehearing in that court. *Chickering* v. *Failes*, 26 Ill., 508; *S. C.*, 29 Ill., 294; *Wadhams* v. *Gay*, 73 Ill., 415; *S. C.*, 83 [50] Ill., 250; *Pettilon* v. *Noble*, 7 Biss., 450.

This cause was reversed by the state supreme court solely on the ground of the error of the

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superior court in admitting incompetent evidence. When, therefore, the cause was remanded, it stood for rehearing as soon as it was re-docketed in the superior court.

We are of opinion, therefore, that the case was properly removed from the Superior Court of Cook County to the United States Circuit Court.

The next ground of error assigned is that the circuit court admitted in evidence the depositions of Scott, Weeks, Bartholemew and Hinckley."

It is perfectly clear that, under the Act of Congress (Rev. Stat., sec. 858), the persons named were competent witnesses in the United States Circuit Court. This point has been expressly ruled by this court in the case of *Potter* v. *Bk.*, 102 U. S., 163 [*ante*, 111], brought up on error from the Northern District of Illinois. It was also held, in the same case, that where there was a conflict between the Act of Congress and the law of the State in regard to the competency of witnesses, the United States Court was bound to follow the Act of Congress. The question is, therefore, reduced to this: Does the fact that while the case was pending in the state court these witnesses were held by that court to be incompetent under the state law, preclude them from testifying in the case after its removal to the United States Court? We think this question must be answered in the negative.

The Federal Court was bound to administer the law of evidence as prescribed by Act of Congress, unless what had transpired in the case in the state court presented an insuperable obstacle to that course. This the appellants claim was the fact. They say that the transfer of a case from the state to a Federal Court does not vacate what has been done in the state court previous to removal; that what has been decided in the state court is *res judicata* and cannot be re-examined. In support of this position the case of *Duncan* v. *Gegan*, 101 U. S., 810 [XXV., 875], and other cases are cited. The law as settled by this court is correctly stated by appellants.

But the rulings of the circuit court in the [51] progress of the cause after its removal did not reverse or vacate anything which had previously been adjudicated by the state court. The decision of the latter court was that, under the state law, certain witnesses were incompetent in the state court. The Federal Court decided that, under the laws of the United States, the same witnesses were competent when offered in a United States court. Here is no conflict of opinion, and no unsettling of any matter which had been adjudged by the state court. The Federal Court was bound to deal with the case according to the rules of practice and evidence prescribed by the Acts of Congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal Court gives him.

In this instance the court below followed the law of evidence as prescribed by Congress, and in doing so it did not reverse any ruling of the state court and, we think, committed no error.

No other evidence admitted by the circuit court is complained of by the appellants as incompetent.

The counsel of both parties have discussed in their briefs the question whether the evidence set out in the record is sufficient to support the decree of the circuit court. No error has been assigned on the ground that the testimony was insufficient. It is, therefore, unnecessary to discuss this point. We may remark, however, that in our opinion the evidence amply justifies the decree.

There is no error in the record. *The decree of the Circuit Court must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 396; 111 U. S., 476.

CITY OF CHICAGO, *Appt.*,
v. [120]
WILLIAM C. TEBBETTS.

(See S. C., 14 Otto, 120-125.)

Action on award—interest when payable.

1. Where a mortgagee of land permitted it to be taken as a street by a city, a purchaser of the land on foreclosure sale under the mortgage, who has also become the assignee of the award made for it by the city, may maintain an action against the city for the amount due on the award.
2. One who is guilty of unreasonable and vexatious delay in making payment of a just claim, is chargeable with interest thereon from the time it became due.

[No. 55.]
Argued Oct. 21, 1881. Decided Oct. 31, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below, by the appellee against the appellant and others, to recover the sum of $10, 000, with interest from May 14, 1869. This sum was alleged to be equitably due to complainant, on account of damages awarded in certain condemnation proceedings instituted by the City of Chicago, in respect to a certain piece of land which was taken by the City for the opening or extension of a street.

The court below rendered a decree in favor of the complainant, and the City appealed to this court.

The facts are stated in the opinion.

Messrs. Francis Adams, Joseph F. Bonfield, and **Wm. C. Goudy,** for appellant.

Messrs. Chas. A. Gregory, George Payson, and **W. B. Wilson**, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

The decree in this case must be affirmed. [122]
The grounds taken by the appellant for resisting payment of the $10,000 due on the note given by Bruner to the insurance company, and secured by the trust-deed given to Dr. Boone, are quite remarkable. It is conceded that the land embraced in the deed was regularly condemned for a street in 1868, and assessed at $36,000 without any deduction for benefits; and that no one was interested in it except Gregory, the owner of the fee, and Dr. Boone as trustee for the insurance company, who held two deeds of trust thereon to secure two several notes for money loaned; one for $10,000, before referred to, and one for a balance of $6,000. On the 22d of March, 1869, the City paid Gregory, the

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owner of the equity of redemption, his proportion of the award, namely: $20,000, and on the 14th of May following, the Board of Public Works of the City gave him a voucher, showing the amount of the award, the payment made to him, and the balance still due, namely: $16,000, being the amount due to the insurance company and secured by the deeds of trust. This voucher Gregory indorsed with an order to pay the said balance to Dr. Boone as trustee of the insurance company, in full of principal due said company for lien on the land, and delivered the same to him. Boone, thereupon, made demand on the City for this balance. On the 21st of May, 1869, the city authorities gave notice that the assessments had been collected, and that the money was ready in the hands of the city treasurer to be paid over to the parties entitled; and on the 5th of June they paid to Dr. Boone, the trustee, $6,000, which he applied to the note on which that amount was due, which was sufficient to cancel the same. The balance of $10,000, though frequently demanded, was never paid, and this suit was brought by the appellee as assignee of the insurance company, to recover the money, or the land.

That it was the intent of the parties that Gregory should, and that they supposed he did, transfer to the insurance company all claim to the balance of the award made for the land, over and above the $20,000 received by himself as owner of the equity of redemption, there cannot be the slightest doubt. The mortgagee was [123] entitled to it, and it was the owner's duty to make the assignment, if any assignment was necessary; and it was, in fact, made, or supposed to be made, by the indorsement of the voucher to the trustee. It was sufficiently made to invest in the insurance company, or its trustee, the entire equitable interest in the money and in such security for its payment as yet remained; and it was manifestly the duty of the City to pay it accordingly.

But, notwithstanding the notice to that effect, it seems that the City did not, at the time, have in hand the requisite funds to pay the last $10,000. The insurance company, however, on receiving guaranties from other parties, who were interested in the street, that the interest should be paid at all events (there being some doubt whether the City would be liable for interest), consented to let the City take possession and go on with the improvement; but with the express reservation and condition, that such consent was not to be a waiver or abandonment of any right against the debtor, or any right of suit against the City for the recovery of the money or the land. This indulgence on the part of the insurance company has been the prime cause of all the trouble experienced by it and its assignees, the present appellee, in collecting the said $10,000. It is conceded that they have never received their money; that the City has the land, and claims the right to keep it for the purposes of the street; that the assessed value was sufficient to pay this claim over and above what was due to others; and that the insurance company was entitled to the money in 1869. Payment, however, is resisted, so far as we can understand the defense, on the ground that the company, being unable to get its money, treated the land as still subject to its claim, and directed its trustee to advertise and sell the same by way of foreclosure, and bid it in at such sale for the amount of the demand. This, the appellant contends, satisfied the debt. But the City still claimed the land, and resisted every attempt of the insurance company to get possession of it. Actions of ejectment were brought but were strenuously defended, and the company was forced to abandon them. The counsel for the City contended then, as they contend now, that by virtue of the condemnation proceedings, all interests and titles in the land were condemned, as well that of the trustee under the trust-deeds, as that of the owner of the fee. Hence, their argument, on [124] this branch of the case is, that the proceedings for foreclosing the trust-deed were illusory and vain. Therefore, the insurance company acquired no title by the foreclosure and sale, and its assignee, the appellee, has none.

It is thus supposed to be conclusively reasoned out, upon the soundest principles of logic—*first*, that the debt is satisfied by the foreclosure and purchase of the land; and, *secondly*, that all claim to the land was extinguished by the proceedings for condemnation. If this argument is sound, the appellee, certainly, has not a particle of ground to stand on. His debt is gone because he has got the security; and the security is gone because it was taken for the street; and yet the insurance company, or its assignee, has not received a cent of money, nor any other consideration whatever.

When, by a train of abstract reasoning we are brought to an absurd conclusion, it behooves us carefully to reconsider the steps by which we have been led up to it. If the last conclusion of the appellant is well founded, namely: that there was nothing left for the deed of trust to operate upon, and that the proceedings in foreclosure were indeed illusory and vain, the first conclusion, that the debt was satisfied by the form of sale which was gone through in such proceedings, could not have been true.

It is admitted, on all hands, that the proceedings for condemning the land for a street were duly and properly pursued; and that the insurance company waived its right to oppose the taking possession thereof by the City before payment of the assessment. The courts were probably right in holding in the actions of ejectment which have been referred to, that the City could not be dispossessed. But, as the insurance company, when permitting the possession to be taken, reserved all its rights for the recovery of the money yet due, and as it is conceded that the City has not paid that money, it is surely against good conscience and every principle of equity to refuse to pay it. We think, therefore, that the insurance company, or its assignee, standing in the position of mortgagee of the land, or, which is the same thing, as *cestui que trust* under the trust-deed [125] and, afterwards, as assignee of the balance due on the award, had a clear ground of equity for filing the bill in this cause, and is entitled to a decree.

The question of interest has been largely discussed by counsel. But in our view of the matter, it needs but little consideration. It has been the express statute law of Illinois, at least ever since 1845, that interest at the rate of six

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per cent per annum shall be allowed "On money withheld by an unreasonable and vexatious delay of payment." We have no hesitation in declaring that this is such a case. It is now more than twelve years since the property was condemned. The money has been due and ought to have been paid long ago. It was the duty of the City to provide for its payment. Instead of that it has litigated and contested the demand year after year, and in court after court.

It is unnecessary to make a minute examination of the statute law for ascertaining the days and times when, in the due course of proceeding, the money might have been collected from the owners of property benefited by the street. It is manifest that it might have been collected long before the commencement of this suit. But a party guilty of unreasonable and vexatious delay in making payment of a just claim, cannot be relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious. If he is guilty of such delay he is chargeable with interest on the debt from the time it became due as upon other debts enumerated in the law. We see nothing to criticise in the amount of interest allowed by the court below.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN M. GLOVER, Assignee of JOHN E. LOVE, *Appt.*,
v.
JOHN E. LOVE ET AL.

154 US 670 Appx

Stocks, which never were the property of the bankrupt, the original purchases of which were made honestly and in good faith with the proceeds of the separate estate of his wife, years before he became involved in the liabilities which caused his failure, cannot be subjected to the payment of his debts, on bill filed for that purpose by his assignee in bankruptcy.

[No. 62.]

Submitted Oct. 28, 1881. Decided Nov. 7, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

This action was brought in the court below, by the appellant against the appellees, alleging the adjudication in bankruptcy of John E. Love, and the appointment of complainant as his assignee. The object of the bill was to compel Irene H. Love to transfer to the complainant certain bank stock which, the bill alleged, had been transferred to her by her husband, with intent to defraud his creditors and to his secret use and trust. The court below dismissed the bill, and the complainant appealed to this court.

Messrs. **W. Hallett Phillips,** *John R. Shepley* and *Hayden & Glover*, for plaintiff in error.

Mr. **J. E. McKeighan,** for defendants in error.

His Honor, *Judge* Treat, who presided at the trial of the above cause, delivered the following opinion, to wit:

Opinion. In equity.

The plaintiff, as assignee in bankruptcy, seeks to have certain shares of stock standing in the name of the bankrupt's wife, subjected to the payment of his debts. The date of bankruptcy is Mar. 8, 1877. The purchases of stock were, respectively, in 1874 and early in 1875. The bill is framed rather on the hypothesis of a conveyance by the husband with the intent to defraud subsequent creditors, than that of a design to defraud existing creditors; but as the evidence has been taken, to cover either view of the case, it has been considered in the double aspect. The rules of law governing such matters are fully settled in the following cases:

Smith v. *Kehr*, 2 Dill., 50; affirmed in 20 Wall., 31 (87 U. S., XXII., 313); *Smith* v. *Vodges*, 92 U. S., 183 (XXIII., 481); *Humes* v. *Scruggs*, 94 U. S., 22 (XXIV., 51); *Phipps* v. *Sedgwick*, 95 U. S., 3 (XXIV., 591).

The difficulty is as to the facts. There is a large mass of immaterial, irrelevant and incompetent evidence, through which the court has been compelled to wade, in order to reach the real facts in controversy.

If Mrs. Love had property in her own right while resident in Alabama, the proceeds of which were brought to Missouri on her removal here with her husband in 1874, and if said proceeds were invested for her benefit in the stocks now in dispute, then said stocks must be held to be her property, exempt from her husband's debts and, consequently, not recoverable by his assignee as a part of his estate, unless reduced to the possession of husband, or through intervention of creditors, prior to the state Act of 1875.

The conclusion the court has reached, after a full and painstaking analysis of the evidence is, that the stocks in question were purchased with the proceeds of her separate estate. That conclusion is decisive of this controversy.

The Cater demand, proved in bankruptcy, could not be withdrawn so as to prevent the consequences of the same as an existing debt, at the time the stocks were purchased; and if the court had reached the conclusion that the vesting of the stocks in the wife was a voluntary settlement by the husband, then the rules laid down in *Kehr* v. *Smith* would be applied.

The evidence, if those stocks were thus vested, would have brought the case within said rules.

The bill must be dismissed with costs.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We have carefully examined all the testimony in this case, and are satisfied with the decree below. It is abundantly proven that the stock which the assignee in bankruptcy now seeks to reach, never was in equity the property of the bankrupt. Unless all the testimony is to be disbelieved, the original purchases were made honestly and in good faith with the proceeds of the separate estate of the wife, and years before the bankrupt became involved in the liabilities which caused his failure.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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52] D. G. DRIESBACH, *Plff. in Errr.*,
v.
SECOND NATIONAL BANK OF WILKES-BARRE.

J. B. STARK, *Plff. in Errr.*,
v.
SAME.

(See S. C., 14 Otto, 52-54.)

Usurious interest by National Bank.

Usurious interest paid a national bank on renewing notes, cannot be applied in satisfaction of the principal of the debt, in an action on such notes.

[Nos. 58, 59.]

Argued Oct. 26, 1881. Decided Nov. 7, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

Each of the above actions was brought in the court below, by the Second National Bank of Wilkesbarre, now the defendant in error, against the respective plaintiffs in error, upon two promissory notes, Driesbach being the maker and Stark, indorser. These notes were the last of a series of renewals which had been regularly discounted by the Bank. Interest was charged and paid at the rate of from 8 to 10 per cent on the whole line of renewals. The defendants set up that these rates were usurious, and claimed the right to offset against the face of the note sued upon, the whole amount of interest which had been paid.

Under the instructions of the court, verdict in each case was rendered for the plaintiff, and judgments having been entered, the defendants sued out these writs of error.

Messrs. **James O. Parker** and *E. N. Willard*, for plaintiffs in error.

Messrs. **W. H. Armstrong** and *Samuel Linn*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The object of the plaintiffs in error in these suits is to have usurious interest *paid* a National Bank on renewing a series of notes, of which those now in suit are the last, applied in satisfaction of the principal of the debt. The claim [54] is not for interest stipulated for and included in the notes sued on, but for the application of what has actually been *paid* as interest to the discharge of principal. This we held in *Barnet* v. *Bk.*, 98 U. S., 555 [XXV., 212], could not be done; and in *Bk.* v. *Gruber*, 8 Weekly N. of Cas., 119, and *Bk.* v. *Adams*, 9 Weekly N. of Cas., 472, the Supreme Court of Pennsylvania followed that case, overruling its former decisions on the same question in *Lucas* v. *Bk.*, 78 Pa., 228, and *Oberholt* v. *Bk.*, 82 Pa., 490. If, therefore, we reverse the judgments for the specific errors now complained of, it would serve no useful purpose, for on the facts admitted the same general result must follow another trial. Without, therefore, considering at all the question on which the cases seem to have turned below, *the judgments are affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 37, 199; 112 U. S., 483.

NOTE.—*Usury by national banks.* See, *note* to Farms. & Mechs. Nat. Bk. v. Dearing, 91 U. S., XXIII., 196.

[78] JAMES KELLY, *Plff. in Errr.*,
v.
CITY OF PITTSBURGH.

(See S. C., 14 Otto, 78-83.)

Due process of law—unequal taxation—collection of taxes.

*1. In this country and in England, the necessities of government, the nature of the duties to be performed, and custom and usage, have established a procedure in regard to the levy and collection of taxes which differs from proceedings in courts of justice but which is still due process of law within the meaning of the Constitution.

2. What parts of a State shall, for local purposes, be governed by a county, a town or a city government and the character of the land included in each are matters of detail within the legislative discretion.

3. When the taxes levied by a city are clearly for a proper public purpose, and are authorized by the State law, though some of the property assessed be farm land within the city, this court cannot say that such a statute deprives the owner of his property without due process of law.

[No. 51.]

Argued Oct. 21, 1881. Decided Nov. 7, 1881.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The case is stated by the court.

Messrs. Wm. H. Sutton, Cook & Cole, **Albert N. Sutton,** *Lewis M. Plumer, Luther H. Pike* and **Daniel Agnew,** for plaintiff in error.

Messrs. Thomas S. Bigelow and **George Shiras, Jr.,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This case is brought before us by a writ of error to the Supreme Court of Pennsylvania.

The plaintiff in error, James Kelly, is the owner of eighty acres of land which, prior to the year 1867, was a part of the Township of Collins, in the County of Alleghany, in that State. In that year the Legislature of Pennsylvania passed an Act by virtue of which and the subsequent proceedings under it, this township became a part of the City of Pittsburgh. The authorities of that City assessed the land in question for the taxes of the year 1874 at a sum which the plaintiff asserts to be enormously beyond its value, and which, he alleges, is almost destructive of his interest in the property. The taxes thus assessed are divisible into two classes, namely: those assessed for state and county purposes by the County of Alleghany, within which Pittsburgh is situated, and those assessed by the City for city purposes.

The laws of Pennsylvania allow an appeal from the original assessment of taxes to a board of revision, and Mr. Kelly took such appeal, with what success does not distinctly appear. The result, however, was unsatisfactory to him and he brought a suit in equity in the court of common pleas of the State to restrain the collection of the tax by the city authorities. There was an answer to this bill, a replication, and a reference to a master, on whose report that court [7 dismissed the bill, and the decree was affirmed on appeal by the Supreme Court of the State.

To that judgment of affirmance this writ of

*Head notes by *Mr. Justice* MILLER.

NOTE.—*What is due process of law.* See, *note* to Pearsons v. Yewdall, 95 U. S., XXIV., 436.

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error is prosecuted, and the transcript of the record, as the Act of Congress requires, is accompanied by assignments of error, seven in number. All of these except two have reference to exceptions to the report of the master in regard to matters of which this court has no jurisdiction. Those two, however, assail the decree of the State Court on the ground that it violates rights of the plaintiff guarantied to him by the Constitution of the United States, and as the same points were relied on in the Supreme Court of the State, it becomes our duty to inquire whether these allegations of error are well founded. They are as follows:

First. The Supreme Court of Pennsylvania erred in sustaining the authority of the City of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of the rights of complainant as guarantied to him by article V. of Amendments to the Constitution of the United States.

Second. The Supreme Court of Pennsylvania erred in sustaining the authority of the City of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of the rights of complainant as guarantied to him by article XIV., section 1, of the Amendments to the Constitution of the United States.

As regards the effect of the 5th Amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal Government and to have no reference to the exercise of such powers by the state governments. See, *Withers* v. *Buckley*, 20 How. 90 [61 U. S., XV., 819]; *Davidson* v. *New Orleans*, 96 U.S., 97 [XXIV., 616]. We need, therefore, give this assignment of error no further consideration. But this is not material, as the provision of section 1, article XIV., of the Amendments relied on in the second assignment of errors contains a prohibition on the power of the States in language almost identical with that of the 5th Amendment above referred to. That language is that "No State shall * * * deprive any person of life, liberty or property without due process of law."

The main argument of counsel for plaintiff in error, the only one to which we can listen, is that the proceeding in regard to the taxes assessed on plaintiff's land does deprive him of his property without due process of law.

[80] It is not asserted that in the methods by which the value of plaintiff's land is ascertained for the purpose of this taxation there is any departure from the usual modes of assessment. Nor that the manner of apportioning and collecting the tax is unusual or materially different from those in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law.

The tax in question was assessed and the proper officers were proceeding to collect it in this way.

The distinct ground on which this provision of the Constitution of the United States is invoked is, that the eighty acres of land of the defendant is and always has been used as farm land, for agricultural use only, and cannot for that reason be subjected to taxation for ordinary city purposes. That to do this is to deprive him of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of this land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct, in this court, the errors and mistakes of the state tribunals on that subject, that we can only refer to those decisions without a restatement of the argument. *State R. R. Tax Cases*, 92 U. S., 575 [XXIII., 663]; *Kennard* v. *Morgan*, 92 U. S., 481 [XXIII., 479]; *Bk.* v. *Kimball* [*ante*, 469]; *Davidson* v. *New Orleans* [*supra*]; *Kirtland* v. *Hotchkiss*, 100 U. S., 491 [XXV., 558]; *Missouri* v. *Lewis*, 101 U. S., 22 [XXV., 989].

But passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is that the law itself is in conflict with the Constitution in the matter already mentioned.

It is not denied that the Legislature could rightfully enlarge the boundary of the City of Pittsburgh so as to include the defendant's land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory must be settled so organized into a city, must be one of the matters within the discretion of the legislative body. Whether its territory shall be governed for local purposes by a county, city or township organization, is one of the most usual and ordinary subjects of state legislation. [81]

It is urged, however, with much force, that though land of this character, land which its owner has not laid off into town lots, but which he insists on using as agricultural land, through which no streets are run or used, cannot be, even by the Legislature, subjected to the taxes of a city, the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements and who use, or might use them if they choose, while the owner of this land reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa where this principle is asserted, and where those courts have held that farm lands in a city are not subject to the ordinary city taxes.

It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States.

We are also referred to the case of the *Loan Asso.* v. *Topeka*, 20 Wall., 662 [87 U. S., XXII., 461], and the assertion there of the doctrine, that taxation which is not for a public use, is an un-

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authorized taking of private property though sanctioned by a state statute.

We are unable to see that the taxes levied on plaintiff's property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, for waterworks—these are the specific taxes found in the list complained of. We think it will not be denied by anyone that these are public purposes; purposes in which the whole community have an interest, for which by common consent property owners everywhere in this country are taxed.

There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government [82] of the City, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against plaintiff is pointed out as intended for any other than a public use.

It may be true that plaintiff does not receive the same amount of benefit from some of these taxes, or from any of them, as do citizens living in the heart of the City. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can undertake to adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain the organization? or to insure in this respect absolute equality of burden, and fairness in its distribution among those who must bear it?

We cannot say judicially that Mr. Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the City who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, a State, is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.

The police government, the officers whose duty it is to punish and prevent crime, are paid out of the taxes. Has he no interest in their protection, because he lives further from the courthouse and police station than some others?

Clearly, however, these are matters of detail within the legislative discretion and, therefore, of power in the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for [83] such purposes is taking the property of the taxpayer without due process of law.

These views have heretofore been announced by this court in the cases of *Kennard* v. *Morgan* [*supra*]; *State R. R. Tax Cases* [*supra*]; *Kirtland* v. *Hotchkiss* [*supra*]; *McMillan* v. *Anderson*, 95 U. S., 37 [XXIV., 335].

In the case of *Davidson* v. *New Orleans* [*supra*], the whole of this subject was very fully considered, and we think it is decisive of the one before us.

The decree of the Supreme Court of Pennsylvania is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES T. DAVIS, *Appt.*, [83]

v.

EDGAR SPEIDEN.

(See S. C., 14 Otto, 83-87.)

Bill of review—necessary averments.

1. A special license of the court for filing a bill of review is not necessary as to a bill which relates to errors on the face of the decree alone.

2. It is not necessary in a bill of review to aver a performance of the decree in case of "poverty, want of assets, or other inability to do it."

[No. 46.]

Argued Oct. 19, 20, 1881. Decided Nov. 7, 1881.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. James S. Edwards and **Job Barnard**, for appellant.

Mr. **W. F. Mattingly**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a bill of review for error apparent on the face of the record, and we think with the court below, that on the merits it presents a case for reversal, because the averments in the original bill were not sufficiently precise and definite to warrant a decree such as was rendered, without proof. The only question, therefore, is, whether [84] the court was right in dismissing the bill because the decree had not been performed.

One of Lord Bacon's ordinances "for the better and more regular administration of justice in chancery, to be daily observed, saving the prerogative of the court," was that "No bill of review shall be admitted, or other new bill to change matter decreed, except that the decree be first obeyed and performed," save only where the Act decreed to be done would extinguish a party's right at common law. Bacon's L. Tracts, 280. This ordinance is the foundation of the practice not to entertain bills of review until the decree to be reviewed has been performed, or its performance excused; the object being, as was said by *Chancellor* Kent, in *Wiser* v. *Blachly*, 2 Johns. Ch., 488, "To prevent abuse in the administration of justice, by the filing of bills of review for delay and vexation, or otherwise protracting the litigation to the discouragement and distress of the adverse party." That this ordinance was intended for the regulation of procedure rather than to limit the jurisdiction of the court, seems to us apparent, because not only on its face the "prerogative of the court is saved," but as early as 1632, in *Cock* v. *Hobb*, 5 Russ., 235 *N.*, a bill of review having been filed without performance of the decree, the cause was permitted to proceed on giving security for

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NOTE.—*Bill of review; nature of; when may be brought; who may maintain; time within which; what it should contain.* See, *note* to Bk. of U. S. v. Ritchie, 38 U. S. (8 Pet.), 128.

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the debt which was decreed to be paid. Afterwards, in 1674, in *Savill* v. *Darrey*, 1 Cas. in Ch., 42, where to a bill for the review of a decree for a large sum of money, the rule was pleaded "that the defendant ought first to pay the money before the bill should be brought into court," the Lord Chancellor said: "Let him give good security for the money, and we will dispense with the rule." Again, in 1682, in *Williams* v. *Mellish*, 1 Vern., 117, where a motion was made that proceedings on a decree be stayed until a bill of review could be heard, it was ordered that the decree should be performed before any bill of review would be allowed, "Unless the plaintiff * * * will swear himself not able to perform the decree, and will surrender himself to the Fleet, to lie in prison until the matter be determined on the bill of review." Afterwards, during the year 1684, in *Fitton* v. *Macclesfield*, 1 Vern., 264, on a motion that a bill of [85] review might be admitted without the payment of costs in a former suit, amounting to £150, the plaintiff having made oath that he was not worth £40 besides the matter in dispute, leave was granted him to bring in the bill without the payment, and although, when the bill of review came on for hearing, it was insisted that the order dispensing with the payment of the costs ought to have been set forth in the bill, and it had not been done, the court passed by the objection without notice, and dismissed the case on its merits. So in 1685, in *Palmes* v. *Danby*, 5 Russ., 237 *N.*, Danby, the defendant to a bill for the review of a decree for the payment of money, put in a plea and demurrer, and among other causes of demurrer assigned that "The decree had not been performed by the complainants in review, as ought to have been done by the rules and practice of this honorable court before they can be permitted to bring a bill of review," but, notwithstanding this, the court finally heard the cause and made a decree on the whole matter. These cases clearly show that from the beginning the ordinance was treated as a rule of practice, and questions touching obedience to its requirements were not considered as matters of strict right, but as governed by a sound discretion. *Taylor* v. *Person*, 2 Hawks (N. C.), 298.

Another of the ordinances of *Lord* Bacon, promulgated at the same time, provided "That no bill of review shall be put in, except the party that prefers it enters into a recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him." Bacon's Tracts, *supra*. This is of the same general character with the other. That provides that a bill of review shall not be *admitted*, that is to say, received, until the decree has been performed, and this that such a bill shall not be *put in* until the prescribed security is given. Both are administrative rather than jurisdictional. The order for security was as imperative as that for performance, but we think it [86] would not be seriously claimed that a bill, which could be filed as a matter of right, was, while that rule was in force, subject to demurrer if it failed to set forth that a recognizance had been entered into. Undoubtedly, a court would strike a bill from the files if it got there, without a performance of the decree, or the security required, unless good cause was shown why it had not been done. That would be a far different thing from dismissing a bill on demurrer for like cause.

We are aware that under another ordinance of Lord Bacon in respect to bills of review for newly discovered matter, and which provides that such a bill "May be grounded by special license of the court and not otherwise," Bacon's Tracts, supra, it was held by the Master of the Rolls, in *Bainbrigge* v. *Baddeley*, 9 Beav., 538, that a demurrer must be allowed unless such special license is averred, and that this case was followed hesitatingly by the Vice-Chancellor in *Henderson* v. *Cook*, 4 Drew., 306, because *Lord* Redesdale had said, Mit. Pl., by Jer., 89, it *seemed* necessary to state in the bill the leave obtained to file it. Whatever may be said in such cases, which are really only bills in the nature of bills of review, and which can *only* be filed on special license, we think it clear that as to bills which relate to errors on the face of the decree alone, and which may be filed without leave, no such rule prevails. The filing without performance is in the nature of privilege, not jurisdiction. The courts of some of the States have so treated it, *Forman* v. *Stickney*, 77 Ill., 577, and we are clearly of the opinion that such is the better practice and fully recognized by all the early English cases. Performance does not establish the error, but only makes it the duty of the courts, when called on in a proper way, to inquire as to any errors that may have been committed. Whether the courts will enter on such an inquiry without performance, depends upon the exercise of a sound judicial discretion applied to the facts of the particular case.

This brings us to the facts as presented by this record. The bill of review does not aver a performance of the decree or give any excuse for non-performance. It was demurred to, among other things, on this ground. The court below, at special term, notwithstanding the demurrer, reversed and vacated the decree in the original cause, and gave the complainant in the bill of review leave to answer *instanter*, and for that purpose to withdraw the answer filed as an exhibit to the present bill, leaving a copy with the papers. Speiden was also enjoined from prosecuting his suit at law until the final hearing of the original cause. On appeal to the [87] General Term it was ordered that Davis be permitted, by a day named, to pay into court the amount due on the decree against him, and if he did, that the decree of the Special Term be affirmed; but if he did not, that such decree be reversed and the bill of review dismissed. At the appointed time Davis appeared and by affidavit showed to the court that he was utterly unable to comply with the decree at General Term; that he had no means and no possible way by or from which he could raise the money to bring into court, and this because of the great financial embarrassment under which he was then laboring. He, consequently, asked that the order as entered be modified so as to allow him to amend his bill, or, if that could not be done, that his bill be dismissed without prejudice. This was refused and, consequently, the decree of the Special Term was reversed and the bill of review dismissed. In this we think there was error. The injustice of the decree as it stood was manifest on the face of the record, and the showing by the affidavit, which was un-

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contradicted, clearly brought the complainant in review within the operation of the exception to the rule dispensing with performance in case of "Poverty, want of assets, or other inability to do it." *Wiser* v. *Blachly*, *supra*.

The decree of the Supreme Court of the district in general term is reversed and the cause remanded, with instructions to affirm the decree at special term and proceed accordingly.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CAROLINE KLEIN, *Appt.*
v.
NEW YORK LIFE INSURANCE COMPANY.

[88]

(See S. C., 14 Otto, 88-92.)

Premiums on insurance—default in payment of—excuse for non-payment.

1. The provision for the release of an insurance company from liability on a failure of the insured to pay the premiums when due, is of the very essence and substance of the contract of life insurance.
2. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do.
3. That a wife was not informed of an insurance on her husband's life in her favor, is no excuse for her not paying the premiums.

[No. 57.]

Argued Oct. 26, 1881. Decided Nov. 7, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. **Hiram Barber, Jr.**, and *W. C. Goudy*, for appellant:

I. From time immemorial it has been the practice of courts of equity to grant relief against forfeitures.

1 Story, Eq. Jur., sec. 89.

In short, the general principle now adopted is, that whenever a penalty is insisted upon, merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory and, therefore, as intended only to secure the due performance thereof, or the damage really incurred by the non-performance.

2 Eq. Jur., secs. 1314, 1315.

Under this doctrine, courts of equity have granted relief from forfeitures in a great variety of cases. It is submitted that this doctrine applies with full force to the case at bar, for the following reasons:

1. Frederick W. Klein, Mar. 1, 1871, at the time the semi-annual premium became payable, was sick unto death. He was incapable of attention to business, and had been in that condition for some weeks previous, and continued in that condition until his death, Mar. 18, 1871.

2. The appellant was, in fact, ignorant of the existence of the policy of insurance prior to and at the time of the death of her husband.

3. The failure to make the payment Mar. 1, 1871, was not due to any financial inability. Every aspect of the case precludes the idea of unwillingness or indifference.

II. It will be said that Klein was guilty of negligence in not giving his wife timely notice of the existence of the policy, and that this is a bar to equitable relief. This would be equivalent to the denial of relief, in all cases where by any possible degree of human foresight, the forfeiture might have been avoided. This, however, is not the doctrine of the courts of equity. The extreme of human vigilance is not the inflexible condition of relief.

Mr. **Francis H. Kales**, for appellee:

Where a policy of life insurance, as in this case, contains a clause or forfeiture in case of non-payment of the premium when due, the sickness or mental disability, partial or total, of a party, will not operate as a waiver of the forfeiture.

Wheeler v. *Ins. Co.*, 82 N. Y., 543; *Phœnix Co.* v. *Sheridan*, 8 H. L. Cas., 745; *Robert* v. *Ins. Co.*, 1 Disn., 355; *S. C.*, 2 Disn., 106; *Simpson* v. *Ins. Co.*, 2 C. B. (N. S.), 257; *Gamble* v. *Assurance Co.*, 4 Irish (Law), 204; *Ins. Co.* v. *Statham*, 93 U. S., 24 (XXIII., 789); Fry, Specific Performance, 2d Am. ed., 415, and *notes*; Bliss, Life Ins., 273, 274.

Mr. Justice **Woods** delivered the opinion of the court:

On September 1, 1866, a policy of insurance was issued by the New York Life Insurance Company, the appellee, upon the life of Frederick W. Klein, in the sum of $5,000, payable to the appellant, Caroline Klein, wife of the said Frederick W., within sixty days after his death and due notice and proof thereof.

The policy was in the usual form. The consideration for its issue was the payment to the Insurance Company by Caroline Klein of an annual premium of $173, in semi-annual installments of $86.50 each, on the first day of September and the first day of March of every year during the life of Frederick W. Klein.

The policy contained the following provision: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that * * * * in case the said Caroline Klein shall not pay the said premiums on or before the several days herein mentioned for the payment thereof with any interest that may be due thereon, then and in every such case the said Company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine." [89]

The premiums were punctually paid until March, 1871, when default was made in the payment of the semi-annual installment which matured on the first day of that month, and it remained unpaid until the death of Frederick W. Klein, which occurred March 18, 1871.

The agent of the Insurance Company, after proof of the death of Klein, offered to pay Caroline Klein the surrender value of the policy. She declined to accept this or any sum less than the amount of the insurance. The Company then insisted upon the absolute forfeiture of the policy, according to its terms.

Thereupon the appellant filed the bill in this case.

It alleged as the ground of relief that the policy was taken out by Frederick W. Klein with-

NOTE.—*Stated sum in contract, whether penalty or liquidated damages.* See, *note* to Tayloe v. Sandiford, 20 U. S. (7 Wheat.), 13.

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out the knowledge of his wife, and that she had received no information of its terms or conditions until after the death of her husband; that he was taken down by the illness of which he died about February 1; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever; and for that reason and that alone failed to pay the premium when it was due; and that the appellant failed to pay it because she was ignorant of the existence of the policy and of its terms.

The prayer of the bill was as follows: "That the said New York Life Insurance Company may be prevented from insisting upon and taking advantage of the alleged forfeiture of said policy of insurance, and that your oratrix may be relieved from said alleged default upon her part, and the accidental default of the said Fredrick W. Klein in the non-payment of said semi-annual premium maturing March 1, 1871, and that the said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of five thousand dollars," etc.

The answer of the Company denied its liability upon the policy of insurance, and insisted that the contract of insurance had ceased and determined by reason of the non-payment of the premium due March 1,1871, and denied the equity of the bill.

Upon final hearing in the circuit court the bill was dismissed, and the cause has been brought to this court for review, by the appeal of the complainant.

Conceding, for the sake of argument, that the case made by the bill is sustained by the [90] evidence, the question is presented, whether upon the facts the appellant was entitled to the relief prayed for.

In the case of *Ins. Co.* v. *Statham*, 98 U. S., 24 [XXIII., 789], it was held by this court, *Mr. Justice* Bradley delivering its opinion, that a life insurance policy "Is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract for assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

But in the same case, the court further said: "In policies of life insurance time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

While conceding this to be the rule which would apply if an action at law were brought upon the policy, the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case.

We cannot accede to the view of the appellant. Where a penalty or forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessary. *Sloman* v. *Walter*, 1 Bro. Ch., 419; *Sanders* v. *Pope*, 12 Ves., 282; *Davis* v. *West*, 12 Ves., 475; *Skinner* v. *Dayton*, 2 Johns. Ch., 535.

But in every such case the test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made.

In *Rose* v. *Rose*, Amb., 332, *Lord* Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever, against non-payment of money at a day certain, against forfeitures of copyholds, but they are all cases where the court can do it with safety to the other party, for if the court cannot put him in as good condition as if the agreement had been performed, the court will not relieve."

A life insurance policy usually stipulates: first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punct- [91] ual payment. Such are the provisions of the policy which is the basis of this suit.

Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality among its patrons.

It was said in *Ins. Co.* v. *Statham*, *supra*, that "Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company."

If the insured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due, is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the insured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. *Wheeler* v. *Ins. Co.*, 82 N. Y., 543; see, also the opinion of *Judge* Gholson in *Robert* v. *Ins. Co.*, 1 Disney, 355.

It might as well undertake to release the insured from the payment of premiums altogether, as to relieve him from forfeiture of his poli- [92] cy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

In a contract of life insurance the insurer and insured both take risks. The insurance company is bound to pay the entire insurance money

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even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium.

The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. The assured also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due.

The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it, as the insured has from loss consequent on the risks assumed by him.

Neither has any such right.

The bill is, therefore, based on a misconception of the powers of a court of equity in such cases.

There is another answer to the case made by the bill. The engagement of the Insurance Company was with Caroline Klein, and not with Frederick W. Klein. It entered into no contract with the latter. It agreed to pay Caroline Klein the insurance, provided she paid with punctuality the premiums. She was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance upon his life and the terms of the policy. The bill is, therefore, an effort by the appellant to obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent.

We are of opinion that the decree of the Circuit Court is right and should be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 258.

142] HENRY T. FORT, *Appt.*,
v.
GEORGE ROUSH ET AL.

(See S. C., 14 Otto, 142-145.)

Mortgage, when not satisfied by a sale—rents and profits.

1. The satisfaction of a mortgage debt, brought about by the sale of the lands mortgaged by virtue of the mortgage, is vacated when the sale is set aside.
2. Where the mortgagee had become the purchaser of the property on such sale, and is sought to be charged for the use and rents of the property while in his possession under such purchase, and for damages for waste, after the sale is set aside, the amount found due from him for such use, rents and damages, should be first applied to the satisfaction of his decree of foreclosure, and personal judgment should be rendered against him only for the balance of such amount after such application.

[No. 49.]

Submitted Oct. 20, 1881. Decided Nov. 7, 1881.

APPEAL from the Supreme Court of the Territory of Montana.

The case is stated by the court.

Messrs. **John F. Phillips** and **Bartley & Southard,** for appellant.

Messrs. **W. F. Sanders** and **Chanison & Chadwick,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This record shows that, in 1871, Fort, the appellant, sued the appellees in the District Court of Lewis and Clarke County, Montana, to foreclose a mortgage executed by them to him, and obtained a decree finding due on the mortgage debt $2,895, and ordering a sale of the property. Under this decree an order of sale was issued and the property sold, part to Isaac W. Stoner, part to Frederick Reece, and the remainder to Fort himself. After this sale the appellees filed the present bill in the same court to set aside the sales on account of alleged fraudulent conduct of Fort. Under this bill the sales to Stoner and Reece were, in all respects, confirmed, but that to Fort set aside. Roush and wife then filed an amended and supplemental bill, in which they sought to charge Fort with the value of the use and occupation of the property bought by him while he was in possession under his purchase, and with alleged damages for waste. In this bill the claim [143] is stated as follows:

"And the said plaintiffs say that, by reason of the premises, the said Fort is chargeable with the damage done to said premises, with the value of the foregoing use and occupation, and the amount of said rents and profits, and that the same should be set off against any balance that may be due upon the said decree."

Fort, in his answer, set forth the amount he claimed to be due on his decree after the amount paid by Stoner and Reece had been credited thereon, and asked that, as the sale to him had been set aside, he might have a revival of his decree for the balance that should be found his due. On motion of Roush and wife, this part of the answer was stricken out, and leave was refused Fort to make such amendments as seemed to be necessary to meet that part of his case. The case was then sent to a referee to ascertain and report the amount for which Fort was chargeable on account of his use and occupation, and for damages by waste while in possession. His request to have the referee directed to ascertain the amount due him on his decree, was refused. The referee reported, and exceptions were taken by Fort. These exceptions were in part sustained and in part overruled—the result being a personal judgment against Fort and in favor of the appellees for $1,836.31, with interest from June 30, 1877. The case was then taken to the Supreme Court of the Territory on appeal, where the judgment of the district court was modified by striking therefrom the sum of $618.51, but in all other respects affirmed. From this action of the Supreme Court the present appeal has been taken.

The amount with which Fort was charged by the Supreme Court, was exclusively for the value of the use and occupation of the property purchased by him while he was in possession under the sale, and a small amount for damages done to the freehold. While the amount charged seems to us to be somewhat large, we have on the whole concluded not to disturb the judgment on that account. Another reference might reduce the amount somewhat, but the error in that particular is not so manifest as to make it proper for us to interfere with what has been done by two courts below.

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The refusal of the court, however, to apply [144] the amount found due towards the satisfaction of the mortgage debt, we think, was erroneous. The very object of the bill of Roush and wife, as amended, was to have that done. If we understand correctly the position of the court below upon this part of the case, it is that, as Fort had not proceeded under section 286 of the Codified Statutes of Montana, and caused his decree to be revived after the sale to him had been set aside, the satisfaction growing out of the sale still remained in force, and there was no outstanding mortgage debt on which the application could be made. This we do not think is the law. The statute referred to is as follows:

"Section 286. If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid; and any other or after-acquired property, rents, issues or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt; *Provided*, That no property of such debtor sold *bona fide* before the filing of such petition shall be subject to lien of said judgment; *And provided further*, That notice of the filing of such petition shall be made by filing a notice thereof in the recorder's office of the county where such property may be situated, and that said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest."

The question here is, not whether Fort shall have execution of his decree by a resale of the [145] property bought by him, but whether the mortgage debt, as a debt, still remains satisfied by reason of the former sale. When the sale was set aside and Roush and wife got back their land, the satisfaction of the debt caused by the sale was vacated. Fort received no money on account of his purchase. He simply took the land as and for money. So long as he kept the land the satisfaction was effectual, but when the sale was set aside and he was compelled to give back the land, the case stood, in respect to the satisfaction of the debt, precisely as it would if Roush had demanded back money he had once handed Fort to be applied on the debt, and Fort had acceded to his request. We do not decide whether, if Fort asks execution of his decree for any balance that may remain his due, he may not be compelled to proceed under the statute, and get his decree revived, but we are clearly of the opinion that, for all the purposes of this suit, the satisfaction of the mortgage debt, brought about by the sale to Fort, was vacated when the sale was set aside, and that Roush and wife cannot in this suit have a personal judgment against Fort, except for any balance that may be found due them for rents, etc., after the mortgage debt has been satisfied.

We are unable to determine from this record what amount is actually due on the original decree. *The personal judgment against Fort is, therefore, set aside and reversed and the cause remanded*, with instructions to take an account of the amount due Fort on his original decree, and apply the amount which has been ascertained to be due from him for rents, profits and damages towards the satisfaction thereof, rendering a personal judgment against him only for any balance of the ascertained rents that may remain after the mortgage debt and costs in the original suit for foreclosure have been actually satisfied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FERDINAND METCALF ET AL., *Appts.*, [93]
v.
WILLIAM G. WILLIAMS.

(See S. C., 14 Otto, 93-99.)

Non-joinder of parties—setting aside judgments in equity—agent, when personally bound—when not.

1. Non-joinder of a defendant in an action *ex contractu*, can be taken advantage of only by a plea in abatement. Courts of equity may set aside judgments obtained by fraud, accident or mistake, where there is no remedy at law.

2. If a person merely adds to the signature of his name, the word "agent," "trustee," "treasurer," etc., without disclosing his principal, he is personally bound. The appendix is regarded as a *descriptio personæ*; it does not, of itself, make third persons chargeable with notice of any representative relation of the signer.

3. But if he be, in fact, a mere agent, trustee or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, the documents thus made and used will not be construed as his personal obligations, contrary to the intent of the parties.

[No. 68.]

Argued Nov. 1, 2, 1881. Decided Nov. 14, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The case is stated by the court.

Messrs. **W. Willoughby** and **C. S. Bundy**, for appellants.

Mr. **James G. Field**, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This was a bill in equity filed for setting aside a judgment at law, the rendering and entry of which, as alleged, were a surprise upon the complainant, who was misled by certain proceedings which took place in the court. The complainant was sued personally upon a check drawn by him, as he contends, officially, as the Vice President of the Montpelier Female Humane Association of Orange County, Virginia, an incorporated association of that State, having its office in the City of Alexandria. The check was in these words, to wit:

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"No]. ALEXANDRIA, VA., *Oct. 2nd*, 1875.
The First National Bank of Alexandria, Va., pay to the order of A. E. & C. E. Tilton seven thousand $\frac{x}{100}$ dollars.
E. P. AISTROP, *Sec'y*.
W. G. WILLIAMS, *V. Pres't.*"

The action was brought in the Circuit Court of the United States in the name of Charles E. Tilton, as surviving partner of himself and Alfred E. Tilton (the payees of the check), for the use and benefit of Ferdinand Metcalf. The writ was returnable on the first Monday of July, 1877, declaration filed at that time, and judgment ordered unless defendant should appear and plead to issue at the next rules, namely: first Monday of August, 1877. At the latter [94] day the rule was confirmed, and on the 17th of October, 1877, during the sitting of the court at Richmond, final judgment was moved and entered. The circumstances on which the bill relies for setting aside this judgment are, that the complainant does not owe the money, and made arrangement to have the claim properly litigated; that in September, 1877, he employed counsel to appear and plead to the action; that the said counsel, appearing at the clerk's office, was informed by the clerk that it was usual to file the pleas in open court; that when the court came on in October, and before the judgment was entered, the said counsel called the attention of the Judge to the case, and stated that he desired to have entered the plea of *nil debet*, and to call the attention of the court to some preliminary questions which would have to be settled before a trial could be had on the merits; that the Judge informed him that he had ordered all cases against persons living in the congressional district in which defendant resided to be tried in Alexandria; and that the counsel for plaintiffs were residents of Alexandria and were not then in court, and probably kept away from the knowledge of the fact that this suit under the rule would be tried there; that thereupon the counsel said he would not press the matter further, but would wait until the court commenced its Term in Alexandria to have said preliminary questions disposed of; that he supposed that the formal plea of *nil debet* had been noted by the clerk, it not being usual in the state courts to write out the plea of the general issue, but simply for the clerk to note it on the record. The judgment was afterwards entered without the knowledge of complainant or his counsel. When the court came on at Alexandria, in January following, the complainant's counsel attended for the purpose of trying the cause, and was informed that no plea had been entered on the record at Richmond, and the case was not on the docket for trial. Being taken by surprise, he moved the court to re-instate the cause upon the docket; but the judge, doubting his authority to do this, refused the motion. By an amendment to the bill, the complainant states that the check sued on was not his check, but the check of the Montpelier Female Humane Association, the corporation before referred to, of which Metcalf, for whose use the action was brought, was general agent in the City of New York, and of which the complainant was vice- [95] president, and E. P. Aistrop was secretary; which association was doing business as a public corporation, and all persons dealing with it dealt with it as such; that the check was signed by complainant and by Aistrop, in their official characters, of which Metcalf was fully cognizant, and knew that the check was not the individual paper of complainant. Letters of Metcalf, dated in December, 1875, are annexed to the bill showing that he recognized and treated the check as the check of the association. Tilton, the nominal plaintiff in the action at law, and Metcalf, for whose use it was prosecuted, were made defendants to the bill, and filed a demurrer thereto. Upon the argument, the demurrer was overruled and, thereupon, it was agreed by the counsel of both parties that the court should finally dispose of the case upon the merits; and a decree was rendered for the complainant on two grounds: first, that he was not personally bound by the check; in other words, that it was not his check, but the check of the corporation; and, secondly, that Aistrop was not joined in the action. The latter ground is untenable, because non-joinder of a defendant in an action *ex contractu* can be taken advantage of only by a plea in abatement. But, upon the other ground, we think that the decree was correct.

First, however, it is proper to inquire whether sufficient cause was shown in the bill for setting aside the judgment. It is manifest that the judgment was a surprise upon complainant. After what passed in the court at Richmond, his counsel had a right to suppose that the cause would be tried in the ensuing Term at Alexandria. The practice in Virginia as to entering pleas of general issue on the record, sufficiently accounts for the omission to file a formal plea. Had not the term passed by, the District Judge would, undoubtedly, have set aside the judgment, and re-instated the cause on the docket for trial. If, as he supposed, the passage of the Term deprived him of power to do this, it became a proper case for equitable interference by bill. When a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief. Perhaps, in view of the equitable control over their own judgments [96] which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and the fact that the court declined to exercise the power upon motion, rendered the resort to a bill necessary and proper. Formerly, bills in equity were constantly filed to obtain new trials in actions at law, a practice which still obtains in Kentucky and, perhaps, in some other jurisdictions; but the firmly settled practice by which courts of law entertain motions for new trial, and the dislike of one court unnecessarily to interfere with proceedings in another, has caused an almost total disuse of that jurisdiction. Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident or mistake.

As to the merits of the case, we agree with the court below in holding that, according to the showing of the bill and as between the parties, the check sued on was the check of the Montpelier Female Humane Association and not the individual check of the defendant. There is nothing on its face to preclude this construction. The bank was requested by two persons, who sign themselves as officers, one as

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vice-president and the other as secretary, to pay a certain sum. Whether they made this request as officers or as individuals, is ambiguous, to say the least. It is evident that an inquiry into the circumstances of the case might render it certain which was intended; as, if the bank had an account with a corporation of which these persons were the officers designated; if they had been in the habit of checking on that account in that form, with the knowledge and consent of the corporation; and the bank had been in the habit of answering such checks accordingly; and if all this were known to the party taking the checks; it would be a construction contrary to truth to hold them to be personal checks of the individuals, and not the checks of the corporation. The bill states, as facts, that the check in question was the check of the association; that the defendant and Aistrop acted as officers only in drawing the check, and that Metcalf, for whose use the suit was brought, was the general agent of the association, and knew and understood the facts and treated the checks as the checks of the association. Under [97] these circumstances, it would be unjust, as between these common agents of the same corporation, to hold the complainant and Aistrop personally responsible on the check. Where a person acts merely as agent of another, and signs papers in that capacity, that is, signs them as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name on the face of the papers, or in the signature, is not essential to protect the agent from personal responsibility.

It is unnecessary to determine whether the form of the document in this case was sufficient to charge innocent holders of the check with notice of its character. The fact that it bore two official signatures, that of the complainant as vice-president and of Aistrop as secretary, is so unusual on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character. But, in the present case, the party claiming to have the beneficial interest in the check was a fellow-agent of the company on whose account it was drawn, actually knew its origin, and cannot pretend that he took it for anything else than a check of the corporation. The plea that the name of the principal was not disclosed on the face of the paper, cannot be made by him, for he knew all about it.

The remarks of *Mr. Justice* Johnson in delivering the opinion of this court in the case of *Mech. Bk.* v. *Bk. of Columbia*, 5 Wheat., 326, are apposite to this case. There the cashier of the bank drew a check and signed it with his individual name without any official designation; but the name of the bank was printed as part of the date. The Justice said: "The question is, whether a certain act, done by the cashier of a bank, was done in his official or individual capacity. Had the draft, signed by Paton, borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face, but predominate, the case is really a familiar one. Evidence to fix its true character becomes indispensable." Again; in reference to the ambiguity raised on the face of the check as to whether it was personal or official, the Justice said: "It [98] is enough for the purposes of the defendant to establish that there existed, on the face of the paper, circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz.: that this was the appropriate form of an official check; that it was, in fact, cut out of the official check book of the bank, and noted on the margin; that the money was drawn in behalf of and applied to the use of the Mechanics' Bank; and by all the banks and all the officers of the banks through which it passed, recognized as an official transaction."

In *Brockway* v. *Allen*, 17 Wend., 40, where the makers of a note appended to their signatures the words "Trustees of the Baptist Society;" the Supreme Court of New York held that they were entitled to show by proof that there was a corporation called The Trustees of the First Baptist Society of the Village of Brockport, that they were its trustees and that the note was given by them in their official capacity, and that the plaintiff, the payee, knew this fact.

In *Kean* v. *Davis*, 1 Zab. [21 N. J. L.], 688, the bill was signed "John Kean, President Elizabeth and Somerville R. R. Co." The Court of Errors and Appeals of New Jersey in an elaborate opinion by *Chief Justice* Green, decided that parol proof was admissible to show that the bill was the bill of the company and not of the defendant individually; and held that, although where a written instrument is not ambiguous or uncertain on its face, parol proof cannot be resorted to, to show what was the real intention of the parties; yet that in cases of ambiguity, on the face of the instrument, as in that case, it might be introduced to explain which of two doubtful constructions was the intent of the parties.

The ordinary rule undoubtedly is, that if a person merely adds to the signature of his name the word agent, trustee, treasurer, etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representa- [99] tive relation of the signer. But if he be, in fact, a mere agent, trustee or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties.

It is hardly necessary to review the long *catena* of decisions on this subject. They are very numerous, and somewhat conflicting, but we do not think that there is any preponderating authority which prevents us from giving to the instrument in question that construction and effect which was given to it by the parties themselves.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 192

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[99] WILLIAM DUDLEY, Assignee in Bankruptcy of WILLIAM P. BUSH, *Appt.*,

v.

JANE C. EASTON, Admrx. of JOSEPH G. EASTON, Deceased, ET AL.

(See S. C., 14 Otto, 99-105.)

Assignee in bankruptcy—duties of—dower and homestead rights—extent of title.

1. An assignee in bankruptcy represents the general or unsecured creditors, and his duties, relate chiefly to their interests. He is in no respect the agent or representative of secured creditors who do not prove their claims.
2. He has nothing to do with the disputes of secured creditors among themselves, and cannot enforce contracts between creditors, except so far as they may directly or indirectly affect the fund he is to get into his hands for distribution under the law.
3. Neither is it any part of his duty to protect the dower rights of the wife of the bankrupt against the consequences of her own acts before the bankruptcy, nor to protect the bankrupt or his wife in homestead rights as against incumbrancers whose title is superior to his own.
4. As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law, he takes by his assignment as a purchaser from the bankrupt, with notice of all outstanding rights and equities.

[No. 5.]

Submitted Oct. 11, 1881. Decided Nov. 14, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Messrs. **Dryden** *& Dryden, Nathaniel Myers* and *Wm. R. Walker*, for appellant.

Messrs. **J. M. & C. H. Krum**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from a decree dismissing a bill in equity on demurrer. The suit was brought by Dudley, as assignee in bankruptcy of William P. Bush, and the case stated in the [100] last amended bill was substantially as follows:

On the 10th of October, 1873, the defendants, Easton and Stillwell, sued Bush in the Circuit Court of Monroe County, Missouri—Easton to recover a judgment on a note which he held for $3,000, and Stillwell another judgment on a note which he held for $5,000. In due course of proceeding, judgments by default could be taken in each of the suits on the 30th of October. Bush was at the time laboring under great financial embarrassment, although as he thought, actually possessed of lands and other property greatly in excess of his debts. On the 24th of October, after service of process upon him in the suits, he met a portion of his creditors, including Easton and Stillwell, and made known to them his embarrassed condition, and the pendency of the suits. He also stated that, if Easton and Stillwell got their judgments, it would give them an advantage over his other creditors, and he was desirous of having all share equally in his property. He thereupon proposed that all the creditors present, including Easton and Stillwell, should accept, in satisfaction of their respective debts, his notes, payable in equal installments in one, two, three and four years from date, with interest at the rate of ten per cent, secured by a mortgage executed by himself and wife, to a trustee to be selected by the parties, on all his real estate, and that Easton and Stillwell should dismiss their suits and not take judgment against him. It is then averred that all the creditors present, including Easton and Stillwell, agreed with each other and with Bush to accept the notes and security as proposed and extend the time, and that Bush agreed to give the notes and make the mortgage. As part of the agreement thus entered into, Easton and Stillwell were to dismiss their suits.

Relying on this agreement, Bush set about the preparation of his notes and mortgage, and paid no attention to the suits. He did not appear in court, or make any defense, as he otherwise would have done, by setting up the agreement for an extension. Consequently, at the proper time, October 30th, judgments were taken against him by default, of which it is averred he had no actual notice until November 3, after the Term of the court had closed.

Without any unnecessary delay, Bush executed his notes and a mortgage to the defendant Logan as trustee, in accordance with the agreement which had been made. The notes were all dated October 29, but the mortgage did [101] not take effect until after the judgments were rendered. For this reason, the lien of the judgments was prior to that of the mortgage. All the creditors represented at the meeting, except Easton and Stillwell, have accepted the notes and now retain them. They are not parties to this suit, unless they are represented by the assignee. Easton and Stillwell refused to carry out their agreement, and rely on their judgments and the priority of lien they have thus acquired.

On the 28th of February, 1874, proceedings in bankruptcy were begun against Bush by some of his creditors, which resulted in an adjudication of bankruptcy and the appointment of Dudley as assignee, to whom the general assignment was made under the law on the 24th of March. After the assignment, this bill was filed against Easton and Stillwell, Logan, the trustee under the mortgage, and Bush and his wife. The foregoing facts were set forth in detail, and then followed this averment.

"And your orator further says: that at the time of the making of said agreement of extension and of said deed of trust, said Bush had a large amount of property, not included or intended to be included in said deed, sufficient in value to satisfy all the debts owing by said Bush to his other creditors, who were not parties to said agreement; that said deed was not made nor was said agreement entered into by said Bush with any intent to give a preference thereby to the parties to said agreement or any of them over his other creditors, or with the intent thereby to convey his said property or any of it in fraud of the provisions of said Act of Congress or the Acts amendatory thereof, but solely under the belief on the part of said Bush that by obtaining such extension of time of payment as aforesaid he would be enabled to pay all his creditors their debts in full, together with interest at the rate of ten *per centum* per annum; that the entire indebtedness secured by said deed of trust, including that to said Stillwell and Easton, amounted to $40,394.70; and that all the lands mentioned in said deed were then thought to be worth and in fact were worth the sum of $50,000;

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especially if a reasonable time could be obtained to negotiate a sale of the same; that among the property described in said deed of trust was that occupied by said Bush and his family as a homestead, out of which he was entitled to have set apart to him as exempt from levy and sale under execution, a homestead of the value of $1,500 under the laws of this State; that because of the release of the dower interest of the defendant, Emma C. Bush, wife of said bankrupt, in all of his lands described in said deed, and the waiver and conveyance of all his right to exemption of a homestead given and made by said deed, and for other good and sufficient reasons, it is to the interest of all of the creditors of said bankrupt's estate, save only said Easton and Stillwell, that the said deed of trust should be recognized, confirmed and enforced by your orator as assignee as aforesaid; and, in fact, this bill is filed by your orator at the request and by the direction and on the behalf of all the creditors of said Bush whether secured or unsecured, excepting only said Easton and Stillwell."

[102]

The prayer of the bill is as follows:

"Wherefore your orator prays that a decree may be made by your honorable court requiring the said defendants, Easton and Stillwell, on their part respectively, to execute and perform said agreement, to accept said notes and the benefit of said trust mortgage respectively, in satisfaction of the demands which they respectively had against said William P. Bush on the 29th day of October, 1873, and then sued for in the said Monroe Circuit Court, and severally to execute to your orator a release of all lien and claim upon any real estate which was of said Bush at the time of the commencement of said proceedings in bankruptcy against said Bush, which they respectively may have under or by virtue of said several judgments of said Monroe Circuit Court, or under or by virtue of the levy of any execution issued thereon, and that said judgments as to said Bush may be set aside and for naught held and esteemed respectively; and that the said defendants Easton and Stillwell may by said decree be forever enjoined and restrained from enforcing said judgments respectively, or from claiming any benefit or lien thereof as against any property which belonged to said Bush at the time of the rendition thereof; and that he may have all such other and further relief as to equity belongs and the circumstances of his case may require."

The first question to be settled is, whether an assignee in bankruptcy can sue for the relief which is asked. The inquiry is, not whether the creditors who accepted the notes and mortgage can compel Easton and Stillwell to give up their judgment liens and come in equally with them under the mortgage, nor whether the bankrupt or his wife can be relieved against their mortgage of their homestead or dower rights; but whether the assignee in bankruptcy stands in such a relation to the alleged agreement and the parties that he can require the agreement to be carried into effect, if called upon for that purpose by all the creditors.

[103]

An assignee in bankruptcy represents the general or unsecured creditors, and his duties relate chiefly to their interests. He is in no respect the agent or representative of secured creditors, who do not prove their claims. He need not take measures for the sale of incumbered property, unless the value of the property is greater than the incumbrance. He has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security. *McHenry* v. *La Société Française*, 95 U.S., 58 [XXIV., 370]. He cannot enforce contracts between creditors, except so far as they may directly or indirectly affect the fund he is to get into his hands for distribution under the law. Neither is it any part of his duty to protect the dower rights of the wife of the bankrupt, against the consequences of her own acts before the bankruptcy, or to inquire whether the bankrupt or his wife can claim homestead rights against incumbrancers whose title is superior to his own. As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law, he takes by his assignment as a purchaser from the bankrupt with notice of all outstanding rights and equities. Whatever the bankrupt could do to make the assigned property available for the general creditors he may do, but nothing more, except that he may sue for and recover that which has been conveyed away in fraud of the rights of creditors, and set aside all fraudulent preferences. As to fraudulent conveyances and fraudulent preferences he has all the rights of a judgment creditor as well as the powers specifically conferred by the bankrupt law.

It may be for the interest of the creditors who carried out the agreement now under consideration for an extension of time and received notes under the mortgage, that Easton and Stillwell should vacate their judgment liens and forego the preference they have thereby acquired, but we are unable to discover, from anything stated in the bill, how the interests which the assignee represents would be specially benefited by making Easton and Stillwell share equally with the other creditors rather than maintain their preference. The object of the bill is, not to set aside any fraudulent preference which has been obtained over the general creditors of the estate, but to settle the rights of secured creditors as between themselves. In no event is the property to be relieved from any part of the present incumbrance. The only question is, how, as between the several incumbrancers, it shall be appropriated. From anything which appears in the bill, we cannot say that the overplus of the property, after the debts are paid, will be more, whether the distribution is made in one way or the other. If there should be a deficiency, and some part of the secured debt be proved up against the general estate, it is not material to the general creditors whether the unpaid part of the debt belongs to all the secured creditors, including Easton and Stillwell, equally, or to the others alone. In either event the amount chargeable on the general fund will be the same.

[104]

We have not overlooked the fact, that in the bill it is averred that when the mortgage was made the lands included were thought to be worth and, in fact, were worth the sum of $50,000, especially if a reasonable time could be obtained to negotiate a sale, and also that "It is to the interest of all the creditors of said bank-

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rupt's estate, save only Easton and Stillwell, that the said deed of trust (mortgage) should be recognized, confirmed and enforced by your orator as aforesaid;" but this, in our opinion, is not enough. The way in which the interests of the general creditors would be injuriously affected by enforcing the judgment liens rather than the mortgage, should have been stated, so that the court can see whether it is sufficient to entitle the assignee to the relief he asks. The request of all the creditors, that the assignee institute and carry on the suit, amounts to nothing, unless the interests which he, in law, represents are such as to make it his duty to do what is wanted.

[105] It may, perhaps, be fairly inferred from what is stated in the bill, that the bankruptcy of Bush was brought about by the failure of Easton and Stillwell to carry out their agreement. Because he could not get the time he wanted, he subjected himself to the proceedings which were instituted against him, but that furnishes no ground for the relief which is now asked. If Easton and Stillwell are compelled to give up their judgment liens and take under the mortgage, neither the adjudication in bankruptcy nor the assignment under it will be vacated. The assignee will be compelled to go on with the administration of his trust, whether he succeeds in this suit or not, and he has not shown to us, in any precise or definite way, that the relief he asks will change in any material respects the result which will otherwise flow from the conversion of the assets as they now stand into money for the purpose of distribution under the law. So far as we can discover, the only object of the assignee is to compel Easton and Stillwell to share equally with the other secured creditors in the proceeds of the mortgaged property, instead of retaining their present preference, and this, too, without showing that the fund he is to gather in for distribution will be in any manner affected thereby. Clearly, he has no interest in saving the dower rights of Mrs. Bush, or in protecting the homestead of the family from sale under the mortgage which has been executed. A fraud may have been perpetrated on the bankrupt and his wife, but it is not one which the assignee has any official interest in redressing.

As what we have said is decisive of the case, without considering any of the other questions discussed in the briefs, *we affirm the decree below.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 86.

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[106] HENRY H. KOON ET AL., *Plffs. in Err.*,

v.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

(See S. C., 14 Otto, 106, 107.)

Stipulation, construction of—jury—form of verdict.

1. A stipulation, "That the jury may, when they have agreed on their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," is equivalent to an agreement that the court may, when the sealed verdict is handed in by the officer, open it in the absence of the jury, and reduce it to proper form.

2. The stipulation is also a waiver of the right to poll the jury if they should not be in court.

3. The court may enter the verdict in such form as to give legal effect to what the jury unmistakably find, under section 954 of the Revised Statutes and the Practice Act of Illinois.

[No. 77.]

Argued Nov. 4, 1881. Decided Nov. 14, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of debt on a bond, brought in the court below, by the defendant in error against plaintiffs in error. The penal sum of the bond was $10,000, and it was given to secure the faithful performance by Henry H. Koon, of his duties as agent of the Insurance Company. The breaches alleged were the failure of said Koon to account for moneys of the Insurance Company received by him, to an amount exceeding the penal sum of said bond. The plaintiffs in error filed pleas of *nil debet.*

On the retirement of the jury to consider their verdict, it was agreed by the parties that the jury might, when they had agreed upon their verdict, if the court should not then be in session, sign and seal up the same and deliver it to the officer in charge, and disperse.

On the opening of the court on the morning of Dec. 28, of said Term, the jury having in the meantime, when the court was not in session, agreed upon their verdict and dispersed; and their verdict, properly sealed, having been duly returned into court by the officer in charge of said jury, the court ordered said verdict to be opened and read, to which order the defendants objected, because of the absence of the jury, which objection was overruled by the court, and the defendants duly excepted thereto. And the said verdict being read, was found to be in the following words and figures, to wit:

"We, the jury, find for the plaintiffs, and fix the sum due on the bond at $7,500, and damages at one cent." It was signed by all the jurors. The envelope in which the verdict was inclosed also contained another paper; on which was the following writing: "The undersigned jury signed the inclosed verdict as a compromise, being the largest amount we can get."

Signed by five of the jurors.

And thereupon the court directed the clerk to put the verdict in the following form: "We, the jury, find the issue for the plaintiff, and find the debt $10,000, and assess the damages at $7,500, the said debt to be discharged on payment of said damages."

To which action of the court, in changing the form of said verdict in manner aforesaid, the said defendants then and there excepted; where- [107]
upon said defendants moved the court to correct the said record entry, so as to make the same conform to the verdict of the jury in form as the same was returned; which motion was overruled by the court, and judgment rendered on the verdict in the form put by the order of

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NOTE.—*Sealed verdicts.*

The court may, especially where the parties tacitly or expressly consent, authorize a jury in a civil case to seal their verdict and separate, if they agree during adjournment; and return the verdict so sealed upon the coming in of court. Douglass v. Tousey, 2 Wend., 352; S. C., 20 Am. Dec., 616; Bunn v. Hoyt, 3 Johns., 255; Crocker v. Hoffman, 48 Ind., 207; Boe

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the court, to which defendants duly excepted.

Messrs. **R. G. Ingersoll** and *W. C. Goudy*, for plaintiffs in error.

Mr. **Lewis H. Boutell**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The stipulation "That the jury might, when they had agreed on their verdict, if the court should not be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," was equivalent to an agreement by both parties, on the retirement of the jury, that the court might, when the sealed verdict was handed in by the officer, open it in the absence of the jury and reduce it to proper form, if necessary. The stipulation was, also, a waiver of the right to poll the jury if they should not be in court.

The issue to be tried was on a plea of *nil debet*. This admitted the execution of the bond, and required the jury only to find the amount due. If anything was found to be due, the law fixed the form of the verdict and judgment. The jury found there was $7,500 due on the debt and one cent damages for the detention. That finding, reduced to proper form, was in favor of the plaintiff for the penalty of the bond, to be discharged on payment of $7,500. All the court did was to enter the verdict in that form. In doing so, it only gave legal effect to what the jury unmistakably found. This was allowable, both under section 954 of the Revised Statutes and the Practice Act of Illinois.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[108] RICHARD JONES ET AL., Tenants of ALLISON NAILOR, *Plffs. in Err.*,

v.

BEVERLEY RANDOLPH ET AL.

(See S. C., 14 Otto, 108-110.)

Misleading charge to jury.

A charge was misleading, which assumed that the jury might find that full payment of a debt had been made, when there was no evidence whatever to support such a verdict; and the judgment will be reversed for that reason.

[No. 37.]

Argued Oct. 17, 1881. Decided Nov. 14, 1881.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. **Walter D. Davidge** and *R. B. Washington*, for plaintiffs in error.

Mr. **John Selden**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was an action of ejectment, and the defendants below, plaintiffs in error here, set up title under a deed of trust made by William O'Neale, November 12, 1820, to William A. Bradley, cashier of the Bank of Washington, to secure a debt to that bank. On the 31st of December, 1839, one Evans, as guardian of Margaret R. Timberlake, a minor child, at the request of the father of his ward, paid the bank the amount of its claim, using therefor the moneys he had in hand as guardian. The note which evidenced the debt was assigned to him in proper form, and from that time he was allowed to collect the rents of the property covered by the trust-deed. The amount he paid was $1,072.41, which, it is conceded, was the actual sum then due the bank. His guardianship terminated in July, 1843. He then settled his accounts with the proper court and filed in court the note he had got from the bank. After that, in 1845, proceedings were instituted under the trust-deed to sell the property to pay the balance due on the debt. At the sale the plaintiffs in error claim to have become purchasers and to have acquired title under which they took the possession they now hold.

On the trial it became a material question whether the debt secured by the trust-deed had been paid before the attempted sale. The evidence was that the guardian, between the time he got the note and the time he went out of office, had collected only about $600 of rents. These were credited by him in his accounts with his ward, but there was nowhere in the testimony anything tending to show that any [109] other person, representing the owners of the debt, ever had the possession of the property or had ever actually collected any more of the rents. The rights of the parties at the trial in reference to this part of the case, so far as the record shows, were predicated upon the actual collection of rents, and not upon the value of the use and occupation of the property, while the creditor assumed the right to collect the rents as they accrued and appropriate them to the discharge of the debt.

Such being the condition of the evidence on this branch of the case, all of which was embodied in the bill of exceptions, the court charged the jury as follows:

"If the jury find from the evidence, that William O'Neale died on October 24th, 1837, having, by his last will and testament and the

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ley v. Farquar, 2 Blackf., 61; Harter v. Seaman, 3 Blackf., 27; McIntosh v. Smith, 2 La. Ann., 756; Welch v. Welch, 9 Rich. (L.), 133; Miller v. Mabon, 6 Iowa, 456; High v. Johnson, 28 Wis., 72; Evans v. Foss, 49 N. H., 497.

Consent of parties is presumed, where the party does not object, when the order is made. Douglass v. Tousey, 2 Wend., 352; S. C., 20 Am. Dec., 616.

In most cases in New York, the direction to bring in a sealed verdict is given by consent of parties. Green v. Bliss, 12 How. Pr., 431.

Court is not authorized, by consent of parties to sealed verdict, to receive an unsigned sealed verdict in the absence of the jury. Sage v. Brown, 34 Ind., 464.

The direction for sealed verdict does not dispense with attendance of the jury, nor can a sealed verdict be recorded if, on opening it, any of the jury dissent. Martin v. Morelock, 32 Ill., 485; Root v. Sherwood, 6 Johns., 68; Rigg v. Cook, 4 Gilm., 336.

Where a judge, upon consent of parties, after adjournment, orders that the jury who have agreed, seal their verdict and separate, this alone is no ground for a new trial. Parmlee v. Sloan, 37 Ind., 469; Lucas v. Marine, 40 Ind., 289.

The jury may retire and perfect the form of sealed verdict. McIntosh v. Smith, 2 La. Ann. 756; High v. Johnson, 28 Wis., 72.

Where a jury have sealed their verdict and separated, without authority of court, it has been sustained, if there was no cause to suspect any tampering with or misconduct of the jury. Evans v. Foss, 49 N. H., 490; Cook v. Walters, 4 Iowa, 72; Sutliff v. Gilbert, 8 Ohio, 405; Heiser v. Van Dyke, 27 Iowa, 359.

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codicil thereto, disposed of his estate as set out in the paper hereunto annexed and marked A, and that after his death, and down to December 31, 1839, the said Rhoda O'Neale collected the rents and profits of the two brick houses mentioned in the said codicil and was in possession of the same under color of authority derived from the said last will and testament; that on the day and year last aforesaid the last renewal of the note mentioned in the deed of trust executed by the said William O'Neale was in part unpaid and outstanding in the hands of the Bank of Washington, mentioned in the said deed of trust; that on that date one French S. Evans, while guardian of one Miss Margaret R. Timberlake, then eleven years of age, and daughter, by a former husband, of the said Mrs. Margaret L. Eaton, mentioned in the said last will and testament, from and with the means of his said ward paid unto the said bank the whole amount then due on the said note, and the same, with the security created by the said deed of trust, caused to be assigned to himself as such guardian; and if the jury further find that thereafter and between the said 31st day of December, 1839, and the 29th day of July, 1843, the said Evans, as guardian aforesaid, of the rents and profits of the estate so as aforesaid disposed of by the said last will and testament, and with the consent of the said Rhoda O'Neale, made collections from time to time, and applied them to the said note, until the same, both as [110] to principal and interest, was fully paid, and that on the said 29th day of July, 1843, the said Evans, in the orphans' court of this district, closed his account as such guardian, then the jury are instructed, as matter of law, that the said note, on or before the 29th day of July, 1843, became extinguished, and that no valid sale could be made of the property in question under the said deed of trust, in the year 1845.

If the jury find that the note in question was paid on or before July 29, 1843, or at any time prior to 1845, out of the proceeds or income of the estate of William O'Neale, deceased, under the direction or consent of his widow, the deed of trust became thereby extinguished."

Inasmuch as the evidence did not tend to show that more than about $600 had been actually collected from the rents by Evans or any other person for the account of the holder of the note, we cannot but think this charge was misleading. It assumed that the jury might find that full payment had been made in that way, when there was no evidence whatever to support such a verdict. It is possible that the guardian, or some other person who for the time being properly represented the ward, while permitted to collect the rents, ought to have collected more, and was on that account chargeable with more than he actually got, or that the debt had been otherwise paid, but that was not the question submitted to the jury. Under the instructions, the jury were to inquire only whether there had been a satisfaction of the debt through actual collection of rents.

As this leads to a reversal of the judgment, we deem it unnecessary to consider any of the other errors assigned, and especially whether the instruction requested by the defendants was properly modified. The same questions may not arise on a second trial.

The judgment is reversed and the cause remanded, with directions to grant a new trial and proceed accordingly.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FRANCIS H. BARTON, *Plff in Err.*, [126]
v.
JOHN S. BARBOUR, Receiver of WASHINGTON CITY, VIRGINIA MIDLAND AND GREAT SOUTHERN RAILROAD COMPANY.

(See S. C., 14 Otto, 126-141.)

Suit against receiver—liability for negligence—direction of court—trial by jury—receiver's authority to repair—suit in another State.

*1. The general rule, that a receiver cannot be sued without leave of the court by which he was appointed, applies to suits brought against him to recover a money demand or damages, as well as to those, the object of which is to take from his possession property which he is holding by order of the court.

2. The fact that a receiver is in possession of a railroad, and is, by the order of court, engaged in the business of a common carrier thereon, does not take his case out of the rule that he is only answerable to the court by which he was appointed, and cannot be sued without its leave.

3. No suit can be maintained against the receiver of a railroad who is, by order of court, conducting the business of a common carrier thereon, for injury to persons or property caused by his negligence or that of his servants without leave of the court by which he was appointed.

4. The trial, by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury.

5. If the adjustment of a demand against the receiver involves any dispute in regard to the facts on which his liability depends, or in regard to the amount of the damages sustained, a court of equity in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law or direct the trial of a feigned issue to settle the contested facts.

6. A court of equity may, in its discretion, in view both of the public and private interests involved, authorise its receiver of the road and other property of a railroad company to keep the same in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested therein.

7. When the court of one State has a railroad or other property in its possession for administration, as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein; a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed, and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property.

[No. 56.]
Argued Oct. 25, 26, 1881. Decided Nov. 14, 1881.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. **S. S. Henkle**, for plaintiff in error:

The sole question in the case is, whether, without leave of the court appointing him, first

*Head notes by *Mr. Justice* WOODS.

NOTE.—*Powers and duties of receivers.* See, *note to* Davis v. Gray, 83 U. S., XXI., 447.

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had, the defendant might be sued in this district for an injury to another occasioned by his own negligence while operating the road.

It is broadly laid down by High, on Receivers, section 254, that it is in all cases necessary that a person desiring to bring suit against a receiver, should first obtain leave of the court appointing him. Numerous authorities, English and American, are cited, but they are all cases in which either application for leave to sue is made, or applications for injunction to restrain such suits commenced without leave.

Sometimes the leave to sue has been granted and sometimes withheld; and in most of the cases where application was made to restrain suits commenced without leave, the injunction has been allowed. They are, I believe, all cases affecting the property in the possession of the receiver.

As in, *Tink* v. *Rundle*, 10 Beav., 318; *In the Matter of Prerease*, 8 Irish (Eq.); *Parr* v. *Bell*, 9 Irish (Eq.), 55.

In the same section, 254, of High, it is said that when an action is instituted against a receiver without leave, the plaintiff is in contempt, and will be punished.

De Groot v. *Jay*, 30 Barb., 488; *S.C.*, 9 Abb. Pr., 364; *Taylor* v. *Baldwin*, 14 Abb. Pr., 166.

It is not, in either of these cases, intimated that the want of leave goes to the jurisdiction of the court in which the suit is brought.

The case of *Angel* v. *Smith*, 9 Ves., 335, decided by *Lord* Eldon, is the English case most frequently cited.

The Chancellor does not intimate, nor had it occurred to the counsel for the receiver, that the want of antecedent leave from the Chancellor might be pleaded to the jurisdiction of the law court.

The English cases all hold, that where the possession of the receiver is sought to be disturbed, application ought to be made to the Chancellor for leave to bring the suit or make the levy or distress, or to ask permission to come in and be examined *pro interesse suo*; and if such a suit be brought, or other attempt be made to interfere with the possession of the receiver, the offending party may have his action or other proceeding restrained, and he is liable to be punished for contempt by the Chancellor.

Bryan v. *Cormick*, 1 Cox (Ch.), 422; *Anon.*, 6 Ves., 287; *Angel* v. *Smith*, 9 Ves., 335; *Brooks* v. *Greathead*, 1 Jac. & W., 176; *Aston* v. *Heron*, 2 Myl. & K., 390.

In all the English cases in which it was necessary to obtain the leave of the Chancellor, the direct object of the action in the other proceeding was to devest the receiver of his possession of the property, and I think I may safely say that no English case can be found, where it was held that the failure to obtain leave of the Chancellor to bring a suit in a law court against a receiver, might be pleaded to the jurisdiction of the latter court.

It seems to me quite apparent that the granting or withholding of permission by the Chancellor, could in nowise affect the jurisdiction of the law court.

Receivers are under the protection of the court appointing them; but this protection is only granted or refused on their own application by the court appointing them, in its discretion, depending upon the circumstances of each case,

Camp v. *Barney*, 4 Hun, 373; *Blumenthal* v. *Brainerd*, 38 Vt., 402; *Paige* v. *Smith*, 99 Mass., 395; *Allen* v. *R. R. Co.*, 42 Ia., 683.

It cannot be possible that the jurisdiction of one court depends upon the exercise of the discretion of another distinct and independent court in granting or withholding leave to the plaintiff to bring the suit, or where he has brought it without leave, in granting or withholding leave to prosecute it to judgment.

I now invite the attention of the court to the late decisions in the state courts, touching the question of jurisdiction:

Camp v. *Barney*, 4 Hun, 373, was an action at law against the Receiver of the Buffalo, Corning & Pittsburgh R. R. Co., appointed by the United States District Court in a proceeding in bankruptcy. The action was to recover damages for a personal injury to a passenger upon said road while it was being operated by the defendant. The reasoning of the court is, that a receiver may apply to the court which appointed him for protection against the action, but if he does not, he will be presumed to have waived it, and the action may proceed against him at law.

See, *Sprague* v. *Smith*, 29 Vt., 421; *Blumenthal* v. *Brainerd*, 38 Vt., 402; *Paige* v. *Smith*, 99 Mass., 395; *Kinney* v. *Crocker*, 18 Wis., 80; *Allen* v. *R. R. Co.*, 42 Ia., 683; *Meara* v. *Holbrook* 20 Ohio St., 137; *Potter* v. *Bunnell*, 20 Ohio St., 150.

The authorities show that the bringing of an action at law against a receiver without the leave of the court appointing him, in another and independent court, has never either in the English or the American state courts, been held to be pleadable to the jurisdiction of the law court. But by the uniform usage and practice of those courts, the receiver has been under the protection of the court whose officer he is, to be invoked only on his own application: that in England no receiver ever set up such a defense in a law court; and never in an American state court has such a defense been sustained; and in most of the cases the direct object of the action was to dispossess the receiver.

Mr. **Linden Kent**, for defendant in error:

Every suit against a receiver as such, is a proceeding set on foot to reach the assets or properties in his hands, and hence in the hands or possession of the court, for the judgment will be entered against him, payable out of the corporate funds in his hands.

Commonwealth v. *Runk*, 26 Pa., 235; *Thompson* v. *Scott*, 4 Dill., 508.

A judgment against a receiver as such, must be satisfied out of the property of the company in his hands as such. *Camp* v. *Barney*, 4 Hun, 373.

This identical question is decided by this court in the case of *Peale* v. *Phipps*, 14 How., 268; *Wiswall* v. *Sampson*, 14 How., 65.

The only case cited on the other side directly in point is *Kinney* v. *Crocker*, 18 Wis., 80, which in terms, overrules both *Wiswall* v. *Sampson* and *Freeman* v. *Howe*, 24 How., 450 (65 U.S., XVI., 749).

The first branch of the second proposition, namely: that a receiver in the possession of and operating a railroad is not exempt from the ordinary common law liabilities of common carriers, is true. The question at issue is, as to the forum in which he is amenable.

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It is argued that because he is a common carrier, not only is the manner in which his liabilities are to be determined involved, but unlike all other receivers, in his case, the doctrine that they are amenable only to the court by which they are appointed is inapplicable; and this doctrine is evolved out of some supposed demand or necessity of public policy.

If, as is said in the brief of plaintiff's counsel, he contracts with hundreds if not thousands of people daily, and is answerable to other courts in actions upon these contracts, which are without limit, how is it possible that the receiver or the property of the corporation can be protected and preserved by the equity court appointing the receiver?

The cases cited by the plaintiff's counsel in support of his theory can be distinguished and reconciled in this view. In these cases it was not a question of forum; it was a question involving the liabilities of receivers.

Can the question be considered as one of jurisdiction in the Supreme Court of the District of Columbia?

The number of cases cited in the brief of counsel for plaintiff, in support of the doctrine maintained by him, that the question cannot be considered as one of jurisdiction, are none of them cases deciding that it is not, but they are all of them cases in which the circumstances prohibit the point being raised as such.

Mr. Justice **Woods** delivered the opinion of the court:

This was a suit brought by Frances H. Barton, the plaintiff in error, against John S. Barbour, the defendant in error, as Receiver of the Washington City, Virginia Midland and Great Southern Railroad Company.

The declaration was as follows: "The plaintiff, Francis H. Barton, sues the defendant, John S. Barbour, as Receiver of the Washington City, Virginia Midland and Great Southern Railroad Company, a corporation organized under a law of the State of Virginia, and doing business and having an office in the District of Columbia, for that the defendant, on the 11th [127] day of January, 1877, was running and operating a railroad through the State of Virginia, and upon said railroad the defendant was a common carrier of freight and passengers for hire. That on the day and year aforesaid, the plaintiff was a passenger in a sleeping car upon said railroad and, by reason of a defective and insufficient rail upon the track of said railroad, the car in which the plaintiff was a passenger was thrown from the track and turned over down an embankment, and she was greatly hurt and injured, and her bodily health permanently injured; that the defendant did not use due care in relation to said defective rail, and the injury to the plaintiff was occasioned by the negligence and carelessness of the defendant, but the plaintiff used due care. The plaintiff claims $5,000 damages."

To this declaration the defendant below filed a plea to the jurisdiction, in which he alleged that at the time of service of process on him he was the Receiver of all the property, rights and franchises of said railroad company, by virtue of a decree made by the Circuit Court for the City of Alexandria, in the State of Virginia, on July 13, 1876, in a cause depending on the equity side of said court, wherein John C. Graham, who sued for himself and others, was complainant, and said railroad company and others were defendants; that said decree authorized him to defend all actions brought against him as such Receiver by the leave of said court, and declared that he should not in any case incur any personal or individual liability in conducting the business of said railroad, by reason of any act done by him or his servants, he acting in good faith and in the exercise of his best discretion; but that the property in his hands as such Receiver should, nevertheless, be chargeable with any claim which might be established in any action brought against him as such Receiver under leave of the court first had and obtained.

The plea then averred that the plaintiff had not obtained leave of said court to bring and maintain said suit. Wherefore the defendant prayed judgment whether the court could or would take further cognizance of said action.

The plaintiff filed the general demurrer to the plea.

The court below gave judgment overruling the demurrer, and against the plaintiff for costs. [128] This writ of error is prosecuted to reverse that judgment.

The question presented by the record is the sufficiency of the plea to the jurisdiction of the court.

The defendant in error insists that the Supreme Court of the District of Columbia had no jurisdiction to entertain the suit without leave of the court by which he was appointed Receiver.

The plaintiff in error concedes it to be a general rule that, before suit is brought against a receiver, leave should be obtained from the court by which he was appointed, and contends that the only consequences resulting from the prosecution of such a suit without leave, is that the plaintiff may be restrained by injunction or attached as for a contempt.

He insists, however, *first*, that the general rule requiring leave applies only to cases where the purpose of the suit is to take from the receiver property which is actually in his possession, placed there by order of the court. We conceive that the rule is not so limited.

The evident purpose of a suitor who brings his action against a receiver without leave, is to obtain some advantage over the other claimants, upon the assets in the receiver's hands. His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. *Hall* v. *Smith*, 2 Bing., 156; *Camp* v. *Barney*, 4 Hun, 373; *Com.* v. *Runk*, 26 Pa., 235; *Thompson* v. *Scott*, 4 Dill., 508.

If he has the right, in a distinct suit, to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it without leave. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property

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of the trust, or any attempt to enforce satisfaction of his judgment, would be precisely the same as if his suit had been brought for the purpose of taking property from the possession [129] of the receiver. A suit, therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit, the purpose of which is and effect of which may be, to take the property of the trust from the receiver's hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against the receiver to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.

And it has been so held in effect by this court. In the case of *Wiswall* v. *Sampson*, 14 How., 52, this court said: "It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court; and the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the result of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

So, in *Ames* v. *Birkenhead Docks Trustees*, 20 Beav., 332, *Lord* Romily, Master of the Rolls, said that it is an idle distinction that the rule forbidding any interference with property in the course of administration in the court of chancery, only applies to property actually in the hands of the receiver, and declared that it applied to debts, rents and tolls, which the receiver was appointed to receive.

It is next asserted by plaintiff in error that the fact that the Receiver in this case is in possession of and is conducting the business of a railroad as a common carrier, takes his case out of the rule [130] that he is only answerable to the court by which he is appointed, and cannot be sued without its leave. His contention is that parties who deal with such a receiver, either as freighters or passengers upon his railroad, may, for any injury suffered, either in person or property, sue the receiver without leave of the court by which he was appointed.

We do not perceive how the fact that the Receiver, under the orders of the court, is doing the business usually done by a common carrier, makes his case any exception to the rule under consideration. It was said by this court in *Cowdrey* v. *R. R. Co.*, 93 U. S., 352 [XXIII., 950], that "The allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid." This puts claims against the receiver, in his capacity as a common carrier, on the same footing precisely as the salaries of his subordinates, or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured in person or property by the negligence of the servants of the receiver can, without leave sue him to recover his damages, then every conductor, engineer, brakesman or track-hand can also sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property in the hands of a court of equity to be controlled by other courts at the instance of impatient suitors, without regard to the equities of other claimants, and to permit the trust property to be wasted in the costs of unnecessary litigation.

Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the [131] trial of a feigned issue to settle the contested facts.

The claim of the plaintiff in error, which is against the Receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way.

We, therefore, think that the demand of the plaintiff in error is not of such a nature that it may be prosecuted by suit without leave of the court.

The plaintiff in error, lastly, contends that want of leave to bring the suit does not take away the jurisdiction of the court in which it was brought to hear and determine it, but only subjects the plaintiff to liability to be attached for contempt, or to be enjoined from its further prosecution. In other words, he says that leave to prosecute the suit is not a jurisdictional fact, and that, therefore, the plea to the jurisdiction should not have been sustained.

Our decision upon this question will be limited to the facts of this case, which are, that the Receiver was appointed by a court of the State of Virginia, and the property in course of administration was in that State; the suit was brought in a court of the District of Columbia, a foreign jurisdiction, and the cause of action was an injury received by plaintiff in the State of Virginia, by reason of the negligence of the defendant while carrying on the business of a railroad, under the orders of the court by which he was appointed. No leave was obtained to bring the suit and it does not appear that any

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application was made, either to the Receiver or to the court by which he was appointed, to allow and pay the demand of the plaintiff in error.

Upon these facts we are of opinion that the Supreme Court of the District of Columbia had no jurisdiction to entertain a suit.

This point has been substantially settled by this court in the case of *Peale* v. *Phipps*, 14 How., 368.

In that case it appeared that, under a law of
132] the State of Mississippi, by the decree of the Circuit Court of Adams County in that State, the charter of the Agricultural Bank at Natchez was declared forfeited and the corporation dissolved, and Peale, the plaintiff in error, appointed trustee and assignee of its assets, and was the sole legal representative of the corporation; that he became legally liable to the creditors of the bank to the extent of the assets, and that he had assets in his possession sufficient to pay all the debts of the corporation. The defendants in error claimed that there was due them from the bank a large sum of money on account of *mesne* profits, etc., of certain real estate in Natchez, from which they had been unlawfully expelled by the bank, and the possession of which they had recovered from the bank in an action of ejectment. The defendants in error presented their claim to Peale, the receiver, for allowance as a valid claim against the bank, who refused to admit or allow it, or, any part of it.

Thereupon the defendant in error brought suit against Peale in the United States Circuit Court for the Eastern District of Louisiana, to recover said *mesne* profits, and effected service upon him in that district. Peale, among other defenses, filed an exception, in which he denied the jurisdiction of the court. This was overruled and judgment was rendered against him for $20,058, to be satisfied out of the assets of the bank in the hands of Peale as trustee. The case having been brought on error to this court, the judgment was reversed. The court, *Chief Justice* Taney delivering its opinion, said: "As we think this exception," the one just mentioned, "decisive against the jurisdiction of the Circuit Court of Louisiana, it is unnecessary to set out the other exceptions. We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams County and subject to its order and was not authorized to dispose of any assets or pay any debts due from the bank, except by order of the court. He had given bond for the performance of his duty and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an officer
133] and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it and wrest it from the hands of its agent and thereby put it out of his power to perform his duty." And the court declared that the facts stated in the petition showed "that the Circuit Court of Louisiana had no jurisdiction" of the case.

That case differs from the one now under consideration only in this: that it was a suit to recover a judgment against the trustee and receiver upon a demand due from the bank before his appointment, while the present case seeks to establish a demand against the Receiver for a claim which, according to the decision of this court, *Cowdrey* v. *R. R. Co.*, *supra*, forms a part of the charges and expenses of executing that trust. Such charges are specially subject to the control and allowance of the court which is administering the trust property.

We think, therefore, that the case just cited is decisive of this.

The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or against the receiver will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. To support this view the following cases are cited: *Palys* v. *Jewett*, New Jersey Court of Error and Appeals, [19] Am. L. Reg. (N. S.), Sep., 1880, 553; *Kinney* v. *Crocker*, 18 Wis., 74; *Allen* v. *R. R. Co.*, 42 Iowa, 683.

But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.

Thus, upon a bill filed for an injunction to restrain the infringement of letters patent, and for an account of profits for past infringement, it is now the constant practice of courts of equity to try without a jury issues of fact relat- [134]
ing to the title of the patentee, involving questions of the novelty, utility, prior public use, abandonment and assignment of the invention patented. The jurisdiction of a court of equity to try such issues according to its own course of practice is too well settled to be shaken. *Rubber Co.* v. *Goodyear*, 9 Wall., 788 [76 U. S., XIX., 566]; *Cawood Pat.*, 94 U. S., 695 [XXIV., 238]; *Marsh* v. *Seymour*, 97 U. S., 348 [XXIV., 963].

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury; but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods. The bankruptcy court may and, in cases peculiarly requiring such a course, will direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion. True, if one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrong-doer in an action at law for its recovery.

Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation. Claims against the company must be presented in due course, as the court having charge of the case may direct. But if the receiver by mistake or

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wrongfully takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for, in such case, the receiver would be acting *ultra vires*. *Parker* v. *Browning*, 8 Paige, 388; *Paige* v. *Smith*, 99 Mass., 395; *Hills* v. *Parker*, 111 Mass., 508. So far the case seems plain. But if claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labor performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress. The new and changed condition of things which is presented by the insolvency of such an institution as a [135] railroad company, has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets. Two very different courses of proceeding are presented for adoption. One is the old method, usually applied to banking, insurance and manufacturing corporations, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will fetch at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges and other property in repair, so as to save them from destruction and, as soon as the interest of all parties having any title to or claim upon the *corpus* of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim.

It is evident that the first method would often be highly injurious and would result in a total sacrifice of the property. Besides, the cessation of business for a day would be a public injury. A railroad is authorized to be constructed more for the public good to be subserved, than for private gain. As a highway for public transportation, it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, which neither the company nor any creditor or mortgagee can interfere with. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not receive detriment by the non-user of the franchises. And in most cases the creditors cannot complain, because their interest, as [136] well as those of the public, is promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for non-user.

As a choice, then, of least evil, if not of the most positive good (but generally of the latter also), it has come to be settled law that a court of equity may and in most cases ought to authorize its receiver of railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of the court to do this was expressly recognized in the case of *Wallace* v. *Loomis*, 97 U. S., 146 [XXIV., 895].

But here arises a dilemma. If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself whilst carrying on the business of the railroad was, it would become impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities. It has, therefore, been found necessary, and has become a common practice for a court of equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suit unless leave is first obtained of the court by which he was appointed.

If the court below had entertained jurisdiction of this suit, it would have been an attempt on its part to adjust charges and expenses incident to the administration by the court of another jurisdiction of trust property in its possession, and to enforce the payment of such charges and expenses out of the trust property without the leave of the court which was administering it, and without consideration of the rights and equities of other claimants to the fund. It would have been an usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distribute the trust assets to creditors equitably and according to their respective priorities.

We, therefore, declare it as our opinion that when the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold, with due regard to the rights of all persons interested therein, a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain [137] a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property.

It follows from these views that the judgment of the Supreme Court of the District of Columbia must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Miller**, dissenting:

The rapid absorption of the business of the country of every character by legally authorized corporations, while productive of much good to the public, is beginning also to develop many evils. Not the least of these evils arise from the failure of the corporations to pay their debts and perform the duties which by the terms of their organization they have assumed. One of the most efficient remedies for the failure to pay debts, when it arises from the inability of the corporation to do so, is to place the corporation in the hands of a receiver, that its affairs may be wound up, its debts paid and, if

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anything remains, it may be distributed among its stockholders. Of the beneficial operation of this mode of closing out an insolvent corporation there can be little doubt, and when this is done with dispatch, and the property of the concern is made to pay its debts and its dead body buried out of sight as soon as possible, no objection can be made to the procedure, and all good citizens and all the courts should contribute, as far as they may, to this desirable object.

In regard, however, to a certain class of corporations—a class whose operations are as important to the interests of the community as any other, and as intimately connected with their business and social habits—the creation of receiverships by courts of chancery, the powers conferred on the receivers, and the duration of their office, has made a progress which, since it is wholly the work of courts and not of Legislatures, may well suggest a pause for consideration. It will not be necessary to any observing mind to say that I allude to railroad corporations. Of the many thousand miles of railway in my judicial circuit, and of the fifty or more corporations who own or have owned them, I think I speak within limits in saying [138] that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the road, collect its means and pay its debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He, generally, takes the road and all its appurtenances out of the hands of the company which is its owner; operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debt of the corporation, but quite as often adds to the sum of these debts, and injures the prior creditors by creating a new and superior lien on the property pledged to them.

All this time the receiver, in the use of the company's road and rolling stock, is performing the functions of a common carrier of goods and passengers. He makes contracts and incurs obligations, many of which he fails to perform.

The decision which has just been announced declares that for these failures he cannot be sued in a court of law. That, by virtue of his receivership, he and all his acts and the business operations of the road which he runs are exempted from the operation of the common law, and that parties who deal with him do so on the implied understanding that they abandon the right to have their complaints tried by jury or by the ordinary courts of justice, and can only obtain such relief as may be had at the hands of a master in chancery of the court which appointed the receiver.

When a receiver is appointed to wind up a defunct corporation; when no power exists to make new contracts or enter upon the performance of new duties; when the sole duty of the receiver is to convert the property of the corporation into a fund for the payment of its debts, and for distribution among those who are entitled to it, a very strong reason exists why the court which appointed the receiver should alone control him in the performance of those duties, and in such cases the court of chancery has the undoubted right to protect its receiver by injunction against parties suing him in other courts, and by punishing such parties for contempt of the court.

And it is in recognition of this principle, and to this class, that the cases of *Wiswall* v. *Sampson*, 14 How., 52, and *Peale* v. *Phipps*, 14 How., 368, belong. In the former case the court decided that a sale of property under a judgment of one court, which was in the actual possession [139] of a receiver appointed by another court, did not confer a valid title as against the sale of the same property subsequently made under an order of the court whose receiver had held possession all the time. The court did not decide that the receiver could not have been sued at law for any tort committed by him as receiver.

The case of *Peale* v. *Phipps* [*supra*], carries the doctrine to an extent to which it had not been carried before, but it was based upon the proposition that Peale, as the trustee under the law of Mississippi, appointed by a court of that State to close out and distribute the assets of a broken bank, could not be made amenable as such trustee to the jurisdiction of a court of the State of Louisiana; the reason being that the fund, out of which alone the plaintiffs could be satisfied, was in the control of the court in Mississippi. The debt sued for in that case was one created by the bank before it was placed in the hands of the receiver. When the receiver was appointed the bank, in effect, ceased to exist, and no business could be done by it or debts contracted in its name. There remained solely the duty of realizing its assets and paying its debts.

In the case before us the Receiver is sued for his own tort in regard to a personal injury to plaintiff; for an act done by him or by his agents in the transaction of business as a common carrier, in which business he was largely and continuously engaged. Why should he not be sued like anyone else for such a cause, in any court of competent jurisdiction?

The reply is, because he is a Receiver of the road on which plaintiff was injured, and holds his appointment at the hands of a Virginia court of chancery. If this be a sufficient answer, then the railroad business of the entire country, amounting to many millions of dollars per annum, may be withdrawn from the jurisdiction of the ordinary courts which have cognizance of other matters of like character, and all the disputes arising out of these vast transactions must be tried alone in the court which appointed the receiver. Not only this, but the right of trial by jury, which has been regarded as secured to every man by the Constitutions of the States and of the United States, is denied to the person injured, and he is compelled, though his case be one with no element of equitable jurisdiction in it, to submit it to a court of chancery or to one of the masters of such a court.

In actions for personal injuries, which have always been considered as eminently fitted for [140] a jury, and especially in the assessment of damages, this constitutional right is denied because it is a Receiver of a railroad and not its owners who has done the injury.

Before I can give my assent to such a principle I must be well assured that the law as heretofore expounded demands it.

So far from entertaining such a conviction, I think the principles which govern the relations of the common law courts and courts of equity

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where, as in the courts of the United States, these jurisdictions have been kept separate, are opposed to such a doctrine.

In England, in the contests between these courts, it was never claimed that the court of chancery could act directly upon the court of law or that the latter was bound in any way to follow the decisions of the former. Nor could the Chancellor direct his writ to the common law court or its officers, but if it was determined to give any equitable relief in the matter pending before the law court, the injunction or other process of the chancery was directed to the suitor and upon him alone was the power of the court exercised. In the class of cases before us, if the court of chancery was of opinion that the plaintiff was improperly interfering with the functions of the receiver, it could restrain him by writ of injunction or punish him by attachment for contempt. If, however, plaintiff could not be reached by the chancery court, it is no more than the evil of many other cases where a defendant cannot be found when he is wanted in a court of justice.

But I know of no principle nor of any precedent whereby a court of law, having before it a plaintiff with a cause of action of which that court has jurisdiction, and a defendant charged in regard to his own act also within the jurisdiction, is bound or is even at liberty to deny the party his lawful right to a trial of his cause because the defendant is receiver of some other court, and to leave the suitor to that court for remedy, where it is known that some of the most important guaranties of the trial to which he is entitled, and which are appropriate to the nature of his case, will be denied him.

[141] Whatever courts of equity may have done to protect their receivers, and may do to protect the fund in their hands, it is no part of the duty of courts of law to deny to suitors properly before them the trial of their rights which justice requires and which the Constitution and the law guaranty.

These views are well sustained by the authorities collected in the brief of plaintiff's counsel, especially in *Angel* v. *Smith*, 9 Ves., 335; *Hills* v. *Parker*, 111 Mass., 508; *Bk.* v. *Risley*, 19 N. Y., 369; *Camp* v. *Barney*, 4 Hun, 373; *Sprague* v. *Smith*, 29 Vt., 421.

The doctrine is stated with admirable precision by the Supreme Court of Wisconsin in the case of *Kinney* v. *Crocker*, 18 Wis., 74, in the following language:

"But in all these cases *it is not a question* of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under such circumstances and itself dispose of the matter involved." "It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might, in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law and no defense to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages."

It is asserted by counsel, whose brief shows the extent of his research, that no case can be found where such a plea has been sustained in an English court. I regret to say that, in my opinion, the judgment just rendered here is without support in authority and unsound in principle.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 312; 110 U. S., 385; 112 U. S., 304; 46 N. J. L., 640.

ST. LOUIS INSURANCE COMPANY, *Plf. in Err.*, [146]

v.

ST. LOUIS, VANDALIA, TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

(See S. C., 14 Otto, 146-159.)

Liability of carrier—delivery by—carriers, when not partners.

1. The liability of a railroad company for the safe carriage of goods, after their delivery to the next succeeding carrier on the route, depends upon whether such company, in any form, assumed, or held itself out to the public as assuming, any such responsibility.

2. In the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, a carrier is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route.

3. An arrangement between a dispatch company of St. Louis, Mo., and sundry railroad companies whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, or at any special rates furnished by the railroad companies, did not involve joint liability upon the part of the railroad companies, or make them partners either *inter sese* or as to third persons.

[No. 47.]

Argued Oct. 20, 1881. Decided Nov. 14, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Mr. **John G. Chandler,** for plaintiff in error:

The Erie & Pacific Despatch was defendant's agent.

The Despatch was not owner, consignor or consignee of goods. It was not charged with freight by the railroads, but was paid a commission by them. It was not paid by the shippers or consignees, but by the carriers. It was not directed nor controlled in the performance of its duties by the shippers, but by the railroads. It had neither roads, cars nor actual custody of the goods. It was a mere soliciting agency of the railroads, by whose interposition at connecting points, like Indianapolis, Urbana and Jersey City, the transit could be hastened and the roads be enabled to hold out inducements to shippers, grounded on the promise of rapid transportation.

Bk. v. *Adams Exp. Co.*, 93 U. S., 174 (XXIII., 872); 2 Greenl. Ev., secs. 59, 60.

NOTE.—*Liability of common carrier for goods to be transported beyond the termination of its line.* See, *note* to C. R. R. Co. v. Mfg. Co., 83 U. S., XXI., 297.

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The contracts of shipment were through contracts, binding the defendant to carry the goods beyond its own line.

R. R. Co. v. *Pratt*, 22 Wall. 123 (89 U. S., XXII., 827); *Root* v. *R. R. Co.*, 45 N. Y., 524.

It will probably be conceded, that if several railroads connect with each other, and goods are delivered to the road at one end of the line, to be carried to the other end, and the road receives them and agrees for their carriage through at a fixed price, paid or to be paid, the road so receiving is liable for a loss occurring anywhere on the route. To this point authorities are superabundant:

Lock Co. v. *R. Co.*, 48 N. H., 339; *R. R. Co.* v. *Pratt* (*supra*); *Wheeler* v. *R. R. Co.*, 31 Cal., 46; *Weed* v. *R. R. Co.*, 19 Wend., 534; *Bk.* v. *Trans. Co.*, 23 Vt., 186; *Noyes* v. *R. R. Co.*, 27 Vt., 110; *Kyle* v. *R. R. Co.*, 10 Rich. (S. C.), 382; *Angle* v. *Miss. & M. R. R. Co.*, 9 Ia., 488; *Schroeder* v. *R. R. Co.*, 5 Duer, 61; *Hart* v. *R. R. Co.*, 8 N. Y., 37; *Perkins* v. *R. R. Co.*, 47 Me., 573; *Bostwick* v. *Champion*, 11 Wend., 571; *S. C.*, 18 Wend., 175; *McDonald* v. *R. R. Co.*, 34 N. Y., 501; *R. R. Co.* v. *Spratt*, 2 Duv., 4; *Barter* v. *Wheeler*, 49 N. H., 9; *Coates* v. *U. S. Exp. Co.*, 45 Mo., 238; *Fairchild* v. *Slocum*, 19 Wend., 329; *Root* v. *R. R. Co.*, 45 N. Y., 524; Redf. Railw., 2d ed., 288; 2 Redf. Ry. Cas., 280, 318; 2 Pars. Cont., 5th ed., 212-218.

On these facts, it is difficult to see how it can be denied that the contracts were through contracts. Indeed, the finding distinctly declares that they were such. The language used is, "These agreements were made in St. Louis, and were to the effect that the cotton was to be transported to Liverpool for a through rate, expressed in English money." The reference is not to the bills of lading, but to the original oral agreements. The bills of lading were not delivered until about ten days afterwards.

R. R. Co. v. *Pratt* (*supra*); *Root* v. *R. R. Co.*, (*supra*); *Sewing-Machine Co.* v. *R. R. Co.*, 70 Mo., 672; *Lock Co.* v. *R. R. Co.*, 48 N. H., 355; *Coates* v. *U. S. Exp. Co.*, 45 Mo., 238; *Wyman* v. *R. R. Co.*, 4 Mo. App., 35, 39.

It is immaterial whether the freight be prepaid to the first carrier, or paid to the last carrier on delivery of the goods.

R. R. Co. v. *Pratt* (*supra*); *Barter* v. *Wheeler*, 49 N. H., 9; 2 Redf. Ry. Cas., 319.

The contracts were oral and contained no limitations of the carrier's liability; and, conversely, the bills of lading were not the contracts between the parties.

No one can doubt that Mr. Meir might have refused to receive these bills of lading, because they did not express the bargains made. But it is argued that, by receiving them without dissent, he accepted the terms, although ignorant of them, and waived his rights already fixed by the oral contracts, and the acceptance by the carrier of his goods subject to all the responsibilities annexed by law to its calling.

One answer to this argument would seem sufficient; that is, that there was no consideration whatever for such waiver; and it was so ruled by the Supreme Court of Kansas in one case, where the shipper actually signed a release of certain liabilities after his cattle were in the cars.

R. R. Co. v. *Reynolds*, 17 Kan., 251.

But there are two well settled propositions of law which effectually dispose of this defense.

1. A carrier's common law liability can only be limited by express contract. There is no such thing as implied assent of the shipper where the duties of a common carrier are concerned.

Gaines v. *Trans. Co.*, 28 Ohio, 418; *R. R. Co.* v. *Mfg. Co.*, 16 Wall., 318 (83 U. S., XXI., 297); *Steam Nav. Co.* v. *Bk.*, 6 How., 344; *R. R. Co.* v. *Lockwood*, 17 Wall., 357 (84 U. S., XXI., 627).

To the effect that assent to the limitations of the carrier's liability must be clearly shown, see also,

Parker v. *S. E. R. R. Co.*, 25 W. Rep., 97; *Jones* v. *Voorhees*, 10 Ohio, 145; *Moses* v. *R. R. Co.*, 24 N. H., 71; *S. C.*, 32 N. H., 523; *Brown* v. *E. R. R. Co.*, 11 Cush., 97; *Buckland* v. *Adams Exp. Co.*, 97 Mass., 124; *Perry* v. *Thompson*, 98 Mass., 249; *Gaines* v. *Union Trans. Co.*, *supra*; *Kansas Pacif. R. R. Co.* v. *Reynolds*, 17 Kan., 251; *Southern Exp. Co.* v. *Moon*, 39 Miss., 822; *Adams Exp. Co.* v. *Haynes*, 42 Ills., 89; *Adams Exp. Co.* v. *Stettaners*, 61 Ills., 184; *R. R. Co.* v. *Frankenberg*, 54 Ills., 88; *Am. Exp. Co.* v. *Schier*, 55 Ills., 140, 150; *Levering* v. *Trans. Co.*, 42 Mo., 91.

If the shipper has parted with his goods on the oral contract, before the bill of lading containing other conditions is given him, he is not in a position to dissent from the terms of the bill of lading, and his assent thereto cannot be presumed.

Bostwick v. *R. R. Co.*, 45 N. Y., 712; *Corey* v. *R. R. Co.*, decided in April Term, 1871, not reported; *Gott* v. *Dinsmore*, 111 Mass., 45; *Lamb* v. *R. R. Co.*, 4 Daly, 483; *Long* v. *R. R. Co.*, 50 N. Y., 76; *Ins. Co.* v. *R. R. Co.*, 72 N. Y., 90; *Hill* v. *R. R. Co.*, 73 N. Y., 351; *Gaines* v. *Trans. Co.*, 28 Ohio St., 418.

That there should be an express assent to limitations of a carrier's liability, is decided in the following cases:

Adams Exp. Co. v. *Nock*, 2 Duv., 563; *Exp. Co.* v. *Moon*, 39 Miss., 832; *Levering* v. *Trans. Co.*, 42 Mo., 94; *Adams Exp. Co.* v. *Haynes*, 42 Ill., 93; *Adams Exp. Co.* v. *Stettaners*, 61 Ill., 186; *R. R. Co.* v. *Mfg. Co.*, 16 Wall., 329 (83 U. S., XXI., 302), and numerous other cases.

The Despatch having contracted as agent without disclosing its principal, the plaintiff has a right to resort to the principal.

Ford v. *Williams*, 21 How., 287 (62 U. S., XVI., 36); *Steam Nav. Co.* v. *Bk.*, 6 How., 381; *Ruiz* v. *Norton*, 4 Cal., 355; Story, Agency, 160 *a*.

Whether the bills of lading constituted the contracts between the parties or not, the defendant is liable because of the negligent and wrongful delay in the transportation.

The goods were in transit at the time of the loss.

Mr. **John G. Williams**, for defendant in error:

The bare statement of this case would seem to be a sufficient argument in support of the judgment below.

The special finding clearly shows:

1. That the Erie & Pacific Despatch was a common carrier.

Bk., etc., v. *Adams Exp. Co.*, 93 U. S., 174 (XXIII., 872); *Buckland* v. *Adams Exp. Co.*, 97 Mass., 124; *Sweet* v. *Barney*, 23 N. Y., 335; *Christenson* v. *Am. Exp. Co.*, 15 Minn., 270.

2. That Meir & Co. delivered their cotton to

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the Erie & Pacific Despatch, and not to the defendant.

3. That the agreement for the carriage of the cotton was between the Despatch and Meir & Co., and not between Meir & Co., and the four railroads named in the petition.

4. That this contract was for carriage to Liverpool from St. Louis, for a through rate expressed in English money.

5. That the Erie & Pacific Despatch employed defendant to haul the cotton from East St. Louis to Indianapolis, and there deliver it to the Pittsburgh, Cincinnati & St. Louis Railroad.

6. That the defendant carried the cotton safely to Indianapolis and there delivered it, under orders from the Erie & Pacific Despatch to the Pittsburgh, Cincinnati and St. Louis Railroad.

Under this state of the facts, the defendant is certainly not liable.

In bringing this action the plaintiff in error must claim through, and therefore adopt the contract between the Erie & Pacific Despatch and the defendant. *Steam Nav. Co.* v. *Bk.*, 6 How. U. S., 381; *Bk.* v. *Adams Exp. Co.*, *supra*.

Having fully complied with this contract, the defendant cannot be held liable for loss or damage occurring long after such compliance.

In the absence of an agreement, express or implied, the carrier is only liable to the extent of his own route, and for safe storage and delivery to the next carrier.

R. R. Co. v. *Mfg. Co.*, 16 Wall., 318 (83 U.S., XXI., 297); *R. R. Co.* v. *Pratt*, 22 Wall., 123 (89 U. S., XXII., 827); *Pratt* v. *R. Co.*, 95 U.S., 43 (XXIV., 336); *Darling* v. *R. R. Co.*, 11 Allen, 295; *Nutting* v. *R. R. Co.*, 1 Gray, 502; *Burroughs* v. *R. R. Co.*, 100 Mass., 26; *R. R. Co.* v. *Berry*, 68 Pa., 272; *Root* v. *R. R. Co.*, 45 N. Y., 524; *Babcock* v. *R. R. Co.*, 49 N. Y., 491; *Perkins* v. *R. R. Co.*, 47 Me., 573; *Converse* v. *Trans. Co.*, 33 Conn., 166; *Bk.* v. *Trans. Co.*, 23 Vt., 209; *Brintnall* v. *R. R. Co.*, 32 Vt., 673; *U. S. Exp. Co.* v. *Rush*, 24 Ind., 403; *McMillan* v. *R. R. Co.*, 16 Mich., 119; *Hoagland* v. *R. R. Co.*, 39 Mo., 451; *Coates* v. *U. S. Exp. Co.*, 45 Mo., 238; *Snider* v. *Adams Exp. Co.*, 63 Mo., 376; *R. R Co.* v. *Pontius*, 19 Ohio St., 222; *Gray* v. *Jackson*, 51 N. H., 9.

The bills of lading, issued and accepted by Meir & Co., expressly confine the liability of each road to its own line.

This provision expressly negatives the idea of a through contract and rebuts the presumption that any of the roads intended to assume any more burdens than the law would impose upon them.

R. R. Co. v. *Bk.*, 20 Wis., 122; *Schneider* v. *Evans*, 25 Wis., 241; *R. R. Co.* v. *Schwarzenberger*, 45 Pa., 208; *McCarty* v. *R. Co.*, 30 Pa., 247; *R. R. Co.* v. *Pontius*, *supra*.

The naming of a through rate does not imply a through contract.

Edw. Bailm., sec. 581 and *notes*; *Hood* v. *R. R. Co.*, 22 Conn., 1; *R. R. Co.* v. *Forsyth*, 61 Pa., 81; *Lamb* v. *R. R. Co.*, 46 N.Y., 283; *Converse* v. *Trans. Co.*, 33 Conn., 166; *Gray* v. *Jackson*, *supra*; *Snider* v. *Adams Exp. Co.*, 63 Mo., 376; *Schneider* v. *Evans*, 25 Wis., 241; *Mfg. Co.* v. *R. R. Co.*, 113 Mass., 490.

Conceding, for the sake of argument, that the Erie & Pacific Despatch, in making the Liverpool contract, was acting in the capacity of an agent, the contract it made as a whole must be apportioned between the undisclosed principals according to the authority the agent had to bind those principals respectively.

The finding clearly states, as has been before shown, that the Despatch's contract with each of the railroads was separate, and provided only for shipments over the line of each road.

If, then, the entire oral contract be apportioned and divided, it becomes the contract of defendant to carry to Indianapolis; of the Pittsburgh, Cincinnati & St. Louis to carry to Urbana; of the Atlantic & Great Western to carry to Salamanca; of the Erie to carry to Jersey City, and deliver to the White Star Line; and of the White Star Line to carry to Liverpool.

The finding shows that the defendant performed its part of this contract and, therefore, is not liable; but it is clear to my mind that the oral contract was merged in the written contracts or bills of lading, and that the rights of the parties must be determined by those bills.

The law will not certainly permit Meir & Co. to say, at this late day, that the bills were not binding upon them.

Each bill of lading expressly stipulates, that in case of loss or damage to the property specified therein, "That company alone shall be held answerable therefor, in whose actual custody the same may be at the time of the happening of such loss," etc.

Such a stipulation as this has often been upheld.

R. R. Co. v. *Pontius*, 19 Ohio St., 222; *R. R. Co.* v. *Bk.*, 20 Wis., 122; *Schneider* v. *Evans*, 25 Wis., 241; *R. R. Co.* v. *Schwarzenberger*, 45 Pa., 208.

Mr. Justice **Harlan** delivered the opinion of the court:

The cotton, for the recovery of the value of which this action was brought against defendant in error, was, at the time of shipment, owned by Adolphus Meir & Co., of St. Louis, who, for a valuable consideration, have assigned to the plaintiff in error all their claim on account of the said loss. The parties having, by proper written stipulation, waived a jury, the case was tried by the court, and judgment given for the Railroad Company.

The facts set forth in a special finding, covering many pages of the printed transcript, so far as they are deemed essential to a clear understanding of the case, are as follows:

The Erie and Pacific Despatch Company, a Kansas corporation, having agencies in different cities of the Union, and whose business it was to solicit and forward freights over trunk railroad lines between St. Louis and New York, received the cotton in question from Meir & Co., under agreements for its transportation to Liverpool, for a through rate, expressed in English money. No direction was given as to the route over which it should be carried to the seaboard, nor were any bills of lading then executed. [147]

The St. Louis Transfer Company, having received from the Despatch the warehouse receipts for the cotton, and, having been engaged by the latter for that purpose, hauled the cotton to East St. Louis, and there delivered it to the defendant, on account of the Erie and Pacific Despatch, taking receipts therefor from the

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Railroad Company. By the dray tickets of the Transfer Company the cotton was consigned by the Erie and Pacific Despatch to C. G. Meir & Co., London. The defendant had not, on previous occasions, issued bills of lading for freight shipped over its line by the Despatch, nor did it do so for any part of these shipments. But, in accordance with its custom, it made a way-bill for the cotton to Indianapolis. The cotton was carried safely over defendant's road from East St. Louis to Indianapolis; thence, pursuant to directions of the Despatch, and without change of cars, over the Pittsburgh, Cincinnati and St. Louis Railroad to Urbana, Ohio, where it was put into other cars suitable to the change of gauge at that point; and thence over the Atlantic and Great Western Railroad and the Erie Railway to Jersey City.

The fire which destroyed the cotton occurred in Jersey City on 21st of March, 1873, and was accidental.

Within the usual time after the respective shipments from East St. Louis, the Despatch Company executed and delivered to Meir & Co., of St. Louis, bills of lading for the cotton. Each bill disclosed the quantity of cotton, its destination, the names of the consignors and consignees, the agreed rates in English money, and purported to be the "Through bill of lading of the Erie and Pacific Despatch, and the Oceanic Steam Navigation from St. Louis to Liverpool, calling at Queenstown." With the last [148] named company, known as the White Star Line, the Despatch had an arrangement by which it could contract for shipments from New York to Liverpool at rates given by the steamer line, the latter agreeing to receive the goods at their dock in Jersey City, and transport them to Liverpool. But the Despatch had no power to bind the steamer line for any risks incurred in the inland transportation. The White Star Line paid the Despatch no commission or other compensation. Their remuneration came exclusively from certain arrangements with railroad companies, to which we shall presently refer.

The bills of lading delivered to Meir & Co. contained, among other provisions, the following:

"That the said Erie and Pacific Despatch and its connections which receive said property shall not be liable * * for loss or damage by * * fire * * nor for damage to perishable property of any kind occasioned by delays from any cause; * * nor for loss or damage on any article of property whatever by fire or other casualty while in transit, or while in deposit or in places of transhipment or at depots or landings at all points of delivery. * *

It is further agreed that said Erie and Pacific Despatch and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which the bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

It is further stipulated and agreed that, in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.

This contract is executed and accomplished, and the liability of the Erie and Pacific Despatch as common carriers thereunder, terminates on the delivery of the goods or property to the steamship at White Star wharf, Jersey City, when the liability of the steamship company commences, and not before. [149]

* * * * *

NOTICE.—In accepting this bill of lading the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions."

The right of recovery in this case against the defendant is rested by the plaintiff in error in part, if not altogether, upon certain business relations existing at and before the time of these shipments, as well between the Despatch Company and the railroad companies over whose lines the cotton was carried, as between the railroad companies themselves. It is necessary, therefore, to ascertain what were the precise relations held by these several corporations to each other.

During the period covered by these transactions, and for some time prior thereto, the Erie and Pacific Despatch had arrangements with sundry railroads having connections terminating in New York, under which it was empowered to contract for the transportation of goods according to the tariff rates, or any special rates furnished by the respective railroad companies. It had a separate agreement with each of the railroad companies already named, in some cases oral, in others written. The agreement with the Erie Railway Company was in writing and, among other things, provided that the Despatch Company should establish and maintain, at its own expense, independent and efficient agencies for soliciting and procuring freight, in the Cities of New York and Boston, and in other cities, east and west, as the parties might deem necessary; that the Railway Company should transport all through freight secured by the Despatch, either eastward or westward bound, passing between Philadelphia, New York, Jersey City, Albany, Boston and common or competing points in New England, and common or competing points on the line of the Erie Railway, except that on east bound freight the Despatch should not receive any commission on shipments from any station on the line of that railway; that the Despatch should issue its own bills of lading to shippers, subject, as to rates, to the current through rates of the [150] Railway Company, which should at all times be as low as the rates furnished to any other party or parties; that the Railway Company

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should receive, load and unload, deliver and way-bill, and furnish daily an impression copy of each way-bill of both eastward and westward bound freight, free of charge, to the Despatch; that the Railway Company agreed to assume "All the risks of common carriers, and to pay all damage to, or loss of property while on their line of road or in their possession," and in case property was lost or damaged, and the loss and damage could not be definitely located, the Railway Company should pay said loss in proportion to what was received for transporting the same, subject, however, to the liability limitations contained in the bills of lading of the Despatch Company; that the Railway Company should transport all freight known as first-class freight on the fastest freight lines running over its road, and so run the same and all through freight trains so as to enable the Despatch to deliver freight between competing points, in the east or west, as quickly as it was done by any other competing line or road; that the Despatch should maintain the authorized rates of the Railway Company, and be governed, in the transportation of through business, by any obligations entered into by the Railway Company with their competing lines for the maintenance of rates; and that the Railway Company should give to the Despatch, at all times, as low rates as were given to any other line running over the road of the former, and would prorate any rate on east bound freight, made by authority of the road leading from the point, provided that road was authorized to make through rates over the Erie Railway; and that they would prorate all losses, damages and rebates that were prorated with any other line running over that railway.

It was further stipulated, in that agreement, that, in consideration of the mutual benefits to be derived by the parties, the Railway Company should pay to the Despatch a commission on west bound freight of fifteen per cent of their gross earnings, as per their way-bills, on first, second and third class freight, and ten per cent on their gross earnings, as per their way-bills, [151] on fourth and special class freight from certain points to certain other designated points. On east bound freight the Despatch was to receive from the Railway Company ten per cent of their gross earnings, as per their way-bills, on first, second and third class freight, and eight per cent of their gross earnings, as per their way-bills, on fourth class freight, from certain named places and on freight from certain places, competing points on the Atlantic & Great Western Railroad, provided such freight originated from points off of said line, it being understood that no commission should be paid on freight originating at such stations.

With the defendant the Despatch Company had an agreement, in parol, but it was the same, in substance, as the written one with the Erie Railway Company. It had no power, however, to contract for or fix any rate on the carriage of goods over defendant's road, except as authorized by the latter.

In all cases of freight, ocean bound, from the West, over the Erie Railway, shipped by or consigned to the care of the Despatch, the latter was treated as the consignee in New York, and the freight was held subject to its order. The Railway Company was ready to deliver the the Meir cotton as it arrived in Jersey City. and as directed by the Despatch Company.

What were the relations which the railroad companies sustained towards each other during the same period? In the year 1873, and prior thereto, the companies owning or operating the various railroad trunk lines between St. Louis and New York, had an arrangement between themselves, whereby the general freight agents of the roads terminating at St. Louis made what was called a joint tariff to New York, fixing through rates, which were divided among the several roads constituting a through line. According to an estimate of distances the goods were to be carried by each road upon the basis of the shortest line. Losses occurring on through shipments, if not located, were prorated as between the companies themselves, in the same ratio as the freight moneys; but if located, were, as between the railroad companies, to be paid by the one on whose road the losses occurred. The joint tariff was published and put into the hands of railroad agents for their guidance in making contracts, and were also distributed to shippers and to the public generally. The title page of of that tariff was: "Joint rates of transportation from St. Louis via Toledo, Wabash and Western; [152] Ohio and Mississippi; Chicago and St. Louis; St. Louis, Vandalia, Terre Haute and Indianapolis; Indianapolis and St. Louis; St. Louis and Southeastern; and St. Louis, Bellville and Southern Illinois Railroads." In all cases, when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for prorating through freights with each other. The railroad companies collected the freight from the consignees, divided it among themselves, and paid to the Erie and Pacific Despatch, for its services, so much per cent on the gross freights for pound freight, and sixty cents a bale on cotton, each road settling separately with the Despatch for its dues.

It is further stated, in the special finding, that on all shipments from St. Louis to New York by the railroad companies over which the Meir cotton was carried, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage at Jersey City, whether the goods were to go to New York proper, or were foreign bound. These transfer and lighterage charges were included in the through rate named by the defendant. On shipments by that route from New York to St. Louis, the defendant collected the freight money from consignees, and, retaining its proportion, accounted for the residue to the next road in the line, which, in like manner, deducted its share and accounted in the same way to the next, and so on, to the beginning of the line. On shipments from St. Louis to New York City proper, the Erie Railway collected the freights from the consignees, and in like manner settled with the next preceding carrier, and so on, in the inverse order of the transportation, to the first carrier. These settlements between the roads were made periodically upon accountings between them. Upon shipments to foreign ports, the Despatch Company collected from the ocean steamer the full amount of the inland freight, and paid the same to the Erie

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Railway Company, which settled with the preceding carriers.

The general question presented by this case, as will have been observed, relates to the liability of the defendant in error, the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, for the value of certain cotton, part of shipments made in January and February, 1873, at St. Louis for Liverpool, and [153] which having passed over defendant's road, thence over the lines of other railroad companies, was destroyed by an accidental fire in Jersey City, while in the custody of the Erie Railway Company for delivery to an ocean steamer for further transportation.

The positions taken on behalf of the plaintiff in error are, in substance, these:

That the original contracts of transportation between Meir & Co. and the Despatch Company, were in parol, became complete when the parol agreements were made and, consequently, for the ascertainment of the rights of the parties, reference cannot be made to bills of lading subsequently issued;

That, in no event, can Meir & Co. be held bound by the special conditions in the bills of lading, whereby not only the Despatch Company and its "connections" were relieved from liability for loss of the cotton by fire, but all legal responsibility was limited to that company in whose actual custody it was when a loss occurred;

That the defendant, with the other companies, over whose roads the cotton passed, jointly formed a continuous and connected line, and constituted a partnership of common carriers for the route between St. Louis and Jersey City;

That the Despatch Company, by virtue of its relations with the railroad companies, including the defendant, was the agent of that partnership of carriers, and of each constituent member thereof, in all contracts by it made for the transportation of freight over their line, and that the delivery to it of the cotton was, in law, a delivery to that line of carriers and to each company of which it was composed;

That, consequently, the defendant was liable for the destruction of the cotton by fire while in the custody of the Erie Railway Company, one of the corporations alleged to constitute the partnership; such liability to be determined not by the before mentioned special conditions contained in the bills of lading, but by the general doctrines which obtain at common law, in reference to public carriers not operating under a special contract, limiting their liability; and, lastly,

That the cotton was held for an unreasonable length of time in Jersey City, without delivery to the Oceanic Steam Transportation Company [154] for further transportation; in consequence of which delay, it is contended, the cotton was lost by the fire mentioned; in other words, had the cotton, after reaching Jersey City, been promptly delivered to the ocean steamer, it would not have been within reach of the fire that destroyed it. It is not claimed that there was negligence in any other respect.

The first question pressed upon our attention relates to the bills of lading. It appears from the special finding that, at the time the cotton was delivered to the Despatch, there was an understanding that bills of lading should be given to Meir & Co. The latter had been, prior to 1873, large shippers of cotton by that company and had received from it numerous bills of lading. Whether they contained any special conditions whatever is not found. Nor does it appear whether the bills of lading for the shipments of 1873 were to contain special conditions relieving the Despatch and its connections from the duties and responsibilities, or any of them, annexed by law to their employment, nor whether the bills for those shipments were similar to those given in previous years. So far as disclosed by the finding, Meir & Co., when receiving the bills in question, were silent as to their provisions. Neither when they received the bills of lading issued prior to 1873, nor those issued on the shipments in question, was attention called to their provisions. Nothing was said by the Despatch, on either occasion, about special exemptions or exceptions for the benefit of the carriers. In fact, Meir & Co., although having abundant opportunity to do so, never read any of the Despatch's bills of lading further than to see that they correctly described the cotton and accurately stated the rate, designation and names of consignors and consignees. They were not aware, until after the loss complained of, that the bills of lading contained the special provisions under examination. And it is expressly stated in the special finding that they never "assented to said special provisions."

If the bill of lading constituted, as the circuit court held that it did, the contract of transportation with the owners of the cotton, and if the defendant is to be regarded as one of the "connections" of the Despatch Company, then, manifestly, the law would be for the defendant. For, the bills of lading expressly limit responsibility for loss or damage to that carrier in [155] whose actual custody the cotton might be when lost or destroyed. But, as we have seen, plaintiff contends that Meir & Co. were not bound by those special conditions, for the reason that the bills of lading were not delivered until after the cotton was surrendered to the Despatch Company for transportation, and because, also, it is expressly stated in the finding that they never assented to those special provisions. Plaintiff insists that it is the settled doctrine of this court, as announced in *Steam Nav. Co.* v. *Merch. Bk.*, 6 How., 383; *R. R. Co.* v. *Mfg. Co.*, 16 Wall., 328 [83 U. S., XXI., 302]; *York Co.* v. *R. R. Co.*, 3 Wall., 113 [70 U. S., XVIII., 172], and in other cases, that a common carrier cannot resort to implication or inference, founded on doubtful and conflicting evidence, or on the silence of the shipper when receiving either a bill of lading, or a notice with special conditions annexed; that the carrier, in order to obtain exemption from any of the duties imposed upon it by law, must show an express stipulation, in parol or in writing, upon the part of the shipper, assenting to such exemption; and that, in the nature of things, Meir & Co. cannot be held to have expressly stipulated for exemptions to which, the court finds, they never assented.

To this it is replied that Meir & Co. expressly stipulated for bills of lading to be given them, had abundant opportunity to examine all the provisions of those subsequently delivered, and did, in fact, read some portion of each one; that their failure to read all the provisions was their own fault, and, since the bill of lading

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contains an express notice that "in accepting this bill of lading, the shipper or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions," the law will not now permit Meir & Co. to plead their own negligence, or to say that its provisions were not binding upon them.

Whether the one or the other of these positions is correct it is not necessary to determine, since there are other controlling questions touching which there is entire unanimity in the court, and upon the determination of which our decision may rest.

Waving, therefore, any expression of opinion [156] as to whether, upon the findings in this case, the bills of lading expressed the contract between Meir & Co. and the Despatch Company, or as to whether the Railroad Company can take shelter under the special provisions, to which reference has been made, and assuming, for the purposes of our decision—as plaintiff in error insists we must do—that the defendant cannot claim the benefit of those provisions, we proceed to an examination of other grounds upon which it is sought to hold defendant liable for the value of the cotton burned in Jersey City.

The main proposition advanced upon this branch of the case by plaintiff's counsel is, that, in these transactions, the Erie and Pacific Despatch was the agent of the defendant and of the other railroad companies over whose lines the cotton was carried. If by this is meant that the Despatch was an agent of the defendant, with general authority to bind the latter by contracts for transportation, it is sufficient to say that there is no justification in the findings for any such position. It nowhere appears that the Despatch assumed to have or that the defendant recognized it as having any such unlimited authority. The Despatch Company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter in the making of contracts for transportation. The agreement between those companies only bound the Railroad Company to "receive, load and unload, deliver and way-bill," such freight as was sent to it by the Despatch; and at the rates established, not by the latter, but by the defendant and other railroad companies. The Despatch could not itself make a contract, or fix any rate for the carriage of goods over defendant's road except as authorized by defendant. It is expressly so stated in the special finding. So far from the Despatch Company being authorized to impose upon defendant obligations for the safe carriage of goods over the lines of other carriers, the agreement of defendant with that Company was, while assuming all the risks of common carriers, "To pay all damages to or loss of property, while on their line of road or in their possession." The contract obligation [157] of the defendant to receive and transport the freight of the Despatch Company, at the established rates, did not impose upon the former an obligation to carry beyond its terminus, or subject it to liability for the negligence of other carriers. Whether the defendant should undertake for the safe transportation of goods beyond its own line, was not a matter left, in any degree, for the determination of the Despatch Company, and was not within any authority it had.

So that the liability of defendant for the safe carriage of the cotton, after its delivery to the next succeeding carrier on the prescribed route to New York, must depend upon the inquiry whether defendant, in any form, assumed or held itself out to the public as assuming any such responsibility. The legal proposition involved in this inquiry was considered by this court in the case, already referred to, of *R. R. Co.* v. *Mfg. Co.* Speaking by *Mr. Justice* Davis, we there gave our sanction to the rule, adopted in most of the courts of this country, that the carrier, in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. This principle was subsequently recognized in *R. R. Co.* v. *Pratt*, 22 Wall., 129 [89 U. S., XXII., 829], although in that case the way-bill or receipt of the carrier was held to import an undertaking for the safe carriage of the goods as well over its own line as over the lines of other carriers. Was there, we then inquire, in the present case, a special contract or undertaking by the defendant to carry beyond its route? A careful consideration of the facts set out in the finding satisfies us that there was no such contract or undertaking. The defendant received the cotton without executing bills of lading therefor. It had never given bills of lading for goods shipped by the Erie and Pacific Despatch. Its custom was to make a way-bill only over its own road. That course was pursued in this case, and defendant only collected and received pay for carrying to Indianapolis. It is true the way-bills, upon their face, indicated that the cotton was consigned to C.G. Meir & Co., London. But that circumstance, is not, of itself, controlling or conclusive. The reference in the way-bill to the consignees was mere description to show the ultimate destination of the cotton. Each way-bill, executed by defendant, purport- [158] ed to be nothing more than a "manifest of freight from St. Louis to Indianapolis," and fails to show an undertaking by defendant to transport beyond the latter city.

Nor, in our judgment, can a special undertaking to carry beyond its terminus be implied, against defendant, from the arrangement already referred to, between the Despatch Company and sundry railroad companies whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, or at any special rates furnished by the railroad companies.

Such an arrangement, did not, in our opinion, involve joint liability upon the part of the railroad companies, or make them partners either *inter sese* or as to third persons. Each company bore the general expenses of its own route and of all transportation over it. The division, upon the basis merely of distance, of the aggregate pay for the entire route covered by the roads of these companies gave each one no greater amount than, perhaps, it would have earned had the Despatch contracted with each, separately, for the transportation of the cotton. The

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arrangement in question was one simply of convenience both for the shipper and carrier. Under it Meir & Co. were enabled to contract, at St. Louis, for a through rate for the transportation of the cotton by the Despatch Company. The latter, in order to meet its obligations to the owners of the cotton, used the road of defendant, receiving from the latter nothing more than its way-bill to Indianapolis, which showed upon its face the proportion of the aggregate pay to which defendant would be entitled. The defendant received compensation only for transportation over its road, and settled separately with the Despatch. It undertook, and was only bound, to transport over its own line and deliver to the succeeding carrier. That duty was discharged and the loss occurred while the cotton was held by another carrier. The mere fact that it joined with other companies in establishing a through rate from St. Louis to New York, to be divided between themselves, upon the basis, not of expenses incurred, or investment made, but of distance simply, although competent as evidence, does not, of itself, imply an undertaking to transport beyond its line, or to become bound for any default or negligence of other carriers.

[159] In view of the conclusion thus indicated, it is unnecessary to determine the rights of the plaintiff in error as against the Despatch, or to inquire whether the detention of the cotton in Jersey City, under the circumstances disclosed in the record, was negligence upon the part either of the Despatch or of the Erie Railway Company, or of both. Nor need we inquire whether the destruction of the cotton, by an accidental fire, was, in a legal sense, the result of its detention, in Jersey City, for an unreasonable length of time without delivery to the ocean steamer. Those questions are not material upon the present issues.

Upon the whole case the law is for the defendant, *and the judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 107; 13 R. I., 574; 43 Am. Rep., 48.

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[159] ERWIN DAVIS ET AL., *Plffs. in Err.*,

v.

WELLS, FARGO & COMPANY.

(See S. C., 14 Otto, 159-170.)

Acceptance of offer—guaranty when absolute—consideration of—demand, when waived—defense—construction of contract.

*1. The rule requiring notice of the acceptance of a guaranty, and of an intention to act under it, applies only in those cases where, in legal effect, the instrument is merely an offer or proposal, acceptance of which by the guarantee is necessary to that mutual assent without which there can be no contract.

2. If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guaranty and constitutes its consideration. It must be so wherever there is a valuable consideration other than the expected advances to be made to the principal debtor which passes at the time the undertaking is given from the guarantee to the guarantor; and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and guarantor. In each of these cases the mutual assent of the parties is either expressed or necessarily implied.

3. When a guaranty is expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt of which is therein acknowledged, it is not an unaccepted proposal, requiring notice of acceptance to bind the guarantor, but without such notice becomes binding on delivery.

4. Where a guaranty declares that the guarantor thereby guaranties unto the guarantee, unconditionally at all times, any advances, etc., to a third person, notice of demand of payment, and the default of the debtor is waived, as well as notice of the amount of the advances when made, when either or both would otherwise be required.

5. But a failure or delay in giving such notices, if required, is no defense to an action upon the guaranty unless where loss or damage has thereby accrued to the guarantor, and then only to the extent of the loss or damage proved.

6. Notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse.

[No. 64.]

Argued Nov. 1, 1881. Decided Nov. 14, 1881.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is stated by the court.

Mr. **James M. Woolworth,** for plaintiffs in error:

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative, if the guarantor be not, within a reasonable time, informed by the creditor of acceptance. This has been settled by a series of well considered judgments of this court.

Russell v. *Clark*, 7 Cranch, 69; *Edmondston* v. *Drake*, 5 Pet., 624; *Douglass* v. *Reynolds*, 7 Pet., 113; *S. C.*, 12 Pet., 497; *Lee* v. *Dick*, 10 Pet., 482; *Adams* v. *Jones*, 12 Pet., 207.

These decisions have been followed and approved in the state courts.

Lawton v. *Maner*, 9 Rich. (S. C.), 335; *Solles* v. *Meugy*, 1 Bailey (S. C.), 620; *Claflin* v. *Briant*, 58 Ga., 414; *Burns* v. *Semmes*, 4 Cranch (C. C.), 702; *Shewell* v. *Knox*, 1 Dev. L. (N. C.), 404; *Taylor* v. *McClung*, 2 Houst. (Del.), 24; *Tuckerman* v. *French*, 7 Me., 115; *Kellogg* v. *Stockton*, 29 Pa., 460; *Bk.* v. *Sloo*, 16 La., 539; *Menard* v. *Scudder*, 7 La. Ann., 385; *Kincheloe* v. *Holmes*, 7 B. Mon. (Ky.), 5; *Allen* v. *Pike*, 3 Cush., 238; *Mussey* v. *Rayner*, 22 Pick., 223; *Rankin* v. *Childs*, 9 Mo., 665; *Mayfield* v. *Wheeler*, 37 Tex., 256; *McCollum* v. *Cushing*, 22 Ark., 540; *Howe* v. *Nickels*, 22 Me., 175; *Geiger* v. *Clark*, 13 Cal., 579; *Cooke* v. *Orne*, 37 Ill., 186; see, also, *Cremer* v. *Higginson*, 1 Mas., 323; *Wildes* v. *Savage*, 1 Story, 22; *Caton* v. *Shaw*, 2 Harr. & G., 22; *Beekman* v. *Hale*, 17 Johns., 134.

Nor is there anything to take this case out of the rule.

1. The words found in this guaranty "unconditionally at all times" have not such effect; for the ground of the doctrine is, not that the operation of the writing is conditional upon notice, but it is until it is accepted, and notice of its acceptance given to the guarantor. There is no contract between the guarantor and the guarantee; the reason being that the writing is merely

*Head notes by *Mr. Justice* MATTHEWS.

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an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party, offering himself as security before the minds met; and he becomes bound.

Until the notice is given, there is want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever.

Kellogg v. *Stockton*, 29 Pa., 460; *Tuckerman* v. *French*, 7 Me. 115; *Allen* v. *Pike*, 3 Cush., 238-242; *Rapelye* v. *Bailey*, 3 Conn., 438; *Kay* v. *Allen*, 9 Barr, 320; *Bk.* v. *Mitchell*, 15 Conn., 206.

2. Nor is the circumstance, that the paper expresses a guaranty of past as well as future overdrafts, material.

The neglect to advise the plaintiffs in error of the closing of the accounts and the amount of the overdraft, relieved them of their liability.

Douglass v. *Reynolds*, 7 Pet., 126; *Mfg. Co.* v. *Welch*, 10 How., 461; *Bk.* v. *Haynes*, 8 Pick., 423; *Oremer* v. *Higginson*, 1 Mason, 323; *Howe* v. *Nickels*, 22 Me., 175.

Messrs. **Shellabarger** & *Wilson*, for defendants in error:

One class of questions made by the defendants is stated in the instructions asked by defendants, Nos. 1, 2, 3, 5, all based upon the claim that there was no liability of defendants on the guaranty set out in the record, unless the plaintiffs first gave notice of their acceptance of the guaranty, and unless, within a reasonable time after each advancement made on the faith of the guaranty, the plaintiffs gave notice to defendants of the fact of advancement.

Did the court err in refusing such instructions? Please note the following elements of this guaranty:

1. It is one under seal and, therefore, denoting a consideration paid (see *Douglass* v. *Howland*, 24 Wend., 35); and, besides, is expressly stated to be made on a consideration paid and estops the party from denying the consideration. See, also, *Lawrence* v. *McCalmont*, 2 How., 426.

2. It is not a proposal for a guaranty, but is expressly stated to be a present guaranty. The words are "we hereby guaranty," in the present tense.

3. It is not a conditional guaranty, binding only on condition of the giving of notice of any sort, but is made unconditional in express words.

4. It is not an indefinite guaranty in respect to the amount guarantied, but is exact as to the *maximum* amount guarantied, $10,000.

5. It is a guaranty in part of a then existing indebtedness. It is one agreeing now to guaranty that present, and also future indebtedness, in consideration of plaintiffs' giving further credit.

6. The guaranty is one not only taking effect *in præsenti*, and absolutely or unconditionally, but is one which expressly defines what alone shall, as against the guarantee, put an end to its continuing force, to wit: until revoked by us in writing.

7. The express words of the guaranty make its acceptance by plaintiffs to take effect and become binding at the same moment when the paper is delivered.

One of the qualities, then, of this guaranty, is undeniably and expressly that it is an unconditional guaranty. "Unconditional" is, in law, the exact equivalent of "absolute." Bouvier defines "absolute," thus: "Complete, perfect, final; without any condition or incumbrance."

The authorities hold that such notice, in the case of such a guaranty "absolute," is not required. *March* v. *Putney*, 56 N. H., 34; *Caton* v. *Shaw*, 2 Harr. & G., Md., 12; *Wordsworth* v. *Allen*, 8 Gratt. (Va.), 174; *Irvine* v. *Brasfield*, 10 Heisk. (Tenn.), 425; *Powers* v. *Bumcratz*, 12 Ohio St., 273; *Bk.* v. *Mitchell*, 15 Conn., 206; *Wildes* v. *Savage*, 1 Story, 22; *Bleeker* v. *Hide*, 3 McLean, 279.

Where notice of the acceptance of the guaranty is either proved to have been duly given, or where the terms of the guaranty were such that notice of acceptance is not required, and the guaranty is a continuing one, as it is here, the giving of notice of each successive credit given on the faith of the guaranty is not required; and such notice, when it is not also waived, as it is by the present guaranty, is only required to be given within a reasonable time after the dealings under the guaranty are closed; and where no damage results from the failure to give even this notice, there is no discharge from liability on account of such want of notice. Such is the holding of the court in *Mfg. Co.* v. *Welch*, 10 How., 461-475; and in *Wildes* v. *Savage*, 1 Story, 32, this doctrine is fully stated.

Mr. Justice **Matthews** delivered the opinion of the court:

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.

This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

Dated, Salt Lake City, 11th November, 1874.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ERWIN DAVIS. [SEAL.]
J. N. H. PATRICK. [SEAL.]

Witness: J. GORDON."

The answer set up, by way of defense, that [160] there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter. [161]

But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence that this guaranty was executed by the defendants below and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account;

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that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendant's counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third and fifth:

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it, and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the [162] guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co. and, on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co., at the date of and since the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding $10,000, which the jury [163] may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative if the guarantor be not within a reasonable time informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In *Adams* v. *Jones*, 12 Pet., 213, *Mr. Justice* Story, delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell* v. *Clark*, 7 Cranch, 69; *Edmonston* v. *Drake*, 5 Pet., 624; *Douglass* v. *Reynolds*, 7 Pet., 113; *Lee* v. *Dick*, 10 Pet., 482; and again recognized at the present Term in the case of *Reynolds* v. *Douglass*, 12 Pet., 497. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel [164] the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under

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what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In *Reynolds* v. *Douglass*, 12 Pet., 504, decided at the same Term and referred to in the foregoing extract, *Mr. Justice* McLean stated the rule to be "That, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted;" and added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule and, consequently, some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plain-
[165] ly, not only from a particular consideration of the cases themselves, but was formally declared to be so by *Mr. Justice* Nelson, speaking for the court in delivering its opinion in the case of *Mfg. Co.* v. *Welch*, 10 How., 475, where he uses this language:

"He [the guarantor] has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract;* he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in *Wildes* v. *Savage*, 1 Story, 22, *Mr. Justice* Story, who had delivered the opinion in the case of *Douglass* v. *Reynolds*, 7 Pet., 113, after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between the parties. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer. Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these [166]
cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell Cas. on Cont., 987), "Though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never, in strictness, become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes* v. *Savage*, *supra*, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which passes at the time the undertaking is given from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor. For, in each of these cases, the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the

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one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief:

"For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is, that until it is accepted and no- [167] tice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., *unconditionally at all times*, etc."—cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words—"for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee, etc." How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence* v. *McCalmont*, 2 How., 452, and was overruled. *Mr. Justice* Story said:

[168] "The guarantor acknowledged the receipt of the one dollar and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman* v. *Tooth*, 5 Bing. (N. C.), 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good. and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety and cannot be separated into distinct parts. The covenant is single and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that Gordon delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guar- [169] antee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "Guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times*, any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of ten thousand dollars, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit, and liberally to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge, of the court below. These exceptions are based on the propositions:

1. That if Wells, Fargo & Co. neglected to

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notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the de-
[170] fault, the plaintiffs could not recover upon the guaranty.

For, if the necessity, in either or both of these contingencies existed, to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision of this court in the case of *Mfg., Co.* v. *Welch* [*supra*]. An unreasonable delay in giving notice, or a failure to give it altogether, is not a bar, of itself.

There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty; and it was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record, *and the judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[171] WILLIAM T. PORTER, Impleaded With J. MORTON POOLE ET AL., *Plff. in Err.*,

v.

JENNY L. GRAVES, Admrx., etc., of CYRUS GRAVES, Deceased.

(See S. C., 14 Otto, 171-175.)

Admission of partnership—existence of, how proved—questions for the jury.

1. An admission, in the answer of defendant who was sued jointly with others for the price of a saw-mill sold the partnership, that he and the other defendants were interested together in the business of sawing and manufacturing lumber, and intended to procure, by lease or purchase, or to erect, a saw-mill, is an admission of the partnership.

2. Private arrangements between the partners as to the relative influence and responsibility of each in deciding questions arising in the course of their business, do not disprove the existence of the partnership.

3. Whether a purchaser had possession under a sale, and whether a portable saw-mill was real estate, were questions properly left to the jury.

[No. 63.]

Argued Oct. 28, 31, 1881. Decided Nov. 14, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **Henry J. Scudder,** for plaintiff in error.

Messrs. **Francis Kernan** and *M. Goodrich,* for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The action in this case was commenced originally in the Supreme Court of the State of New York, for the County of Cortland, and was removed from that court into the Circuit Court of the United States for the Northern District of that State, on application of Porter, the plaintiff in error.

The action was brought to recover the purchase price of a portable saw-mill, which the plaintiff, acting as administratrix of the estate of her deceased husband, alleged she had sold to J. Morton Poole, William T. Porter and W. G. Norwood, who were at the time partners in the business of sawing and manufacturing lumber and timber, and of procuring and owning and operating a saw-mill for that purpose, at or near Homerville, in the State of Georgia. Though all the partners were sued, the plaintiff in error only was served or appeared.

The answer of Porter raised several issues which were submitted under the charge of the court to a jury, and the exceptions to this charge, and to the refusal to grant the instructions prayed by Porter's counsel, with some ex- [172]
ceptions in regard to evidence, constitute the errors relied on to reverse the judgment and set aside the verdict in favor of the plaintiff below.

The evidence introduced tended to show that plaintiff, who resided in the State of New York, made a visit to Georgia, and while there had negotiations with Norwood concerning the sale of the saw-mill. That her right to sell, without an order of the probate court of the proper county, was considered doubtful, but that Norwood said if she would get the necessary authority to sell he would, for the firm of J. Morton Poole & Co., give $5,000 for the mill.

That having been duly appointed administrator of the estate of her husband, by the surrogate of Cortland County, New York, she procured from the Probate Judge of the County of Georgia, in which the mill was situated, an order of sale, and after duly advertising the same it was sold to said Norwood, as one of the partners of J. Morton Poole & Co., for $5,000.

The first point we shall examine relates to the existence of this partnership. The Judge in his charge to the jury said that this was conceded by the parties. To this an exception was taken at the time.

We have already given the language of the declaration alleging the existence of this partnership. The answer of Porter on that subject is as follows:

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"And defendant admits that he and the defendants, Poole and Norwood, were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint, and contemplated and intended to procure by lease or purchase, or erect a saw-mill in the neighborhood of Homerville, aforesaid, but said defendant denies that the defendants or either of them applied to the plaintiff to purchase the saw-mill described in the complaint, and alleged to have been the personal property of said Cyrus Graves in his lifetime, or to buy any personal property."

We think this is a concession or admission of the alleged partnership, and when it is further proved without contradiction that the mill, at the time of sale, was in the possession and use of those gentlemen, the instruction of the court was justified.

Poole and Porter were resident in Delaware, [173] and Norwood a citizen of North Carolina. In a letter signed J. Morton Poole & Co., written to Mrs. Graves, in Cortland County, and dated Wilmington, Delaware, before she went to Georgia, in which the subject of the purchase of this mill and the price and her power to sell are considered, it is said: "We do not think your price is unreasonable, and though Mr. Norwood is a partner and must be consulted, we say now, as Mr. Pusey said to you personally, that we are the responsible parties in the concern and control all the decisions." This is relied on to show the error of the court in the statement that the existence of the partnership was conceded. But as the statement of this letter is positive that Mr. Norwood was a partner, and as the partnership was then negotiating for the purchase of this very mill, we are of opinion that it proves the soundness of the charge on that point. The effect of private arrangements between the partners as to the relative influence and responsibility of each of them in deciding questions arising in the course of their business, is a very different thing from disproving the existence of the partnership.

Another point on which error is assigned, arises out of instructions asked by defendant as to the validity of the sale.

It was in evidence that, by correspondence and otherwise between Mrs. Graves and the defendants, she had agreed that she would sell the mill to defendants for $5,000, which they did not think too much. But it was found necessary that she should proceed in the sale according to the laws of Georgia, and she accordingly went there and obtained the probate court order for sale. While this was going on she had several interviews with Mr. Norwood, who was then running the mill under some arrangement with parties who had leased it from Mr. Graves in his lifetime. The advertisement of the sale states that the mill was to be sold to perfect a contract for sale to J. Morton Poole & Co., and it was so announced at the time of sale by the auctioneer. On this evidence the defendant prayed the court to instruct the jury as follows:

"That the attempted sale at public outcry, to perfect a previous private sale is contrary to the law and public policy of the State of Georgia and, therefore, void.

[174] That the private sale of the property in question being illegal, no concerted attempt by the parties thereto to validate it by the forms of a public sale under an order of the ordinary, can be effectual.

No agreement of the parties or united request on their part, to secure a formal compliance with the law in aid of a previous illegal private sale, will render the latter valid.

The formal public sale of the mill, made expressly to perfect a title to the same to the defendants in accordance with the terms of a private sale made of said property to them, is a mere form and an evasion of the statute, and hence illegal."

All these requests were refused.

That these requests were founded on a sound general principle, is undeniable. When the law requires a sale of property, real or personal, to be made at public auction, after due notice, it is for the purpose of inviting competition among bidders that the highest price may be obtained for what is sold.

To make a private bargain beforehand between the party who wishes to buy and the person authorized to sell, as to the price and other incidents of the contract, and then invoke the forms of a public sale with competition to give effect to this private agreement, is a course of procedure well calculated to defeat the purpose for which the public sale is required. There can be no doubt that in such case, at the instance of the heirs or devisees or creditors interested in having the property bring its full value, such a sale would be set aside, either in a court of chancery, if it were real estate, or in the probate court, on motion, if it had jurisdiction.

But it may be doubted whether this may be done at the instance of one who was purchaser at both the public and private sale. And it is still more questionable whether such purchaser, after having received and used the personal property for a long time, can set up such a defense to a suit for the purchase money.

Such was the case here. As it is not clear from the evidence that there was a private contract of sale, and as the defendants bid what the jury have found to be a fair price, and took the mill and used it afterwards as long as its use was profitable, and have never returned it to plaintiff, we think the court was justified in [175] refusing the instructions asked by them on this point. See, *Nutting* v. *Thomason*, 46 Ga., 34.

Another point raised by plaintiff in error is, that the sale was void under the Statute of Frauds, because no memorandum in writing was signed by the party charged.

To this it is answered that the defendants took possession of the mill under the sale, and thus brought the case within the exception of the statute. This is denied, and the possession of defendants is alleged to be a mere continuation of that which they had at the time of the sale under the former lessee.

But the sale took place at the mill. Norwood, the man who bid it off, was then in possession. It nowhere appears that after this he paid any money or acknowledged any relation to the former lessee. The court left it to the jury to say whether he had possession under the sale, and we think this was right.

It is insisted that the mill was real estate, and no title passed to defendants by the sale, as no deed was made, and no title was in the plaintiff to the land on which it was situated. It was what is known as a portable saw-mill, capable,

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as the name implies, of being removed from one locality to another, as the exhaustion of the timber by use of the mill required. It was properly left to the jury, under sound instructions, to say what the character of the mill in that respect was, and of this, plaintiff here cannot complain.

Several errors are assigned on exceptions to the ruling of the court in regard to the admission of evidence. We have examined these carefully and find no error in them. We cannot, in the pressure of the business of the court, give our reasons for this in detail.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[183] WILLIAM G. WINSLOW ET AL. *Appts.*,

v.

BLISS O. WILCOX, Owner and Claimant of THE SCHOONER S. OSBORNE.

(See S. C., "*The S. S. Osborne*" 14 Otto, 183, 184.)

Findings of Circuit Court.

To justify this court in returning a cause to the circuit court to certify up its findings, it must clearly appear that the omission to state such findings was attributable to the fault or neglect of the court, and not to the parties.

[No. 243.]

Submitted Oct. 31, 1881. Decided Nov. 14, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

On motion.

The case is sufficiently stated by the court.

Mr. **Albert G. Riddle,** of counsel for appellants, in support of motion.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from a decree in admiralty on the instance side of the court. There is nowhere in the record a statement of facts and conclusions of law such as is required by the Act of February 16, 1875. 18 Stat. at L., 315, ch. 77, sec. 1. The case was heard on its merits in the circuit court at the April Term, 1878, and decided September 24. On the 19th of September a bill of exceptions was signed and filed, to put on record the objections of the present appellants to the rulings of the court on their motion to dismiss the appeal from the district to the circuit court. When the case was decided on its merits a reference was made to a commissioner to ascertain and report the amount of [184] damages. A report was filed January 3, 1879, to which exceptions were taken. These exceptions were heard and a final decree rendered March 15. An appeal was allowed in open court the same day and the cause docketed here September 13. We cannot find from the record that the court was ever asked to state its findings specially, and it is conceded that, in fact, no such statement was ever made. The appellants now move for a writ of *certiorari* to the circuit court to certify up its findings.

We suppose the real object of this motion is to have the cause remanded to the circuit court, so that findings may be now stated and put into the record, as was done in the case of *The Abbotsford*, 98 U. S., 440 [XXV., 168]. That was an exceptional case, depending on its own peculiar facts, and furnishes no precedent for what we are now asked to do. The hearing was had in this case, and the interlocutory decree which settled the merits rendered, more than three years after the Act of 1875 took effect. The provisions of that Act must have been in the minds of the counsel for the appellants, because a bill of exceptions was signed at their instance and filed just before the decree was entered, which could not have been done but for the change in the practice brought about by this legislation. The final decree was not rendered until six months afterwards, and special findings seem not to have been desired by either party. Such findings are only important in case of an appeal, and may certainly be waived by the losing party. Under the circumstances of this case, the court might reasonably infer that the appellants intended to rest their appeal on their bill of exceptions, being satisfied that upon the findings, which would be stated if required, the decree must necessarily be sustained. To send the case back would be unjust to the court as well as the parties, for a special statement of the facts now would involve a rehearing. To justify us in returning a cause for such a purpose, it must clearly appear that the omission was attributable to the fault or neglect of the court and not to the parties.

The motion is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CENTRAL NATIONAL BANK OF BALTIMORE, *Appt.*, [54]

v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(See S. C., 14 Otto, 54-77.)

Deposit by trustee—trustee's checks—notice—following trust property—banker's lien—deposit by agent—suit against national bank—plea—replication.

*1. Although the relation between a bank and its depositor is that merely of debtor and creditor, if the money deposited belonged to a third person and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

2. The contract between the bank and the depositor is, that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume, in case the account is kept in the name of the depositor as trustee or other fiduciary character, that the trustee is in the course of lawfully performing his duty and to honor them accordingly; but when against such a bank account the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund

* Head Notes by *Mr. Justice* MATTHEWS.

NOTE.—*Liability of bank upon checks drawn upon it.* See, *note* to Nat. Bk. v. Millard, 77 U. S., XIX., 897.

Liability of bank, for general deposits. See, *note* to Planter's Bk. v. Union Bk., 83 U. S., XXI., 473.

Bankers' lien.

Bankers' liens, upon securities in their hands, must be based upon a credit given upon the faith of such securities, either while in their possession or in expectancy. Russell v. Hadduck, 3 Gilm., 233; S. C., 44

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represented by the account is not the individual property of the depositor if it is shown to consist, in whole or in part, of funds held by him in a trust relation.

3. That, so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, are established doctrines of equity and apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created, as well as to every other description of property.

4. A bankers' lien ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement express or implied or conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner of which the bank has notice, either actual or constructive.

5. When a bank account is opened in the name of a depositor as general agent and it is known to the bank that he is the agent of an insurance company; that conducting its agency is his chief business; that the account was opened to facilitate that business and used as a means of accumulating the premiums on policies collected by him for it and of making payment to it by checks, the bank is chargeable with notice of the equitable rights of the insurance company, although the depositor deposited other moneys in the same account and drew checks upon it for his private use; and the insurance company may enforce by bill in equity its beneficial ownership therein, against the bank claiming a lien upon the balance thereof for a debt due to it from the depositor contracted for his individual use.

6. A national bank in voluntary liquidation under section 5220 of the Revised Statutes, is not thereby dissolved as a corporation, but may sue and be sued by name for the purpose of winding up its business; and it is no defense to a suit by a creditor upon a disputed claim that the creditor has also filed a creditors' bill under section 2 of the Act of June 30, 1876, authorizing the appointment of receivers of national banks and for other purposes, to enforce the individual liability of its shareholders.

7. Pleas in equity must allege matters of fact and not mere conclusions of law; and if not traversable for that reason, or have been filed irregularly for lack of the affidavit of the party and certificate of counsel required by the 31st Equity Rule, may be disregarded.

8. When an equity cause has been heard upon the merits, upon bill, answer and proofs taken as upon issue perfected, the want of a formal replication cannot be assigned as error upon appeal.

[No. 44.]

Argued Oct. 17, 18, 1881. Decided Nov. 17, 1881.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The case is stated by the court.

Messrs. **Arthur W. Machen,** *Geo. H. Williams* and *James O'Conner*, for appellant:

Upon the merits, the complainant had no equity entitling it to the decree given in its favor.

With respect to the addition, "general agent," suffixed to the proper name of the depositor, while the bill of complaint, the interrogatories of counsel and complainant's principal witness, Dillon, in his testimony studiously used the term "general agent," as the appropriate description of his relation to the complainant; Dillon going so far as to testify that his power of attorney from the complainant set forth that he was appointed general agent of the Company. The power of attorney itself, when produced, showed that he was simply constituted agent, and the business he carried on as agent was not at all confined to the affairs of the complainant.

He himself admitted that he carried on a general agency for all corporations or individuals with whom he could make satisfactory arrangements.

The words "general agent," if they mean anything, rather indicated the business of the depositor than pointed to an agency for any particular principal.

It is also in evidence that Dillon had a motive for adding the word "agent" to his name, according to a not uncommon commercial practice, in the existence of a number of unsatisfied judgments against him in the State of Iowa.

It has been held that the word "assignee" appended to the name of the depositor, does not earmark the fund nor indicate that it belongs to a particular person or fund.

Laubach v. *Leibert*, 87 Pa., 55.

And the addition of the official title of an officer of the government, collector, was held not to indicate that the fund belonged to the government, but left it subject to the disposition of the depositor, as if no such description had been affixed to his name.

Swartwout v. *Bk.*, 5 Den., 555.

And the signature to a check, "A B," agent, does not furnish any qualification of the personal responsibility of the drawer nor give the drawee notice of the unnamed principal.

Bickford v. *Bk.*, 42 Ill., 238; *Tryon* v. *Oxley*, 3 Greene, Ia., 289.

The addition of any merely descriptive word, as "trustee" or "executor," does not impose any obligation upon the bank to look beyond

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Am. Dec., 693; Fourth Nat. Bk. v. City Nat. Bk., 68 Ill., 403.

Where there is a usage between banks, to apply proceeds of collections indorsed in blank to payment of balances due from bank sending collections, for its customers, when there is a balance left standing on faith of such collections, the collecting bank may so apply proceeds. Bk. of Metropolis v. N. E. Bk., 47 U. S. (6 How.), 227; Wood v. Nat. Bk., 129 Mass., 358; S. C., 37 Am. Rep., 306.

The contrary rule prevails where the indorsement is "for collection." Sweeney v. Easter, 68 U. S. XVII., 681; Cecil Bank v. Farms. Bk., 22 Md., 148; Miller v. Farms., etc., Bk., 39 Md., 392.

In New York, the correspondent bank cannot retain the proceeds of collection paper and apply it on the balance due from the transmitting bank, even if it has no notice that the bank sending the collection does not own it. Van Amee v. Bk. of Troy, 8 Barb., 312; West v. Am Exch. Bk., 44 Brab., 175; Lindauer v. Fourth Nat., Bk., 55 Barb., 75; Dod v. Fourth Nat. Bk., 59 Barb. 265; Com. Bk. v. Marine Bk., 3 Keyes, 337; McBride v. Farms. Bk., 26 N. Y., 450.

A bank has no lien on a customer's deposit for a debt to the bank not yet due. Jordan v. Nat. Shoe & Leather Bk., 74 N. Y., 467; S. C., 30 Am. Rep., 319; S. C., 7 Week. Dig., 264; affg. 12 Hun, 512; 6 Week. Dig., 11; Giles v. Perkins, 9 East, 12.

Bankers, who are strictly such and who are dealers in money, have a general lien on all paper securities, money and funds of a depositor in their possession, for the amount of the general balance. Davis v. Bowsher, 5 T. R., 448; Brandao v. Barnett, 3 Man. Gr. & S., 519; 12 Cl. & F., 805; Scott v. Franklin, 15 East, 428; *Re* Gen. Prov. Asso. Co., 14 L. R. Eq., 507; *Ex parte* Wakefield Bk., 19 Ves., 25; Com. Bk. v. Hughes, 17 Wend., 94; McDowell v. Bk. of Wilmington, 1 Harr., 369; *In re* Williams, 3 Ired. Eq., 346; State Bk. v. Armstrong, 4 Dev., 519.

A bank loses its lien, by taking security payable at a future time. Hewison v. Guthrie, 2 Bing. (N. C.), 755.

A bank can acquire no lien on securities or moneys deposited under special agreement, nor upon securities left with it by mistake. Grant v. Taylor, 3 Jones & Sp., 338; S. C., 52 N. Y., 627; Bk. of U. S. v. McAlester, 9 Pa. St., 475; Bk. of Metropolis v. N. E. Bk., 42 U. S. (1 How.), 234; Petrie v. Myers, 54 How. Pr., 513; Lucas v. Dorrien, 7 Taunt., 279.

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the depositor, and the credit given him is a credit to him personally.

Morris, Banking, 2d ed., 293; and see, *Miller* v. *Receiver of Franklin Bk.*, 1 Paige, 446; *Cowell* v. *Springs Co.*, 100 U. S., 55 (XXV., 547).

The rights which a third person may have as against the depositor, present an entirely different question.

See, *Foley* v. *Hill*, 2 H. of L. Cas., 28, and other cases above cited.

Independently of usage, of course the Bank, under the law, was entitled to debit its customer, in account, with the amount of his overdue note, which it had discounted.

Bk. v. *Hughes*, 17 Wend., 94; *Marsh* v. *Bk.*, 34 Barb., 298; *Ex parte Howard Nat. Bk.*, 2 Lowell, 487.

The Bank, having reason to believe that the note would not be otherwise provided for, the cashier was instructed, some days before its maturity, to charge it up against Dillon in his account when it fell due, if it was not paid, and this was accordingly done June 1, 1874.

A third party who intervenes and claims the right to adopt an account which has existed between a bank and one with whom it has dealt as customer, is bound by the engagements of the actual customer, and *a fortiori* by any charges previously made which were proper as against him.

Brownrigg v. *Rae*, 5 Exch., 489; *School District in Greenfield* v. *First Nat. Bk.*, 102 Mass., 174; *Justh* v. *Bk.*, 56 N. Y., 478, 483; *Tassell* v. *Cooper*, 9 C. B., 509; and see, *Jackson* v. *Bk. of U. S.*, 10 Pa., 61; *Beatty* v. *McCleod*, 11 La. Ann., 76.

The Connecticut Mutual Life Ins. Co. would have been so bound even had the account been kept in its name, if Dillon was the customer dealt with.

Brownrigg v. *Rae*, 5 Exch., 489.

The check for $8,000, delivered to the appellee by Dillon, established no privity between the Insurance Company and the Bank, and operated neither at law nor in equity as an assignment *pro tanto* of the fund.

Bk. v. *Millard*, 10 Wall., 152 (77 U.S., XIX., 897); *Bk.* v. *Whitman*, 94 U. S., 343 (XXIV., 229); *Ætna Nat. Bk.* v. *Fourth Nat. Bk.*, 46 N. Y., 82; *Carr* v. *Bk.*, 107 Mass., 45; *Essex Co. Nat. Bk.* v. *Bk. of Montreal*, 15 Am. L. Reg. (N. S.), 418.

Mr. **John Carson**, for appellee:

As between *cestui que trust* and trustee, and all claiming under the trustee, save by purchase for a valuable consideration without notice, all trust property however changed may be followed and recovered. This is a familiar doctrine in equity.

Oliver v. *Piatt*, 3 How., 333; *Pennell* v. *Deffell*, 4 De G. M. & G., 388; *Frith* v. *Cartland*, 2 Hem. & M., 422; *VanAlen* v. *Bank*, 52 N.Y., 1; *Bank* v. *King*, 57 Pa., 206; *Knatchbull* v. *Hallett*, L. R., 13 Ch. Div., 697.

The cases cited above are approved and extended, and the law of them is declared to be applicable, not merely to trustee and *cestui que trust*, but to all persons holding fiduciary relations.

Clayton's case, 1 Mer., 572, is overruled.

Had the Bank knowledge that Dillon was the agent of the Insurance Company and was dealing with its funds? I answer, the testimony demonstrates it.

1. The way the account was headed. A. H. Dillon, Jr., General Agent, gave notice that it was not an individual account, but a fiduciary one.

Bodenham v. *Hoskyns*, 2 De G. M. & G., 906; *Pannell* v. *Hurley*, 2 Coll., 244; *Ex parte Kingston*, L. R., 6 Ch. App., 637; *Duncan* v. *Jaudon*, 15 Wall., 165 (82 U. S., XXI., 142).

2. Mr. Dillon's course of dealing with the Bank was finally to indorse every check as general agent, even when drawn to him individually or otherwise, and this indorsement the Bank required.

It is submitted that this course of dealing is conclusive as to knowledge.

Mr. Justice **Matthews** delivered the opinion of the court: [55]

The Connecticut Mutual Life Insurance Company of Hartford, in the year 1864, appointed A. H. Dillon, Jr., its general agent for the territory consisting of the States of Maryland, Delaware, West Virginia and the District of Columbia. He opened an office at No. 8 South Street, Baltimore, conspicuously designated by signs as his place of business as general agent of the Connecticut Mutual Life Insurance Company. It was his duty, among others, to collect and receive premiums on policies issued by the Company, from persons residing within his territory, and remit the same to the Company at Hartford. This he usually did twice a month, finally accounting for the business of each month at its close. The mode of remitting was by checks upon a Baltimore bank to the order of the secretary of the Company. To this end [56] he at first opened an account with John S. Gittings & Co., transferred afterwards to the Chesapeake Bank, and on April 1, 1871, to the appellant, a national bank, then recently organized, whose banking house was across the street from his office. The account was designated on its books as follows: "Dr. Central National Bank in account with A. H. Dillon, Jr., gen'l ag't. Cr." To the credit of this account he deposited from time to time premiums collected for the Insurance Company, and remitted twice a month his checks, signed by him as general agent, and payable to the order of Jacob L. Greene, secretary of the appellee. When the premiums were paid by the checks of others, they were indorsed by him as general agent and deposited to the credit of this account. In such instances an indorsement in this form was required by the Bank. Dillon also deposited to the credit of this account, from time to time, various amounts of money received by him from other sources than from premiums belonging to the appellee; and drew upon this account checks for money, applied and paid to his own use. The aggregate of the deposits made, as shown in this account, from the beginning till it was closed, amount to $470,753.05. There were drawn against it, in all, 411 checks, of which 68 were on their face payable to the order of Greene as secretary of the appellee, representing, however, much the larger part of the gross sum of the deposits.

On June 12, 1874, this account was finally closed, with a balance, as between deposits and

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checks, of $11,000.86. At that date Dillon owed an amount larger than this to the Insurance Company, and the proof is clear that the whole balance then shown by the account, as above stated, was the proceeds of collections of premiums made by him as its agent.

His current deposits of premiums in this account included his own commissions as agent.

Before opening this account with the Central National Bank, on March 9, 1871, Dillon had opened another account with it, in the name of his wife, Mrs. A. P. Dillon. This account was kept open until May 1, 1873, which is the [57] date of the last entries, when it was balanced and closed. The deposits to the credit of this account were made by Dillon, and the checks were drawn by him in his wife's name. All the transactions represented in it were for his individual account. On both these accounts Dillon was, by agreement with the Bank, allowed interest, which he collected for his individual use.

On March 14, 1872, Dillon was in distress for money to make good his margins on some speculations in stock, and applied to O'Connor, the president of the Bank, for a loan. He explained to O'Connor the nature, extent and cause of his necessity; who, indeed, was already aware that Dillon was in the practice of stock speculation, having been interested with him in some ventures of that character. O'Connor testifies that he declined making the loan without security, when Dillon proposed his wife as security for the amount required, not to exceed $12,000, to be drawn upon checks in her name, which, if not made good in a few days, were to be taken up by a note signed by her, assuring O'Connor that certain real estate owned by her where they resided in Baltimore, with its furniture, was worth at least $15,000 or $20,000. He also urged, says O'Connor, that he kept a valuable account with the Bank, and as he had never asked before for any loan, he thought he was entitled to it. The reference, doubtless, was to his agency account.

The loan was made, the money being paid by the Bank on checks drawn in the name of Alice P. Dillon, to the amount of $13,000, on March 14th, 15th and 16th, 1872. These checks were debited to the bank account in her name, and constituted an overdraft of $12,067.14. On April 2, 1872, the Bank discounted Mrs. Dillon's note for $12,000, and carried the proceeds to the credit of this account, in order to change the form of the debt. This note was renewed from time to time, the interest being paid in some instances by Dillon's check as *general agent*, charged to the account kept by him in that name. It was reduced at one time by a payment of $2,000, paid in money. It was then carried in the same way until December 11, 1873, when the note of Mrs. Dillon for $10,000 was given, dated November 29, 1873, at six months, falling due June 1, 1874. This [58] note was signed by Dillon and his wife, in their own handwriting, both as makers and indorsers. The discount upon it, and the interest accrued on the prior note, overdue for some time, of which it was the renewal, making in all $333.34, was paid to the Bank by Dillon's check as general agent. The account in the name of Mrs. Dillon was balanced on May 1, 1873, by two entries of $12,000 each, representing the debt as it then stood and that account was closed. The note thereafter appeared only in the discount ledger, until it was charged up, as hereafter stated. It was expressed to be payable at the Central National Bank of Baltimore. The same day this note was given, Nov. 29, 1873, an agreement was made in writing between the Bank, by resolution of the directors, and Dillon and his wife, "That in consideration of Alice P. Dillon being a stockholder in this Bank, and of A. H. Dillon, Jr., being a customer of the Bank, their note for $10,000, dated November 29th, 1873, at six months, be discounted at 6 per c. per annum, provided only that it be agreed in writing between the makers and indorsers of said note and the Bank, that at the maturity of the note $5,000 must be paid, and a new note at 6 months, to be discounted at 6 per c., which at its maturity must be paid in full, being in full payment of the loan."

In addition to these two accounts there was a third, entitled on the books of the Bank, "A. H. Dillon, Jr.," spoken of in the testimony as his individual account. The first entry is dated Oct. 15, 1873; the last Dec. 11, 1873. There are eight items on each side, amounting to $28,337.50. In the first three items it is testified that Dillon had no interest at all. They represent transactions made by him for the Bank itself. The last item in the account is $10,000, being proceeds of his note discounted, which were used to take up a prior one, then matured.

On June 1, 1874, the note given by Dillon and his wife for $10,000, dated Nov. 29, 1873, at 6 months, became due and was not paid. By order of the Bank it was that day charged to Dillon in his account as general agent. In ignorance of that fact, he continued to make deposits in that account and draw checks upon it, till June 12, 1874, when it was closed, showing [59] a credit balance at that date, if the note of $10,000 was not properly chargeable, of $11,000.86.

On June 10, 1874, Dillon drew his check, as general agent, on the Bank, for $8,000 to the order of Greene, the Secretary of the Insurance Company, and remitted it to him at Hartford. On June 13 it was presented to the Bank for payment and payment refused, on the ground that there were not funds to the credit of the drawee sufficient to pay it.

In the settlement of his agency accounts with the Company for May and June, 1874, he was allowed a credit for the amount of this balance in the Central Bank, $11,000.86, and paid in addition, in full of his account to June 30, $4,550.66.

On June 11 the directors of the Bank, by resolution, recite the agreement made in respect to the $10,000 note, on Nov. 29, 1873, when it was discounted; that it had not been complied with; that the note was made payable at the Bank; and declare that "This Board approve of the act of the acting cashier in charging said note in full to the account and funds of A. H. Dillon, Jr., general agent," etc.

On July 18, 1874, the Insurance Company filed a bill in equity in the Circuit Court of Baltimore City against the Bank to recover the balance which it alleged remained in the account of A. H. Dillon, Jr., general agent, $11,000.86, claiming it to be a fund, received by him in his

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fiduciary character, as its agent, which they had a right to follow and reclaim as against the Bank.

To this bill the Bank appeared and answered, denying its equity.

The Insurance Company filed an amended bill on March 4, 1875, in which it repeated the allegations of the original bill, and further averred that the defendant Bank had taken proceedings under the National Bank Act to wind up its business and cease to act as a national bank in the City of Baltimore, and that if it be permitted to do so, distributing its assets among its stockholders, the complainant will have no remedy except by a multiplicity of suits [60] against individual stockholders, many of whom are not within the jurisdiction. It, therefore, prays, in addition to an account and a declaration that the fund in question is a trust fund, of which the complainant is beneficial owner, that an injunction may be granted restraining the Bank from paying to its stockholders its assets without retaining a sufficient amount to satisfy the complainant's demand.

To the amended bill the defendant filed what are designated as pleas, as follows:

1. That the plaintiff is not, in any sense, a creditor of the defendant.

2. That there never was nor is any privity between the plaintiff and the defendant as to the various matters alleged in the bill.

3. That the court had no jurisdiction as to the matters alleged, the remedy, if any, being complete and adequate at law.

And afterwards an additional plea:

4. That under the provisions of the Acts of Congress, in reference to National Banks, it is exempted from the process of injunction as prayed for.

By the amended bill A. H. Dillon, Jr., was made a party defendant. He appeared and filed his answer to the original and amended bill; but having been lost or mislaid, it is not contained in the transcript of the record.

Subsequently, on April 10, 1877, the cause was removed from the State Court to the Circuit Court of the United States, on the petition of the defendant, the Central National Bank.

The Bank, on May 23, 1878, filed a motion to dismiss the bill, on the grounds:

1. That the Bank, by a vote of its shareholders, owning two thirds of its stock, taken July 15, 1874, had gone into liquidation, in pursuance of sections 5220, 5221 and 5222 of the Revised Statutes, and had thereby become dissolved.

2. And that the complainant, on June 8, 1878, had filed in the Circuit Court of the United States its bill of complaint, by virtue of section 2, chapter 156, of an Act of Congress approved June 30, 1876, entitled "An Act Authorizing the Appointment of Receivers of National Banks, and for Other Purposes," praying process against said Bank and against the persons [61] who were shareholders thereof at the time the same went into voluntary liquidation, and seeking the enforcement of the same demand sought to be enforced in this case, which is still pending.

This motion was overruled. The cause having been set down for hearing, the complainant moved for leave to file a general replication to the original answer, *nunc pro tunc*, and also to file a replication to defendant's first plea, which motions were granted; and to deny the legal sufficiency of the defendant's 2d and 3d pleas, setting the said two pleas for argument, which was overruled.

The motion to dismiss the bill, on the ground that the Bank had gone into liquidation and was thereby dissolved, was renewed on June 10, 1878, with the additional averment, that, in the meantime, all its property and assets had been distributed among its shareholders, and that the Bank was wholly and finally closed, and had ceased to have a corporate existence. This motion was overruled as having been filed after the cause had been argued and submitted, and after the court had orally pronounced its opinion.

And on the same day a decree was passed reciting that the cause standing ready for hearing, and having been argued, and submitted upon the bill, answer, pleadings and other proceedings and evidence in the cause, and decreeing payment by the Bank to the complainant of the amount of the fund claimed, with interest.

From this decree the Bank prosecutes this appeal.

The contention of the appellant, in opposition to the decree below, upon the merits, is that the account of A. H. Dillon, Jr., general agent, with the Bank, was an individual account with him as a depositor, which created the relation of debtor and creditor between them, and to which no other party was or could be privy; that the style in which it was kept, of general agent, was merely a *descriptio personæ*, and furnished no indication that the money deposited [62] belonged to the depositor in any fiduciary capacity; that it described merely the business in which he was engaged, as that of a general agency, for whomsoever might employ him; that, in point of fact, the account embraced deposits from various sources, and was used as a medium for payments of every description, according to the will of the depositor; that the Bank had no notice of any equitable claim of the complainant nor of the facts on which its claim rests; that, consequently, it had the right to treat the account as a dealing with Dillon individually, in which, so far as the Bank was concerned, no one else had any interest, legally or equitably, and subject to its lien as a banker, for any overdue obligation of the depositor.

It is claimed further, in support of the Bank's position, that the discount of the note afterwards charged to this account, was made originally upon the faith and credit that the latter was Dillon's individual property. But this we find to be distinctly and fully negatived by the circumstances in proof. There was a considerable balance to the credit of this account when the original debt was contracted, and at each time when it was renewed; but at no time does it appear that the suggestion was made that it should be applied, in whole or in part, to pay or reduce the indebtedness. The debt was first charged in the account kept in the name of Mrs. Dillon, and never appeared in the other, till it was finally charged up for payment. In the original conversation that resulted in the agreement for the loan, O'Connor, the president of the Bank, demanded security, and was satisfied with the responsibility of Mrs. Dillon, as the supposed owner of their residence

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in Baltimore, and it was not until after O'Connor learned that this had been conveyed to another, that he conceived the idea of charging the note, when it should become due, if it remained unpaid, to the account of Dillon, as general agent. The existence of this account as a profitable one to the Bank, was alleged as a reason by Dillon why he should have the accommodation, but it was not pledged for the payment of the loan, either in express terms, or by any acts or conduct from which such an intention can be inferred. And no such claim is made by the directors of the Bank, either in their resolution of November 29, 1873, authorizing the discount of the last six month's note, or that of June 11, 1874, justifying the act of the cashier in finally [63] charging it up to the account of Dillon, as general agent.

We find it also to be fully proven that the Bank knew that Dillon was the agent for the Insurance Company; that it was his business, and duty to collect and remit to it the premiums on policies of life insurance as they accrued; that the bank account in his name as general agent was opened in that way, to be used for that purpose; that in point of fact such premiums were collected and deposited for accumulation to be remitted, and were remitted by checks on that account, and that they constituted much the larger part of the fund which entered into it.

It will be observed that the question arising here is, not what the rights of the parties would be if, the Bank having no knowledge of the character of the account, except what might be inferred from the use of the words "*general agent*" at its head, the note had been taken up by Dillon's check upon that account. Here the attempt is made, with the actual knowledge which we find imputable to the Bank, and without Dillon's assent, to pay itself his overdue note out of a fund for which, as agent of the Insurance Company, he was bound to account to it. In the case of *Duncan* v. *Jaudon*, 15 Wall., 165 [82 U. S., XXI., 142], this court decided that a banker lending money to a person, for his private use, on the security of stocks, the certificates of which showed that he held them as trustee for another. was chargeable, as a party to the breach of trust, for the value of the trust property converted, and cite with approbation the similar decision in *Shaw* v. *Spencer*, 100 Mass., 389, where the certificates were in the name of "A B, trustee," without naming a *cestui que trust*. In that case it was held that the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, does so at his peril.

A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor *as trustee*, differs from other trust funds which are permanently invested in the name of trustees for the [64] sake of being held as such. For a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor, in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor if it is shown to consist, in whole or in part, of funds held by him in a trust relation.

In such circumstances, it is merely an application of the principle of set-off, and is illustrated by the case of *Bailey* v. *Finch*, L. R., 7 Q. B., 34. There the plaintiff, as trustee of a bankrupt banking firm, sought to recover a balance of the banking account which had been overdrawn. The defendant sought to set off a balance due to him as executor of A, in which name he had another account, and proved that as residuary legatee he was beneficially entitled to this balance, the legatees being otherwise satisfied. It was held that the effect of the account being in the name of the executor was to affect the bank with notice, if there were any equities attaching to the fund, but that, under the circumstances, there were no such equities as to prevent the defendant from treating the balance as a fund to which he was beneficially as well as legally entitled, and that, consequently, he was entitled to set it against the plaintiff's claim. Cockburn, *Ch. J.*, said: "There can be no doubt that in point of law the estate and effects of the deceased testatrix passed to the defendant as executor. And although it may be for his convenience to open an account in his own name as executor instead of his own name as private customer, the whole effect of that is, I apprehend, to affect the bank with the knowledge of the character in which he holds the money. Therefore, if there were persons beneficially interested in that fund, the bank might be liable to be restrained by proceedings in equity from dealing with the fund as if it [65] were one in which their customer, the defendant, were beneficially interested, absolutely without reference to any trust or beneficial interest to which it was subject." In the same case Blackburn, *J.*, said that opening the account as executor operated "as a notice to them, as a statement to the bank: 'This account which I am opening is not my own unlimited property, but it is money which belongs to the estate which I am administering as executor; consequently, there may be persons who have equitable claims upon it.' The bank would have been bound by any equity which did exist, of which they had notice at the time the bank became bankrupt."

In the case of *Pannell* v. *Hurley*, 2 Coll. Ch. C., 241, the depositor, having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker. The Vice-Chancellor, Knight Bruce, put the case thus:

"Money is due from A to B. in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B in setting one debt against the other, which is done without C's consent. Can it be a question in equity whether such a transaction can stand?"

In *Bodenham* v. *Hoskyns*, 2 DeG. M. & G., 903, the principle was stated to be one, acted

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upon daily by courts of equity, "According to which a person who knows another to have in his hands or under his control moneys belonging to a third person, cannot deal with those moneys for his own private benefit when the effect of that transaction is the commission of a fraud on the owner."

In the case of *Ex parte Kingston, etc., L. R.*, 6 Ch. App., 632, a county treasurer had two bank accounts, one headed "Police Accounts." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest, the bank treated the accounts as one [66] account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. He absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set off the one account against the other, but that the county magistrates could recover the balance standing to the credit of the police account. Sir W. M. James, L. J., said: "In my mind this case is infinitely stronger than those referred to during the argument, in which a similar claim on the part of bankers was disallowed; for in those cases the bankers relied on cheques drawn by the customers; and if a banker receives from a customer holding a trust account a cheque drawn on that account, he is not in general bound to inquire whether that cheque was properly drawn. Here the customer has drawn no cheque and the bankers are seeking to set off the balance on his private account against the balance in his favor on what they knew to be a trust account."

It is objected that the remedy of the complainant below, if any existed, is at law, and not in equity. But the contract created by the dealings in a bank account, is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the Bank and the Insurance Company. The latter would not have been liable to the Bank for an overdraft by Dillon, as was decided by this court in *Bank* v. *Ins. Co.* [*ante*, 459], and conversely for the balance due from the Bank, no action at law upon the account could be maintained by the Insurance Company.

But although the relation between the Bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

[67] "It is," said *Lord Justice* Turner, in the case of *Pennell* v. *Deffell*, 4 DeG. M. & G., 372, 388, "I apprehend, an undoubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." In the same case, *Lord Justice* Knight Bruce said, p. 388: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trust*, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other." He added: "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee or owing also to him, money in every sense his own."

Vice-Chancellor Sir W. Page Wood, in *Frith* v. *Cartland*, 2 Hem. & M., 420, said that *Pennell* v. *Deffell* rested upon and illustrated two established doctrines. One was that "So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust;" the second is, "That if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."

The case of *Pennell* v. *Deffell* [*supra*], was the subject of comment by Fry, *J.*, *in re West of England and South Wales District Bank; Ex parte Dale & Co.*, L. R., 11 Ch. D., 772. Strongly approving the decision in principle, he felt bound, nevertheless, by what he considered the weight of authority, not to apply it, in the circumstances of the case before him, where there had been a mingling of trust money with indi- [68] vidual money. He said, however: "Does it make any difference that instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in which, if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own."

The whole subject of this discussion was very elaborately and with much learning reviewed by the Court of Appeal in England, in the very recent case of *Knatchbull* v. *Hallett, in re Hallett's Estate*, L. R., 13 Ch. D., 696. It was there decided that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court over-

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ruled the opinion in *Ex parte Dale & Co.* [*supra*]. It was also held that the rule in [*Devaynes* v. *Noble*], *Clayton's Case*, 1 Mer., 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular *Pennell* v. *Deffell* was not followed. The Master of the Rolls, Sir George Jessell, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account. He adopts the principle of *Lord* Ellenborough's statement in *Taylor* v. [69] *Plumer*, 3 M. & S., 562, that "It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman*, Willes, 400, or into other merchandise, as in *Whitecomb* v. *Jacob*, 1 Salk., 161, for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." But he dissents from the application of the rule made by *Lord* Ellenborough, when the latter added, "which is the case when the subject is turned into money and confounded in a general mass of the same description," for equity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The court of appeals had previously applied the very rule as here stated in the case of *Birt* v. *Burt*, reported in a note to *Ex parte Dale & Co.*, L. R., 11 Ch. D., 773.

The principle is illustrated by many cases in this country. In that of the *Bk.* v. *King*, 57 Pa., 202, a collector of rents deposited moneys of his principal in a bank in his own name; it was attached by a creditor of the depositor, and immediately afterwards notice of ownership was given by the principal. It was held that the attaching creditor stood in the position of the depositor, and could recover only what the depositor could. The law of the case was stated by *Judge* Strong in the following language:

"It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed; but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability extinguished, in the absence of interference by his [70] principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its repayment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to the agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor."

The same doctrine was strongly maintained by the New York Court of Appeals in the case of *VanAlen* v. *Bank*, 52 N. Y., 1. In that case it was decided that when an agent deposits in a bank to his own account the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. In the course of the opinion, Church, *Ch. J.*, said:

"It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in this court. *Oliver* v. *Piatt*, 3 How., 333; *May* v. *LeClaire*, 11 Wall., 217 [78 U. S., XX., 50]; *Duncan* v. *Jaudon*, 15 Wall., 165 [82 U. S., XXI., 142]; *Bayne* v. *United States*, 93 U. S., 642 [XXIII., 997]; *U. S.* v. *Bank*, 96 U. S., 30 [XXIV., 647].

The relation of Dillon to the Insurance Company was one of confidence and trust. He was its agent for the collection of premiums, which [71] belonged to it no less when in his hands than before their receipt by him. He was to account for them, under its directions, and in his entire dealing with them was bound to obey its orders. He was not merely its debtor for the amount in his hands. He held the fund for the use and as the property of the Company. *Foley* v. *Hill*, 2 H. L. Cas., 28. In a direct suit between them, *Dillon* v. *Ins. Co.*, 44 Md., 386, it was so expressly ruled, the Maryland Court of Appeals saying: "Dillon not only held the fiduciary relation to the Company of its agent, but was acting in respect to this and all the money he collected while such agent, under specific directions as to what he should do with it, directions which the company had the right, for its own protection and that of its policy holders,

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to have specifically performed. * * * He must, we think, be regarded and treated as a trustee, and the fund thus in his hands must be considered as so far impressed with a trust as to give a court of equity jurisdiction of the case on that ground, if on no other."

Evidently the Bank has no better right than Dillon, unless it can obtain it through its banker's lien. Ordinarily that attaches in favor of the Bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner, of which the Bank has notice, either actual or constructive.

In the present case, in addition to the circumstance that the account was opened and kept by Dillon in his name as general agent, and all the presumptions properly arising upon it, we have found that other facts proven on the hearing justify and require the conclusion that the Bank had full knowledge of the sources of the deposits made by Dillon in this account and of his duty to remit and account for them as agent of the Insurance Company. It is, consequently, chargeable with notice of the equities of the appellee.

[72] In our opinion the equity of the case, upon the merits, was manifestly with the appellee. But the appellant has assigned other errors upon the decree which remain to be considered.

1. It is claimed that the suit while in the circuit court abated by reason of the dissolution of the defendant below as a corporate body.

The Central National Bank was organized under the National Bank Act of 1864 [13 Stat. at L., 99], and its amendments on January 16, 1871. Its articles of association provided that "This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the Act."

On July 15, 1874, three days before the complainant's bill was filed, at a meeting of the stockholders of the Bank held pursuant to law, "It was voted by the stockholders of said association owning more than two thirds of its stock, that said association go into liquidation and be closed."

It is certified by the Comptroller of the Currency "That the Central National Bank of Baltimore went into voluntary liquidation on July 15, 1874, under sections 5220 and 5221 of the Revised Statutes of the United States, and on January 8, 1875, deposited legal tender notes with the Treasurer of the United States for the full amount of its outstanding circulation, as provided in section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the Bank, thus finally closing its connection with this department."

It further appears that the Bank ceased to do any new banking business after resolving to go into liquidation; paid its depositors and other creditors, so far as their claims were admitted; reduced its assets to cash, and distributed the money among the shareholders, paying them back their capital in full with an accumulation of two per cent premium. The Bank's lease of its banking house expired March 1, 1875, when its doors were closed, its clerks discharged, and afterwards its furniture removed and disposed of and its signs taken down. On February 1, 1875, a special authority was issued by the [73] Board of Directors, authorizing the president and acting cashier to act for and do all legal acts that might become necessary in the liquidation of the business of the Bank.

It is claimed that these facts show a dissolution of the Corporation.

It is provided by section 5136, Rev. Stat. U. S., that every national bank, duly incorporated, shall "have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two thirds of its stock, or unless its franchise becomes forfeited by some violation of law."

By section 5220 it is also provided that "Any association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock."

Section 5221 requires that whenever a vote is taken to go into liquidation, notice of the fact shall be given to the Comptroller of the Currency, and publication made in newspapers, that the association is closing up its affairs and notifying its creditors to present their claims for payment.

Six months thereafter is given by section 5222, in which the association is required to deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation.

It is further provided (section 5224), that when that deposit has been made, the bonds deposited to secure payment of its notes shall be reassigned to it. "And thereafter the association and its shareholders shall stand discharged from all liabilities upon its circulating notes, and their notes shall be redeemed at the Treasury of the United States."

In connection with the provision of the articles of association of the Central National Bank, already noticed, these are all the provisions of law that are supposed to affect the question.

It is to be observed that the sections under which the proceedings took place which, it is claimed, put an end to the corporate existence [74] of the Bank, do not refer, in terms, to a dissolution of the Corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defense. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs and, in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of its circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of the association and

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its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for, is to pay the debts of the Corporation, that the remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place, with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made, which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business.

In the case of the *Bk. of Bethel* v. *Pahquioque Bk.*, 14 Wall., 383 [81 U. S., XX., 840], the same question was made in reference to a national bank which, having become insolvent, by a refusal to pay its circulating notes, was put into liquidation by the Comptroller of the Currency, by the appointment of a receiver under other provisions of the Bank Act. It was there claimed, for the purpose of defeating a suit brought against the Bank by name, that the appointment of the receiver, who had refused to admit and pay the plaintiff's claim, was a dissolution of the Corporation. *Mr. Justice* Clifford, delivering the opinion of the court, recited the provisions of the law upon the subject, and said: "None of these proceedings, however, support the theory that the association ceased to exist [75] when the receiver was appointed, nor at any time before the assets of the association are fully administered, and the balance, if any, is paid to the owners of the stock or their legal representatives" (p. 398).

"Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly, if not entirely, upon the construction of the Act of Congress, and suffice it to say, that we are all of the opinion that the Act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs, under the provisions of the Act which authorized its formation."

In that case it was argued, as in this, that as the only constitutional warrant for the existence of a national bank was its connection with the government as a fiscal agent, the severance of that connection *ipso facto* deprived it of vitality. The same argument would render it incapable of returning to its stockholders their capital and accumulated profits. If it was a reasonable incident to its living that it should contract debts, it is equally a reasonable incident to its dissolution that it should pay them. We see no constitutional impediment that prevents it.

The same conclusion was reached by the Court of Appeals of Maryland in the case of *Ordway* v. *Bk.*, 47 Md., 217.

On June 30, 1876, Congress passed an Act, authorizing the appointment of Receivers of National Banks, and for Other Purposes, 19 Stat. at L., 63, the 2d section of which provides that when any national banking association shall have gone into liquidation under the provisions of section 5220 of the Revised Statutes, the individual liability of the stockholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself [76] and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

After the passage of this Act, on January 8, 1878, it appears that the appellee filed in the Circuit Court of the United States for the District of Maryland its bill of complaint against the appellant, and against the persons who were shareholders in the Bank at the time it resolved to go into liquidation, under the provisions of this section.

It is urged that this statute is itself evidence that the Bank was dissolved as a corporation by the proceedings in liquidation, and that the pendency of the bill authorized by it was a bar to any further proceeding in the present suit.

We see nothing in the Act of 1876 inconsistent with the continued existence of the Bank as a corporation for the purposes of liquidation. Indeed, it seems to confirm the idea that for the purpose of being sued, in order judicially to determine the question of disputed liability, it continues to exist, and the remedy against the shareholders is added as a means of execution, in case the corporate assets have in the meantime been otherwise applied or shown to have been insufficient. It is a cumulative remedy and against other persons, and cannot be considered as an objection to the rendition of the present decree.

It is also assigned for error that the appellee failed to set down for argument or traverse the pleas of the defendant, as required by the 38th Equity Rule; but the pleas in this case were irregularly filed and defective, under the 31st Rule, for lack of the affidavit of the defendant that they were not interposed for delay, and of the certificate of counsel that they were, in his opinion, well founded in point of law, and may well have been disregarded on that account. Besides, the second and third pleas were such only in form, as they merely alleged matters of law and not of fact.

"The office of a plea," said *Lord* Eldon, in *Rowe* v. *Teed*, 15 Ves., 372, "generally is, not to deny the equity, but to bring forward a fact which, if true, displaces it." The first plea is open to the same objection; for although it appears to negative the averment of a matter of fact essential to the complainant's case, that he was a creditor of the defendant, yet really it merely denies the conclusion of law, to be

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drawn from the whole of the case as stated in [77] the bill. Every matter, therefore, covered by the pleas was necessarily embraced in the hearing upon the bill, answer and proofs. There was no issue tendered on matter of fact that was left undecided, and no matter of law affecting the merits that was not adjudged.

It is also assigned for error that the complainant failed to file a replication to the answer. Leave to do so was granted by the court, on the complainant's motion, and although the transcript does not show that it was done, the parties went to the hearing as if it had been done, submitting the case upon the proofs which had been taken, as though a formal issue had been perfected.

The same objection was made in the cases of *Clements* v. *Moore*, 6 Wall., 310 [73 U. S., XVIII., 788], and *Laber* v. *Cooper*, 7 Wall., 569 [74 U. S., XIX., 152], under circumstances not distinguishable from the present, and for the reasons there stated it is overruled.

The absence of an answer by Dillon, and the want of an issue upon it, is also assigned for error. The transcript shows that an answer had been filed by Dillon, but had been lost or mislaid. This fact having been called to the attention of the court below, before the hearing, the Circuit Judge announced that he would not proceed with the hearing without the answer, if the respondent's solicitor, then present, objected to the hearing for that reason. No objection was made, and the hearing properly proceeded. For aught that appears Dillon's answer may have been a confession of the truth of the allegations of the bill.

We find no error in the record, *and the decree is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

Cited—30 Kan., 162; 46 Am. Rep., 92.

MRS. M. M. ADA LANE AND GEORGE W. LANE, Her Husband, *Plffs. in Err.*,

v.

JAMES E. WALLACE AND WILLIAM W. HANDLIN, Suing as WALLACE & HANDLIN.

To what state court a writ of error should be directed—inferior court.

1. Where a judgment of an inferior state court was appealed to a higher state court, which dismissed the appeal for want of jurisdiction, and only determined that the inferior court was the highest court of the State in which a decision of the suit could be had, a writ of error from this court to the higher state court should be dismissed, as such court made no decision of the federal question involved in the case and passed upon by the lower court.

2. A writ of error should have been issued to the inferior state court; and such writ can be issued in this case, after such dismissal here.

[No. 1016.]

Submitted Nov. 15, 1881. Decided Nov. 21, 1881.

IN ERROR to the Supreme Court of the State of Louisiana.

Motion to dismiss.

This was an action upon a mortgage, brought in one of the State District Courts of Louisiana. In the course of the proceedings in that court, a petition for a removal to the United States Circuit Court was filed. The district court denied this petition, and after various other proceedings, unnecessary to be here set out, a money judgment was rendered in favor of the plaintiffs, their claim under the mortgage being denied. Defendants appealed to the Supreme Court of the State, and that court dismissed the appeal for want of jurisdiction.

Mr. **W. W. Handlin,** for defendant in error.

Messrs. **Joseph P. Hornor,** and *Francis W. Baker*, for plaintiffs in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment of the Supreme Court of Louisiana in this case was one dismissing the suit for want of jurisdiction. Consequently, that court could not have decided the federal question presented to and passed upon by the district court. All it did was to determine that the district court was the highest court of the State in which a decision in the suit could be had. The writ of error should, therefore, have been directed to that court instead of the Supreme Court. Such a writ can now issue if applied for and allowed in time.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NEVADA BANK OF SAN FRANCISCO, [111]
Plff. in Err.,

v.

JOHN SEDGWICK.

(See S. C., 14 Otto, 111, 112.)

Taxation of bank capital.

Under the 2d clause of section 3408 of the Revised Statutes, the capital of a state bank, invested abroad and in foreign countries, can be taxed by the United States.

[No. 87.]

Argued Nov. 11, 1881. Decided Nov. 21, 1881.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. **John E. Ward** and *Hall McAllister*, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by a Bank incorporated under the laws of and having its principal place of business in California, against a Collector of the Internal Revenue of the United States, to recover back taxes alleged to have been illegally exacted under the second clause of section 3408 of the Revised Statutes. That clause provides for the levy and collection of "A tax of one twenty-fourth of one *per centum* each month upon the capital of any bank, association, company, corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds." A part of the capital of this Bank was, as is alleged, "invested abroad and in foreign countries," and in assessing the taxes this was included as capital with the rest. The case stands on demurrer to the

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complaint, and the single question we are asked to consider is, whether the capital of a state bank "invested abroad and in foreign countries" can be taxed by the United States. In what manner the investments were made does not appear. The averment in the complaint is in the general language we have quoted.

As long ago as 1819 it was said by this court, speaking through *Chief Justice* Marshall, in *McCulloch* v. *Maryland*, 4 Wheat., 429, that "All subjects over which the sovereign power of a State extends, are objects of taxation;" [112] and, acting on this principle, we held recently, in *Kirtland* v. *Hotchkiss*, 100 U. S., 491 [XXV., 558], that a State might tax her resident citizens for debts held by them against non-residents and secured by mortgage on property in another State. That seems to us conclusive of this case. The Nevada Bank was incorporated and organized under the laws of one of the States of the Union, and it had its principal place of business within the United States. It was, therefore, subject to the sovereign power of the United States and a proper object of taxation. The investments abroad are still the property of the Bank and part of its capital. In the absence of any averments to the contrary, we must presume they were such as banks usually make in doing a banking business, and that their legal *situs* was at the home office of the Corporation. We need not consider, therefore, whether, if they had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply. As the case is presented it comes clearly within the principle which was applied in *Kirtland* v. *Hotchkiss*, *supra*.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[176] FLAGSTAFF SILVER MINING COMPANY OF UTAH (Limited) ET AL., *Plffs. in Err.*,

v.

GEORGE CULLINS.

(See S. C., 14 Otto, 176-179.)

Mechanics' liens—Utah law.

1. Statutes, giving liens to laborers and mechanics for their work and labor, are to be liberally construed.
2. An overseer and foreman of a body of miners, who performed manual labor upon the mine, is entitled for his services to a lien on the mine, under the law of Utah giving a lien for labor thereon.

[No. 80.]

Argued Nov. 8, 1881. Decided Nov. 21, 1881.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. **Walter H. Smith,** *John R. McBride* and *George H. Williams*, for plaintiff in error.

Messrs. **Shellabarger & Wilson**, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

George Cullins, the defendant in error, brought suit against the Flagstaff Silver Mining Company of Utah, the plaintiff in error, in the District Court of the Third Judicial District of the Territory of Utah, to recover wages which he claimed to be due him from the defendant in error for services rendered it, and to subject its property to a lien therefor in his favor, which he claimed attached by virtue of the Statute of the Territory. The statute declared as follows:

"Any person or persons who shall perform any work or labor upon any mine or furnish any materials therefor in pursuance of any contract made with the owner or owners of such mine or of any interest therein, shall be entitled to a miner's lien for the payment thereof upon all the interest, right and property in such mine by the person or persons contracting for such labor or materials at the time of making such contract. Said lien may be enforced in the same manner and with the same effect as a mechanics' lien, as provided by the laws of Utah." Compiled Laws of Utah, sec. 1221.

The answer of the Mining Company denied that anything save a small balance was due the plaintiff, and denied that the statute of the Territory gave him a lien on its property for the sum due him.

The case was submitted to the district court upon the issues of fact as well as of law.

The court found that the defendant below was a Corporation organized under the laws of Great Britain, and at the time the services of the plaintiff below were rendered, was the owner of and engaged in working a mine called the Flagstaff Mine, situate in Salt Lake County, in [177] the Territory of Utah, and that one J. N. H. Patrick was its general agent and the manager of its mining and smelting business in America.

The court further found "That on or about the 14th day of December, 1873, the said Company, by said J. N. H. Patrick, its agent, for that purpose duly authorized, employed the plaintiff for an indefinite time thereafter to direct the *work* in its said mine, and with authority to employ and discharge miners and procure and purchase supplies for working said mine; and that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee and direct the work in said mine, direct the shipping of ore and, generally, to control and direct the actual working and development of the mine; that the plaintiff, while in the employment of said Company, performed said duties, and in the performance thereof did some manual labor."

The court also found that, at the commencement of the suit, there was due the plaintiff from the Mining Company, for wages earned by him under said employment, the sum of $1,530, for which sum the court gave judgment, and declared it to be a lien upon the Mining Company's mine.

From this judgment an appeal was taken to the Supreme Court of the Territory, by which it was affirmed.

This writ of error is prosecuted to reverse the judgment of the Supreme Court.

The plaintiff in error alleges that the District Court of the Territory erred in declaring the judgment in favor of the defendant in error to be a lien on its mine, and that the Supreme Court of the Territory erred in affirming that decision. The precise question presented by the writ of error is, whether the services found by

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the district court to have been performed by the defendant in error, for the Mining Company, were such "work and labor," as under the Statute of the Territory entitled him to a lien therefor upon the mine.

Statutes giving liens to laborers and mechanics for their work and labor are to be liberally construed. *Davis* v. *Alvord*, 94 U. S., 545 [XXIV., 283]. The finding of the district court makes clear the character of the services rendered by defendant in error. He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. The services rendered by him were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. He appears from the findings to have performed duties similar to those required of the foreman of a gang of track hands upon a railroad, or a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is, nevertheless, as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work is required for their successful performance. We think that the discharge of such duties may well be called work and labor, and that the district court rightfully declared the person who performed them entitled to a lien, under the law of the Territory.

[178]

We have examined all the cases cited by the plaintiff in error. None of them seem to be inconsistent with the views we have expressed. They decide that an architect and superintendent of a building; that a person employed to cook for men engaged in constructing a reservoir; that a contractor for the building of a railroad, or the erection of a house; that an agent employed to disburse money and pay off the hands who are building a house; that the assistant chief engineer of a railroad company, are not, under laws similar to the Statute of Utah, entitled to a lien for their services. *Foushee* v. *Grigsby*, 12 Bush (Ky.), 75; *McCormick* v. *Los Angelos Water Co.*, 40 Cal., 185; *Aikin* v. *Wasson*, 24 N. Y., 482; *Blakey* v. *Blakey*, 27 Mo., 39; *Caldwell* v. *Bower*, 17 Mo., 564; *Brockway* v. *Innes*, 39 Mich., 47; *Peck* v. *Miller*, 39 Mich., 594.

The case which comes nearer supporting the contention of plaintiff in error than any other cited by him is *Smallhouse* v. *Kentucky, etc., Co.*, 2 Mon. T., 443. But in that case the court says, that "From the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or laborer, or that he labored directly in the construction of the buildings, but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named." This case is fairly distinguishable from the one now under consideration, but even if it fully supported the contention of the plaintiff in error, is entitled to no more weight than the decision of the Supreme Court of Utah in the present case.

[179]

Views similar to those we have expressed were declared by Williams, *Ch. J.*, in *Willamette Falls Co.* v. *Remick*, 1 Oreg., 169, and by the Supreme Court of Nevada in *Capron* v. *Strout*, 11 Nev., 304.

It is somewhat difficult to draw the line between that kind of work and labor which is entitled to a lien, and what is mere professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of the Territory of Utah, that an architect who furnishes plans and superintends the erection of a building, acquires a lien thereon, as for work and labor. *Stryker* v. *Cassidy*, 76 N. Y., 50; *Ins. Co.* v. *Rowland*, 26 N. J. Eq., 389; *Jones* v. *Shaughan*, 4 Watts & S., 257; *Bk.* v. *Gries*, 35 Pa., 423. *Knight* v. *Norris*, 13 Minn., 473.

It is not necessary in this case to go so far as these decisions would warrant. But we are clearly of opinion that, upon the facts found by the district court, the defendant in error, under the Statute of Utah, was entitled to a lien upon the mine to which his services were applied. *The judgment of the Supreme Court of Utah must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

J. H. FECHTENBURG AND J. A. LOVENGREEN, as J. H. FECHTENBURG & Co., *Appts.*,

[180]

v.

THE BARK WOODLAND, Her Tackle, etc., and Cargo and Freight, WM. W. TURNBULL and CHARLES TURNBULL, Claimants.

(See S. C., 14 Otto, 180-183.)

Lien on vessel—drafts by master.

1. Drafts drawn by the master of a vessel on her owners, which express on their face that they are recoverable against the vessel, freight and cargo, do not themselves create a lien on the vessel, unless the debt for which they were given bound the vessel.

2. Where the drafts included insurance, although none was ever effected, and commissions calculated on an excessive valuation, and there was a corrupt understanding between the master and the payee of the drafts, under which the master was given one of the drafts which he drew on his owners, as "his share," the approval of the accounts by the master amounts to nothing as evidence of what was actually due.

[No. 88.]

Argued Nov. 11, 1881. Decided Nov. 21, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Henry J. Scudder**, for claimants, in support of motion.

Messrs. **James Ridgway** and *William R. Beebe, contra.*

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Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in admiralty to recover of the bark Woodland and her freight the amount of two drafts drawn by the master of the vessel at St. Thomas, W. I., on her owners; one for the payment of $2,000, and the other for the payment of $2,606.40 in New York, to the order of J. Niles & Co., merchants in St. Thomas, ten days after sight. The facts found by the circuit court, which, in our opinion, are conclusive of the case, are as follows:

The Woodland was a British bark owned by the claimants, residents of St. John, New Brunswick. In November, 1870, while on a voyage from Montevideo to New York with a cargo, being in distress, she put into the Danish port of St. Thomas for repairs, which were necessary before she could safely proceed on her voyage. J. Niles, who carried on business under the name of J. Niles & Co., attended to the affairs of the vessel at St. Thomas, landed the cargo, and sold a portion of it, on which he received an amount sufficient to re-imburse all the moneys expended, but he charged for commissions and insurance $6,875. As to the insurance, none was actually effected, and the commissions were on an excessive valuation. The master approved all the bills, and drew drafts on his owners for a balance of $6,106.24, which expressed on their face that they were [181] "recoverable against the vessel, freight and cargo." Two of these drafts the libelants discounted, and this suit was brought for their recovery. The third, for $1,500 was given by Niles to the master upon a corrupt understanding that it was to be his share. The two drafts have not been accepted or paid and the libelants are the owners thereof, having advanced money upon them in good faith and without any knowledge of the fraudulent acts of Niles and the master.

The drafts did not themselves create a lien on the vessel. Unless the debt for which they were given bound the vessel, the drafts, notwithstanding what is expressed on their face, did not. If the owners owed Niles nothing under his contract with the master for the repairs and supplies which had been furnished, he had no lien on the vessel, which he or anyone else could enforce in admiralty. For the purposes of this suit the libelants occupy no better position than Niles, and if he could not recover they cannot. Having advanced their money in good faith they may not be affected, so far as their remedies against the parties to the drafts are concerned, by the fraudulent character of the transactions between Niles and the master, but if the vessel owed Niles nothing, it does not owe them.

Now, we think it clear that if Niles were here as appellant instead of these libelants, he would not be entitled to the reversal of this decree upon the findings as they stand. The findings sent here under the Act of 1875 furnish the only evidence of the facts which we can consider. It is incumbent on the libelants to prove a debt from the vessel to Niles, and its amount. Until this proof is made they cannot recover. If the settlement between the master and Niles had not been impeached, that would have been enough, for the master is the agent of the owner for all such purposes. But it has been impeached. The court has expressly found that although insurance was charged for and allowed, none was ever effected, and that the commissions were calculated on an excessive valuation. It has also found that there was a corrupt understanding between the master and Niles, under which the master was given one [182] of the drafts which he drew on his owners, as "his share." Under these circumstances, it is clear that the approval of the accounts by the master amounts to nothing as evidence of what was actually due, and without that there is nothing to show that Niles is entitled to anything. His advances were all paid by sales of the damaged cargo, and while there was $6,875 allowed him for commissions and insurance, the balance his due on the accounts as stated was only $6,106.24. Thus it appears that in addition to his expenditures he must have received $768.76 on account of commissions. In the absence of anything to show what his services were reasonably worth, we cannot say from the findings that anything is honestly due Niles on his accounts.

It is insisted, however, that there was no evidence whatever in the case to establish the corrupt understanding between Niles and the master, because a deposition bearing on that subject was ruled out in the circuit court.

It is true such a deposition was excluded, but without that there is abundant evidence in the testimony of Niles, tending at least to support the finding. His account as stated by himself can be properly abstracted as follows:

Bill of supplies		$ 216 27
Labor, loading and unloading cargo, wharfage, etc		1,832 38
Paid captain for himself and crew		768 14
Sundry bills for repairs		2,582 93
Total expenditures		5,399 72
Receipts from sale of damaged cargo		7,035 50
Receipts over actual expenditures		$1,635 78
Com's charged on bills of supplies	$10 81	
Com's charged on bills of labor, etc	91 63	
Com's charged on payments to master	38 41	
Com's charged on bills for repairs	129 15	
Com's charged on sale of cargo	352 78	
Com's 2½ per cent on receiving, storing and shipping cargo	3,125 00	
Storage, 2 per cent on valuation of cargo	2,500 00	
Insurance, 1 per cent on valuation	1,250 00	
Paid 2½ per cent discount on drafts	152 65	
Com's for indorsing and negotiating	91 59	
		7,742 02
Balance		$6,106 24

The same witness also testified that the drafts [183] were all drawn in the same form by the master on the owners, to the order of Niles & Co., payable in New York at ten days' sight, and that the draft for $1,500 was indorsed by Niles & Co. and delivered to the master. The cargo

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consisted of hides, sheep-skins, kip-skins, horse and cow-hair and shin-bones, and the vessel was detained in St. Thomas about two months.

Without considering any of the other important and interesting questions which have been urged on our attention in the argument, *we affirm the decree.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[192] MAHONEY MINING COMPANY, *Plf. in Err.*,

v.

ANGLO-CALIFORNIAN BANK, (Limited)

(See S. C., 14 Otto, 192-196.)

Power of officers of a corporation, how shown—presumption—officers de facto.

1. Where a mining company had power to borrow money for the purposes of the corporation, and to invest its president and secretary with authority to negotiate loans, to execute notes and to sign checks drawn against its bank account, the existence of such authority in such officers may be shown by the course of business, and the usages and practice of the company.

2. Where such proofs of their authority are given, the presumption, in the absence of contrary proof is, that those officers, in making an overdraft, did not exceed their authority, and that the moneys thus obtained were paid over to or received by the company.

3. Officers *de facto*, holding under color of an election, having charge of the affairs of a company, are capable of binding it in all matters legitimately devolving upon directors of the company.

[No. 78.]

Argued Nov. 4, 7, 1881. Decided Nov. 21, 1881.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. **J. Hubley Ashton** and *Stewart, Vanclief & Herrin*, for plaintiff in error.

Messrs. **Shellabarger** *& Wilson* and *Theo. Sutro*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, a mining corporation, was organized under the laws of California on the 22d day of December, 1873. From that date until the 21st of June, 1877, its treasurer was the defendant in error, a banking corporation created under the laws of Great Britain and doing business in the City of San Francisco. During that period the moneys of the Mining Company were, from time to time, deposited with its treasurer, and were paid out upon checks signed by the president and secretary of [193] the Company. In addition, the Bank allowed the account of the Company to be overdrawn upon like checks. Such overdraft, including proper allowance for interest, amounted, on the 21st of June, 1877, to $6,319.59.

On the day last named, at 11 o'clock A. M., in an action then pending in the District Court of the Nineteenth Judicial District of California, in and for the City and County of San Francisco, wherein certain stockholders of the Mining Company were plaintiffs, and Ignatz Steinhart, S. Heydenfeldt, P. N. Lilienthal, Otto Esche, F. N. Benjamin and the Mining Company were defendants, which action had been brought to remove those persons from office as directors of the Mining Company, a decision was announced by the court that the election under which said persons acted as directors was invalid and void, and that they should be ousted and removed. When that decision was announced, the findings of fact by the court, as well as its judgment in conformity with the decision, were reduced to writing and dated of that day. They were, however, not filed with the clerk of the state court until June 22, 1877, upon which day the judgment was recorded by the clerk.

In the afternoon of June 21, 1877, after the announcement by the Judge of the state court of his decision, the individuals above named met as a Board of Directors of the Mining Company, when its president informed them that the account of the Company with the Bank, its treasurer, was overdrawn to the amount of $6,319.59, gold coin of the United States, and that the manager of the Bank requested either the money or the note of the Company. A resolution was thereupon adopted authorizing the president and secretary to execute, and they then did execute, in behalf of the Company, a note for $7,500, payable in coin, and with interest thereon at the rate of one and a half per cent per month until paid. The note was intended to cover as well the amount overdrawn as anticipated advances. But no such advances were afterwards made.

When the foregoing resolution was passed, the persons participating in its adoption had notice of the decision announced by the state court in manner and form as stated.

The present action is to recover from the Company the amount of its overdraft. The com- [194] plaint, framed in accordance with the Code of Procedure of California, contains two paragraphs or counts: one, for $6,351.72 gold coin, on an account, as of June 26, 1877, for money lent by the Bank to the Company, and for money paid, laid out and expended by the former to and for the use of the latter; the other for a like amount, with interest, being the balance alleged to be due upon the note referred to, after deducting all just offsets, which note, it is averred, was given in consideration of the amount due the Bank upon an account stated between the parties on the 21st of June, 1877.

The court gave judgment against the Company for the amount of the overdraft, with interest at the rate specified in the note. And from that judgment the present writ of error is prosecuted.

We are all of opinion that the Bank is entitled to recover the amount of the overdraft as shown by the checks signed by the president and secretary of the Mining Company.

Upon the Board of Directors of the Mining Company was imposed, by the laws of California (Civil Code, sec. 305), the duty of exerting its corporate powers, and of conducting and controlling its business and property. Among the powers which the Company had (Civil Code,

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NOTE.—*Corporations possess only powers conferred by statute creating them and those necessarily implied.* See, *note* to Huntington v. Bk., 96 U. S., XXIV., 777.

Acts of de facto *officer, when valid.* See, *note* to Hussy v. Smith, 99 U. S., XXV., 314, 315.

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sec. 354), was the power "to enter into any obligations or contracts, essential to the transaction of its ordinary affairs, or for the purposes for which it was created." Necessarily, therefore, the Board had authority not only to designate the banking institution in which the money of the Company should be deposited, but to prescribe the mode in which and the officers by whom it should be withdrawn, from time to time, for the use of the Company. It is equally clear that the Board had, as incident to the general powers conferred by law upon the Company, power to borrow money for the purposes of the Corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account. And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the Board. It may be established by proof of the course of business [195] between the parties themselves; by the usages and practice which the Company may have permitted to grow up in its business; and by the knowledge which the Board, charged with the duty of controlling and conducting the transactions and property of the Corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the Corporation. Since checks against the account of the Mining Company must, in the ordinary course of its banking business, have been signed by some officer or officers designated for that purpose, the Bank had the right, in view of the long period during which the checks of that Company were signed by its president and secretary—without objection, so far as the record shows, upon the part of the Company's Board—to assume that those officers had been invested, by the Board, with authority to sign all checks drawn against the Company's bank account. So long, therefore, as the Mining Company had money to its credit on the books of the Bank, the latter, in the absence of notice that the president and secretary of the former had no authority to sign checks, was justified in honoring all checks signed by those officers. This much we do not understand counsel to dispute. Their contention, upon this branch of the case, relates mainly to the liability of the Mining Company for the amount of any overdraft checks signed by its president and secretary.

Touching that liability, we have to say that since the Mining Company had power, under its charter, to raise money in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the Company. But that is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the Mining Company to make overdraft checks, and by proof that the Company did not receive the money paid thereon by the Bank. There is, [196] however, no such proof in this case. The finding is entirely silent as to whether the Company did not receive and use the money. And the finding that "No resolution or special authority of the defendant was *shown* authorizing its president and secretary, or either of them, to overdraw its account in bank," fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that a resolution to that effect was not, in fact, passed, nor that such special authority was not, in effect, given. The meager evidence upon which, according to the special finding, the case was tried below, is, we think, insufficient to overturn the presumptions which should be indulged in favor as well of the Bank as of the integrity and fidelity of the officers of the Mining Company.

This conclusion would render it unnecessary to consider any other question in the case, did not the judgment of the court give interest upon the amount due the Bank at the rate stipulated in the note. By the laws of California, unless there be an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum, on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of account, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him. The majority of the court are of opinion that the judgment for the amount of the overdraft, with interest at the *agreed* rate, must stand; this, because the decree of ouster against the persons who passed the resolution of June 21, 1877, did not take effect until the succeeding day when it was actually filed with the clerk and entered on the record; and, because, in the language of *Mr. Justice* Field, who tried the case, the "Parties ousted were officers *de facto*, holding under color of an election, and having charge of the affairs of the Company, and capable of binding it in all matters legitimately devolving upon directors of the Company." [*Bank* v. *Mining Co.* 1 Sawyer, 255.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

KNICKERBOCKER LIFE INSURANCE COMPANY, *Plff. in Err.*, [197]
v.
CHRISTINA TREFZ.

(See S. C., 14 Otto, 197-208.)

Insurance application—meaning of—immaterial inaccuracy—questions for jury

1. Where, in an application for life insurance, the applicant is interrogated as to whether he had had certain diseases, the answer "never sick," must be taken to mean, not that the party was never sick at all of any disorder, but only that he had never had any of the enumerated diseases, so as to constitute an attack of sickness.

2. If the applicant is a foreigner, with an imperfect knowledge of the language, it is obviously just and reasonable that that circumstance should be considered in determining the meaning of the words he has used.

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3. An inaccuracy in a charge, which could not have misled the jury, is immaterial.

4. Where the interrogatory propounded in the application, to which the answer in question was made, did not include sunstroke in the list of enumerated diseases, but it did include diseases of the brain, it was proper for the court to submit to the jury the questions, whether an attack which the insured had had, called sunstroke, was it in reality, and whether such attack, whether sunstroke or not, was a disease of the brain.

[No. 85.]

Argued Nov. 10, 11, 1881. Decided Nov. 21, 1881.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

The case is stated by the court.

Messrs. **A. Q. Keasbey** and *Henry W. John-n*, for plaintiff in error.

Mr. **Joseph Coult**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought by the defendant in error upon two policies of insurance issued to her upon the life of her husband, Christoph Trefz, both dated Sep. 6, 1873, one for $2,500, the other for $8,500. It resulted in a verdict and judgment for the plaintiff below.

Each of the policies contained the declaration that it was "issued and accepted by the assured upon the following express conditions and agreements," and, among others, these: that if the death of the person whose life was thereby insured should be caused by the habitual use of intoxicating drinks, "or if any of the statements or declarations made in or accompanying the application for this policy, and upon the faith [198] of which the same is issued, shall be found in any respects untrue, then, and in every such case, this policy shall be null and void."

The defendant pleaded the general issue *non assumpsit*, and especially that the death of the said Christoph Trefz was caused by the habitual use of intoxicating drinks, whereby the policy was made void, and issue was taken thereon. No evidence was offered to support the special plea.

It was proved on the trial that on May 25, 1867, a policy had been issued by the defendant in favor of the plaintiff, on the life of her husband for $3,000, and another on March 18, 1868, for $10,000, both of which were surrendered on Aug. 30, 1873, on which day two agreements in writing were entered into between the parties, each referring to the number and amount of the corresponding policy, and of one of which the following is a copy:

"The undersigned, owner of policy No. 16,772 on the life of Christopher Trefz, hereby requests the Knickerbocker Life Insurance Company of New York to issue a new policy for two thousand five hundred dollars, with insurance payable annually, and in consideration thereof I do hereby covenant and agree that all the statements contained in the original application and declaration for the said policy were true and valid when made and are hereby made the basis of the contract between myself and the said Company for the new policy hereby solicited."

The other agreement was in the same form and asks for a policy of $8,500, and both are signed by Christina and Christoph Trefz.

The application for the original policy for $10,000 was in the English language, the 5th question of which was:

"Whether now or formerly, when and how long, and to what degree, subject to, or at all affected by, any of the following diseases and infirmities."

(Here follows a long list, in alphabetical order, of disorders, beginning with "apoplexy," and ending with "yellow fever," and including "diseases of the brain, disease of the heart.")

The answer was "Never sick."

The application for the original policy for $3,000 was in the German language. It con- [199] tained a similar question, including diseases of the brain and heart, and to this the answer was "No."

Both of these applications contained this stipulation:

"That if any fraudulent or untrue allegation, misrepresentation, or concealment as to my health or habits be contained in this proposal, all moneys which shall or may be paid on account of such assurance or dividends due me shall be forfeited to the said Company and the policy be void."

One of them is signed Christina Trefz, by Christoph Trefz, and the one in German by Christina Trefz.

It is stated in the bill of exceptions that the defendant offered evidence tending to prove that the answers of Trefz to these interrogatories were, at the time of such applications, untrue; and the evidence itself bearing on that point is set out in full.

It appears therefrom that the intention with which the testimony was offered was to establish the fact that, in the year 1866, Trefz had a sunstroke. One of the witnesses called by the defense to this point was named Schimper, who was in Trefz's employ from the summer of 1866 till in 1875. He knew nothing personally about it, but testified that he had heard Trefz say that he had had a sunstroke, and that he had known him to wear a cabbage-leaf in his hat to prevent its recurrence; that in March, 1871, the witness having neglected to pay a premium falling due on one of the original policies, being charged as Trefz's bookkeeper with the duty of payment, went with Trefz to the office of the Company in New York to tender it, where he was required to submit to a medical examination, to enable the Company to determine whether it would accept the premium and restore the lapsed policy. The witness further testified as follows: "The doctor asked me whether Mr. Trefz had sunstroke; I said no. Mr. Trefz said, yes; he was sunstruck on the farm once; he had a farm, and was at the farm taking in hay, and was sunstruck." In reply to the question, what suggested to the doctor the fact of sunstroke, the witness said: "I asked the same question of the doctor, whether he could see it. He said: 'I could see it by his queer action with his elbow, and so I could see that the man had something.' That was the doctor's answer since to me; and [200] he asked me whether he had sunstroke, and Mr. Trefz told he was working on the farm once and was overcome by the heat. He said that did not matter; that did not make any difference; he said: have you felt anything since? and he said, no. Was you sick any time, taken sick by the heat again afterwards? No. That is all right. He gave him a certificate." And the premium was paid and the lapsed policy restored.

In another part of his examination the wit-

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ness, repeating the statement, said that Trefz told the doctor, "he had a sunstroke once when he was working on the farm; he was then working, and he fell down and did not know anything about himself any more; that was his talk to the doctor." The witness was then asked to state what Trefz said. He replied: "That is as near as I can give it. Mr. Trefz spoke very bad English; that was the reason the doctor asked me first whether Trefz had sunstroke, because he did not understand him so well; so Trefz told he was overcome by the heat; he said that half English and half German."

The plaintiff, Mrs. Trefz, testified that on the occasion referred to as that of the sunstroke, Trefz came home, saying he was overcome by work and the heat. She offered him his dinner, to which he said he did not care for anything to eat. After a while he ate his dinner and went off to his work again the same day, and then for two days he said he did not feel right well; after that he went about his business as usual.

There was some testimony about his going to Sharon Springs that summer, which is entirely consistent with the supposition that he went upon business as much as for his health; and some evidence, not only that he wore cabbage-leaves in his own hat as a protection against heat, but that he insisted that the drivers of his beer wagons (he was a brewer) should do the same for their own protection.

There was evidence also that Trefz frequently spoke of having had a sunstroke, and there was testimony from two or three physicians on the subject of the characteristics and consequences of sunstroke. One of them spoke of it as a brain disease, and said that whether it [201] was a serious or dangerous thing depended upon the kind of sunstroke, and that there were degrees in its forms, the severer being frequently fatal, and diminishing down to a mere sense of fullness in the head; and that he considered it more an accident than a disease.

The charge of the court, which was at length, is given in the bill of exceptions in full. To specified parts of it exceptions were taken by the defendant below, the plaintiff in error, and they form the basis of the assignment of errors now to be considered.

I. It is first alleged that the court erred in charging the jury as follows: "In considering whether the reply 'never sick' was an untruth of such a character as to avoid the policy, the jury had the right and ought to remember that the applicant was not a native-born citizen, and that he was not very familiar with the language in which the question was put, and did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him."

This exception may properly be considered in connection with the sixth assignment of error, as follows:

"That the court, on request, erroneously refused to charge the jury as follows: 'That if the answer of Trefz to any question was untrue in the sense in which such question and answer are commonly understood, the policy is void, even although the answer may have been true in the sense in which he understood the question;' but, on the contrary, charged the jury as follows: 'It seems to me that in endeavoring to ascertain the truth or falsity of the answer, we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he uses.'"

It is objected that the court erred in mistaking the answers referred to, as made by the husband, instead of the wife, who was, in fact, the applicant, whose answers they were, and that there was no proof that she was not a native citizen, and fully acquainted with the English language.

It is, perhaps, a palliation of this error, if it be one, that the counsel who makes the objection himself fell into it, in the very request, which the court refused, and which speaks of the answer as that of the husband. And practically it was, and was so considered and treated by all parties to the insurance. The applicant, [202] it is true, was the wife, and it is her agreement that the answers shall be true, but it is manifest that the party interrogated, and whose answers are relied on, are those of the person whose life is the subject of the insurance.

Indeed, the original applications themselves speak of the allegations, misrepresentations or concealments, if any, contained in the proposal, the existence of which will avoid the policy, as pertaining to "my health or habits," as though the person whose life was the subject of the insurance was himself the applicant.

The whole trial proceeded upon the idea that the question at issue was the truthfulness of the husband's answers, and upon that ground the plaintiff in error gave evidence of his statements made at other times and places to contradict him.

It is insisted, however, in argument, that there is substantial error in the above charges and refusal to charge, reversing the rule of interpreting contracts according to the ordinary sense of the language employed, and subverting the principle, for which *Ins. Co.* v. *France*, 91 U. S., 510 [XXIII., 401], and *Jeffries* v. *Ins. Co.*, 22 Wall., 47 [89 U. S., XXII., 833], are authorities, that in such a case as the present, the right of the plaintiff to recover is defeated, upon proof that an answer to any of the questions in the application is untrue without regard to the materiality of the question or the good faith of the answer. It is unquestionable law, that in such a case as the present, the answer must be true, to justify a recovery, without regard to these considerations; and for a lack of substantial truth, it is no valid excuse that the party giving the answers did not understand, from [203] ignorance or otherwise, the scope of the question. And so, in the present case, the court below distinctly charged the jury. The language used was: "But if you believe from the testimony that the insured, whether willfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the husband and wife entered into, on the ground that it would be a hardship to the widow." And in another part of the charge, the court said: "If they are in any respect untrue, they avoid the contract and prevent a recovery upon the policies."

The question, then, for the jury was this: Was the answer of Trefz to the question whether he had ever had any of the enumerated diseases —"never sick"—true or untrue? And undoubtedly it was material and even necessary to

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inquire what was the meaning of that answer. And to ascertain its meaning—the meaning the law will affix to it—it is perfectly proper to determine the sense in which the words were used by the speaker; the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by *Mr. Justice* Swayne, in *Ins. Co.* v. *Gridley*, 100 U. S., 614 [XXV., 746]: "The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive."

The nature of this written instrument, as affected by its form, must be considered in every question of its interpretation. It is not a formal instrument, employing technical language with well ascertained legal effect, like a deed or a bill of lading, or framed with precision and nicety as to the choice of phrases to express a certain and definite covenant which the parties, duly advised, have entered into with deliberation and in solemn form. It is, on the contrary, a conversation, reduced to writing, and the writing done by one only of the parties. The language is colloquial, and in the form of a dialogue; of question and answer. It is in the shape of a deposition, where the party interrogated is giving his testimony, and where the meaning of his statements must be ascertained from his own peculiar use of language. And if the party is a foreigner, with an imperfect knowledge of the language, it is obviously just and reasonable that that circumstance should be considered in determining the meaning of the words he has used.

[204] In the present instance, the apparent purpose of the charge asked by the counsel for the defendant below and refused by the court, was to charge as a matter of law that the answer of Trefz, "never sick," was to be taken as meaning, as it literally does, standing by itself, that he had never during his life had any sickness whatever, and thence to draw the necessary inference that it was untrue in that sense, as it no doubt was, and that, for that reason, the plaintiff's recovery was made legally impossible.

In that view it became the duty of the court to say to the jury, that in determining whether that statement was true or untrue, in view of the terms of the policy, they might properly consider that it was the expression of a man ignorant of the language, who did not on that account understand and, consequently, did not intend the literal scope of the expression. And whatever sense the jury, as reasonable men, in the light of that circumstance, would put upon it, might well be taken as the sense in which it was understood by the Insurance Company, to whose agent it was personally spoken, for that would be the sense in which it would be understood commonly by reasonable men in similar circumstances.

Indeed, the court might well have gone further, for it is matter of law that the answer "never sick," in the connection in which it was used in the application, must be taken to mean, not that the party was never sick at all of any disorder, but only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. The generality of the language of the answer must be restrained to the particulars to which alone it was meant to be applied, and the surplusage does not fall within the agreement which warrants the answer to be true.

II. It is next assigned for error that the court erred in charging the jury in reference to the testimony relating to the transaction with the Company's physician, in March, 1871, as to the renewal of one of the policies, as follows:

"When this testimony was given, I presume that every gentleman upon the jury at once came to the conclusion that if it was true, and if the agent of the Company regarded the attack when he was told of it as of too little consequence to hinder the renewal of the forfeited policies, it was now too late for them to come forward and say that it was of so serious a character and nature that he ought never to have been insured at all; in other words, that the Company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it and take the money of the insured for a renewal of the policies, and after his death to avoid the payment of the loss on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply 'never sick.'" [205]

This charge was given in connection with a statement of the testimony of Schimper as to the conversation that took place with Dr. Derby, the medical examiner of the Company, in March, 1871, at the time of the examination of Trefz for the restoration of his lapsed policy.

It is not objected to this charge that it instructed the jury as a matter of law that the Company was estopped by the restoration of that policy, after the information it had then acquired respecting Trefz having had a sunstroke, from making its defense on that ground to the present action. It is not claimed that that is the meaning of the charge or that it was so understood by the jury.

It is criticised, however, for inaccuracy in referring to the renewal of the forfeited policies as if both had lapsed, instead of but one, as the fact was; but that inaccuracy could not have misled the jury, as there was no question about the fact; and so far as the charge had any bearing upon the question at issue, its effect would not be different whether one or both policies had lapsed and had been restored.

The charge in question was merely a suggestion addressed to the jury, perfectly legitimate in itself, but which they might adopt or reject as they saw fit. The court expressly disclaimed any right to influence them as to any matter of fact, and instructed the jury accordingly.

It is argued that the charge assumes from the testimony that the sunstroke spoken of occurred before the date of the original policies, when in the conversation with Dr. Derby, no date being given, he might well have inferred that it was subsequent to that date. But it is entirely immaterial, for however it may weaken the force of the suggestion upon the question of fact, it does not show that it contained any error in law. The force of the suggestion was to be judged by the jury upon their own finding as to the facts.

III. It is next assigned for error that the court gave to the jury the following charge:

"It is for you to determine the extent of the injury received by Mr. Trefz and whether it

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was of such a character or nature as to make his reply to the interrogatories a falsehood or not. It is for the jury to say from the evidence in regard to the extent, nature and kind of sickness, whether the attack which the insured suffered from was of acharacterto make his answer 'never sick' a falsehood. The burden of proof is on the defendant. The Company sets up the defense and the jury must be satisfied from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff."

[206]

This is to be considered in connection with the refusal of the court to give the following charge, which is also assigned for error:

"That if within one or two years the insured had such disease (sunstroke) his answer 'never sick' was untrue, although he had entirely recovered from it long before his death or even at the time of his application."

And also in connection with the refusal to charge the following, also assigned for error:

"That it is proved by witnesses unimpeached and uncontradicted, that the insured frequently stated that he had had sunstroke in the summer of 1866, and guarded carefully against its recurrence long after the insurance was effected; and that, unless you can find something in the case which renders these statements incredible, the jury are bound to treat the facts as established in the cause, and to find for the defendants on the principle asserted by the court."

The propositions included in these requests, and maintained on behalf of the plaintiff in error, may be stated thus:

If Trefz frequently said that he had had sunstroke, it is to be taken as the fact, although the jury might be satisfied from the evidence that what he supposed to be such was not so in reality; and that if he had ever had sunstroke, his answer to the interrogatory is untrue, although the list of diseases therein enumerated does not contain that of sunstroke, and although it does not appear that whatever affection in fact he had, was one of the diseases enumerated.

In other words, that it is matter of law that if Trefz said he had sunstroke, that he did have it; and that it is matter of law that sunstroke, of whatever character or degree in fact, is a disease of the brain, that being the disease in respect to which it is claimed the answer was untrue.

On the other hand, the proposition of the court, as submitted to the jury, was:

That whether or not Trefz ever had had sunstroke properly so called;

[207]

And whether the attack which he did have, whether it could properly be called sunstroke or not, was a disease of the brain, must be determined by the jury from the whole evidence as matters of fact.

It is not difficult to decide that in this respect the court below committed no error.

The interrogatory propounded in the application, to which the answer in question was made, did not include sunstroke in the list of enumerated diseases. It did include disease, of the brain. The answer, it is conceded, was not untrue, unless Trefz had had a disease of the brain. To establish this, it was necessary to prove something more than that he had what he called sunstroke. It was essential to show that he had sunstroke in fact, and that it was such as to constitute disease of the brain.

The medical authority cited in argument by the counsel for the plaintiff in error, Dr. H. C. Wood, Jr. (Thermic Fever or Sunstroke, Boylston Prize Essay, p. 7), shows that what is popularly called sunstroke is not always the true disease known to the profession as such. He says:

"There can be no doubt that under the name of sunstroke or *coup de soleil*, sudden cases of severe illness of very different natures have been described by authors. Such of these cases as have really been dependent upon exposure to excessive heat can be classified under two or, perhaps, three heads, to which the names of *acute meningitis* or *phrenitis*, *heat-exhaustion* and *thermic fever* or *true sunstroke* may be respectively applied, as more or less expressive of the pathological conditions existing.

Acute meningitis or phrenitis, due to exposure to the sun and the direct action of its rays upon the head, must be a very rare affection. In fact I have no positive evidence to offer of its existence in nature, having never seen or read an unequivocal record of such a case and, therefore, will pass this theoretical class by without further allusion.

Simple exhaustion, due to excessive labor in a heated atmosphere, is an affection so very distinct from true sunstroke that it is strange it should ever have been confounded with the latter. It does not differ in its pathology or symptoms from other forms of acute exhaustion, offering like them, as its chief features, a cool, moist skin, and a rapid, feeble pulse, associated with great muscular weakness and a tendency to syncope." * * *

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"As there is nothing peculiar in these cases, I do not think that they should have any special name. The term "heat-exhaustion" might be applied to them had it not been used to signify true sunstroke. The main point to be borne in mind is, however, that such cases should not be called sunstroke, as they have not the slightest affinity with that disorder."

From this authority, then, it sufficiently appears that a man working in the heat of summer in a hay-field, exposed to the rays of the sun, may be overcome by the heat to the point of exhaustion, so as to be prostrated with weakness, and even fall into insensibility and unconsciousness without having sunstroke in its technical sense. And thus, that it might well be that Trefz, notwithstanding his attack of what he ignorantly called sunstroke, might truthfully answer that he had never been sick of any disease of the brain.

It was undoubtedly, therefore, the principal question for the jury, in order to find whether Trefz's answer that he had never been sick of brain disease was true or untrue, to ascertain and determine whether the affection which he declared he at one time had, was or was not a case of true sunstroke, and whether, if so, it was a disease of the brain. That question was fairly submitted to them by the court upon the charges which we have reviewed, and for the reasons assigned we find no error in them.

The judgment is accordingly affirmed.

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[223] ELISHA T. LORING, *Plff. in Err.*,
v.
HELEN L. FRUE, EXTX. of WILLIAM B. FRUE, Deceased.

(See S. C., 14 Otto, 223-227.)

Motion for nonsuit—sale of stock—treasurer of corporation—vague charge.

1 Whether a court has the power to set aside a nonsuit more than two years after the judgment has been rendered, depends on the facts. Where no bill of exceptions was taken, so as to bring before this court the grounds of either the motion or the facts on which it was supported, it must presume that the action of the court below was in accordance with law.

2. Where the plaintiff received shares of stock from the president of an association, to be sold on its account, and so sold them and remitted the money to its treasurer, the latter is not personally liable to him therefor, and if he has the right to recover part of such money, it is by action against the corporation.

3. A stockholder of a corporation who has paid for his shares is entitled to certificates for them. If the corporation or its officers have otherwise disposed of them, so that they can not be issued to him, the corporation is liable for conversion; but he has no personal claim on its treasurer for the shares.

4. Where the whole charge to the jury was vague and misleading, and there was not a fair trial, the judgment will be reversed.

[No. 71.]

Argued Nov. 3, 1881. Decided Nov. 21, 1881.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated by the court.

Messrs. **George F. Edmunds,** *E. W. Meddaugh* and **C. I. Walker,** for plaintiff in error.

Messrs. **Samuel T. Douglass,** *Sidney D. Miller* and **John H. Bissell,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Michigan.

The declaration contained the common counts and nothing else, and the plea was the general issue. A jury was sworn to try this issue, and after evidence offered by plaintiff below, Frue, he elected to take a nonsuit, whereupon the following order was made, June 11, 1874:

"It is, therefore, ordered judgment of nonsuit, and that the defendant recover of the said plaintiff his costs of this suit to be taxed, and leave is granted to said plaintiff to move to set aside this judgment."

October 31, 1876, the court made an order setting aside this nonsuit, in the following terms:

"The motion to set aside the nonsuit heretofore entered in this cause again coming on to be heard, the same having been heard in part on the thirtieth day of October, instant, the arguments of counsel for the respective parties are concluded and the matter submitted, and the same having been duly considered by the court, it is now ordered that said nonsuit be, and the same is hereby set aside, with leave to put the [224] case on the docket for trial at the next ensuing November Term of this court."

And on the 26th December thereafter, there appears an entry of an order overruling a motion, after argument of counsel on both sides, to set aside the order last cited. After this the case went to trial, and on the trial the defendant again sought, by way of prayers for instruction, to raise the question of the validity of the order setting aside the nonsuit.

The same point is much urged here on an assignment of the action of the court in that respect as error.

It is quite obvious that no such question could be submitted to the jury, and that any prayer for instruction to them on that subject was properly overruled.

Whether the court had the power to set aside this nonsuit more than two years after the judgment, is a very interesting question, and would depend somewhat on facts that are not before us in this record. Although counsel was present at the argument of the motion, no bill of exceptions was taken, so as to bring before this court the grounds of the motion or the facts on which it is supported. And though the same counsel were present at the argument of the motion to set aside the order granting a new trial, and setting aside the nonsuit, no exception was then taken to the action of the court.

It is a principle equally well settled in law and necessary in the administration of justice, that in cases heard in an appellate court on writ of error, only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record of the case is to be made in favor of the action of the inferior court.

It is not inconsistent with anything in this record that the motion to set aside the nonsuit was made at the same Term in which the nonsuit was granted, and continued by regular orders from term to term until it was decided. In such case there could be no question of the power of the court to make the order. So it may have been stipulated between he parties that the case should remain in court until the decision of the chancery case, which is found in the record between the same parties, and then come up on the motion to set aside the nonsuit. This, also, would have given the court the right to set it aside.

As the plaintiff in error was present by counsel when the objectionable order was made, and [225] also on the hearing of the motion to set it aside, made afterwards, and has taken no bill of exceptions to negative the presumptions we have mentioned, as well as others which might be suggested, we must presume that the action of the court in the premises was in accordance with law. The assignments of error based on the order of the court to set aside the nonsuit are not well taken.

On the trial before the jury, a very full bill of exceptions was signed, which professes to embody all the evidence submitted, and the errors assigned relate to the charge of the court to the jury and to prayers for instructions by counsel for plaintiff in error, against whom a verdict was rendered, which were refused.

The defendant introduced no evidence. The plaintiff and his agent, Palmer, were the witnesses on his behalf, and their testimony, with some letters and correspondence introduced by them, constitute the evidence.

It appears from this, that the transaction on which plaintiff's claim is founded originated in the purchase of mineral lands in Michigan, the organization of two joint stock companies as

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owners of these lands, and speculations in the sale of the shares of these corporations.

Frue, the plaintiff below, resided in Michigan, and having been engaged in mining there, was supposed to be skilled in the discovery of the mineral of that region.

He, and Palmer and Loring, who lived in Boston, and one or two other persons, after some preliminary negotiations, determined to purchase two or more pieces of this land, which they supposed to have the mineral in it, and to organize two or more corporations. They accordingly made the purchase of the land and organized two corporations, the one called the Ossipee and the other the Kearsarge. The usual process of a large capital stock divided into a great many shares was resorted to, and then the sale of these shares was in order.

Of these corporations Loring was president, treasurer and active managing agent in Boston, and the testimony tends to prove that he received from Frue about $114,000 in some connection with the business of these companies.

The controversy turns upon the question whether Loring received this money as treasurer of the corporation, and as Frue's share of the money necessary to buy and pay for the lands, or as money sent to him for the purchase of stock in the companies, for a failure to deliver which he would be liable to Frue for money had and received to his use.

The first item going to make up this sum of $114,000, to which attention is called, is one of $73,000. Mr. Frue, in his testimony, states that it was determined by the original promoters of the venture to sell a large amount of the [226] stock of the two companies. That he accordingly sold 2,000 shares of the Ossipee at $11.50 per share, amounting to $23,000, and 5,000 shares of the Kearsage at $10 per share, making $50,000, and that he forwarded the money so received to Mr. Loring. Before the jury he claimed to recover $9,276 of this sum on the ground that of the stock sold by him so much as would amount to that sum belonged to him personally.

It is not easy to see by what process of reasoning this result is arrived at. But it is clear that Loring, in forwarding the stock to Frue, which the latter sold for $73,000, was acting as president and treasurer of the association, whether it was before or after the organization of the companies. Mr. Frue's own evidence on that subject is that Loring sent him the stock and he accounted with him for it as president. When asked why he sent forward all the money instead of retaining what he now claims to have been his individual money, he said he wanted to keep Loring in ample funds. Mr. Palmer also testified that Loring was president, director and financial manager of the companies and, as such, paid for the land purchased by them. He also testifies that these lands were conveyed to the corporations and paid for out of the funds placed in Loring's hands.

We are of opinion that plaintiff himself makes out, beyond dispute, that he received these shares of stock from Loring as president of the associations, to be sold on their account; that he did so sell it, and remitted the money to Loring as treasurer of the two organizations. It is clear, therefore, that Mr. Loring is not liable personally for any part of this $73,000, and that if Frue has any right to recover part of it, it is in action against these corporations, and the refusal of the court to so instruct the jury was error.

The next item for which Mr. Frue claims to recover is the sum of $15,889.32.

He says, in his testimony, that this sum was sent to Mr. Loring to pay for his shares of the stock of these two companies, at prices per share which had been previously fixed by the members of the corporation, and he insists that this was a transaction between him and Loring, in which Loring, having failed to deliver the stock, is personally liable for the money so received.

But it is quite clear, both from Frue's testimony and that of Palmer, that this sum was part of the capital stock of the companies, for which Frue was liable to them, either by the original terms of the organization or by reason of assessments made on him as a stockholder. That he was entitled to his certificates of shares, if he never received them, is equally clear. And if the corporation or one of its officers had otherwise disposed of the shares, so that they [227] could not be issued to him, the corporation would be liable, and perhaps the officer, for conversion, in a proper action. But the money sent to Loring in these cases was sent to the corporations. It came to his hand properly as treasurer, and the obligation to issue and deliver the certificates was the obligation of the corporation, and not of Loring. It is true the court told the jury, if they believed this they must find for the defendant. But this was misleading to the jury, for while Mr. Frue thought that in sending the money to Loring he had a personal claim on him for the shares, and swore to this belief, the facts to which he testified showed that he had no such claim, and the jury should have been told so, instead of being left to act on Frue's sworn opinion of the legal result of the transaction.

The remaining item of $25,401.08 is made up of drafts sent by Frue, on December 31, 1866, to Palmer, his agent at Boston, payable to his order, with instructions to apply it on purchase of sections 24 and Penn. Palmer testifies that he indorsed and delivered these drafts to Loring, and that the money was used for other purposes by Palmer and Loring, though afterwards the same amount was invested for Frue in Torch Lake, which was the same as Penn and section 24.

We are not prepared to say that the court was in error in refusing the instructions prayed by Loring's counsel on this point, nor that there was any manifest error of law in the charge of the court on that matter.

But we are of opinion that the whole charge was vague and misleading in this matter as in others, leaving on the jury the impression that the opinions of Frue and Palmer, in their mode of looking at these transactions, were competent evidence, and in failing to give due effect to the simple and undoubted facts of the case. For these reasons there was no fair trial, *and the judgment of the circuit is reversed, with directions to set aside the verdict of the jury and grant a new trial.*

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GEORGE HEARST, *Appt.*,

v.

FANNY B. HALLIGAN, Admrx. of JAMES HALLIGAN, Deceased, ET AL.

154 US 699

1. The decree is affirmed, in this case, upon the facts, and the conclusions of the court below thereon.

2. The principal relief demanded therein was denied on account of the laches of complainant, and the want of proof of any trust relations, or contract or understanding between the parties.

[No. 6.]

Submitted Nov. 14, 1881. Decided Dec. 5, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The bill in this case was filed in the court below, by the appellant, to recover certain premises situated in Missouri.

The bill states that complainant is a citizen of California, and the defendants are citizens of Missouri; that in the year 1850 he was the owner of certain real and personal property in Franklin Co., Mo.; that at that time said real estate was worth at least $15,000; that said personal property was worth $2,800, besides two slaves whose hire was worth $150 per year; that his debts only amounted to about $700; that, in May, 1850, being about to remove to California, he constituted one William N. Patton, his attorney in fact, to take care of his real and personal property, collect his notes and accounts, rent his farms, pay his debts, hire his slaves and settle up his father's estate which was still in course of administration. That said Patton, by various representations made at the time, and upon promising to reconvey the property when required, and to pay the complainant's debts and account for everything that came into his hands as his agent, prevailed upon the complainant to execute and deliver to him two warranty deeds, absolute in form, conveying to him part of said real estate; that while a consideration of $3,000 was expressed in such deeds, none whatever was received, the deeds being made in good faith by the complainant in the belief that they would facilitate the settlement of his affairs; that Patton received, under his trust, about $5,600, belonging to complainant, between 1850 and the day of his death, in January, 1858. That said Patton proved false to his trust, failed to pay the debts out of complainant's moneys in his hands, and allowed his real estate to be sold under attachment suits by his creditors; kept complainant in ignorance of these facts and proceedings and, in April, 1856, procured a deed to be made to himself, of all the property so sold held by him in trust, paying therefor with the trust moneys then in his hands, and fraudulently claimed the property as his own. That, in August, 1856, the defendant, James Halligan, as attorney, commenced three suits by attachment against the complainant, on notes held by William V. N. Bay, Thomas F. Renfro, and defendant, James N. Inge, on which the entire amount then due was in all $502.23; and that in each of these suits there was attached part of the real estate mentioned in the bill. That the lands attached were, at the time of the levy, worth $12,000, and that the levy was grossly excessive in every respect. That special judgments, not exceeding in all $525, were rendered, under which, all the lands attached were sold in 1857 to Halligan and Inge, the defendants, for the small and inadequate sum of $325, and that in 1858 the sheriff delivered a deed therefor, to them. That complainant had no notice nor knowledge of these facts or proceedings until long after the sale; that all said proceedings were irregular and insufficient to give them any title, of which defendants had full knowledge; that they suppressed these irregularities from complainant, but represented that they would recover his property from the heirs of Patton; as they only wanted the amount of the debts involved in said suits; that they recommended the appointment of another agent in the place of Patton, and that the complainant appointed his step-father, Joseph Funk, as such agent, by deed, dated April, 1858, to do all things necessary to recover his property. That the defendants induced Funk to make to them a deed, dated July 14, 1858, of complainant's property, by falsely representing that complainant was without other remedy in the premises; that defendant, Halligan, drew this deed, and that although a consideration of $100 was expressed, nothing whatever was ever paid therefor. That, in the year 1860, he returned from California to Missouri, and then first learned of the attachment suits, and of the proceedings thereunder, and that Halligan and Inge had commenced a suit in equity in their own names to set aside the two deeds to Patton, and to devest his heirs of title to complainant's lands, and to vest the same in them; that they represented to him that all they had done and were doing was for his benefit and to save his property for him; that it would be impolitic to give him any written acknowledgment to this effect, as that might defeat a recovery; that complainant, confiding in their representations, allowed them to proceed, remained in Missouri for eighteen months, gave them every assistance in his power, and employed Halligan and one E. A. Nickerson as his attorneys to prosecute his claims against Patton's estate for the conversion of his personal property; that, as such attorneys, they compromised these suits, prosecuted in his own name in connection with the suit to devest title, whereby complainant lost all right to proceed against Patton's estate for the value of the lands sold under said attachment suits. That it was fully understood between the defendants and complainant, that when they were successful on said chancery suit, they would convey to him his lands upon his paying the debts and a reasonable compensation for their services in the premises; that thus the defendants became, and are, trustees for complainant, of the lands in question; that he has paid off the judgments, and offered them as a reasonable compensation in the year 1865 the sum of $5,000, which they fraudulently refused to accept, and claimed $5,000 in gold, an amount grossly excessive.

The bill prays that an account be taken; that the several conveyances procured by and made to defendants, as well as the decree in the equity suit, be set aside and canceled, and the title vested in complainant, and for general relief.

The defendants filed a demurrer for want of equity in the bill, and a special plea of the Statute of Limitations in bar. The plea in bar was

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stricken out on complainant's motion, and the demurrer overruled, whereupon they filed their joint and several answers.

The court below having entered a decree dismissing the bill, except as to the deed of July 14, 1858, which it set aside, the complainant appealed to this court.

The following is the opinion of the court below:

DILLON, Circuit Judge, delivered the opinion of the court:

I have carefully gone over the pleadings and voluminous proofs in this cause, and have attentively considered the thorough and exhaustive arguments which the counsel of the respective parties have submitted. The confidence which the plaintiff reposed in Patton, the abuse of that confidence by the latter, resulting in an unnecessary sacrifice of the plaintiff's property, in connection with the small consideration given for it by the defendants at the purchase under the judicial sale, not unnaturally predisposed the court to take as favorable a view of the plaintiff's cause as the proofs would justify. But there is no ground to claim that there were, between the defendants or either of them and the plaintiff, any trust relations nor any contract nor understanding of any kind at the time when Bay's, Renfro's and Inge's suits were commenced, or when the sheriff's deed under the judgments therein was executed.

These suits were wholly adversary as to all persons. It was after whatever right the defendants thus acquired that the amended bill sets up that the defendants agreed to perfect their title by the proceedings against the administrator and heirs of Patton, for the benefit of the plaintiff. The contract or understanding does not appear, even according to the averments of the amended bill, to have been very definitely agreed upon, and its existence is wholly denied by the defendants. There is no evidence of it in writing, and if parol proof be admissible to establish it, the weight of evidence is against the plaintiff. The plaintiff alone testifies to it; each of the defendants positively denies it in his testimony. The decree in the defendant's favor against the administrator and heirs of Patton was rendered in pursuance of the compromise of the several suits in April, 1862. The plaintiff, so far as it appears, from 1868 down to the institution of this suit, in 1873, made no claim against the defendants for the lands, but allowed the defendants to hold and control them as their own, and to pay all the taxes thereon, including back taxes as for 1852. I have not been able to resist the strong confirmatory force which this long and unexplained silence on the part of the plaintiff gives to the defendants' case.

As respects the quitclaim deed of Funk, as attorney in fact for the plaintiff, to the defendants, of date July 14, 1858, I am of opinion, upon the consideration of the evidence, particularly that of Mr. Nickerson, and the letters of the defendant, Halligan, of June 30 and July 5, and that no money consideration passed, and that Halligan had at that time, at the instance of Funk, consented to act as the attorney of the plaintiff in contemplated suits against the estate of Patton, that this quitclaim cannot stand against Hearst. In one of these letters, the defendant Halligan says: "I am preparing our suits against Patton's estate, and also *Judge* Funk's matters, and the claims of Geo. Hearst against Patton, for they are all parts of one transaction." The suits were not commenced until afterwards, but the reason for this appears in the letters of Mr. Halligan just referred to, and when they were brought, Mr. Halligan acted as one of the attorneys of the plaintiff.

In view of this relation, I am of the opinion that if the quitclaim deed gave the defendants any additional rights, or if it embraced any lands of the plaintiff, not embraced in the sheriff's deed to the defendants, that it cannot be set up against the plaintiff, and that the latter is, under the circumstances, entitled to have it set aside. In point of fact and of law, the interests of the plaintiff and the interests of the defendants, in the suits against the estate of Patton, were antagonistic rather than coincident; and that Mr. Halligan's opinion to the contrary notwithstanding, as expressed in those letters, was an erroneous or mistaken opinion. Halligan's and Inge's interest was to show that the deeds and transfers to Patton were fraudulent. Hearst's interest was just the reverse, for if fraudulent, this would interfere with, if not defeat, his contemplated suits.

The only relief, in my judgment, to which the plaintiff is entitled, is a decree setting aside the quitclaim deed of July 14, 1858, and this will leave the rights of the parties to stand as they existed when and before that instrument was executed.

As to all other matters in the plaintiff's bill, the same will be dismissed, neither party to recover costs against the other.

Messrs. **Jacob Kleim, Samuel Knox** and *W. M. Stewart*, for appellant.

Messrs. **T. W. B. Crews** and *John W Booth*, for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

A very thorough examination of the record and the printed arguments in this case, fails to disclose any difficult question of fact or of law. We are entirely satisfied with the conclusions reached by the Circuit Judge, and with the reasons given in support thereof. All the relief to which appellant was entitled, under the evidence, was accorded to him by the final decree. We are not sure but that the court might have gone further, and adjudged that, as to a material portion of appellant's cause of action, the Statute of Limitations of Missouri constituted a complete defense.

No further opinion will be delivered.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE BRIG ANNIE LINDSLEY, Her Tackle, etc., CORNELIUS T. TOMPKINS, Claimant, *Appt.*, [185]

v.

DANIEL BROWN ET AL.

(See S. C., "*The Annie Lindsley*," 14 Otto, 185-191.)

Finding of facts—objections to—sailing rule—collision—lookout.

1. Under the Act of 1875, the finding of facts by the circuit court in admiralty is conclusive. This

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court cannot look into the evidence or the opinion of the court, to ascertain the facts.

2. Where the circuit court has passed on all the issues, this court cannot listen to complaints that the circuit court refused to find certain facts which it was asked to find, or has found certain other facts which the weight of the testimony did not warrant.

3. If two sail vessels are meeting end on or nearly so, so as to involve risk of collision, the helms of both should be put to port, so that each may pass on the port side of the other.

4. Where one of them, in violation of the rule, instead of porting her helm, put it to starboard, and the court found as a matter of fact that this was the direct cause of the collision, the conclusion of law, that she was in fault for so doing, was correct.

5. The owners of a vessel whose lookout was negligent are not thereby liable for the consequences of a collision, when his neglect had nothing to do in causing it.

[No. 97.]

Argued Nov. 17, 18, 1881. Decided Dec. 5, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Statement of the case, by *Mr. Justice* **Woods.**

On the night of May 7, 1869, a collision occurred in Long Island Sound between the brig Annie Lindsley and the schooner Sallie Smith, which resulted in the sinking and total loss of The Smith and her cargo. The owners of the schooners brought suit against the brig in the district court to recover the damages sustained by them in consequence of the collision, and the district court having rendered a decree in their favor, the case was appealed by the claimants of the brig to the circuit court, by which, on July 10, 1878, the decree of the district court was affirmed. The decree of the circuit court is brought by the appeal of the claimant to this court for review.

The circuit court made the following finding of facts.:

"1. About half-past eight o'clock on the evening of May 7, 1869, the brig Annie Lindsley collided with and sunk the schooner Sallie Smith, in Long Island Sound, between two and three miles north and east of Eaton's Neck. The sky was overcast and there was a little rain, but no mist or fog, though it was quite dark. The wind was fresh and east of south. Its precise direction is not satisfactorily shown. The water was not rough.

2. The schooner, of 96 tons new measurement and 106 old, was bound from Connecticut River to New York, with a cargo of brown stone and scrap iron. When the brig was first discovered by those on board the schooner she (the schooner) was heading on her regular course through the sound, which was W. by S., and had her port tacks aboard. Her regulation lights were set and burning brightly. Her mate was at the wheel and a competent lookout at his post on deck forward of the windlass.

3. The Annie Lindsley, a brigantine of 220 [186] tons British measurement, was bound east from New York to Hillsborough, New Brunswick, in ballast. She was steering by the wind and not by the compass, and was heading as near on her course through the sound as the wind would permit. Her general direction was about E. N. E., which was a little to the northward of her regular course. Her master was on deck, the second mate at the wheel, and one man forward, properly stationed as a lookout. Her regulation lights were set, and she had her starboard tacks aboard.

4. Both vessels were sailing under full canvas.

5. When the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on, and on courses involving the risk of collision. The brig was close-hauled. The schooner had the wind a little free.

6. A short time before the collision the lookout on the schooner discovered the brig about dead ahead. He saw no lights, but made out the vessel and her sails coming, as he judged, from an opposite direction. He at once reported to the man at the wheel, who put the wheel to port and bore off, until he opened the red light on the brig.

7. The schooner was not discovered from the brig until after the brig was discovered from the schooner. The lookout was the first to see the schooner from the brig, and he called out 'light right ahead.' Almost at the same moment a hail was heard from the schooner. The brig's wheel was then put to starboard, and she swung off one point. As soon as this movement could be discovered, another hail came from the schooner to luff, and the wheel was put to port, but before it could materially affect the course of the brig the two vessels came together, the brig striking the schooner on the port quarter, the jib-boom of the brig passing through the main sail of the schooner. The schooner sank in a very few minutes with her cargo, and was a total loss.

8. The starboarding of the brig was the direct cause of the collision.

9. The value of the schooner at the time she was lost was $5,000."

And, as conclusions of law from the findings [187] of fact, the court declared:

1. That the brig was in fault for starboarding the wheel, and this was the cause of the collision.

2. The libelants are entitled to a decree for the value of the schooner, cargo and freight, as reported by the commissioner, with interest at six per cent from May 7, 1869, the date of the loss.

A decree was entered accordingly.

Upon the trial of the cause in the circuit court, the claimants asked the court to make thirteen findings of fact, and to deduce therefrom certain conclusions of law.

The court declined to find the facts and conclusions of law as requested by claimant.

Messrs. **Benedict,** *Taft & Benedict,* for appellant.

Messrs. Butler, Stillman & Hubbard, and **Wilhelmus Mynderse,** for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The assignments of error, which are sixteen in number, may be fairly condensed as follows:

1. The court erred in refusing to find the facts as requested by claimant.

2. The court erred in refusing to find the conclusions of law as requested by claimant.

3. The court erred in certain of its findings of fact.

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting.* See, *note to* St. John v. Paine, 51 U. S. (10 How.), 557.

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4. The court erred in finding as matter of law that the brig was in fault for starboarding her wheel.

5. The court erred in finding as matter of law that the libelants were entitled to a decree.

The first and third assignments of error, which refer to the findings of fact, are disposed of by the decisions of this court in *The Abbotsford*, 98 U. S., 440 [XXV., 168] and *The Benefactor* [*ante*, 157]. In both these cases it was held that, under the Act of February 16, 1875, entitled "An Act to Facilitate the Disposition of Causes in the Supreme Court of the United States, and for Other Purposes" (supplement to U. S. Rev. Stat., vol. 1, page 135), the finding of facts by the circuit court in admiralty was conclusive. Upon an appeal from a decree in admiralty rendered by a circuit court since the Act went into effect, which was on May 1, 1875, we have no right to look into the evidence or the opinion of [188] the court to ascertain the facts. The evidence is not properly in the record sent up to this court; it has no business there; and, by an amendment to Rule 8 of this court, promulgated May 2, 1881, it is excluded from the transcript. *The Adriatic* [*ante*, 605]. We, therefore, cannot listen to complaints that the circuit court refused to find certain facts which it was asked to find, or found certain other facts which the weight of the testimony did not warrant.

This disposes also of the second ground of error.

The conclusions of law which the court was asked by the claimant to declare were based on the findings of fact proposed by the claimant, which the circuit court refused to adopt.

The question, and the only question, presented by the assignments of error which we can consider is, whether the facts found by the court support its conclusions of law and decree. These questions are raised by the fourth and fifth assignments of error.

The circuit court finds, both in its conclusions of fact and of law, that the starboarding of her helm by the brig was the cause of the collision. It also finds, as a conclusion of law, that the brig was in fault for starboarding her wheel.

We are required, therefore, to consider whether the brig, under the facts found by the court, committed a fault in starboarding her wheel.

From the findings of the circuit court it appears that the wind was east of south; that the schooner, just before the collision, was heading west by south, bound from the Connecticut River to New York, and had her port tacks on board. The brig was bound east from New York to New Brunswick. She was steering by the wind; her general direction was east northeast. Both vessels were sailing under full canvas, and both had their regulation lights set.

Immediately before the collision, the brig was sailing close-hauled to the wind, the schooner had the wind a little free. When the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on, so as to involve the risk of collision. A short time before the collision, the lookout on the schooner discovered the brig dead ahead. Her wheel was at once put to port, and she bore off. The schooner was not discovered by the brig until the brig had been discovered by the schooner. The lookout was the first to see the schooner from the brig, and called out "light right ahead." The brig's [189] wheel was then put to starboard, and she swung off one point. On being hailed from the schooner, and told to luff, the wheel was put to port, but before it could materially affect the course of the brig, the two vessels came together.

The duty of the vessels in the emergency preceding the collision, is plainly prescribed by the 16th Rule for the prevention of collisions on water, U. S. Rev. Stat., sec. 4233, which is as follows:

"If two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

We have seen that the vessels were approaching each other end on, or nearly end on, so as to involve risk of collision. The rule under the circumstances in which the vessels were, required them to port their wheels, and pass each other on the port side. The brig, in violation of the rule, instead of porting, starboarded her helm. The circuit court finds as matter of fact, that the starboarding of her helm was the direct cause of the collision; and as a matter of law, that she was in fault for so doing. We think that from this finding of fact the conclusion of law inevitably follows.

The counsel for the appellants, however, insist that the conclusion of law drawn by the circuit court amounts to laying down this rule: that a vessel close-hauled on the starboard tack, seeing a light right ahead, is in fault if she starboards; and argues that the rule thus stated is too broad, and that whether a vessel is in fault for starboarding on seeing a light right ahead, depends upon what the light is, that is to say, whether it is a green light or a red. They insist that if the light seen by the brig upon the schooner just before the collision was a green light, that this fact made it the duty of the brig to starboard and not to port her helm. In support of this view they cite Jenkins' Rule of the Road at Sea, pp. 44, 124, 125, 127, 129, 135, 208 and other authorities.

They then go on to argue from the testimony that the light seen by the brig was a green light. As we have already shown, we have nothing to do with the testimony. We are limited strictly to the findings of fact, so that the point presented by the contention of appellants is, whether, upon the facts found, the rule of navigation was too broadly stated by the court. The answer to the contention of appellants is, therefore, plain. The court did not find that the [190] light seen by the brig was a green light, and did find that the vessels were approaching each other end on, or nearly end on, so as to involve the risk of a collision. The situation as found by the court was, therefore, precisely the one provided for in the 16th Rule, which it was the duty of the brig to obey by putting her helm to port. The rule to be deduced from the conclusion of law drawn by the court from the facts found is no whit broader than the 16th Rule itself, and is really only a repetition of that rule.

The effort of the appellants seems to be to bring the case within the provision of the 24th Sailing Rule, which declares that, "In construing and obeying these rules due regard must be had to all dangers of navigation, and

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to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." U. S. Rev. Stat., sec. 4233.

The facts found, however, having brought the case clearly within the 16th Rule, if there were any additional fact which took the case out of that rule and brought it within the operation of the 24th Rule, it was incumbent on the appellants to establish that fact, and have it incorporated with the findings made by the court. The burden of proof was on them to show some special circumstances which made their case an exception to the 16th Rule.

But there is no finding that the light seen on the schooner by the brig just before the collision was a green light.

On the contrary, the record shows that the court was explicitly asked by appellants to find that the light seen was a green light, and refused to make such finding. Nor is there any finding from which it can be fairly inferred that both of the schooner's lights were not seen by the brig just before the collision. The appellants have, therefore, failed to show any fact which takes their case out of the operation of the 16th Rule, and makes the 24th Rule applicable.

The appellants next contend that the findings of the circuit court do not show that the schooner kept a good and proper lookout. The court found that she had a competent lookout at his post, on deck, forward of the windlass, [191] but the appellant says that the fact that the lookout did not discover the lights of the brig until just before the collision shows that he was not vigilant in the performance of his duty.

It would seem that the finding of the court in reference to the lookout did not leave any ground for the appellants to stand on. If the lookout was competent, and at his proper post, there is a presumption of law that he did his duty, which we do not think is overcome by the fact that he did not see the lights of the brig until just before the collision. The brig, also, according to the findings, had one man forward, properly stationed as a lookout, and he did not see the lights of the schooner until the collision was imminent. The fact that the lookout on each vessel failed to see the lights of the other, shows that there must have been something in the state of the weather, or some other obstacle, to prevent the lights from being seen at the usual distance. But the court has distinctly found that the cause of the collision was the fault of the brig in starboarding her helm. That fully accounts for the disaster. Neglect of the lookout does not appear from the findings to have had any part in bringing it about. It would be against all reason to hold that the owners of a vessel whose lookout was shown to be negligent, should be made liable for the consequences of a collision, when the neglect of the lookout had nothing to do in causing it. *The Farragut*, 10 Wall., 334 [77 U. S., XIX., 946]; *The Fannie*, 11 Wall., 238 [78 U. S., XX., 114].

So far as the findings in regard to the lookout are concerned, there is nothing in them to show that the decree of the circuit court was not a just decree.

The appellants have raised other points, but they rest wholly or in part upon a denial of the truth of the facts found by the court, or upon alleged facts not found by the court, but which they claim the evidence establishes. It is, therefore, not necessary to consider them. Our duty in this case is to consider and decide whether the findings of fact actually made by the court support its conclusions of law and decree, and there our duty ends.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 500.

SAMUEL P. WILLIAMS, *Plff. in Err.*, [209]
v.
TOWNSHIP OF NOTTAWA.

(See S. C., 14 Otto, 209-213.)

Suit by assignee—collusive parties—relief granted.

1. By section 11 of the Judiciary Act, Circuit Courts of the United States have not cognizance of any suit to recover the contents of any chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.
2. If parties to a suit in the circuit court have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case, cognizable under the Act of March 3, 1875, the circuit court should dismiss the suit.
3. Where the party guilty of the collusion asks relief from a judgment against himself, this court will stop the suit just where it should have been stopped in the court below, and remit the parties to their original rights.

[No. 93.]

Submitted Nov. 17, 1881. Decided Dec. 5, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is stated by the court.

Messrs. **Hughes, O'Brien & Smiley,** for plaintiff in error.

Mr. **Charles Upson,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Williams, the plaintiff in error, a citizen of Indiana, against the defendant in error, a municipal corporation of Michigan, to recover the amount alleged to be due on certain bonds of the defendant in error, negotiable by the law merchant, and payable to Samuel Kline, or bearer. A trial was had by a jury, which resulted in a verdict by the direction of the court in favor of Williams for six of the bonds, and in favor of the defendant in error for the remainder. This writ of error has been brought by Williams to reverse the judgment against him, and as the court directed the verdict which was rendered, the whole of the evidence has been embodied in the bill of exceptions, and is properly before us for consideration.

From the testimony of Williams himself, it distinctly appears he was personally the owner [210] of only three of the bonds sued on of $100 each. One Bracey Tobey was the owner of three others of the same amount. The judgment in favor of Williams was upon these six bonds, and for $994.57 only. All the other bonds,

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being those on which the judgment was rendered in favor of the Township, were owned by Samuel Kline and William Connor, both of whom were residents of the Township and citizens of Michigan when the bonds were issued. There is no evidence of any change of citizenship by Kline since the bonds were delivered, and Connor, who was a witness at the trial, testified that he continued to be a citizen of Michigan. The bonds were transferred by Kline and Connor to Williams simply for the purpose of collection with his own. The same is true of those belonging to Tobey, but there is nothing in the evidence to show of what State he was a citizen, though he testified that he bought his bonds in Michigan.

By the Judiciary Act of 1789, 1 Stat. at L., 79, ch. 20, sec. 11, it was expressly provided that the District and Circuit Courts of the United States should not "Have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." By the Act of 1875, 18 Stat. at L., 470, ch. 137, sec. 1; Sup. R. S., 174, this provision was so far modified as to extend the exception to "promissory notes negotiable by the law merchant and bills of exchange," but in section 5 it was expressly enacted "That if in any suit commenced in the circuit court * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this Act; the said circuit court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just."

This case, so far as the bonds owned by Kline and Connor are concerned, comes clearly within [211] this prohibition. As the actual owners of the bonds were citizens of Michigan, they could not sue in the courts of the United States, and Williams distinctly testifies that he received and held their bonds solely for the purpose of collection with his own, and for their account. It cannot for a moment be doubted that this was done "for the purpose of creating a case" for Kline and Connor cognizable in the courts of the United States. That being so, it was the duty of the circuit court to dismiss the suit as to these bonds, and proceed no further; for as to them the controversy was clearly between citizens of the same State, Kline and Connor being the real plaintiffs. The transfer to Williams was colorable only, and never intended to change the ownership. This both Williams and Kline and Connor knew. Under the Act of 1789, it was held in *Smith* v. *Kernochen*, 7 How., 216, that this objection was one which could only be taken by plea in abatement; but in *Barney* v. *Baltimore*, 6 Wall., 280 [73 U. S., XVIII., 825], there was no such plea, and the bill was dismissed in this court without prejudice, because it appeared in evidence that certain conveyances by means of which the citizenship of the parties was changed so as to give the courts of the United States jurisdiction, did not transfer the real interest of the grantors. But whatever may have been the practice in this particular under the Act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by *Mr. Justice* Miller, speaking for the court, in *Barney* v. *Baltimore*, *supra*, such transfers for such purposes are frauds upon the court and nothing more.

It is clearly shown, also, that Williams and Tobey were collusively joined as plaintiffs, to create a case cognizable in the circuit court, for when the suit was begun the amount due them respectively was less than $500. Neither one [212] of them could then have sued alone in the courts of the United States, because the value of the matter in dispute was not sufficient.

Since the judgment below was rendered, the amount due Williams and Tobey respectively has got to be more than $500, by reason of the accumulation of interest. The citizenship of Tobey is not disclosed by the record. Whether he can sue in the courts of the United States we do not know. Williams can sue at this time if he still continues to be a citizen of some State other than Michigan, but without a false averment in his pleadings, he could not have done so when this suit was begun. If he had in his pleadings falsely overstated the amount of his claim, he could not, when his judgment was obtained, have recovered costs, and at the discretion of the court might have been adjudged to pay costs. *Gordon* v. *Longest*, 16 Pet., 104. He was as much guilty of collusion as the other parties, and is no more entitled to consideration here than they are.

Inasmuch, therefore, as it was the duty of the circuit court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to have stopped all further proceedings and dismissed the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that court, leaving the parties in interest to such remedies as they may each be entitled to for the recovery of any amount that may be due them respectively on the bonds they severally own. In this connection, we deem it proper to say that this provision of the Act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases. If they improperly dismiss a cause, their action in that behalf is expressly made reviewable here. Whether if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not now decide.

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[213] That would be a different case from this. Here the party guilty of the collusion asks relief from a judgment against himself. In such a case we deem it our duty to stop the case just where it should have been stopped in the court below, and remit the parties to their original rights.

Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 180; 106 U. S., 525; 109 U. S., 125, 355, 356; 111 U. S., 386.

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[216] UNITED STATES, *Appt.*,

v.

CHARLES M. TAYLOR, In His Own Right, and as Admr. of IRENE M. TAYLOR Deceased.

(See S. C., 14 Otto, 216-222.)

Surplus after tax sale—action for—limitation.

1. The clause of the Act of 1861, which allowed the owner of lands sold for taxes to apply for and receive the surplus proceeds remaining after payment of the taxes and charges, is not repealed by the Act of 1862.

2. The Court of Claims had jurisdiction of a suit for such proceeds, when the application to the Secretary of the Treasury, and the bringing of the suit therefor, were both more than six years after the sale.

3. The Act of 1861 limits no time within which application must be made for the proceeds of the sale to the Secretary of the Treasury. Upon such demand, the claim first accrued. A suit, brought within six years from the date of demand, is not cut off by the lapse of time.

[No. 288.]

Submitted Nov. 21, 1881. Decided Dec. 5, 1881.

APPEAL from the Court of claims.

The case is stated by the court:

Messrs. **S. F. Phillips,** *Solicitor-Gen.*, and **John S. Blair,** for appellant.

Messrs. **Albert Pike** and **Luther H. Pike,** for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

This was an action brought against the United States for the recovery of the proceeds of a tax sale made under the Act of June, 7, 1862, of certain land in the State of Arkansas, of which it was alleged that Irene M. Taylor, deceased, the intestate of the defendant in error, was in her lifetime the owner.

The Court of Claims found as matter of fact:

That block 37 in Little Rock, Arkansas, was, on May 4, 1865, subject under the provisions of law to a direct tax of $37, which was assessed thereon to Matilda Johnson.

That this tax was so assessed to Matilda Johnson, notwithstanding the fact that on May 4, 1865, Irene M. Jordan was, and ever since [217] March 4, 1863, had been, the owner of said block by purchase from said Matilda Johnson; that the assessment was made against Mrs. Johnson because she appeared by the records to be the owner of the block, her deed to Mrs. Jordan not having been recorded until August 25, 1866.

That the board of direct tax commissioners for the district in which the block was situate sold it on May 4, 1865, to one Meservey, because of the non-payment of said tax, for the consideration of $3,000, of which sum the United States was entitled to $70.50 on account of the tax and the costs and charges and commissions of sale.

That in 1865 Mrs. Jordan became the owner of the tax sale title by purchase for a valuable consideration from Meservey's assignee.

That on December 10, 1873, Mrs. Johnson, the former owner, by her formal instrument of writing of that date recognized Mrs. Jordan, who before that date had intermarried with Charles M. Taylor, as the rightful owner of said block and of the money in the Treasury realized from the tax sale thereof.

That on January 15, 1874, Mrs. Taylor and her husband made application to the Secretary of the Treasury for the residue of the $3,000, the proceeds of said tax sale after deducting therefrom the tax, penalty, costs, etc. This application was rejected January 17, 1874.

On December 8, 1875, they brought this suit in the Court of Claims, and on May 19, 1879, recovered judgment for $2,929.50, the amount of said surplus.

The United States has brought the case by appeal to this court for its consideration.

Two questions are raised by this appeal, the first of which is, whether, under the legislation of Congress, the surplus of the proceeds of lands sold should be returned to the owner.

By section 8, of the Act of August 5, 1861, 12 Stat. at L., 292, Congress declared that a direct tax of $20,000,000 should be annually laid upon the United States, and apportioned the same among the several States respectively.

The 36th section of the Act declared that when personal property could not be found sufficient to satisfy the tax and costs, the real estate should be sold, and further provided as follows:

"But in all cases where the property liable to a direct tax under this Act may not be divisible, so as to enable the collector, by a sale of part thereof to raise the whole amount of the tax, with all costs, charges and commissions, [218] the whole of such property shall be sold, and the surplus of the proceeds of the sale, after satisfying the tax, costs, charges and commissions, shall be paid to the owner of the property, or his legal representatives; or, if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." 12 Stat. at L., 304.

It was further provided, that if no one should bid the amount of the tax and 20 per cent additional thereon, the collector should be required to purchase the land in behalf of the United States, and in that case the owner was allowed to redeem on certain terms within two years.

It is not disputed that under these provisions of law, if they still remain in force, the defendant in error would be entitled to recover the surplus money sought to be recovered in this suit. So that the question presented under this branch of the case is, whether the provisions of

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law just recited have been repealed or annulled by subsequent legislation.

The appellant contends that this has been done by the Act of June 7, 1862, 12 Stat. at L., 422, "For the Collection of Direct Taxes in Insurrectionary Districts within the United States, and for Other Purposes," and later statutes.

There is no direct repeal, either in the Act of June 7, 1862, or any subsequent Act, of that provision of the Act of August 5, 1861, which entitles the owner of lands sold for direct taxes to the surplus of its proceeds, after payment of tax and costs. If it is repealed at all, it must. therefore, be by implication. In other words, the subsequent legislation must be so inconsistent with the Act of August 5, 1861, that both cannot stand. *McCool* v. *Smith*, 1 Black, 459.

We have been unable to find any such incongruity. The Act of June 7, 1862, and its amendments, contain no mention of the right of the owner of the land to receive the surplus proceeds of its sale. But the absence of such provision is not sufficient to repeal the positive enactment of the Act of August 5, 1861. On the contrary, it strengthens the presumption that it was the purpose of Congress to allow that provision to stand.

The Act of 1862 provided that, in States where insurrection existed, the entire tax for a State should be apportioned and levied upon its lands, which should become charged with [219] their respective shares of the tax, which, with a penalty of 50 per cent, should be a lien thereon.

The owner could relieve his land of the tax by paying it within sixty days after the tax commissioners should have fixed its amount. If he did not pay within that time, the title to the land became forfeited to the United States, and upon a sale thereof as provided for in the Act, vested in the United States, or the purchaser at the sale, in fee simple, free and discharged of all prior liens, incumbrances, right, title and claim whatsoever.

The tax commissioners, in case of non-payment of the tax, penalty and charges, were required to sell the land at public sale to the highest bidder, for a sum not less than the amount of the taxes, penalty, etc., and if no person made a higher bid, then to strike off and sell the land to the United States for said sum.

In case the United States became the buyer, there was, of course, no surplus. But if anyone should become the purchaser for a sum greater than the tax, penalty, etc., the commissioners were to give him a certificate of purchase, which should be evidence of title, and the owner, or any person loyal to the United States having a lien thereon, upon taking an oath to support the Constitution of the United States, was allowed to redeem the lands sold. This court has held, in the case of *Bennett* v. *Hunter*, 9 Wall., 326 [76 U. S., XIX., 672], that the primary object of the Acts of Aug. 5, 1861, and of June 7, 1861, being the raising of revenue, they must be construed together. In other words, they are to be construed as if passed at the same time, and effect must be given to all the provisions of the first Act not in conflict with the later one.

In the same case it was held that the forfeiture declared by the 4th section of the Act of 1862 does not operate of its own force to vest the title ot the land forfeited in the United States upon the non-payment of the tax, but that a sale, as prescribed by the Act, was necessary to transfer the title.

We find nothing in the provisions of the Act of 1862, above recited, which takes from the owner of the land the right accorded him by the Act of 1861, of applying for and receiving from the Treasury the surplus proceeds of the sale, nor anything inconsistent with that right.

But it is insisted by appellant that section 12 of the Act of 1862 makes a disposition of the [220] surplus proceeds of lands sold for taxes, inconsistent with the right thereto claimed by the appellee.

That section declares that "The proceeds of said leases and sales shall be paid into the Treasury of the United States, one fourth of which shall be paid over to the Governor of said State wherein said lands are situated, when such insurrection shall be put down, * * * for the purpose of re-imbursing the loyal citizens of said State, or such other purposes as the State may direct, and one fourth shall be paid over to said State as a fund to aid in the colonization or emigration from said State of any free person of African descent who may desire to remove therefrom." * * *

On recurring to the preceding sections of the Act to ascertain what is meant by the words "said leases and sales," the proceeds of which are to be so disposed of, we find that the first eight sections of the Act provide for the assessment of the direct tax upon the lands of the States in insurrection; for their forfeiture for non-payment of the tax; for their sale at auction; for their purchase by the United States, if no bid greater than the amount of the taxes, charges, etc., is received; and for their redemption by the owner.

The statute, beginning with section 9, then takes up a new subject, which is continued through sections 10 and 11.

These sections relate exclusively to the disposition to be made of the lands bought by the United States at the tax sales. They authorize the commissioners, under certain circumstances, to lease said lands, or, under the direction of the President, instead of leasing, to cause them to be subdivided into parcels not to exceed three hundred and twenty acres, and sold. Then follows section 12, which provides that the proceeds of "said leases and sales" shall be paid into the Treasury, etc. We think there can be no doubt that this provision must be limited to the proceeds of the leases and sales authorized in the three next preceding sections. Such is not only the natural and obvious, but also the grammatical, construction of the statute.

The Statute of June 7, 1862, was an Act for the collection of direct taxes in insurrectionary districts. It was not a confiscation Act. It allowed the owner of land sold for taxes to redeem it within 60 days after the sale, and while more stringent in its provisions, was not antagonistic to the previous legislation on the same [22 subject.

Our opinion is, therefore, that the clause of the Act of 1861, which allowed the owner of land sold for taxes to apply for and receive the surplus proceeds remaining after payment of the taxes and charges, is not repealed by the Act of 1862.

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The second question raised by the appeal is, whether the Court of Claims had jurisdiction of a suit for the proceeds of land sold for taxes, when the application to the Secretary of the Treasury and the bringing of the suit therefor, were both more than six years after the sale.

By section 1069, U. S. Revised Statutes, it is provided that every claim against the United States cognizable by the Court of Claims shall be forever barred, unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues.

Under the 36th section of the Act of 1861 the surplus proceeds of the sale of land for taxes was required to be deposited in the Treasury, to be there held for the use of the owner or his legal representatives until he or they should make application therefor to the Secretary of the Treasury, who, upon such application, should, by warrant on the Treasury, cause the same to be paid to the applicant.

This section limits no time within which application must be made to the Treasury for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. Whenever the owner of the land or his legal representatives should apply for the money, it was the duty of the Secretary to draw his warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an indefinite period of time without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.

A construction should be given to these statutes which would be consistent with good faith on the part of the United States. It would certainly not be fair dealing for the Government to say to the owner of lands sold for taxes that the surplus proceeds should be held in the Treasury [222] for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover such proceeds, to plead in bar that the demand therefor had not been made within six years.

The general rule is, that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own and not subject to the trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the Statute of Limitations will begin to run against him from the time such knowledge is brought home to him, and not before. *Merriam* v. *Hassam*, 14 Allen, 522; *Baker* v. *Whiting*, 3 Sumn., 486; *Kane* v. *Bloodgood*, 7 Johns. Ch., 90; *Atty-Gen.* v. *Federal Street Meeting-House*, 3 Gray, 1; *Bright* v. *Legerton*, 2 De G., F. & J., 606; *Wedderburn* v. *Wedderburn*, 2 Keen, 749.

In analogy to this rule, the right of the owner of the land to recover the money which the Government held for him as his trustee, did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued. As the suit was brought within six years from the date of demand, it falls within the terms of the section giving jurisdiction to the Court of Claims, and is not cut off by the lapse of time.

Our opinion is, that the appellee was entitled, under the Acts of Congress, to the surplus proceeds of her land sold for taxes, and that her petition therefor was filed in the court below within six years after the claim first accrued. *The judgment of the Court of Claims is, therefore, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 149.

WILLIAM C. CONNER, JAMES A. FLACK AND JAMES P. CONNER, Exrs. of WILLIAM C. CONNER, Deceased, Sheriff of the City and County of New York, *Plffs. in Errr.*, [228]

v.

WILLIAM H. LONG, Assignee in Bankruptcy of BENJAMIN H. SPAULDING.

(See S. C., 14 Otto, 228-244.)

Assignee in bankruptcy—right to property attached, or its proceeds—conversion—liability of sheriff.

1. The title of the assignee in bankruptcy to the property of the bankrupt, vests by relation to the commencement of the proceedings in bankruptcy, although the property is then attached on *mesne* process as the property of the debtor.

2. If property of the debtor, levied on under an attachment, has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the sheriff, or, before the assignment, have been applied to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold.

3. In such a case the plaintiff in the attachment suit, having received the proceeds of the sale on his judgment, will be liable to an action by the assignee for the money; or, if it remains in the hands of the sheriff, the assignee may obtain an order of the court requiring the amount to be paid directly to himself.

4. If the property has been sold under the attachment after the commencement of the bankruptcy proceedings, no title passes by the sale, and both the plaintiff in the attachment and the purchaser at the sheriff's sale will be liable to th assignee for a conversion of his property.

5. Where a sheriff levied an attachment on goods before proceedings in bankruptcy had been commenced, and by order of the court sold them after such proceedings had been commenced against the defendant in the attachment, but without notice of such bankrupt proceedings; held, that the sheriff is not liable in an action by the assignee in bankruptcy appointed after such sale, for the conversion of the goods.

[No. 76.]

Argued Nov. 4, 1881. *Decided Dec. 5, 1881.*

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. Vanderpoel, **Green** *& Cuming,* for plaintiffs in error.

Messrs. **Chamberlain,** *Carter &* **Hornblower,** for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The facts out of which the controversy in this case has grown are undisputed. They are as follows:

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On July 20, 1875, a warrant of attachment was duly issued in an action commenced on that day by Alfred J. Dickerson against Benjamin H. Spaulding in the Supreme Court of the State of New York, the defendant being a non-resident. Wm. C. Conner, as sheriff of the City and County of New York, to whom the warrant of attachment was directed, levied it on the same day, on the personal property in controversy in this action, being a quantity of straw goods, and the property, at the time, of Spaulding.

On July 27, 1875, an order was made in the [229] cause directing the sheriff to sell the property levied upon by him, on the ground that it was perishable, under which it was sold on August 1, 1875, for the sum of $1,156.50. Judgment was entered in the action on September 15, 1875, in favor of the plaintiff for $2,175.85. Execution was issued thereon, tested September 15, and received by the sheriff on that day. He returned it September 20, 1875, showing that the amount made, being the proceeds of the sale less expenses, had been paid by the sheriff to the attorney of the plaintiff in execution.

Benjamin H. Spaulding, the defendant in the attachment, was a resident of Massachusetts. On July 23, 1875, a petition in bankruptcy was filed against him by creditors in the District Court of the United States for the District of Massachusetts, and he was adjudged a bankrupt on September 4, 1875. The deed of assignment was executed by the register in bankruptcy to William H. Long, the appointed assignee, on September 21, 1875.

On January 21, 1876, Long, as assignee, commenced in the Superior Court of the City of New York the present action against Conner, the sheriff, to recover the value of the goods, on the ground that the sale by him was a wrongful conversion of property, the title to and right of possession in which had, at the time, by the operation of the Bankrupt Act, become vested in him as assignee of the bankrupt, Spaulding.

This action was removed by the plaintiff therein to the Circuit Court of the United States for the Southern District of New York. The trial resulted in a verdict and judgment for $1,186.43 in favor of the plaintiff, to reverse which this writ of error is prosecuted.

The answer of the defendant, Conner, denied "That he knew or in any way had any notice or intimation of said alleged proceedings in bankruptcy until subsequent to such sale and until after the payment over by this defendant of the money so received by him upon such sale, as hereinafter set forth."

Upon the trial the Judge instructed the jury that, upon these admitted facts, the sheriff was guilty of a conversion of the property in question on August 1, 1875, in selling it under the order of the Supreme Court of New York; that he was, consequently, liable to pay to the plaintiff the market value thereof on that date, with interest; and that the only question submitted for their determination was the amount of damages.

[230] The form of this charge assumed the truth of the foregoing allegation in the defendant's answer, as to the want of notice in fact to the sheriff of the proceedings in bankruptcy.

The question now to be considered and determined is, whether there is error in this charge.

The solution of this question depends upon the force to be given to the 14th section of the Bankrupt Act of 1867 [14 Stat. at L., 522], now section 5044 of the Revised Statutes, which reads as follows:

"As soon as an assignee is appointed and qualified, the judge, or when there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

In the case of *Hampton* v. *Rouse*, 22 Wall., 275 [89 U. S., XXII., 758], it was declared by *Mr. Justice* Clifford, delivering the opinion of the court, that the plain meaning of this section of the Bankrupt Act was, that, "Until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property, whatever it may be, remains in the bankrupt." It is equally plain that when the assignment is made, it operates retrospectively. The title of the bankrupt in the interval is defeasible, and when the assignment is made, is devested as of the date when the petition was filed. All titles derived under or through him, originating subsequent to that date, are overreached and defeated, and that by force of law, without regard to the knowledge or motives of the claimant. *Bank* v. *Sherman*, 101 U. S., 403 [XXV., 866]. The statute declares that the title of the assignee shall thus vest by relation to the commencement of the proceedings in bankruptcy, although the property is then attached on *mesne* process as the property of the debtor.

It is urged in argument on behalf of the present plaintiff in error, that the language of the [231] Act, in the case of property held by virtue of an attachment, devests the title, only when the property is so held, at the date of the execution and delivery of the assignment, and not at the time of filing the petition in bankruptcy; and that, consequently, when, as in the present case, the attachment proceedings had resulted in a disposition of the property, prior to the actual conveyance to the assignee, the title to them would not pass to him. To hold otherwise, it is said, would be to defeat the legitimate operation of an attachment, which had been commenced more than four months prior to the inception of the bankruptcy proceedings, in opposition to the plain provisions of the law; for it might well be that, under such an attachment, property might be held, undisposed of, at the date of the filing of the petition in bankruptcy. But it is equally true that property so held might remain subject to the attachment, at the date of the conveyance to the assignee, and the supposed difficulty is not removed by the proposed construction of the Act. It is removed, however, by considering the whole sec-

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tion, from which it appears that it is the title to property, subject to an attachment, only when levied within four months next preceding the commencement of the bankruptcy proceedings, which becomes vested in the assignee by relation, the same attachment being thereby dissolved, as of that date.

One consequence is, that if property of the debtor, levied on under such an attachment, has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the sheriff, or have been applied before the assignment to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold, for, not being subject to the attachment at the commencement of the bankruptcy proceedings, the title to the attached property is not thereby transferred to the assignee; but the attachment being dissolved upon that event, the right to the proceeds of the sale passes under the assignment, released from the claims of all parties to the attachment suit, as of the date of the commencement of the proceedings in bankruptcy. And in such a case the plaintiff in the attachment suit, having received the proceeds of the sale on his judgment, would be liable to an action by the assignee for that sum of money had and received to his use; [232] or, if it remained in the hands of the sheriff, the assignee might become a party to the action and obtain an order of the court requiring the amount to be paid directly to himself.

Another result is, that if the property has been sold under the attachment after the commencement of the bankruptcy proceedings, no title passes by the sale, for the property ceased, at that time, to be the property of the bankrupt and became the property of the assignee, a stranger to the action and not affected by it; and both the plaintiff in the attachment and the purchaser at the sheriff's sale, would be liable to the assignee for a conversion of his property; the one for having caused its sale, the other for having taken possession of it as owner.

Upon this point there can scarcely be any diversity of opinion, for it would be difficult to give to this feature of the bankrupt law any less effect without depriving it of all substantial operation, and defeating its obvious policy. It was, undoubtedly, deemed an essential element in any efficient system, the main purpose of which was to secure an equal participation in the effects of the bankrupt to all his creditors, not only as against fraudulent and collusive dispositions by the bankrupt himself, but also as against the zealous competition among creditors, in their heedless race of diligence, to obtain priority. For this reason every title to property sought to be acquired by a seizure and sale under an attachment, belonging to one subsequently declared to be a bankrupt, is defeated, if the attachment is levied within four months next preceding the institution of the bankruptcy proceeding; and the creditor, at whose instance and for whose benefit the sale has been made, and the purchaser who has acquired possession of the property, asserting a claim of ownership, are each liable for a tortious conversion of the property of the assignee.

In *Duffield* v. *Horton*, 73 N. Y., 218, it was decided that a debtor of the bankrupt, whose obligation had been subjected to an attachment, levied within four months next preceding the bankruptcy proceedings, was liable to the as- [233] signee, notwithstanding previous payment, without actual knowledge of the bankruptcy, to the sheriff, upon a judgment rendered against the bankrupt in the attachment proceedings. In that case the court say: "The payment by the defendants to the sheriff of the debt due Yerkes was without authority and did not discharge the obligation either to Yerkes or the plaintiffs. The lien of the sheriff was discharged and the payment was voluntary. There was no process against the defendants or their property, neither was there any judgment or order of any court, in obedience to which the money was paid. The judgment and execution was a general judgment and execution against Yerkes, and not a judgment specifically subjecting the debt to the payment of the judgment and requiring the defendants to pay it or the sheriff to collect and apply it."

In the course of the same decision, the New York Court of Appeals intimates an opinion that "The sheriff could not probably be sued, being an officer of the court and receiving the money as such;" and cites in support of it the cases of *Johnson* v. *Bishop*, 1 Woolw., 324, and *Bradley* v. *Frost*, 3 Dillon, 457.

The former of these cases (*Johnson* v. *Bishop*, *supra*) was an action of detinue, brought by the assignee of Loeb, a bankrupt, to recover possession of goods attached as the property of Loeb & Co., of which he was the sole member, and held by the sheriff. The attachment suit had been brought in a state court of Iowa, and the action of the assignee, in the District Court of the United States for that district. The district court had dismissed the cause for want of jurisdiction, and the assignee prosecuted a writ of error to the circuit court. It was admitted in the opinion of that court, delivered by *Mr. Justice* Miller, that, on the facts alleged, the title to the goods vested in the assignee as soon as the assignment to him was executed, and with that title he acquired a right of immediate possession; but it was held that he must apply to the state court in the attachment suit for a recognition and enforcement of his rights, or waiting till the sheriff had parted with the possession, prosecute a party who could not shelter himself behind the jurisdiction of a court of law, and that he could not maintain an action against the sheriff for the recovery of the possession of the property, and damages for its detention. "The [234] property," it was said, "is held by the sheriff under writs rightfully issued, and his possession is the possession of the court by the command of whose writ he seizes it. And so long as the proceedings in virtue of which it was taken are pending, that possession will not be interfered with by any other court."

In answer to the argument that the bankruptcy proceedings operated to discharge the attachment at once, without any order in that behalf, so that the sheriff was left without any authority to hold the property, the opinion proceeds as follows, p. 328:

"It may be true that the attachments have ceased to have any binding force. But whether they have or not, is the question; and this question depends, not only upon a proposition of law here urged upon us, but also upon two questions of fact; that is, whether Loeb has been

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adjudicated a bankrupt, and whether he was the only member of the firm of Loeb & Co. Of the principle of law the state court is bound to take judicial notice, but of the two facts stated it is not bound to take such notice. No court is bound to take judicial notice of the proceedings of another court. If material to a controversy before it, it must be informed thereof by the pleadings, and if the allegations are denied, they must be proven by the record. The state court can have no knowledge or even notice of the proceedings in the Federal Court, by which its right to possess and adjudicate the property in question is affected. It should be informed, in a proper way, of those proceedings, before its possession is interfered with or assailed." And in support of this conclusion reliance was had upon the cases of *Hagan* v. *Lucas*, 10 Pet., 400; *Pulliam* v. *Osborne*, 17 How., 471 [58 U. S., XV., 154]; *Taylor* v. *Carryl*, 20 How., 583 [61 U. S., XV., 1028]; *Freeman* v. *Howe*, 24 How., 450 [65 U. S., XVI., 749]; *Ex parte Dorr*, 3 How., 103; and *Buck* v. *Colbath*, 3 Wall., 334 [70 U. S., XVIII., 257].

The principle of this decision was expressed in the opinion of the court in the case of *Doe* v. *Childress*, 21 Wall., 642 [88 U. S., XXII., 549], in which *Mr. Justice* Hunt said: "Where the power of a state court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction;" and adding: "This rule gains, whether the four months' principle is applicable, or whether it is not applicable." [235]

The case of *Johnson* v. *Bishop*, *supra*, however, does not decide the question now before us, whether after the state court has exhausted its jurisdiction over the attached property, the sheriff, as well as the plaintiff and the purchaser, may not be proceeded against for a conversation of the property at the suit of the assignee, who at the time of the sale had become in law its owner.

Bradley v. *Frost* [*supra*], was such an action, not distinguishable in its circumstances from the present; and in that the Circuit Judge, upon the principle decided in *Johnson* v. *Bishop*, held that the sheriff was not liable, but not without expressing doubt of the correctness of his decision. The ground of his judgment was, that the property levied on, under the attachment, was at the time the acknowledged property of the debtor, and thereby came into the lawful possession of the court, held by the sheriff as its officer, and was sold by the latter in obedience to a command directing him to sell, not generally, as in case of an ordinary execution upon a personal judgment, the property of the judgment debtor, but specifically, the very property in the custody of the court, and upon which it acted *in rem*.

The case is thus brought within the terms of the first of the two classes of legal process described in *Buck* v. *Colbath* [*supra*]—"those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property"—the sale being substituted for the seizure—in respect to which, it is said, "he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described;" and from which, it is added, it follows, "as a rule of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts."

On the other hand, in the case of those writs [236] "in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken," it is declared, in the same opinion (p. 344), that "The officer has a very large and important field for the exercise of his judgment and discretion: first, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; secondly, that it is property which by law is subject to be taken under the writ; and thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure." And "The court can afford him no protection against the parties so injured; for the court is in nowise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else."

It is manifest that the act of the sheriff, for which he is sought to be charged in the present action, is not within the rule established as to the latter class of cases; for he neither had nor exercised any discretion in making the sale, and doing only what he was specifically and in terms commanded to do by the order of the court, the court is responsible for his obedience.

It is argued, however, that the proceedings in bankruptcy, prior to the sale, had the effect of ousting the jurisdiction of the State Court in the attachment suit, so that thereafter its order to sell was a nullity, incapable in law of any effect and, therefore, incompetent to protect the officer against the consequences of executing it. But if the jurisdiction of the court became vacated, in the sense that after the assignment in bankruptcy its action was void, in respect of all persons, and for all purposes, then, it also follows, that it thereby lost the legal custody of the attached property, and the sheriff held it afterwards, not officially, but merely as a private person; and he could not, consequently, defend against an action of replevin, brought by [237] the assignee to recover possession of the specific property. This conclusion, upon the principles and authorities already referred to, we have already excluded, but the same reasoning would support the defense of the officer, in an action for a conversion of the property, sold in obedience to the order of the court and, therefore, not by him, but by the court itself. Otherwise, the judge who made the order would be equally liable for the tort, with the sheriff who executed it.

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It is true, ordinarily, and in the case of private persons, acting voluntarily, that in case of a conversion of the goods of another, in which both principal and agent are concerned, both are severally liable, and the servant cannot justify under orders from a master; for, as was said by *Lord* Ellenborough in *Stephens* v. *Elwall*, 4 Mau. & S.,259, "A person is guilty of a conversion who intermeddles with my property, and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it."

But this rule has its limitations, and does not apply even in cases of private persons, exercising a public employment, when the act complained of is in the discharge of a duty to the public incident thereto: as in *Greenway* v. *Fisher*, 1 Car. & P., 190, where the defense was that the defendant, who was a common carrier, had merely shipped the goods in the ordinary course of business, Abbott, *C. J.*, said: "The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and a refusal, trover will lie; but while he is the mere conduit pipe in the course of trade, I think he is not liable."

And such undoubtedly is the law. The reason and policy of it apply with even greater force to a person acting in an official capacity, such as a sheriff, where the act, for the consequences of which it is sought to make him liable, is the direct and express command of a court, whose precepts he is under the highest obligation to obey without question and without hesitation.

[238] The rule of duty and of liability is thus stated with admirable force by Hosmer, *Ch. J.*, in *Watson* v. *Watson*, 9 Conn., 146: "Obedience to all precepts committed to him to be served, is the first, second and third part of his duty; and hence, if they issue from competent authority, and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command." The action in that case was replevin, and the following extract from the same opinion is pertinent to the present inquiry. The learned Judge said: "It was said in the argument of this case, that no difference exists, as to the proceedings of an officer, if the plaintiff has no property in the goods to be replevied, between the taking of property on a replevin and the taking of the goods of A, upon a process commanding him to take the goods of B; that is, the caption in both cases is equally a trespass. No remark can be more unfounded, for the difference is immense and distinctly marked. In the case of the replevin, the officer does what by legal authority he is commanded to do; and in the other case, he does what he was commanded not to do. In replevin, the property is identified and described, and the command is, *take this specific property*. In the case of a process commanding the taking of the goods of A without any identification or description, the command is, *take the goods of A, if any such there be, but not the goods of any other person*. From the nature of the case last put, the officer must act on his own inquiry, and is bound to all the responsibility of his action."

So, in *Savacool* v. *Boughton*, 5 Wend., 170, the rule was, as we think, correctly stated by Marcy, *J.*, that if the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction arising from some other cause, for example, as to the person or place, the officer who executes process issued on such suit is no trespasser, unless the want of jurisdiction appears by such process.

The same rule was sustained by Nelson, *Ch. J.*, in *Webber* v. *Gay*, 24 Wend., 485. In *Wilmarth* v. *Burt*, 7 Met., 259, *Ch. J.* Shaw said: "As a general rule, the officer is bound only to see that the process, which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject. In such case he is justified in obeying his [239] precept, and it is highly necessary to the due, prompt and energetic execution of the commands of the law that he should be so."

To the same effect are *Twitchell* v. *Shaw*, 10 Cush., 46, and *Clarke* v. *May*, 2 Gray, 410. The same principle was applied to the proceedings of a court-martial, by this court, in *Dynes* v. *Hoover*, 20 How., 65 [61 U. S., XV., 838].

In the present case, it is admitted that the State Court had full and perfect jurisdiction, in all respects, until it was terminated by the proceedings in bankruptcy. But the fact that put an end to its jurisdiction did not appear by its own record and, consequently, was one of which the sheriff could not, by legal possibility, have official notice; and without that, he was bound to obey the order of that court, to whom he was responsible, directing the sale of the property, which, so far as he was concerned, at the time it was made, was an exercise of jurisdiction as legitimate as the issuing of the original attachment under which the property had been lawfully taken and held. Indeed, the general rule is, that where an attachment has been dissolved, no action can be maintained against the sheriff for a return of the property, until he have notice by the record of the fact; or if it has taken place, by the act of the parties, *dehors* the record, then not until notice of the extrinsic facts, which have satisfied it, has been brought home to him. Drake, Attachments, sec 426; *Livingston* v. *Smith*, 5 Pet., 96.

These considerations, leading to the exoneration of the sheriff from the responsibility sought to be imposed upon him in such cases, derive additional force from the circumstance that the transaction which is supposed to entail liability upon him not only operates retrospectively, but occurred in a different jurisdiction, to which he was not responsible. The proceedings in bankruptcy were had in a court of the United States sitting in the District of Massachusetts. The defendant below was sheriff of a court of the State of New York. It is entirely true that the Act of Congress prescribing a uniform rule as to bankruptcies, passed in pursuance of an express grant of power in the Constitution of the United States, is the paramount law throughout the territorial jurisdiction of the National [240] Government. It is as truly the law of each State, as it is, and because it is, a law of the United States. The assignment in bankruptcy made in one district, so far as its operation is matter of law, operates with the same effect in all districts. And it operates upon the title to the property of the bankrupt wherever it is situate, so as to preserve it, according to the provisions of the Act, for distribution under it, and so that the title shall pass, as it requires,

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without regard to any dealing with it, which it forbids. Whatever hardship, if any, may follow to private persons who sell or buy it, and attempt to divert it to their own use, falls upon them, as in other cases, where titles fail, even in the hands of innocent, because ignorant, purchasers. But they are volunteers, seeking only their private interests, and take the chances of all the consequences of their conduct. The maxim to which they are subject is, "*caveat emptor*." It is not so with the sheriff, who, as a public officer of the court, obeys its precepts, regular on their face, without notice of any want or failure of jurisdiction; who is not at liberty to exercise any discretion, and has no choice but to obey. The language of *Mr. Justice* Miller in delivering the opinion of this court in *Eyster* v. *Gaff*, 91 U. S., 524 [XXIII., 405], though spoken in reference to a different state of facts, is applicable to the present case. "It is a mistake," he said, "to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the Act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. * * * It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of the parties to the suit already pending."

There is no language in the Bankrupt Act that, either expressly or by any necessary implication, requires us to hold the officer liable in such circumstances; nor is its policy defeated or thwarted by refusing to do so. The opposite conclusion is based upon an inference from the doctrines relating to the conversion of personal property, and, in our opinion, is the result of a misapplication of the principle invoked.

[241] The court below took a different view of the law, following a prior decision in the same circuit in *Miller* v. *O'Brien*, 9 Blatchf., 270, in which the Circuit Judge, Woodruff, said: "It accords with our sense of justice to say that they (sheriffs) ought not to be held liable for their acts in the execution of process, done in good faith, without actual notice of any proceedings in bankruptcy against the debtor," but, nevertheless, felt constrained to adopt "the reasoning and the principles upon which the question was settled in England under the bankrupt law of that country," referring to *Balme* v. *Hutton*, 9 Bing., 471, and *Garland* v. *Carlisle*, 4 Cl. & F., 693.

And these cases have been pressed upon us in this argument as authorities entitled to be followed. They are entitled, certainly, to very respectful examination.

The principal case in England is that of *Cooper* v. *Chitty*, 1 Burr., 20, decided by *Lord* Mansfield in 1756. It arose, as did all the subsequent cases, under the Bankrupt Act of 13 Eliz., ch. 7, which, after authorizing the appointment of commissioners for managing and disposing of the bankrupt's estate, enacted that every direction, order, bargain, sale and other thing done by the persons so authorized, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, etc., and *against all other person or persons claiming by, from or under such offender or offenders, debtor or debtors, by any act or acts had, made or done after any such persons shall become bankrupt.* The action was trover against the sheriffs of London by the assignees of a bankrupt, to recover the value of goods levied on and sold under an execution upon a judgment recovered against the bankrupt, the goods having been seized after an act of bankruptcy and sold after the assignment was executed. The officers were adjudged liable for a conversion. It appears from the report of the arguments and judgment that in no prior case had the sheriff been held liable in such circumstances, and several were cited to the contrary. These *Lord* Mansfield either distinguished from the case before him or overruled as without authority; and, in answer to the argument of hardship to the officers, laid stress upon the fact that in the case before him the sheriffs knew of the bankruptcy before they sold the goods.

Lord Mansfield's decision in *Cooper* v. *Chitty*, [242] *supra*, controlled the course of judicial opinion upon the question until the case of *Balme* v. *Hutton*, 2 Cromp. & J., 19, was decided in the Court of Exchequer in 1831. In the course of his opinion in that case, *Lord* Lyndhurst said: "The sheriff does not act of his own accord or for his own benefit; he acts as a ministerial officer in execution of the command he receives from a court of justice in the King's name; and if what he does is, at the time he does it, in strict obedience to that command; if it be what the court itself, if it could itself have acted, would have done; and if it be at that time justifiable by the writ under which he acts, it is a strong measure to say that subsequent events shall make that a wrongful act in the sheriff which, at the time he did it, was rightful, and shall make him answerable as a wrong-doer for what, at the time he did it, it was his duty to do." He also showed, by an elaborate review of the earlier authorities, that in such a case the sheriff had been uniformly protected by his process, and concluded that *Cooper* v. *Chitty* decided only that a sale by the sheriff, *with notice of the bankruptcy*, was a wrongful conversion by the sheriff, and a sufficient foundation for an action of trover; but that it left the case of the sheriff, upon a sale *without notice*, as much protected as before. He then proceeded to show that the subsequent decisions had overlooked the distinction on which *Cooper* v. *Chitty* was founded, and were a departure from the true rule as established by the earlier authorities, and gave judgment for the defendant. But this judgment was reversed in 1833 by the Court of Exchequer Chamber. *Balme* v. *Hutton*, 1 Cromp. & M., 261.

The question came finally before the House of Lords in the year 1837, in the case of *Garland* v. *Carlisle* [*supra*], where it was settled by a decision against the sheriff, who, before the passing of the 6 Geo. IV., ch. 16, having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a *fi. fa.*, but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy, and it was held that the assignees might maintain trover against the sheriff for [243] the goods seized, the receipt of poundage being considered evidence of a conversion by the sheriff. The Judges were called upon for their

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opinions, and the majority, who gave opinions against the sheriff, relied largely upon the language of the Stat. 13 Eliz., ch. 7, and upon the settled course of decision, which it was thought to be inexpedient to reverse.

Mr. Justice Vaughan, one of the minority Judges, in stating the ground of his opinion, said (p. 771): "Being, therefore, of opinion that there is no legislative enactment by which the sheriff is rendered expressly liable, but assuming for the sake of argument that the general terms in which the clauses to which I have referred are expressed, may be thought so large as to be of universal application and, consequently, to comprehend the sheriff, I think, for the reasons I have stated, that the law would imply an exception in his favor, arising out of his official character and duty, being an officer of justice, compelled by stern necessity to execute the King's writ, *Necessitas quidquid coegit defendit.*"

The final judgment was given against the sheriff. Great stress was put upon the long established series of decisions to that effect. *Lord* Brougham, although concurring, said: "I may say, however, that I agree particularly with one of the learned Judges, *Mr. Justice* Coltman, in his expression of opinion, that had the case been an entirely new case, and now to be decided for the first time, I might have come to a different conclusion upon it; but that as it is, a whole current of decisions unbroken for so many years, from 1756 to 1881, has disposed of the question, and we are not now left at liberty to form an opinion upon it. I do not, however, think that *Cooper* v. *Chitty* absolutely decided this question, though it certainly decided the principle. The more that case is examined, the less, as it appears to me, will it be found to have decided the question, if, indeed, it does not rather operate as an argument against the side for which it is now quoted." *Lord* Denman dissented.

The question is now a new one in this court, and we are not fettered by an inveterate course of decisions upon it. We are at liberty, in view of all appropriate considerations, to decide it upon reason and not by precedent. And we are satisfied, upon grounds already stated, that [244] in doing so we shall reach conclusions entirely satisfactory, and supported, as we believe, by recognized principles of law. It is a sufficient reason, in our judgment, for not following the English decisions, that in 1839, shortly after the House of Lords had declared its inability to disregard the course of previous decision, Parliament, recognizing the injustice and inexpediency of the rule thus finally established judicially, interposed by the Act of 2d and 3d Vic., ch. 29, and by several successive Acts, which had the effect to protect the sheriff in the performance of his official duty against such actions as the present. Indeed, some relief had been introduced by the Bankrupt Act of 6 Geo. IV., ch. 16, passed in 1825. *Edwards* v. *Scarsbrook*, 3 B. & S., 280; *Slater* v. *Pinder*, L. R., 6 Exch., 234. This legislation we regard as evidence of the highest character, that the rule in question ought never to have been judicially established. Its effect was not so much to change as to restore the law. It was, in fact, a legislative reversal of the judgment of the House of Lords. It cannot be assumed that Congress intended, in the Bankrupt Act of 1867, to restore a rule of liability which had become obsolete in England nearly thirty years before.

In our opinion, the judgment below should have been for the plaintiff in error; and it is, therefore, reversed.

The cause is remanded, with instructions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 180.

HENRY N. WALKER ET AL., *Appts.*
v.
DANIEL W. POWERS AND OSCAR CRAIG, EXRS. of JOHN CRAIG, Deceased, DANIEL W. POWERS, Personally, and HELEN MARIA POWERS, Sole Devisee, etc., of JOHN CRAIG, Impleaded with HENRY TEN EYCK.

(See S. C., 14 Otto, 245-252.)

Judgment satisfied by sale on execution—assignee as party—multifariousness.

1. A judgment is satisfied by a sale of lands on execution issued thereon, the bid being sufficient to cover the amount of the judgment and costs, and a deed executed thereon.
2. The Circuit Court has no jurisdiction of an action founded on a judgment brought by an assignee thereof, unless the assignor might have prosecuted a suit thereon in the same court if no assignment had been made, the judgment having been recovered on a contract.
3. A bill is liable to the objection of multifariousness, where there is a misjoinder of parties complainant, and where the causes of action and the relief sought in regard to the property are distinct, in some respects antagonistic, and such as cannot properly be joined in the same suit.

[No. 104.]

Argued Nov. 18, 1881. Decided Dec. 5, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Messrs. **Joseph P. Whittemore,** *Theodore Bacon* and *John Atkinson*, for appellants.

Mr. **William F. Cogswell,** for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This is a suit in chancery in the Circuit Court for the Northern District of New York, the plaintiffs being citizens of the State of Michigan and the defendants of the State of New York.

The general purpose of the suit is to declare null and void, certain sales and conveyances of real estate in New York, owned by Nelson P. Stewart in his lifetime, and to subject the property to the payment of his debts. Stewart, at the time of the transactions mentioned in the bill, was a citizen of Michigan, where he died in the year 1863, and where George K. Johnson was appointed administrator of his estate in 1874. No administrator was ever appointed in New York.

The debt on which Walker counts was a simple contract debt, which, on being presented to the Probate Judge in Michigan, was allowed.

NOTE.—*Equity; multifariousness.* See, *note* to Gaines v. Chew, 43 U. S. (2 How.), 619.

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The foundation of Whittemore's claim for relief is, first, a judgment recovered by him against Stewart in the courts of New York on the 20th day of August, 1862, and docketed in Monroe County, where the land in controversy [246] is situated, on the 28th of the same month. Also a similar judgment in favor of Elisha W. Chester, docketed about the same time and assigned to Whittemore in 1872.

As regards the judgment in favor of Whittemore, the bill alleges that after the death of Stewart the plaintiff instituted a proceeding in the nature of a *scire facias* against the *terre tenant* in the proper court of the State, and obtained the order of that court under which the property so frequently mentioned in the bill as Congress Hall, a hotel in the City of Rochester, was sold to Whittemore on a bid that was the full amount of the debt, interest and costs, and that he has received the sheriff's deed conveying to him a good title to the property, on which he has brought an action of ejectment, now pending, to recover possession of it.

The bill then charges a variety of transactions connected with the sale of this property, and of other real estate under judicial proceedings against Stewart in his lifetime, and with conveyances made by him of the same, all of which are said to be fraudulent, and to have been made in pursuance of a fraudulent conspiracy on the part of Stewart and the purchasers and others to hinder and delay the creditors of Stewart and to defeat them in the collection of their debts. The bill alleges that, besides the claims on which plaintiffs sue, there are large debts held by numerous creditors, on whose behalf the bill purports to be brought as well as of plaintiffs. Some of the real estate described is alleged to be in the hands of innocent purchasers for value. Most of the parties charged as being conspirators are dead. The heirs or devisees of Stewart, though named, are not made parties to the bill; nor, indeed, can they be made defendants, because they, like plaintiffs, are citizens of the State of Michigan. The administrator living in Michigan, though a creditor, as the bill alleges, to the amount of $80,000, is not made a party, nor is any reason given why he did not take out administration in New York, as it was eminently proper he should do.

The bill was dismissed on demurrer, and this appeal is taken from that decree of the circuit court.

It will be perceived that Whittemore, the principal complainant, founds his right to relief on two totally distinct causes of action.

In the one case he asserts himself to be the owner, by virtue of a judicial sale, of Congress Hall, with a complete legal title, on which he is prosecuting an action of ejectment. The statement of his bill shows that, by the sale [247] under which he became the owner of that property, his judgment against Stewart was satisfied, and as the execution must be presumed to have been returned to the proper office with the sheriff's proceeding indorsed, the judgment stands satisfied by the record of the court in which it was rendered. No attempt to set aside this satisfaction has been made by plaintiff, but on the contrary, he is by this very bill insisting on the fruit of that satisfaction, by endeavoring to remove the cloud on his title, created by the fraudulent proceedings of which he complains. In reference to that judgment, he is no longer a creditor of Stewart, nor has he any debt chargeable or provable against Stewart's estate. What interest has he, then, founded on this judgment in any other property which Stewart held in his lifetime, or in the administration of the assets of his estate? How can he, on the foundation of that judgment, inquire into frauds in regard to other property than what he bought? What interest has he, apart from his other judgment in favor of Chester, in common with other creditors of Stewart, and how can he maintain any joint suit with them?

So far from being able to do this, or having any common interest with them, he asserts a right in conflict with the interests of all the other creditors. If the claim of the defendants who are in possession of the Congress Hall property, the only property of much value mentioned in the bill, should be declared to be void as against Stewart's creditors, then, while it is their interest to subject it to the general administration among all the creditors, we have Mr. Whittemore asserting that this result inures to his sole benefit; that he has already taken steps by which he has become the exclusive owner when the frauds are swept out of the way.

It is impossible to see, therefore, what interest Whittemore has, founded on that judgment, in a general administration of the assets of Stewart, or any interest in common with Walker, or the other creditors, or any right to call upon the defendants other than those setting up claim to Congress Hall.

This view of the matter involves no hardship on Mr. Whittemore, who having satisfied his debt against Stewart's estate by the purchase of that property, will find no difficulty in litigating with the adverse claimants the matters he now sets up in a separate suit, which would concern him and them alone.

In reference to the judgment of Chester, on which Whittemore asks relief as assignee of Chester, it is urged as ground of demurrer, that Chester being a citizen of the same State with [248] defendant and, therefore, incapable of sustaining this suit in a Federal Court, it cannot be sustained by Whittemore, his assignee. The suit was brought in 1876, and the question here raised must be decided by a construction of the Act of March 3, 1875 [18 Stat. at L., 470].

The 1st section of that Act, after declaring in terms intended to be exhaustive, the jurisdiction of the Circuit Courts of the United States and certain limitations on that jurisdiction, as to residence and service of process on defendants, adds this further restriction: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

Since Whittemore cannot sustain this suit on the ground of his own judgment against Stewart, because that is satisfied by the sale of property, the only other ground on which he can succeed is as the owner of this judgment in favor of Chester. That judgment is, then, the foundation of his suit in the circuit court. It is a cause of action which he holds by assign-

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ment from a party who cannot sue in that court. Without this cause of action he has no standing in court, and has no right to ask the court to inquire into the other matters alleged in the bill. It is as much the foundation of his right to bring the present suit as if it were a bond and mortgage on which he was asking a decree of foreclosure. See, *Sheldon* v. *Sill*, 8 How., 441.

If, then, the judgment is a contract, it gives Whittemore no right to sue in the courts of the United States for New York. There is some conflict in the authorities as to whether a judgment *eo nomine* is a contract. In 1 Story on Contracts, section 2, they are divided into three classes, in the first of which judgments are mentioned with recognizances, statutes staple, etc. It is, however, permissible in all cases, where justice requires it, to inquire into the nature of the demand on which the judgment was rendered. If the judgment be rendered on [249] a conract, that judgment is a contract, the nature and extent of the liability having been judicially ascertained.

The bill in this case alleges that "The debt on which this judgment was recovered accrued in the year 1858." It was, therefore, recovered on a contract, and the present suit is a suit to give a remedy on that contract, and any decree rendered by the court in favor of plaintiff would be intended to enable him to recover the money due on the contract.

If the judgment of Chester had been recovered in the circuit court in which this bill is brought, instead of a state court, the circuit court might have jurisdiction of the case to remove obstructions to the enforcement of its own judgment, no matter who might for the time be its owner. But where a party comes for the first time in a court of the United States to obtain its aid in enforcing the judgment of a state court, he must have a case of which the former court can entertain original jurisdiction. *Christmas* v. *Russell*, 5 Wall., 290 [72 U. S., XVIII., 475].

It remains to be seen whether the suit can be prosecuted further on the part of Walker.

A very learned argument, with a review of the authorities, is made by counsel for appellants, to show that it is not essential to the relief sought that there should be a judgment and an execution returned *nulla bona*.

We do not think it necessary to enter upon the consideration of that question as the case is presented to us.

If what we have already said of the standing of Whittemore is sound, the bill is liable to the objection of multifariousness—one of the points specified in the demurrer—on almost every ground on which that objection may be taken to bills in chancery.

1. There is a misjoinder of parties plaintiff.

There are but two plaintiffs, Walker and Whittemore. Whittemore, as we have seen, has no standing in the court, and is, therefore, improperly joined with Walker, if Walker has such a standing, and the defendants cannot be required, in litigating with Walker any right he may have against them, to contest with Whittemore, who, on his own showing, has no right in that court. It is true this difficulty could have been removed if plaintiff had dismissed Whitte- [250] more from his case as plaintiff, which he might have done after the demurrer was sustained. But he asked no such leave, and permitted his bill to be dismissed as it stood and still stands.

2. The causes of action and the relief sought in regard to the Congress Hall property and the other property mentioned in the bill are distinct, and in some respects antagonistic, and such as cannot properly be joined in the same suit. Whittemore seeks to have his title established in regard to the Congress Hall property, and the cloud created by the fraudulent sales and conveyances on it removed, so that he may be declared the owner of that property. In this matter no one is interested but himself and Helen Maria Powers, one of the defendants. The prayer of the bill is that the other property may be subjected to the payment of Stewart's debts, and in this Walker and all the other creditors of Stewart are interested, and Ten Eyck also as defendant.

A case bearing a strong analogy to the one before us is that of *Emans* v. *Emans*, 14 McCarter [N. J. Eq.], 114.

After a partition of real estate among part owners, a controversy arose as to its fairness, which was submitted to arbitrators. They awarded that the defendant should convey to complainant in the suit 23.30 acres to equalize the partition. The bill prayed that defendant might be decreed specifically to perform the award; if not, that the court should declare how much more and what lands defendant should convey to make the partition equal; and lastly, for general relief. On demurrer for multifariousness the court says: "The leading object of the bill is to enforce specific performance of an award of arbitrators. The submission to arbitrators related to the fraud or unfairness of a partition of certain lands devised to the parties, and included the power of making a just partition. A new partition was, in fact, made. If the award cannot be enforced, the bill further asks that the court will relieve against the unfairness or fraud of the partition. Now it is apparent that these are matters of a distinct character. The one relates to the validity of the submission and award and the power and propriety of enforcing a specific performance, and the other to the equity and fairness of the partition. They involve totally distinct questions, requiring different evidence, and leading to different decrees."

Another analogous case is *Sawyer* v. *Noble*, 55 Me., 227.

Sawyer and Noble were partners, and the bill charges Noble with many improper transactions [25 justifying a dissolution of the partnership and, among others, a fraudulent and pretended sale of the stock in trade and good-will of the business to Randall, his co-defendant. The bill prays that this sale may be set aside and the partnership dissolved, and an account and settlement be had between complainant and Noble. The court says it is obvious that Randall is in no way interested in the partnership affairs of Sawyer, and that the settlement of the affairs of the firm and rescission of a fraudulent sale are distinct and unconnected matters and properly to be determined in separate suits."

By multifariousness "Is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them. As, for example, uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of

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a distinct and independent nature against several defendants in the same bill." Story, Eq. Pl., sec. 271. In Daniel's Ch. Pr., 335, it is said in explanation of this, that "It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

8. It seems to us, also, though of that we are not quite so sure, that if this real estate is to be subjected to the payment of Stewart's debts, that Frederick S. Stewart, Helen W. McConnell and Adeline M. Johnson, whom the bill alleges to be his only heirs and devisees in his unprobated will, should be parties to the suit. The mere allowance of the debt of Walker by the probate court is not conclusive evidence against them in a suit to reach the real estate of their ancestor and devisor.

In a court of the State where the land is situated which it is the object of this suit to reach, the statutes of which enable those courts to entertain jurisdiction of necessary parties who are not within reach of their process, and where the rules of practice and pleading have been much modified by legislation, it is possible this bill, or some part of it, might, by making additional parties, be sustained. But we are satisfied that the effort to prosecute the suit in the Circuit Court of the United States on the present bill, with the misjoinder of some parties and the non-joinder of others, with the connection of matters totally distinct in the right asserted and in the relief sought, and with the principal party plaintiff entitled to no relief in that court, is attended with insuperable difficulties and that the bill was properly dismissed.

[252]

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 484.

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[261] CALVIN H. HALE ET AL., *Plffs. in Errr.*,

v.

DUNCAN B. FINCH.

(See S. C., 14 Otto, 261-270.)

Who not bound by judgment—condition—covenant, what is.

*1. One not a party to an action nor notified of its pendency, having no opportunity or right to control the defense, to introduce or cross-examine witnesses or to prosecute a writ of error from the judgment therein, is not bound by such judgment.

2. Certain language in a bill of sale construed to be a condition, not a covenant.

3. Neither express words of covenant nor any particular words nor any special form of words are necessary in order to charge a party with covenant. Sometimes words of proviso and condition or even recitals will be construed into words of covenant, such being the apparent intention and meaning of the parties. Covenant will not arise unless it can be collected from the whole instrument that there was an agreement or promise or engagement upon the part of the person sought to be charged for the performance or non-performance of some act.

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Service of notice to appear and defend; when necessary to validity of judgment.* See, *note to* Hollingsworth v. Barbour, 29 U. S. (4 Pet.), 466.

[No. 79.]

Argued Nov. 7, 8, 1881. Decided Dec. 5, 1881.

IN ERROR to the Supreme Court of the Territory of Washington.

The case is stated by the court.

Messrs. **John H. Mitchell,** *J. K. Kelly* and *William Strong*, for plaintiffs in error.

Messrs. **Elbridge G. Lapham** and *M. I. Townsend*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

On the first day of May, 1864, the Oregon Steam Navigation Company, then engaged in the transportation, for hire, of freight and passengers on the Columbia River and its tributaries, purchased a steamboat, called the New World, from the California Steam Navigation Company, then engaged in like business upon the rivers, bays and waters of the State of California.

The terms of the sale are embodied in a written agreement, from which it appears that the consideration was $75,000, and the covenant and agreement of the vendees, not only that they would not "run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel upon the rivers, bays and waters of the State of California for the period of ten years from the first day of May, 1864," but that its machinery should not be "run or employed in running any steamboat, vessel or craft upon any of the routes of travel, or on the rivers, bays or waters of" that State for that period. The Oregon Steam Navigation Company, in that agreement, further stipulated, that in case of any breach of their covenant and agreement, they would pay the California Steam Navigation Company the sum of $75,000 in gold coin of the United States "as actual liquidated damages," such stipulation, however, not to have the effect to prevent the latter from taking such other remedy, by injunction or otherwise, as they might be advised.

[262]

On the 18th of February, 1867, the Oregon Steam Navigation Company sold The New World to Henry Winsor, Clanrick Crosby, N. Crosby, Jr., and Calvin H. Hale, executing to Winsor a bill of sale, which stated the consideration to be $75,000. That instrument, after setting out the covenant of the vendors to warrant and defend the steamboat and all its appurtenances against all persons whomsoever, recited that "it was understood and agreed" that the sale was "upon the express condition" that the steamboat should not run, nor its machinery be used in running, any other steamboat, vessel or craft, within ten years from first day of May, 1867, on any of the routes of travel on the rivers, bays or waters of the State of California, or on the Columbia River and its tributaries.

At the time of the making of that bill of sale Winsor and his associates, with L. D. Howe and A. R. Elder as their sureties, executed an additional writing, similar in all respects to that before mentioned as having been executed by the Oregon Steam Navigation Company on the 1st of May, 1864, except that Winsor and his associates, in the paper by them signed, covenanted and agreed that The New World should not, for the period of ten years from May 1, 1867, be

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run, or suffered to be run or employed, nor its machinery used in any other steamboat, on the rivers, bays or waters of the State of California, or on the Columbia River and its tributaries.

[263] On the 5th of March, 1867, Winsor executed to Hale a bill of sale of The New World, reciting a consideration of $75,000, and by the terms of which, the former for himself, his heirs, executors and administrators, promised, covenanted and agreed to and with Hale, to warrant and defend the title to the steamboat, her boilers, engines, machinery, tackle, apparel, etc.

On the 23d of November, 1867, Hale executed to Finch, the defendant in error, a bill of sale, reciting a consideration of $50,000, and containing, among others, the following clauses:

"And I, the said Calvin H. Hale, have, and by these presents do promise, covenant and agree, for myself, my heirs, executors and administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators and assigns, to warrant and defend the whole of said steamboat New World, her engines, boilers, machinery and all the other before mentioned appurtenances, against all and every person and persons whomsoever.

And it is understood and agreed that this sale is upon this express condition that said steamboat or vessel is not, within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bays or waters of the State of California, or the Columbia River or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be employed in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays or waters of the State of California, or the Columbia River and its tributaries."

At the same time a separate written agreement was entered into between Finch and Hale, from which it appears that the former, in terms, covenanted and agreed to do various things which have no connection with this case and need not, therefore, be here specified. It is only important to observe, as to that separate agreement, that it did not embrace any covenant or agreement whatever on the part of Finch against the use of the steamboat New World, or of its machinery, upon the waters of California or upon the Columbia River or its tributaries.

The present action was brought against Finch by Hale and those associated with him in the purchase from the Oregon Steam Navigation Company.

The complaint avers:

[264] That in all of said transactions, Winsor, defendant knew, represented his co-plaintiffs as well as himself;

That defendant, in violation of his promise and agreement, made at the time he purchased the steamboat, caused, suffered and permitted the same to be taken to San Francisco, on or about the first day of October, 1868, and from that date up to May 1, 1874, caused, suffered and permitted it to be run upon the routes of travel on the rivers, bays and waters of California;

That, on October 5, 1869, the Oregon Steam Navigation Company sued the plaintiffs and their sureties, Howe and Elder, to recover the sum of $75,000, fixed as liquidated damages for the breach of the covenants and agreements contained in the within memorandum of February 18, 1867; the ground of said action being that the defendants therein had run the steamboat New World, or suffered and permitted it to be run, on the rivers, bays and waters of California, after November 1, 1868, and prior to May 1, 1874, which acts, it is averred, are the same now complained of as constituting a breach of the defendant's alleged agreement of November 23, 1867 [*Oregon St. Nav. Co.* v. *Winsor*], 20 Wall., 64 [87 U. S., XXII., 315]; and,

That, in said action, the Oregon Steam Navigation Company recovered a judgment against the present plaintiffs for $75,000, which sum, with $4,000 expended in defending the suit, they had been compelled to pay.

Judgment is now asked against Finch for $79,000 in damages, for the violation of his alleged agreement and promise.

The answer puts in issue all the material allegations of the complaint, except the fact that the steamboat, subsequent to the purchase by Finch, was used upon the waters of the State of California during the period charged.

The defendant, in addition, pleads: 1. That the alleged agreement was void under the Statute of Frauds and Perjuries of the Territory, in that it was not, and is not, to be performed in one year from the making thereof, and was not, nor was any note or memorandum thereof, in writing, signed by defendant, according to the provision of the statute; 2. That the steamboat was taken to California, and run upon the waters and bays of that State, by the leave and license of the plaintiff, given to the defendant on the first day of July, 1868; 3. That the action is barred by the limitations of three and six years, prescribed by the Statute of the Territory. [265]

There was a verdict for the defendant, in obedience to a peremptory instruction by the court, and the judgment rendered thereon was affirmed by the Supreme Court of the Territory. From that judgment of affirmance this writ of error is prosecuted.

Upon the filing in the Supreme Court of the Territory, of the judgment and mandate of this court, in *Oregon St. Nav. Co.* v. *Winsor* [*supra*], that cause was remitted to the court of original jurisdiction, for further proceedings according to law. The defendants therein obtained leave to withdraw and did withdraw their answers. Judgment by default was thereupon entered against them for the sum of $75,000, the amount fixed as actual liquidated damages, with interest and costs. Satisfaction thereof was entered at the same term of the court. That judgment it is contended, by the present defendant, was obtained by collusion between the parties to that action. It is further claimed that it has never, in fact, been satisfied. Whether these charges are true, we need not here inquire. And it is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, nor notified of its pendency. He had no opportunity or right in that case, to controvert the claim of the Oregon Steam Navigation Co., to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. *R. R. Co.* v. *Bank* [*ante*, 61]. Besides, that case was founded upon the written covenant and agreement of Winsor and his associates with the Oregon Steam Naviga-

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tion Company, while the liability of Finch to the plaintiffs in this action depends altogether upon the construction which may be given to the bill of sale executed to him by Hale. If the record of the case of the *Oregon St. Nav. Co.* v. *Winsor, etc.*, is competent evidence in this action, for any purpose, it can only be to show the amount of damages which Winsor and his associates have sustained, by reason of The New World being run on the waters of California, after Finch became owner.

266] But, the liability of those parties for such damages arose out of the covenant and agreement which they made with the Oregon Steam Navigation Company. With that transaction, however, Finch had no connection, and unless he made a similar covenant and agreement with those from whom he purchased, thereby becoming interested in keeping the covenant and agreement made with that Company by Winsor and his associates, he cannot be affected by the judgment obtained against the latter.

This brings us to the main contention on behalf of plaintiffs in error, viz.: that the language of the bill of sale from Hale to Finch, if interpreted in the light of all the circumstances attending its execution, imports a *covenant* upon the part of the latter, that he would not use or permit the use by others, of the steamboat or its machinery, within a prescribed period, either upon the waters, rivers and bays of California, or upon the Columbia river and its tributaries. If, however, the language, properly interpreted, imports only a *condition*, for breach of which the vendor had no remedy other than by suit to recover the property sold, then it is, as indeed it must be, conceded, that the judgment below was right.

We are of opinion that the latter construction is the proper one.

If we look both at the circumstances preceding and at those immediately attending the purchase by Finch, and if we even impute to him full knowledge of everything that occurred, as well when the Oregon Steam Navigation Company made its original purchase, as when it subsequently sold to Winsor and his associates —all which counsel for plaintiffs contends we are bound, by the settled rules of law, to do— what do we find?

The written memorandum between that company and the California Steam Navigation Company, in words aptly chosen, shows, as we have seen, an express covenant and agreement, upon the part of the former, that The New World, nor its machinery, shall be used on the waters of California within ten years from May 1, 1864, and, also, to pay a certain sum, as actual liquidated damages, for any breach of such covenant and agreement. The bill of sale from the Oregon Steam Navigation Company to Winsor and his associates did not contain any words of covenant or agreement. But that company, in view of its express covenants to the California 267] Steam Navigation Company, took care to exact from its vendees a separate written obligation, in which the latter, in express terms, covenanted and agreed with that company, in like manner as the latter had covenanted and agreed with the California Steam Navigation Company. The next writing executed was the bill of sale from Winsor to Hale. That instrument shows nothing more than a covenant to warrant the title to the steamboat. It makes no reference, in any form, to any waters from which the steamboat should be excluded. Then comes the bill of sale executed by Hale to Finch. Its material portions are the same in substance and, in language, almost identical with the bill of sale given by the Oregon Steam Navigation Co. to Winsor. Each contains a covenant and agreement, upon the part of the vendor, simply to warrant and defend the title to the steamboat, its machinery, etc., against all persons whomsoever. But each recites, let it be observed, only an agreement that the *sale* is upon the *express condition* that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter writing shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as is found in the writings which passed between the California Steam Navigation and the Oregon Steam Navigation, or such as are contained in the separate agreement between the latter and Winsor and his associates.

If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of The New World, the absence, as well from the bill of sale accepted by him, as from the written agreement of the same date, signed by him and Hale, of any *covenant* or *agreement* that he would not use that vessel, or permit it to be used, on the prohibited waters within the period prescribed, quite conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant.

It thus appears that the circumstances, separately considered, militate against the construction for which plaintiff contends. [268]

But, if we omit all consideration of the circumstances under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, are necessary in order to charge a party with covenant. 1 Roll. Abr., 518; *Lant* v. *Norris*, 1 Burr., 287; *Williamson* v. *Codrington*, 1 Ves., 516; Sheppard's Touchstone, 161, 162; *Courtney* v. *Taylor*, 7 Scott (N. R.), 749; 2 Pars. Cont., 510. "The law," says Bacon, "does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." Bac. Abr., Covenant, A. So, in Sheppard's Touchstone, 161, 162, it is said: "There need not be any formal

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words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever words it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement." "Sometimes," says Mr. Parsons, "words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties." 2 Pars. Cont., 510, 511. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. *Farrall* v. *Hilditch*, 5 C. B. (N. S.), 840; *Great Northern R. W. Co.* v. *Harrison*, 12 C. B., 576; *Severn and Clerke's Case*, 1 Leon, 122. And there are cases in which the instrument to be construed was held to contain both a condition and a covenant; as "If a man by indenture [269] letteth lands for years, provided always, and it is covenanted and agreed, between the said parties, that the lessee should not alien." It was adjudged that this was "A condition by force of the proviso, and a covenant by force of the other words." Co. Litt., 203 *b*.

But according to the authorities, including some of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. Comyns, in his Digest (Covenant, A 2), says that "Any words in a deed which show an agreement to do a thing, make a covenant." "But," says the same author, "where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses." Com. Dig., Covenant, A 3. The language last quoted is found also in Platt's Treatise on the Law of Covenants. Law Library, Vol. 3, p. 17. It there appears in connection with his reference to the case where A leased to B for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them. In such case, the author remarks, the lessee was held liable to an action for omitting to leave the houses in good plight, "for here an agreement was implied."

Applying these doctrines to the case before us, its solution is not difficult. Without stopping to consider whether a covenant upon the part of Finch could arise out of a bill of sale which he did not sign, but merely accepted from his vendor (Platt, Covenants, ch. 1), it is sufficient to say that that instrument contains no agreement or engagement or promise by him that he would or would not do anything. There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement, not that Finch would not use, or permit others to use, the boat and its machinery upon the prohibited waters within the period limited, but only an agreement that the *sale* was upon the *express condition* that neither the boat nor its machinery should be so used. It is the case of a [270] bare, naked condition, unaccompanied by words implying an agreement, engagement or promise by the vendee that he would personally perform or become personally responsible for the performance of the express condition upon which the sale was made. The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition prescribed. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part, that he would not use, and should not permit others to use, the boat or its machinery upon the waters and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction, and against the apparent intention of the parties, into a covenant or agreement involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition—stated in such form as to preclude the idea of personal responsibility upon the part of the vendee—we should give effect to their intention, thus distinctly declared.

This conclusion disposes of the case, and relieves us of the necessity of considering other questions of an interesting nature which counsel have discussed.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN C. BELK, *Plff. in Err.* [279]

v.

HENRY MEAGHER ET AL.

(See S. C., 14 Otto, 279-291.)

Mining claim—possession—relocation, when invalid—objections to evidence—county records.

1. Work done in June, 1875, on a mining claim was sufficient to give the original locators or those claiming under them an exclusive right to the possession and enjoyment of the property until Jan. 1, 1877, under the Act of 1872, and the Acts of 1873 and 1874, amendatory thereof.

2. A mining claim perfected under the law is property. There is nothing in the Act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States.

3. Mining claims are not open to relocation until the rights of a former locator have come to an end. The right to the possession comes only from a valid location. If there is no valid location there can be no possession under it.

4. Where an attempted relocation by one is invalid, another who has got into possession and effected a relocation has secured a better right.

5. Nothing which occurred in the progress of the trial below can be assigned for error here, which was not brought to the attention of the court below and decided by it. When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly.

6. The official records of the county, transcribed, under the supervision of the recorder, into a book which has been recognised as part of the public records of the office, the original book having been

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lost or destroyed, are admissible to prove a location.

[No. 69.]

Argued Nov. 2, 1881. Decided Dec. 5, 1881.

IN ERROR to the Supreme Court of the Territory of Montana.

The case is stated by the court.

Messrs. **Shellabarger** & *Wilson*, **E. W. Toole** and *J. H. Mandeville*, for plaintiff in error.

Messrs. **Richard T. Merrick**, *M. F. Morris*, *W. W. Dixon* and **J. C. Robinson**, for defendants in error.

280] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is an action of ejectment brought by Belk, the plaintiff in error, to recover the possession of a certain alleged quartz-lode mining claim, being, as is stated in the complaint, "A relocation of a part of what is known as the old original lode claim." Passing by for the present the exceptions taken to the rulings of the court at the trial on the admission and rejection of testimony, the facts affecting the title of the respective parties may be stated as follows:

In July or August, 1864, George O. Humphreys and William Allison located the discovery claim on the original lode and claims one and two west of discovery. These locations were valid and subsisting on the 10th of May, 1872, and no claim adverse to them then existed. No work was done on them between that date and June, 1875. During the month of June, 1875, and before any relocation had been made, the original locators, or their grantees, resumed work upon the claims and did enough to re-establish their original rights, if that could be done by a simple resumption of work at that time. No work was afterwards done on the property by the original locators, or any one claiming under them, and it does not appear that they were in the actual possession of the claims, or any part thereof, on the 19th of December, 1876, or for a long time before. It is conceded by both parties that the original claims lapsed on the 1st of January, 1877, because of a failure to perform the annual work required by the Act of Congress in such cases.

On the 19th of December, 1876, Belk made the relocation under which he now claims, and did all that was necessary to perfect his rights, if the premises were at that time open for that purpose. His entry on the property was peaceable, no one appearing to resist. Between the date of his entry and the 21st of February, 1877, he did a small amount of work on the claim, 281] which did not occupy more than two days of his time, and probably not so much as that, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On the 21st of February, 1877, the defendants entered on the property peaceably and made another relocation, doing all that was required to perfect their rights, if the premises were at the time open to them. The possession they had when this suit was begun, was in connection with the title they acquired in that way.

Upon this state of facts the questions presented in argument for our consideration are:

1. Whether the work done in June, 1875, was sufficient to give the original locators, or those claiming under them, an exclusive right to the possession and enjoyment of the property until January 1, 1877.

2. Whether, if it was, a valid relocation of the premises, good as against everybody but the original locators or their grantees, could be made by Belk on the 19th of December, 1876, his entry for that purpose being peaceable and without force.

3. Whether if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed; and,

4. Whether, even if the relocation of Belk was invalid, the defendants could, after the 1st of January, 1877, make a relocation which would give them as against him an exclusive right to the possession and enjoyment of the property, their entry for that purpose being made peaceably and without force.

By "An Act to Promote the Development of the Mining Resources of the United States," passed May 10, 1872, 17 Stat. at L., 91, ch. 152, sec. 3, it was provided that the locators of all mining locations theretofore made, or which should thereafter be made, on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns, where no adverse claim then existed, should have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they complied with the laws of the United States, and with state, territorial and local regulations, not in conflict with the laws of the United States, governing their possessory title. By the same Act (p. 92, sec. 5) it was fur- [282] ther provided that on all claims located prior to the passage of the Act, $10 worth of work should be performed or improvements made each year for each one hundred feet in length along the vein, until a patent should have issued therefor, and upon a failure to comply with this condition, the claim or mine on which the failure occurred should be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns or legal representatives had not resumed work on the claim after the failure and before the relocation. By another Act, passed March 1, 1873, 17 Stat. at L., 483, ch. 214, the time for making the first annual expenditure, under the Act of 1872, was extended to June 10, 1874; and by an Act of June 6, 1874, 18 Stat. at L., 61, ch. 220, to January 1, 1875. The exact language of this last Act is as follows: "That the provisions of the 5th section of the Act * * * passed May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said Act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said Act, shall be extended to the first day of January, 1875."

For all the purposes of this case, the law stands as it would if the original Act of 1872 had provided that the first annual expenditure on claims in existence when that Act was passed might be made at any time before January 1, 1875, and annually thereafter until a patent issued. If not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators, or

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those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the Act. The argument on the part of the plaintiff in error is, that if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights after resumption were precisely what they would have been if no default had occurred. The Act of 1875 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new.

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From what has thus been said, it is apparent that as work was done in the present case during the year 1875, before any relocation was made, the original claim was continued in force and made operative until there could be another forfeiture by reason of the failure of the owners to do the necessary annual work. The year in which the work was done began on the 1st of January, 1875, and ended on the 31st of December. The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has gone by. That, in this case, would not be until December 31, 1876, and the work, if completed on that day, would be just as effectual for the protection of the claim as if it had been done on the 1st of January previous. It follows that on the 19th of December, 1876, the owners of the original location had, under the Act of Congress, the exclusive right to the possession and enjoyment of the property in dispute.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. *Forbes* v. *Gracey*, 94 U. S., 767 [XXIV., 314]. There is nothing in the Act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the Act is that the locators "Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted, 13 Stat. at L., 441, ch. 67, sec. 9; R. S., sec. 910, that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

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Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid at the time it was made, and continued to be so until January 1, 1877.

The next inquiry is, whether the attempted location in December became operative on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not, necessarily, follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or preemption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the Act of Congress. A location, to be effectual, must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States are not directly actors, but is carried on by the locator alone, so that he may take what the United States have, through an Act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give. Here Congress has said, in unmistakable language, that what has been once located under the law shall not be relocated until the first location has expired, and it is difficult to see why, if Belk could make his relocation on the 19th of

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December, he might not on the 19th of January before. *Lansdale* v. *Daniels*, 100 U. S., 116 [XXV., 588]. The original locators and their grantees had precisely the same rights after the last date as they did after the first, the only difference being in duration. To hold that an entry may be made and the several acts done necessary to perfect a relocation before the former location has expired, will be to encourage unseemly contests about the possession of the public mineral-bearing lands which would almost necessarily be followed by breaches of the peace.

This brings us to the inquiry, whether the possession of Belk, after the 1st of January, was such as to prevent the defendants from making a valid relocation and acquiring title under it. The position taken in behalf of Belk is, that even if the original locators, or their grantees, had, under the Act of Congress, a right to the possession of their claim until January 1, a Statute of Limitations in Montana would bar an action in their favor against him for its [286] recovery, because they had not been in actual possession within a year previous to his entry and, consequently, his entry, though tortious as to them, was good as the beginning of an adverse possession, which, if continued for a year, would entitle him to a patent under the provisions of section 2332 of the Revised Statutes. The Statute of Montana relied on, is as follows

"No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interests therein or possession thereof, unless the same be held under patent from the Government of the United States, shall be commenced or maintained unless that it is proved that the plaintiff or his assigns or predecessor in interest, were in the actual seisin or possession of such mining claim, quartz lead or lode, within one year next before the commencement of such action." * * * Laws of Montana, 1872, p. 591.

And section 2332 of the Revised Statutes is as follows:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of an adverse claim." * * *

The Montana Statute was passed January 11, 1872, and the Act of Congress, under which both parties claim, on the 10th of May thereafter. Under the Act of Congress, as has just been seen, the original locators, or their grantees had what was equivalent to a grant by the United States of the right to the exclusive possession and enjoyment of the property until January 1. If the Montana Statute is in any respect repugnant to this, it was repealed to the extent of such repugnancy by the Act of Congress. As between mere possessors, having no other title than such as they got by mere occupancy, an action would, undoubtedly, be barred by the Montana Statute. Whether that would be so in a case where an actual right of possession had been acquired under the Act of Congress, is a question we need not consider, as here the controversy is not between Belk and the prior locators. It is clear that, whether an action could be maintained against him or not in Montana, Belk's right of location depended entirely on the Act of Congress, and under that, as has already been seen, what he did had no effect as [287] securing to himself the grant of any rights. All he got or could get by his entry was possession, and that, to be of any avail, must be actual.

Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in *Atherton* v. *Fowler*, 96 U. S., 513 [XXIV., 732], to the contrary of this. In that case it was held, a right of preemption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved and inclosed the property. Upon that proposition the court was unanimous. We also all agreed that if a peaceable entry had been made on lands which had not been inclosed or improved, a good right might have been secured. The only difference of opinion we had was, as to whether the entry in that case was by force or peaceably. A majority of the court thought it was forcible, while the minority considered that the case had been fairly put to the jury on the question of forcible or peaceable entry, and the effect of the verdict was that it had been peaceable.

This brings us to the facts of the present case. No one contends that the defendants effected their entry and secured their relocation by force. They knew what Belk had done and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no inclosure, and he had made no improvements. He apparently exercised no other acts of ownership, after January 1, than every ex- [288] plorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, "no hard work on the claim," and he "probably put two days' work on the ground." This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. Relying on what he had done in December, he did not do what was necessary to effect a valid relocation after January 1. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without

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any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the Act of Congress to the exclusive possession and enjoyment of the property. The defendants having got into possession and perfected a relocation, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claimants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title.

It is contended, however, that the court erred in its charge to the jury, because it assumed that the defendants' relocation was good if that of Belk was bad. The notice of the relocation of the defendants was proved by the introduction of the county records, and if we understand correctly the position which is now taken, it is that this notice was defective because of an insufficient affidavit. We cannot find that this precise objection was taken below. When the record was first offered in evidence it seems to have been objected to generally, but afterwards, on a motion to strike it out, the reasons assigned were: 1, that the original was not shown to have been out of the possession or under the control of the defendants; and, 2, that the record did not give a sufficient description of the location. As the affidavit to the notice of the relocation of Belk was identical in form with that of the defendants, it is possible such an objection as is now made was not then desirable; but however that may be, we are clearly of the opinion it is one that cannot be made for the first time in this court. The trial below was conducted entirely on the theory that Belk had the better right, because the defendants could not, in law, make a relocation at the time they did. The court had the right to understand that it was conceded the defendants had perfected their title if it could be done under the circumstances, and the special objections made to the evidence that was introduced should not be sustained. Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it. When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly. Consequently, when the specific objections made to the introduction of this notice in evidence were overruled, the court had the right to consider it was no longer contended that the requisite notice had not been given and recorded.

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This disposes of all the questions raised on the instructions to the jury. It remains to consider the various exceptions taken to the admission and rejection of testimony. These are:

1. As to the admission of the book from the office of the Recorder of Deer Lodge County, to prove the record of the location of the original lode claims by Humphrey and Allison.

2. As to the admission of the books of record from the same office, to prove certain deeds by which it was claimed the title of Humphrey and Allison to the original lode claims was transmitted, in whole, or in part, to one Murphy; and

3. The rejection of the testimony of one McFarland, a witness produced at the trial.

1. As to the proof of the record of the location of the original lode claim.

As Belk sets up title only as a relocator of part of the original lode claim, he impliedly admits the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property. It is nowhere disputed that Humphrey and Allison were the locators and owners of the claim originally. The proof by the record was, therefore, probably unnecessary; but if not, it seems to us the book offered was sufficiently authenticated. It was one of the books of record kept in the proper office and transmitted as such from one officer to another. The original recording appears to have been in a temporary book and, at a very early date in the history of the county, transcribed by the deputy-recorder, under the general supervision of his principal, into the book which has since been recognized as part of the public records of the office. It was sufficiently shown that the original book had been lost or destroyed. This we think enough to justify the use of the present book in its place. Having been recognized as part of the official records of the county almost from the time of the organization of civil government in the Territory, it would be dangerous to exclude it now without any proof of fraud or mistake.

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2. As to the deeds. In the view we take of the case, it is entirely unimportant whether the original lode claim had been transferred or not. The work was done in 1875 by Humphrey, one of the original locators, for the express purpose of resuming the claim. He says it was done under an arrangement which he made to that effect with Thornton, who, according to the deeds put in evidence, was the owner of three fourths of the property, Humphrey himself owning the rest. It is a matter of no importance to Belk whether the work that was done inured to the benefit of Humphrey alone or to him with others. Without, therefore, considering any of the questions presented in the argument as to the competency of the evidence, or the proper execution of the deeds, we are clearly of the opinion that there is nothing in the assignments of error affecting this branch of the case which requires a reversal of the judgment.

3. As to the testimony of McFarland. He was, in effect, asked whether anyone had that day pointed out to him the line between the National Mining and Exploring Company's ground and the defendant's; and if so, whom; and if he knew where the line was. There was but one question, and the objection was made to the question. It was entirely immaterial, so far as anything appears in the record, whether anyone pointed out the line to the witness or not, unless it was some one connected with the suit or the parties. It is true, if he knew of his own knowledge where the line was he might tell, but in the form the question was put, he could well think he would be permitted to tell where it was, as it had been pointed out to him. The question was clearly too general, and on that account objectionable. It is quite possible the witness knew facts that were material to the issue which was being tried. If he did, and the plaintiff desired to have them, the question should have been made more specific and the

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objections to the form of that which was put, removed.

Upon a careful consideration of the whole case, we find no error, and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 351; 14 N. W. Rep., 429.

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[319] GARDNER A. SAGE, JR., *Appt.*,

v.

JONATHAN WYNCOOP, as Assignee in Bankruptcy of JOHN H. FOWLER, A Bankrupt, Impleaded with DAVID COSSITT, As Sheriff of Onondaga County, and JOHN H. FOWLER.

(See S. C., 14 Otto, 319-321.)

Preference under Bankrupt Act.

Under the Bankrupt Act, very slight evidence of an affirmative character, of the existence of a desire to prefer one creditor, or of acts done with a view to such preference, may be sufficient to invalidate a transaction.

[No. 106.]

Argued Nov. 21, 1881. Decided Dec. 5, 1881.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The bill in this case was filed in the court below by the appellant, for the purpose of compelling the application of a certain sum in the custody of the District Court of the United States for the Northern District of New York in bankruptcy, to the payment of two judgments claimed to have been recovered, and to be held, by the complainant against the bankrupt, John H. Fowler. The court below dismissed the bill, and the complainant appealed to this court.

Messrs. Ambrose Monell and **Aaron J. Vanderpoel**, for appellant.

Mr. **George N. Kennedy**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

There are two questions in this case: 1. Whether the preference which the appellant claims to have got by his judgments and levies was procured with the active assistance of the [321] bankrupt; and 2. Whether the appellant is chargeable with notice of the insolvency of the bankrupt.

We said in *Wilson* v. *Bank*, 17 Wall., 487 [84 U. S., XXI., 728], "Very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or acts done with a view to such preference, might be sufficient to invalidate the whole transaction." This case seems to us full of such evidence. The bankrupt was largely insolvent, and we cannot but believe his son, who was the agent of the appellant, knew it in a legal sense, when, as he was leaving for Europe, he said to the attorney in whose hands he put the claim for collection, "If you can assist him (the bankrupt) in any way I want you to do it; but Gardner Sage is my client; this is his money, and I want him protected at all hazards." One of the suits was begun on the same day and, as we think, with the help, if not by the procurement of the bankrupt. Before the property was taken into the actual possession of the sheriff under any levy, the papers in voluntary bankruptcy were prepared and sent to the clerk of the bankrupt court with instructions not to file until directed to do so by telegraph; and as soon as the sheriff had perfected his last levy, and was in actual possession of the goods, the proceeds of which are now in controversy, the necessary dispatch was sent and the proceedings begun. Four days afterwards, an adjudication of bankruptcy was secured. We deem it unnecessary to go over the evidence in detail. It is sufficient to say we are satisfied with the conclusions reached below.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT GRAME, EXR. of JOHN GRAME, Deceased, *Plff. in Err.*,

v.

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

112 US 273

WELLINGTON GODDIN, EXR. of S. P. VIAL, Deceased, *Plff. in Err.*,

v.

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

Refusal of court below to rehear a cause, not reviewable.

A petition for a rehearing, filed in the court below after judgment, which has been refused, is no part of the record to be returned here with a writ of error for a review of the judgment.

[Nos. 1049, 1050.]

Submitted Nov. 28, 1881. Decided Dec. 12, 1881.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

Motions for *certiorari*. Motions to dismiss. Motions to affirm.

Messrs. **W. B. Webb** and **James Lyons**, for plaintiff in error.

Messrs. **P. Phillips**, *W. A. Maury* and *W. H. Phillips*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The motions for writs of certiorari *are denied.* A petition for a rehearing, filed in the court below after judgment, which has been refused, is no part of the record to be returned here with a writ of error for a review of the judgment. *Steines* v. *Franklin Co.*, 14 Wall., 21 [81 U. S., XX., 848].

The motions to affirm are also denied. The further consideration of the motions to dismiss is postponed until the causes come up for hearing on the merits.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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NARCISSA SCRUGGS, AND E. R. MATTHEWS AND JAMES MATTHEWS, Sureties, *Appts.*,

v.

MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL.

Service of citation—bond on appeal—jurisdictional amount.

US cciv Appx.

1. Service of the citation on appeal on the attorney of the appellee, is sufficient.
2. The bond on appeal need not be signed by all the appellants. When approved by the judge it stands as security for all the appellees, although all are not named in it.
3. Where the amount in dispute as shown by the exceptions to the master's report is more than $5,000, and the original claim of the appellee exceeded that sum, and it has all been allowed in the progress of the cause, although the final decree in his favor was less than $5,000, because the remainder of the claim had, by order of the court, been paid from the proceeds of the litigation, the case will not be dismissed for want of sufficient jurisdictional amount.

[No. 391.]

Submitted Oct. 11, 1881. Decided Dec. 12, 1881.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

On motion to dismiss.

For a full statement of this case see the report of the decision upon the merits. 108 U. S., Book XXVII., No. 116 of October Term, 1882.

The present motion was made upon the following grounds.

First. That no citation had been served on the appellee, J. H. Viser.

Second. That the appeal bond is defective, because it is given and signed by only two of the appellants; does not state the title of the cause correctly; is made payable to one of the two appellees only; and by the omission of the obligatory part, creates no obligation even upon those who have signed it.

Third. W. F. Dowd was a party to the cause in the court below, but is not made a party to the appeal.

Fourth. This court has no jurisdiction of the appeal as regards the appellee, J. H. Viser, the decree in his favor being for a sum less than $5,000.

Mr. **J. H. Viser,** in person, in support of the motion to dismiss, cited, as to the first ground:

Conk. Tr., 650, 657; *Chaffee* v. *Hayward*, 20 How., 208 (61 U. S., XV., 804); *Yeaton* v. *Lenox*, 7 Pet., 220; *U.S.* v. *Hodge*, 3 How., 534; *Villaboloo* v. *U.S.*, 6 How., 81; *Alviso* v. *U. S.*, 5 Wall., 824 (72 U. S., XVIII., 492).

As to the third ground:

2 Abb. U. S. Pr., 249, 257.

As to the fourth ground:

Walker v. *U. S.*, 4 Wall., 163 (71 U. S., XVIII., 819); *Wise* v. *Turnpike Co.*, 7 Cranch, 276; *Gordon* v. *Ogden*, 3 Pet., 33; *Smith* v. *Honey*, 3 Pet., 469; *Knapp* v. *Banks*, 2 How., 73; *U. S.* v. *McDowell*, 4 Cranch, 316; *Terry* v. *Hatch*, 93 U. S., 44 (XXIII., 796); Conk. Tr., 42; Abb. U. S. Pr., 337.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. There is sufficient evidence of the service of the citation on the attorney of Viser, and that is enough. *U. S.* v. *Curry*, 6 How., 111; *Bacon* v. *Hart*, 1 Black, 39 [66 U. S., XVII., 52]. The bond for the appeal is sufficient. The appeal does not operate as a *supersedeas*. The security is for costs only. The bond need not be signed by all the appellants. *Brockett* v. *Brockett*, 2 How., 240. Having been approved by the Judge, it stands as security for all the appellees.

The controversy in the suit is as to the account between Mrs. Scruggs and the Railroad Company, growing out of the purchase by the Company of the hotel in Corinth. The amount in dispute, as shown by the exceptions to the master's report, is more than $5,000. Viser seeks payment of a debt due him from Mrs. Scruggs out of the proceeds of the litigation between Mrs. Scruggs and the Railroad Company, and if it should appear that she was not bound to return the Company any of the money which was paid to her, he can have no decree against her personally. The relief which he asks is a mere incident to the accounting between Mrs. Scruggs and the Railroad Company.

In addition to this, it appears that the original claim of Viser exceeded $5,000. Mrs. Scruggs resisted the payment of the whole. It has all been allowed in the progress of the cause. The final decree in his favor was less than $5,000, because the remainder of the claim had, by an order of the court, been paid before from the proceeds of the litigation.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN MORRISON, *Plf. in Err.*, [213]

v.

SAMUEL STALNAKER.

(See S. C., 14 Otto, 213-216.)

Preemption right.

The Act of July 14, 1870, gives a claimant of preemption rights, eighteen months from the time limited for his declaratory statement, to make payment and proof.

[No. 149.]

Submitted Nov. 23, 1881. Decided Dec. 12, 1881.

IN ERROR to the Supreme Court of the State of Nebraska.

The case is stated by the court.

Messrs. **Willis Drummond** and **Robert H. Bradford,** for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Nebraska. The suit was commenced as an action of ejectment to recover possession of a quarter-section of land.

The defendant, Stalnaker, filed an answer to the plaintiff's petition in the nature of a bill in chancery, to the effect that while the plaintiff had the patent of the United States for the land, it was issued to him in fraud of the rights

NOTE.—*Preemption rights.* See, *note* to U. S. v. Fitzgerald, 40 U. S. (15 Pet.), 407.

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of defendant under the preemption laws, and by mistake of the officers of the Land Department in regard to these rights. The inferior court of the State rendered judgment for Morrison, which was reversed on appeal to the Supreme Court.

The errors assigned here may be divided into two, substantially.

The first of these is, that the Supreme Court of Nebraska erred in holding that Stalnaker, in making his application to the Register and Receiver of the Land-Office to enter the land, after he had in due time filed his declaration of intention as preemptor, had not made the requisite offer of proof of citizenship, and the other facts necessary to qualify him as a preemptor. To this the only answer necessary is, that those officers refused to receive any proofs from him whatever, or any money, because they said he came too late, and was not, for that reason, entitled to enter the land, no difference how perfect his proof otherwise might be.

The other assignment of error is, that the Supreme Court of Nebraska erred in deciding that Stalnaker had any right to perfect his claim by proofs twelve months after his date of settlement.

It appears from the record that Stalnaker entered upon the tract of land in controversy, January 18, 1871, and on the 16th day of February thereafter, filed with the Register of the Land-Office his declaratory statement of intention to preempt it.

The land at those dates was not subject to private entry, having been withdrawn by the Land Department as within the grant to the Burlington and Missouri River Railroad Company, though it had been by proclamation offered at public sale prior to the passage of the Act making said grant.

The argument of counsel for plaintiff in error is, that the case does not come within section 2267 of the Revised Statutes, because the land had once been proclaimed, and because it was surveyed. Sections 2265 and 2266 prescribe rules of preemption for land surveyed, but not proclaimed for sale, and for lands not yet surveyed; and section 2267 declares that all claimants of preemption rights under these two sections shall, when no shorter period is prescribed, make their proofs within thirty months after the date prescribed for filing the declaratory statement. As this land had been both surveyed and at one time proclaimed for sale, the argument is that the time for making proof is not governed by this provision of section 2267.

It is, therefore, insisted, that it is governed by section 2264, which requires the person who asserts a preemption on land subject at the time to private entry, to make the proof within one year after the date of settlement. But this land, at the date of Stalnaker's settlement, was not subject to private entry.

We find, however, that at that time section 2 of the Act of July 14, 1870, 16 Stat. at L., 279, was in force. The 1st section of that Act extends certain laws for the sale and survey of public lands to the Territory of Colorado. The 2d section, however, is more general and, among other things relating to settlers on lands reserved for railroad purposes, enacts that "All claimants of preemption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed within eighteen months after the date prescribed for filing their declaratory notice shall have expired."

All Stalnaker's proceedings took place while this law was in force. It gave him eighteen months from the time limited for his declaratory statement, namely: from the 18th day of April, 1871, to make payment and proof.

He offered his money and his proof on the first day of June, 1872, several months within the time which this statute allowed. [216]

The Supreme Court of Nebraska, therefore, did not err in refusing to hold that his right expired within one year from the date of his settlement, *and its judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 464.

NATIONAL BANK OF GLOVERSVILLE, [271]
Plff. in Err.,

v.

JAMES H. JOHNSON.

(See S. C., 14 Otto, 271-279.)

National bank, liability to penalties—discount, what is—case distinguished.

1. A national bank is liable, at the suit of the indorser, to the penalties imposed by sections 5197 and 5198 of the U. S. R. S. for discounting business paper, transferred to it by indorsement imposing the ordinary liability upon the indorser, at a greater rate of interest than seven per cent per annum.

2. To buy or purchase a debt is always in commerce termed to discount it. Discount is the difference between the price and the amount of the debt.

3. The present case may, perhaps, be distinguished from cases where the title to the paper is transferred by an indorsement without recourse, or by mere delivery; upon which this court expresses no opinion.

[No. 139.]

Argued Nov. 22, 1881. *Decided Dec. 12, 1881.*

IN ERROR to the Supreme Court of the State of New York.

The case is stated by the court.

Messrs. **Francis Kernan** and *H. S. Parkhurst*, for plaintiff in error:

By the law of New York as long settled, persons or copartnerships may lawfully do in that State precisely what this Bank did as to this business paper. It is neither usurious nor unlawful for them to do so.

3 R. S. of N. Y., 5th ed., 72, etc.; *Munn* v. *Commission Co.*, 15 Johns., 44, 55, etc.; *Cram* v. *Hendricks*, 7 Wend., 569; *Cobb* v. *Titus*, 10 N.Y., 198; *Rapelye* v. *Anderson*, 4 Hill (N.Y.), 472.

The transaction, by the law of New York, was a purchase of this commercial paper and not a loan of money. The rule of law is the same, whether the owner, who transfers the business paper, indorses it, or guaranties its payment, or not.

The true intent and meaning of the National Banking Act is, that the corporations organized under it are to be upon the same footing, as to the rate of interest on loans, and as to the amount of discount by which they may become the own-

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ers of commercial business paper, as natural persons in the State where they are located.

U. S. R. S. secs. 5197, 5198; *Tiffany* v. *Bk.*, 18 Wall., 409 (85 U. S., XXI., 862); *Nat. Bk. of Charlotte* v. *Nat. Ex. Bk. of Balt.*, 92 U. S., 122, 127 (XXIII., 679, 681); *Hintermister* v. *Nat. Bk.*, 64 N. Y., 212, 216.

The provisions of the statute in question were intended to prevent the national banks from violating the usury laws of the State.

By the law of New York, it is usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent per annum; but it is not usurious nor illegal in that State for parties to acquire business paper, paper valid in the hands of the holder, at a rate of discount agreed upon by the parties and amounting to more than seven per cent.

Penal statutes are to be construed strictly. They are not to be extended to cases not clearly within their intent and meaning.

Mr. **Clayton M. Parke,** for defendant in error.

National banks are organized under Acts of Congress, and Congress has power, not only to authorize them to transact certain business, but to restrict the manner in which such business shall be done, and they must act strictly in the manner prescribed.

2 Kent, 290, 299; *In re Wild*, 11 Blatchf., 243; *Fowler* v. *Scully*, 72 Pa., 456; *Venango Nat. Bk.* v. *Taylor*, 56 Pa., 14; *Head* v. *Ins. Co.*, 2 Cranch, 127; *Bk.* v. *Dandridge*, 12 Wheat., 64; *Bk.* v. *Earle*, 13 Pet., 587.

Discounting promissory notes by a bank consists in advancing funds upon them, deducting the interest in advance for the time they have to run.

Web. Dic. Discount; *Fleckner* v. *Bk.*, 8 Wheat., 338; *Bk.* v. *Baldwin*, 23 Minn., 198; *S. C.*, 23 Am. Rep., 683; Thomp. Nat. Bk. Cas. 39; *Bk.* v. *Baker*, 15 Ohio St., 68.

Discounting paper is understood in the business of banking as only a mode of loaning money on the same, and taking the interest in advance.

Cases above cited, and *Smith* v. *Bk.*, 26 Ohio, 141; Thomp. Nat. Bk. Cas., 836; *Ins. Co.* v. *Ely*, 2 Cow., 699; *Talmage* v. *Pell*, 7 N. Y., 343; *People* v. *Ins. Co.*, 15 Johns., N. Y., 392; *Pape* v. *Bk.*, 20 Kan., 440; 27 Am. Rep., 183.

The transaction in evidence in this case as to both business and accommodation paper was that of discount, and is directly within the statute which forbids the taking of more than seven per cent, upon any loan or discount made, or upon any note, bill of exchange, or other evidence of debt.

There is nothing, either in law or reason, why a borrower may not obtain the discount by a bank, of the existing notes and bills of others of which he is the holder, as well as of his own paper made directly by the bank, and when such paper is discounted in violation of the prohibition contained in section 5197, U. S. R. S. the bank so discounting is liable to the penalty imposed therefor.

Nash v. *Bk.*, 68 N. Y., 396; *Johnson* v. *Bk.*, 74 N. Y., 329; *Smith* v. *Bk.*, 26 Ohio, 141; Thomp. Nat. Bank Cas., 836; *Bk.* v. *Pierson*, 24 Minn., 140; *S. C.*, 31 Am. Rep., 341; *Bk.* v. *Baker*, 15 Ohio St., 85; *Fleckner* v. *Bk.*, 8 Wheat., 338; *Bk.* v. *Savery*, 82 N. Y., 291, 305.

It is entirely immaterial whether the transaction is called a purchase or a discount.

Mr. Justice **Matthews** delivered the opinion of the court:

The original action was brought in the Supreme Court of the State of New York by the defendant in error to recover of the plaintiff in error, a national bank, penalties alleged to have been incurred by it under sections 5197 and 5198 of the Revised Statutes of the United States.

These sections are as follows:

"Section 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed, by the laws of the State, territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven *per centum*, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Section 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." [272]

The facts, as stated in the record, are undisputed. The defendant below, a national banking association, doing business at Gloversville, in the State of New York, from November 10, 1874, to February 7, 1876, discounted for the plaintiff commercial paper and promissory notes amounting to $158,003. All such discounts were made at a uniform rate of interest, being twelve per cent per annum. The whole amount of interest paid thereon by the plaintiff below was $6,564.88, being an excess beyond the rate

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allowed by the general laws of the State of $2,785.36. This interest was knowingly charged and received by the Bank. The most of the paper discounted was business paper, that is, negotiable promissory notes, held and owned by the plaintiff below and on which he could have maintained actions against the prior parties. A small portion was accommodation paper, but not known by the Bank to be such, and there was nothing upon its face to indicate that to be its character. All the paper discounted was paid to the Bank at maturity or before the present action was brought. At the times when the notes were discounted they were indorsed by the plaintiff below, and the proceeds of the notes discounted were entered to his credit in his bank account.

Upon these facts judgment was rendered against the defendant below for $5,470.72, twice the amount of the interest in excess of seven per cent per annum, to reverse which this writ of error is prosecuted.

It is contended, on behalf of the plaintiff in error, that the sections of the Revised Statutes in question were intended only to prevent national banks from violating the usury laws of the State in which they were severally organized and established; and that while, by the law of New York, it is usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent per annum, yet it is not usurious or illegal in that State for natural persons to acquire business paper, that is paper valid in the hands of the holder, so that he might maintain an action thereon against the prior parties, at any rate of discount agreed upon between the parties to the negotiation, without limit in excess of seven per cent per annum.

It is assigned for error that the Court of Appeals negatived this proposition.

The rate of interest upon the loan or forbearance of money, established and in force by the laws of New York, is seven per cent per annum. Part II., ch. IV., tit. III., 3 R. S., N. Y., 72, sec. 1.

By section 5 of the same Act, it is provided that all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatever (except bottomry and *respondentia* bonds and contracts), etc., whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of money, etc., than is above prescribed, shall be void.

It is and long has been the law in New York, as decided in *Cram* v. *Hendricks*, 7 Wend., 569, that, "The transfer by the payee of a valid available note, upon which when due he might [275] have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not an usurious transaction, although the payee on such transfer indorses the note; and on non-payment by the maker, the indorsee may maintain an action against the indorser; but the sum which the indorsee in such case is entitled to recover of the indorser is the amount of the advance made by him, together with the interest thereon at the legal rate; while in an action against the maker, the indorsee is entitled to the whole amount of the note."

This proceeds upon the idea that the original note is founded upon a valid consideration, free from usury in its inception; and that the indorsement and delivery contains two contracts one, executed, which transferred the title as upon a sale, as if indorsed without recourse; the other, executory, upon which the indorser is liable to the indorsee, to pay upon the default of the maker, after demand, and due notice thereof; although in the latter case, it will be observed, the recovery is limited by the New York decisions to the actual consideration paid, with lawful interest thereon.

The transaction is treated as a sale of the note, and no limits are fixed by law upon the price of the article sold; but so far as the liability of the vendor is concerned, in order to avoid the consequences of treating the advance of money, which constituted the consideration, as a loan, it is limited to a return thereof, with lawful interest.

The question we have now to determine is, whether, in transactions of this description, in which a national banking association is the transferee, the same view can be taken of the relations and rights of the parties, in the present case the Court of Appeals having decided that the same rule does not apply. *Johnson* v. *Bank*, 74 N. Y., 329.

The very point had been previously raised and decided by that court in *Nash* v. *Bank*, 68 N. Y., 396, which was an action to recover penalties under the State Law of 1870, in reference to banking institutions, for discounting paper at a greater rate of interest than seven per cent per annum. The provisions of that Act, being [276] chapter 163, laws of New York of 1870, correspond almost exactly with those of sections 5197, 5198 of Revised Statutes of the United States, now under consideration, it being the declared intent of the statute to place the banking associations of the State on an equality, in the particulars specified, with national banks under the sections referred to. It was held that the fact that the paper discounted was business paper, purchased by the defendant, did not constitute a defense, for the question was not whether it was an illegal transaction under the general statutes against usury, but whether it was within the terms of the prohibition, which forbade banks from charging on any discount a rate greater than seven per cent per annum.

And in *Bank* v. *Savery*, 82 N.Y., 291, it was decided that the purchase of a promissory note for a sum less than its face, is a discount thereof within the meaning of the provision of the Banking Act of that State (sec. 18 ch. 260, Laws of 1838), which authorizes associations organized under it to discount bills and notes. And in support of that definition of the terms, the court cites the authority of MacLeod on Banking, 43, where the author says: "The difference between the price of the debt and the amount of the debt is called discount," and "to buy or purchase a debt is always in commerce termed to discount it."

In *Fleckner* v. *Bank*, 8 Wheat., 350, *Mr. Justice* Story said: "Nothing can be clearer than that by the language of the commercial world and the settled practice of banks, a discount by a

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bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank," and added, that if the transaction could properly be called a sale, "it is a purchase by way of discount."

Discount, as we have seen, is the difference between the price and amount of the debt, the evidence of which is transferred, and that difference represents interest charged, being at some rate, according to which the price paid, if invested until the maturity of the debt, will just produce its amount. And the advance, therefore, upon every note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money. [277]

The specific power given to national banks, R. S., sec. 5136, is "To carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt." So that the discount of negotiable paper is the form according to which they are authorized to make their loans, and the terms loans and discounts are synonyms. It was so said in *Talmage* v. *Pell*, 7 N. Y., 328; and in *Bank* v. *Baker*, 15 Ohio St., 68, the very point decided was that "To discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance."

But whether loans and discounts are identical, in the sense of section 5197 or not, is quite immaterial, for both are expressly made subject to the same rate of interest. And, unquestionably, the transfer of the notes, which forms the basis of this controversy, if not a loan, was a discount.

The contention of the plaintiff in error, that under this section, whatever by the law of the State is lawful to natural persons in acquiring title to negotiable paper by discount is lawful for national banks, cannot be sustained, and derives no countenance, as is argued, from the decision in *Tiffany* v. *Bank*, 18 Wall., 409 [85 U. S., XXI., 862]. All that was said in that case related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a State in which a national bank was located one rate of interest was lawful for natural persons and a different one to state banks, the national bank was authorized to charge on its loans the higher of the two. The sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them. It is not intimated or implied that if, in any State, a natural person may discount paper, without regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some rate of interest, allowed to natural persons, which is fixed by the state law. [278]

If it be said that the rate is allowed by the law of the State, when it permits the parties to reserve and receive whatever they may agree upon, then the section furnishes the conclusive answer, that "When no rate is fixed by the laws of the State, etc., the bank may take, receive, reserve, or charge a rate not exceeding seven *per centum*." So that the transaction in question, in either aspect, is within the prohibition of the statute, and subjects the bank to the penalties sued for.

The conclusion is confirmed by the provision which declares that "The purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." Here the purchase, discount and sale of bills of exchange are classed as one, and subject to the same rule and rate of interest. In section 5198, the forbidden transaction for which the penalties are prescribed, is spoken of as usurious; but this reference is to the prohibitions of the preceding section, and not to the laws of the State.

In the present case, the paper was transferred by an indorsement, imposing the ordinary liability upon the indorser. It may, perhaps, be distinguished from cases where the title to the paper is transferred by an indorsement without recourse, or by mere delivery. The advance in such cases, to the previous holder, of the agreed consideration, can hardly be considered a loan, for the relation of debtor and creditor as between them is not created by the transaction, if made, as supposed, in good faith, and not as a cover for usury. Whether it be a discount, within the meaning of the sections we have considered and, therefore, subject to the same rule as to the rate of interest at which it may be discounted, which we have decided to be applicable to the transactions described in the present case; and if not, but is to be treated as a purchase of the paper, lawful at any proportion which the price paid bears to the amount ultimately payable by the parties to it; whether, in that case, national banks are authorized by the law of their organization, to acquire title to it in that way, are questions which do not arise in this case, and upon which we express no opinion. [279]

We find no error in the judgment, *and it is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EZEKIEL GILES, *Plff. in Err.*, [291]
v.
SAMUEL W. LITTLE ET AL.

(See S. C., 14 Otto, 291-300.)

Construction of will—devise of life estate—direction to pay debts.

1. Where a will conveyed to the testator's wife all his estate, real and personal, to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she should remain his widow; conditioned that if she should marry again, it, or whatever may remain should go to his surviving children, share and share alike, the testator's devise to his wife was an estate during her widowhood, and on its determination a remainder in fee to his children, and not an absolute estate in fee simple, with power, so long as she remained his widow, to dispose of it absolutely; her estate in the land and that of her grantees determined on her subsequent marriage.

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2. When a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power is intended.
3. Where the estate of the devisee is clearly defined, a direction to pay debts cannot enlarge it.

[No. 849.]

Submitted Nov. 29, 1881. Decided Dec. 12, 1881.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

Statement of the case by *Mr. Justice* **Woods.**

This was an action brought in the Circuit Court of the United States for the District of Nebraska, for the recovery of lot No. 6, in block 54, in the City of Lincoln.

The following are the material averments of the petition:

"On June 10, 1869, and thence up to his death, Jacob Dawson was seised and possessed of divers real and personal estates of great value, and had a wife named Edith J., and six children who were on said day minors, and some very young, and all without any property whatever, his wife being seised and possessed in her own right of real and personal estates of the value of $10,000 and over.

[292]

On said day, the said Jacob made his last will and testament, which contained the following sole bequest: After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: to my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Edith J., to be executrix of this my last will and testament.

On the 22d day of June, 1869, the said Jacob died at Lancaster County in this district, leaving him surviving his said wife and six children. The said will was duly proved and admitted to probate in the proper court of said county, and letters testamentary thereon were issued out of said court to the said Edith J., who took upon her the execution of said trust.

The personal property, whereof the said Jacob died possessed, was duly inventoried and appraised at $958; and among the real estates whereof, at his death, the said Jacob was seised, was that certain piece or parcel of land, known and described as follows: lot number 6, in block 54, in the City of Lincoln, in said Lancaster County, except six inches off the entire east line of said lot, which supports the east party-wall of said lot; which lot is of the value of $5,000 and over.

On the 27th day of April, 1870, the said Edith J., by her certain deed of conveyance, dated on said day, and duly executed and acknowledged, conveyed the said premises to one Cody, by warranty deed, which contained no reference to nor recited the power in said will, and a copy of said deed is hereto annexed, marked 'A,' and made a part of this petition, and by divers *mesne* conveyances from said Cody, the said defendant, Little, claims and pretends that he is seised in fee of said premises; and he is now in possession thereof by the defendant May, as his tenant.

[293]

On or about the 15th day of November, 1879, the said Edith J. intermarried with one Pickering.

One of the said children of the said Jacob died intestate without issue, and the survivors, being in indigent circumstances, have joined in a conveyance of the said premises, bearing date September 15, 1869, and duly executed and acknowledged, whereby they conveyed the same in fee to one Burr and one Wheeler, who by their deed have duly conveyed the same to the plaintiff. And by reason of the premises the said plaintiff has become and is seised in fee of said premises above described, and is entitled to the immediate possession thereof; the defendant, under the alleged title derived to him as aforesaid, unlawfully keeps the said plaintiff out of possession thereof."

There was a general demurrer to this petition, which the circuit court sustained, and gave judgment for the defendants.

This action of thec ourt is assigned for error.

Mr. **James M. Woolworth,** for plaintiff in error.

Mr. **T. M. Marquett,** for defendants in error.

Mr. Justice **Woods** delivered the opinion of the court:

The contention of the plaintiff in error is, that Edith J. Dawson took, under the will of her deceased husband, Jacob Dawson, an estate for life, subject to be determined in case she contracted another marriage, with remainder to the heirs of Jacob Dawson; and that the power of disposal conferred on her by the will was only co-extensive with the estate which she took under the will, that is to say, the power was granted her to dispose of her life estate, and, consequently, that the estate conveyed by her deed to Cody determined upon her marriage with Pickering.

It was said by this court in *Clarke* v. *Boorman*, 18 Wall., 493 [85 U. S., XXI., 904], *Mr. Justice* Miller delivering its opinion, that "Of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of legal technical terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under the state of the science of law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself."

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If we apply the methods thus indicated to the construction of the will of Jacob Dawson, there can, it seems to us, be no serious doubt about its meaning.

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According to the averments of the petition, it appears that twelve days before his death Dawson executed his last will. At that time he was the owner of some real estate, and of personal property of the value of $958. He was the father of six living children, all of whom were minors, some of them very young, and all without any property in their own right. His wife, Edith J. Dawson, was the owner of real and personal property to the amount of $10,000 or more.

The promptings of natural affection would lead a testator so situated to provide in his will, not only for his wife, but also for his infant children.

The disposition of his property is made by a single sentence in his will. It seems clear that his purpose was to give to his wife an estate for life in his property, subject to be devested on her contracting a second marriage, and on the determination of the wife's interest, either by her death or marriage, then an estate in fee to his children. No man unversed in technical rules of construction can, it seems to us, read this will without coming to this conclusion. To hold otherwise would be to suppose the testator, in drafting his will, was governed by abstruse rules of law in regard to the effect of his expressions, of which, it is probable, he never heard and had not the slightest conception.

The clause of the will which disposes of the [295] testator's entire estate, provides first for the payment of his lawful debts. The residue of his estate (after payment of debts) is then disposed of as follows: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow." This part of the disposing clause of the will is not open to doubt. The phrase, "so long as she remains my widow," refers to and qualifies the estate granted, as well as the power of disposition. The clear and undoubted meaning of the sentence is, that as long as the devisee remains the widow of the testator, his property, real and personal, shall remain and be hers, with full power to dispose of the same. This construction, so far as it concerns the estate granted, is so obvious that no discussion can make it any plainer. How large an estate the widow was empowered to dispose of, will be considered hereafter.

But the testator, not satisfied with this unequivocal declaration of his purpose, and to leave no doubt of his intention, and to give direction to his property when the estate of his wife therein should determine, proceeds to add: "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should [shall] go to my surviving children, share and share alike."

It would be hard to express more clearly the purpose of the testator to devise to his wife an estate during her widowhood, and on its determination a remainder in fee to his children.

The contention, however, of the defendants in error is, that the testator by this will gave to his wife an absolute estate in fee simple, with power, so long as she remained his widow, to dispose of it absolutely.

We find no warrant for this construction of the will, either in its terms or in the circumstances which surrounded the testator. The language is plain that the devisee was to take a life estate, subject to be determined on her second marriage, with a limitation over to the children of the testator. His purpose was clearly expressed, to provide for his children as well as his widow, to give the latter all his estate as long as she remained his widow, but to put it out of her power to disinherit his children. According to the construction of the defendants in error, the will gave her the power [296] of absolute disposition during her widowhood, so that she could by her conveyance entirely divert the estate from his children; and having done this, could contract a second marriage without the loss of any interest in the proceeds of the property devised to her by the testator.

We think it was not the purpose of the testator to devise an estate in fee to his wife. As already remarked, the devise is limited by the words "so long as she shall remain my widow." But even if these words were wanting, the limitation over to his children in case she should marry again, would control and restrict the preceding words by which the estate was granted.

The case of *Smith* v. *Bell*, 6 Pet., 68, is in point. The will construed in that case declared: "I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what name, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath to my wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely, the remainder of said estate to be for the use of said Jesse Goodwin," son of the testator, mentioned in an earlier part of the will; "and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament."

The court held that this was a devise to the testator's wife for life, with remainder to his son, Jesse Goodwin. *Chief Justice* Marshall, in delivering its opinion, said: "It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate to the wife, or which would more clearly express that intention. But the testator proceeds: 'The remainder of said estate, to be for the use of the said Jesse Goodwin.' These words give the remainder of the estate, after his wife's decease, to the son with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. * * * The limitation in remainder shows that, in the opin- [297] ion of the testator, the previous words had given only an estate for life. This was the sense in which he used them."

This case establishes conclusively the contention of plaintiff in error, that the words of the will under consideration, granting an estate to the wife, grant only an estate for life, and not an estate in fee simple.

But it is contended by defendants in error

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that there are words in the last clause of the will which imply an absolute power of disposition, and give to the children only what may remain undisposed of in the wife's hands at the termination of her estate. The clause is, "If she should marry again, then it is my will that all the estates herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike." The contention rests upon the words, "or whatever may remain," and is, that they imply that a part or all of the estate might be absolutely disposed of by the wife during her widowhood.

If the purpose of the testator in the disposition of his property is what the other parts of his will clearly indicate, then these words cannot be construed to change that purpose. They can have operation without giving them that effect. The testator was seised of real estate and possessed of personal property. Both were included in the devise to the wife, and she was to have the enjoyment of both during her widowhood. The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to the children of the testator a remainder in the real estate, and whatever of the personalty was not consumed by the widow during her widowhood.

This construction is warranted by the language of this court in *Smith* v. *Bell*, 6 Peters, *supra*, which was as follows: "This suit is brought for slaves, a species of property not consumed by the use and in which a remainder may be limited after a life estate. They composed a part, and probably the most important part, of the estate given to the wife 'to and for her own use and benefit and disposal absolutely.' But in this personal property, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as stock on a farm, household furniture, the crop of the year, which would be consumed in the use, and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator when he employed the strong words of the bequest to her." [298]

This passage shows that in order to carry out the evident purpose of the testator, general words which are applicable to property of different kinds may be restricted to property of a particular kind. For instance, that the phrase "or whatever may remain," in the will under consideration, may be limited to personal property only, though used in a sentence which applies to both real and personal estate.

On this subject the case of *Green* v. *Hewett*, decided by the Supreme Court of Illinois, 12 Cent. L. J., 58, is precisely in point. The will in that case provided as follows: "Second. After payment of such debts and funeral expenses, I give and bequeath to my beloved wife the farm on which we now reside; also all my personal property of every description so long as she remains my widow, at the expiration of that time the whole, or whatsoever remains, to descend to my daughter, M. T."

The court held that under this devise the widow did not take a fee, and said: "The use of that expression (whatsoever remains) is of no vital significance and cannot be permitted to override the clearly expressed intention that the widow should take a life estate only."

The next position of the defendants in error is, that even conceding that the will gives the widow of testator an estate for life, yet it conferred on her during her widowhood the power to convey the entire estate in fee, and she having so conveyed, the defendants in error who claim under her have a good title.

But the authorities are adverse and show that when a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power is intended.

Thus, in *Brandt* v. *Coal and Iron Co.*, 93 U. S., 326 [XXIII., 927], the words of the will were: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." [299]

By virtue of this power, the widow undertook to convey the fee of the land. But this court, speaking by *Mr. Justice* Field, said: "The interest conveyed by the devise to the widow was only a life estate. The language admits of no other conclusion; and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, consistently with that estate and perhaps without liability for waste committed. The words used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected." See, also, *Bradley* v. *Westcott*, 13 Ves., 445; *Smith* v. *Bell* [*supra*]; *Boyd* v. *Strahan*, 36 Ill., 355.

It is next insisted by the defendants in error, that the Statute of Nebraska, according to which the will must be construed, favors the construction contended for by them. The statute declares "Every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate." General Statutes of Nebraska, sec. 124, ch. 17. We are at a loss to see how the statute supports the view of one party to this suit, more than the other. According to the construction of the plaintiff in error, the devise vested in the widow of the devisor a life estate, remainder in fee to his children; according to the construction of defendants in error, it vested the fee in the widow. By either construction the devise conveyed all the estate of the devisor in the property devised. This is all the statute demands.

Lastly, it is claimed by defendants in error that it is the settled rule that where a devisee, whose estate is undefined, is directed to pay debts, the devisee takes an estate in fee. [300]

The rule has no application here, for as we have seen, the estate of the devisee and executrix is clearly defined. A direction to pay debts cannot enlarge it. The case of *Smith* v. *Bell*, *supra*, is precisely in point against the application of the rule to this case.

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We have no doubt about the true construction of this will. Edith J. Dawson took under it an estate for life in the testator's lands, subject to be devested on her ceasing to be his widow, with power to convey her qualified life estate only. Her estate in the land, and that of her grantees, determined on her marriage with Pickering.

The judgment of the Circuit Court must, therefore, be reversed and the cause remanded to that court, with directions to proceed in the case in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 Ill., 231; 44 Am. Rep., 781.

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[310] ARTHUR PICKERING, CHARLES H. VICKERY, HENRY D. ATWOOD, EXR. of CHAS. H. ATWOOD, Deceased, and the PHŒNIX MANUFACTURING COMPANY, *Appts.*,

v.

MICHAEL McCULLOUGH Jr., ET AL., Partners, as McCULLOUGH, DALZELL & Co.

(See S. C., 14 Otto, 310-319.)

Patentable invention—void letters patent.

1. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. The combination, to be patentable, must produce a new result.
2. The invention claimed, as described in letters patent re-issued to George Nimmo, for an improvement in molding crucibles is covered by prior patents.

[No. 155.]

Argued Nov. 30 and Dec. 1, 1881. Decided Dec. 12, 1881.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The case is stated by the court.

Mr. **James E. Maynadier**, for appellants.
Mr. **William Bakewell**, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity, filed by the appellants, to restrain the appellees from infringing re-issued letters patent, No. 6,166, dated December 8, 1874, to George Nimmo, for an improvement in molding crucibles, and for an account, the patent having been re-issued to the complainants as assignees of Nimmo, the inventor and original patentee.

The original patent, No. 49,140, was granted to Nimmo, June 20, 1865.

The subject of the alleged invention is an improvement in the manufacture of molding crucibles and pots, made of a plastic material, composed of plumbago, or so-called black-lead and fire-clay, used principally in the manufacture of steel. They were formerly made by hand, on a common potter's wheel, the hand and eye of the skilled workman building them up as the material revolved upon the wheel, in the desired shape. It is recited in the original patent to Nimmo, that they had also been made in a mold, by a pressing instrument, for which reference is made to letters patent granted Oct. 26, 1852, to John Akrill. It is stated also by Nimmo, in the specification to his original patent, that "Difficulty has heretofore been experienced in removing the crucibles from the mold, in consequence of the adhesive nature of the black-lead compound or mixture employed for such crucibles. The amount of water, also, that is required to make the mixture sufficiently plastic, causes the material frequently to crack and break in shrinking as it dries."

[311]

The following is the description of the invention, as contained in the specification, referring to the drawing accompanying it:

"The nature of my said invention consists in the manufacture of crucibles in a plaster mold, which gives shape to the pot externally and absorbs the moisture from the pot, causing it to dry uniformly and at the same time shrink away from the mold, preventing the air acting on the outside of the pot until after the moisture has been mostly absorbed, and prevents the pot from splitting or cracking from unequal contraction in drying. I mount my plaster mold in a revolving chuck, and employ a rib attached to a lever for spreading the plastic crucible material on the inside of the mold, and at the same time hardening, consolidating and polishing the crucible on the inside by means of said rib.

In the drawings is a bed carrying the vertical spindle, on the upper end of which is the hollow chuck, into which the plaster mold fits, and these parts are revolved by a belt to a wheel and crank, or by any other competent means. Near the chuck is an upright frame, with rollers over which the chain or rope passes, on one end of which is the counter-weight, and on the other the lever, having a handle at one end and carrying the rib. This lever is guided by the upright frame, and when not in use is drawn up by the weight. The crucible material is placed in the plaster mold, and partially spread by hand or by a conical muller. The back end of the lever is then brought beneath the stop or fulcrum, and pressed down until the lever takes a stop. The rib on the lever smooths, compresses, hardens and polishes the interior of the mold, forming a perfect crucible, possessing great strength and beauty. At the same time there is great uniformity in the crucibles made in this manner. The crucible and mold are to be lifted off the chuck, and another mold introduced in the chuck, and the operation repeated.

[312]

The crucible and mold are set aside. When the plaster of the mold has absorbed the moisture from the crucible, and the crucible has contracted away from the mold, and become sufficiently dry to be exposed to the air without risk of cracking, the crucible is to be removed and dried in any usual manner, and may be baked or burned."

The claims are as follows:

"What I claim and desire to secure by letters patent is:

1. Manufacturing crucibles in a plaster mold, in the manner and for the purposes specified.

2. Lever *l* and rib *n*, applied in the manner specified to form the interior of a crucible contained within a revolving mold, as set forth.

3. The combination of the revolving chuck *c*, plaster mold *d*, lever *l*, and rib *n*, as and for the purposes specified.

4. Mounting the lever *l* and rib *n* in the frame *g* in the manner specified, in combination with

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the counterpoise *k*, fulcrum *o*, and stop *p*, for determining the size of the interior of the crucible, as specified."

It is conceded by counsel for the appellants that the claims in this patent were invalid, as being too broad, and that it was for this reason, and for a more definite and limited description of the real invention intended to be claimed, that it was surrendered and re-issued.

The state of the art, at the date of his original patent, is described by Nimmo in the re-issue, as follows:

"Long prior to said Nimmo's invention, the mode of manufacturing certain articles of pottery by means of a rib or former to give the desired shape to the inside of the article, and a revolving plaster vessel to properly present the 'ball' (as the lump of tempered clay is called) to and support it under the action of the rib, was well known; but this mode of manufacture was not applicable in the manufacture of crucibles, because the apparatus was such that the crucible would be injured or destroyed in removing the rib, by the end of the rib striking the upper part of the crucible, as will be plain [313] to all skilled in the art of crucible-making, and acquainted with the mode of manufacture above referred to.

Another mode of manufacturing certain articles of pottery-ware by means of a rib or former for the inside of the article, and a revolving table (a common potter's wheel) which partially presented the ball to and supported it under the action of the rib, the workman using his hands to aid in presenting the ball to and supporting it under the action of the rib, is described in a French work published in 1857, entitled '*Leçons de Ceramique,' par* M. A. Salvetat, volume second, pages 121, 122. This last named mode of manufacture was applicable to the manufacture of crucibles, the apparatus being such that the rib was guided so as to cause it to approach the axis of the pot, where it was necessary that it should do so in order to prevent injury to the pot; but, even if useful at all in that manufacture, it is, without doubt, very much inferior to the mode of manufacture invented by Nimmo, and hereinafter described, the distinguishing difference between them being that the ball is presented to the rib and supported under its action, not by a flat revolving metal disk, but by a vessel made of plaster, which takes the place of both the flat revolving disk and the workman's hands, performing all the functions performed by the disk and the hands of the workman, but in a much more perfect manner and in less time.

The invention of said Nimmo is, in fact, an improvement on the mode of manufacture, as well as on the apparatus, described in Salvetat's work, the improvement consisting in the different mode of presenting and supporting the ball; but we do not wish to be understood as claiming this mode of presenting and supporting the ball as the invention of said Nimmo, as his improved mode of manufacture is new solely because it is, as a whole, substantially different from the mode described by Salvetat, and from the mode first above referred to; indeed, as a short general description of Nimmo's improved mode, it may be said to be substantially the same as that described by Salvetat, so far as shaping the inside of the crucible is concerned, and substantially the same as the mode first above referred to, so far as presenting the ball to and supporting it under the action of the rib is concerned. By Nimmo's improved mode of manufacture much labor and expense are saved and, what is still more important, crucibles are produced which are superior to those made by any practical mode known prior to said Nimmo's invention, in many very important respects."

The drawings are the same in both the original and re-issued patent, but in the description of the machine, with reference to the drawing contained in the re-issue, prominence is given [314] to the mode of operating the rib, after the crucible is formed, by which it can be withdrawn without striking and injuring the crucible, as to which no allusion was made in the original patent. It is admitted, however, that this mechanism is substantially the same as that described by Salvetat in the publication referred to.

The re-issue expressly disclaims as the invention of Nimmo both the modes and both the apparatus above mentioned, that is, the use of a rib or former to give the desired shape to the inside of the article, and the revolving plaster vessel or mold; and the mode and apparatus described by Salvetat, that is, the use of a rib or former, the apparatus being such that the rib is guided so as to cause it to approach the axis of the crucible, when it was necessary that it should do so in order to prevent injury to it.

The importance of this feature in any apparatus of the kind becomes manifest from the fact that crucibles of the character of those intended to be made by this process, usually have what is termed "a bilge," that is, are smaller in circumference at the mouth or top than at some other point; so that if the rib or former were lifted out perpendicularly from the position it occupies while in operation, it would necessarily strike against the interior surface of the crucible as it rose. To avoid this, it has to be withdrawn from the position it occupies while in the act of forming the internal surface of the crucible, to one nearer to the axis of rotation, so that being lifted, it may pass upward through the mouth of the crucible without striking against the sides. And considering how characteristic is this feature of the apparatus, and how essential it is to its profitable use, it is worthy of note that Nimmo, in his original patent, does not allude to it, although his claim for managing his rib includes it; and equally so, that it does not seem to have suggested to him, at that time, its utility in connection with the manufacture of crucibles with a bilge, for his description does not distinguish between those which have and those which have not a bilge, and his drawing is that of a mold with a [315] flaring mouth, for the making of which such a motion of the former, in withdrawing it, is not necessary. In addition, the mold itself, made of plaster, for vessels having a bilge, is required to be in two parts, in order that it may be removed from the crucible after the operation is complete; an adaptation which does not appear either in Nimmo's specifications or drawing.

Nimmo's actual claim, as made in the re-issue, is as follows:

"The improved apparatus above described, having the specific character, objects and functions above explained, and consisting of the rib,

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the revolving mold, and the mechanism by which the rib is guided toward the axis of revolution of the mold as it is withdrawn, as set forth, these elements being claimed only in combination each with all the others, and no claim is made to any combination of any of them less than the whole."

It is admitted in argument by counsel for the appellants that the mold is old and the rib is old, but it is claimed that prior to Nimmo's invention the mechanism for combining the rib and mold into one machine was such, that the rib could not be moved bodily toward the axis of the mold or away from that axis.

Besides a denial of the alleged infringement, the appellees maintained several defenses. They claimed that the re-issued patent is void: because the claim is too broad; because there is no coactive combination between the elements of the claim; because the state of the art, as set forth in the specification, shows that there is no novelty in the alleged combination; because the reissue is for a different invention from that described in the original patent; and because the alleged invention of Nimmo had been fully anticipated. The anticipations set out in the answer and relied on, were:

1. By the Salvetat publication.

2. By the Wise patent, being a patent granted to Jacob Wise and Freeman Wise, dated November 30, 1852, No. 9437, for an "improvement in the manufacture of stone and earthenware."

3. By the Smith patent, being a patent granted to William Smith, dated November 3, 1863, No. [316] 40,506, for apparatus for making plumbago crucibles.

4. By prior knowledge and use of the alleged invention at Kier's works in Pittsburgh.

The decree below dismissed the bill, to reverse which this appeal is prosecuted.

The account given in the specifications of the re-issued patent, of the state of the art at the date of the alleged invention, and the reference to Salvetat's publication, describing the method and apparatus referred to, and a comparison of that with the claims and disclaimers of the appellants, require a more particular examination of Salvetat's description of the device and its mode of operation, as contained in his publication. It will be observed that the re-issue represents Salvetat as having fully described the rib or former, and the mechanism which guides it so that it can be withdrawn from the crucible, when completed, without injury, even when it has a bilge; but as omitting, in connection with it, any use of a mold. The statement of the re-issue is, that while Salvetat described the use of the rib for forming the interior of the vessel, its external form was molded by the unassisted hand of the workman, manipulating the ball while revolving on the flat disk of the common potter's wheel. And the alleged invention of Nimmo consists merely in adding a mold to the apparatus described by Salvetat to form the combination which he claims as his invention.

An examination of the extract from Salvetat's publication, descriptive of this apparatus and method, which is contained in the record, makes it doubtful whether the account of it given in the specification of the re-issued patent is not a misconception. The drawings illustrating it, it is true, do not show a mold, and the text in referring to them says the vessel is supported by the wheel. But this, perhaps, is explained by the statement that it is intended to show merely how Messrs. Bourgon and Chalot, the originators of it, have arranged the rib in a very ingenious manner for hollowing out hollow ware with the rib itself. The whole article or chapter is entitled, "Hollow-ware Pressing in Plaster Molds," and its very purpose seems to be to explain the use and utility of molds in shaping the forms of pottery by pressing, and all the other processes and devices mentioned certainly refer to molds as used. If the rule, "*noscitur a sociis*," applies, there would be little room to doubt that the one in question also contemplated their use, and it seems difficult to understand how the vessel can be shaped externally unless the mold is implied. [317]

But we assume, for the purpose of this case, that the account, as contained in the re-issued patent, of this method and apparatus, is correct, and that Salvetat does not describe the use of a mold in combination with the rib. There is, however, no doubt whatever that Salvetat describes the operation of a rib, by means of a mechanism which directs it in the formation of the interior of a vessel, while in motion on a revolving wheel, and guides it when the vessel is formed, even when it has a bilge, so that by bringing it into a proper relation with the axis of revolution, it can be withdrawn from the side of the vessel, which it has shaped, and lifted through its mouth or top, without touching and injuring its sides. This is conceded by the appellants, and is admitted in the patent itself. It is also confessed that the use of the mold for supporting the ball, while the rib or former presses it on the inside, and thus shapes its corresponding outside, is old and is not of itself claimed as the invention of Nimmo. The alleged invention, then, consists merely in supplying to the apparatus described by Salvetat, a mold for supporting the ball and giving shape externally to the crucible.

We are clearly of opinion that this is not patentable. It comes plainly within the rule, as stated by *Mr. Justice* Strong, in *Hailes* v. *Van Wormer*, 20 Wall., 368 [87 U. S., XXII., 248], where he said:

"All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are [318] they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and then allowing each to work out its own effect, without the production of something novel, is not invention."

"The combination, to be patentable," said *Mr. Justice* Hunt, in *Reckendorfer* v. *Faber*, 92 U. S., 357 [XXIII., 723], "must produce a different force or effect or result, in the combined forces or processes, from that given by their

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separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."

In Nimmo's apparatus, it is perfectly clear that all the elements of the combination are old, and that each operates only in the old way. Beyond the separate and well known results produced by them severally, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action. In a patentable combination of old elements, all the constituents must so enter into it, as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise, it is only a mechanical juxtaposition, and not a vital union.

In the case of this apparatus, the mold was known, and a rib or former was known, and their use in combination was known. Salvetat described a rib, so arranged that after it had performed its function in shaping the interior of the vessel, it could be withdrawn, through the top of the vessel, so as not to produce injury by striking against its side. This rib Nimmo substituted for the old one in the same combination. And this is the whole of the invention. Upon the principle stated, there is no in-
[319] vention in it.

We are, also, of opinion, that the invention claimed for Nimmo, as described in the re-issued patent, is covered by the prior patents to Wise and to Smith.

Undoubtedly, they both embody the principle of a former used in combination with a mold, for the purpose of manufacturing crucibles, connected so that the former can be withdrawn in the case of vessels having a bilge without injury.

It is objected, however, that the machines described in these patents are mere paper machines, not capable of successful practical working. But on examination it sufficiently appears, we think, that the objections can be sustained only as to minor matters of detail in construction, not affecting the substance of the invention claimed, and could be removed by mere mechanical skill, without the exercise of the faculty of invention. In this view, the Wise and Smith patents are not rendered inefficient as defenses in this suit, by reason of the alleged imperfections of the machines described in them.

The bill of the appellants was dismissed by the court below, on the ground of the prior knowledge and use of the alleged invention at Kier's works in Pittsburgh. We are of opinion that the testimony sustains that finding.

We find no error in the decree, *and it is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FELIX COLLINS ET AL., *Plffs. in Err.*, [322]
v.
WILLIAM W. RILEY.

(See S. C., 14 Otto, 322-333.)

Married woman—disability of coverture—deed—sufficient verdict.

1. Under the Statute of West Virginia, that a woman shall not be barred of her right of entry into land by a judgment in her husband's lifetime, or by default or collusion, she is not barred, because, at the date of a conveyance by her and her husband to a third person, her husband's right to recover was cut off by limitation; she had ten years after the disability of coverture was removed, in which to assert her right of entry.

2. Notwithstanding her husband's right of possession may have been barred when the deed to such third person was made, that conveyance, in the absence of evidence that she was barred, passed her interest in the lands and, when her disability was removed, the grantee could enter upon the land, or bring an action for its recovery.

3. Where the issue to be tried was, whether the defendants unlawfully withheld from the plaintiff the premises described in the declaration, a verdict, that the land was claimed by defendants, is sufficient under the law of that State.

[No. 152.]

Argued Nov. 28, 1881. *Decided Dec. 12, 1881.*

IN ERROR to the District Court of the United States for the District of West Virginia.

Statement of the case by *Mr. Justice* **Harlan:**

The defendant in error, claiming to be the owner in fee simple of a large body of land, containing 3,000 acres, consisting of several tracts, in the County of Ritchie, State of West Virginia, brought this action, on the 28th day of March, 1868, to recover the same from the plaintiffs in error, who, it is alleged, unlawfully withheld from him the possession thereof. The plea, following the requirements of the local law, was "Not guilty of unlawfully withholding the premises claimed by the plaintiff in his declaration." A trial was had before a jury, which resulted in a verdict for the defendants. That verdict was, on motion, set aside and a new trial awarded. Upon a second trial, the jury found for the plaintiff, the verdict being in these words: "We, the jury, find for the plaintiff the land described in the declaration, [*here follows a description of the boundary of the entire tract of 3,000 acres*], except as to two undivided thirds of [*here follows a description of separate tracts, aggregating 1,834 acres, and claimed by the respective defendants*]. And as to the two thirds of the lands heretofore described and excepted, we find for the defendants; and as to the remaining one third of the lands hereinbefore excepted, and claimed by the said defendants, we find the following facts: that Frederick Swetzer died on the ——— day of ———, 1823, possessed in fee of lot No. 4 and the lower half of No. 5, as hereinbefore found for the [323] plaintiff, leaving three heirs-at-law who inherited said property, one of whom, Polly, had, prior to his death, intermarried with Abraham Wagoner; and that subsequent to his death, to wit: on the — day of January, 1868, the said Abraham Wagoner and Polly, his wife conveyed to the plaintiff in this cause all right and title in said lands; and that before the commencement of this suit Abraham Wagoner died, on the — day of February, 1868, and the said

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Polly Wagoner died afterwards, on the — day of March, 1868; and we further find that, at the date of the deed executed by the said Abraham and Polly Wagoner to the plaintiff in this cause, the said Abraham Wagoner's right to recover against the said defendants was barred by the Statute of Limitations. *Upon this state of facts* as to the interest of Polly Wagoner, if the law be for the plaintiff, then we find for the plaintiff in fee the remaining one third of the several tracts of land claimed as aforesaid by the defendants, and of which two thirds have been found for them; if the law be for the defendants, then we find for the said defendants the one undivided third part of the said land conveyed by the said Abraham Wagoner and wife, of which we have herein found two undivided third parts for the defendants."

The plaintiff moved the court to enter judgment in his behalf upon the special verdict, while the defendants moved to arrest judgment for the plaintiff, and, "for various reasons appearing upon the face of the record," to enter judgment in their favor. The motion of defendants was denied, and that of the plaintiff granted.

Messrs. **Robert S. Blair, Edwin Maxwell** and *Caleb Boggs*, for plaintiffs in error.

Mr. **Gideon Draper Camden,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

On behalf of the defendant in error, it is contended that the verdict of the jury is a general finding in his favor as to the undivided one third of the several tracts claimed by the defendants respectively, and should be followed by a judgment for him, unless the facts, specially stated, preclude a recovery by him. In that view we are unable to concur: The finding is, in form, a special verdict as to the undivided one third [324] of the lands in controversy, and was so treated, in the court below, by both parties. It has all the essential requisites of a special verdict, which is one wherein the jury "State the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had a cause of action, they then find for the plaintiff; if otherwise, then for the defendant." 3 Bl. Com., p. 377. The inquiry, therefore, is, not whether the facts stated prevent the court from entering a judgment in favor of Riley, in pursuance of a general finding for him, but whether the facts stated—"this state of facts as to the interest of Polly Wagoner"—affirmatively establish his right to any judgment for the recovery of that interest from the present defendants.

The main proposition advanced by plaintiffs in error is that even if Riley, as between himself and his grantors, acquired that interest by an effectual conveyance, his action was barred by the Statute of Limitations.

The statute, which, it is conceded, governs this case, provides:

That no person shall make an entry on, or bring an action to recover, any land, but within fifteen years next after the time at which the right to make such entry, or to bring such action, shall have first accrued to himself, or to some person through whom he claims. Va. Code, 1860, tit. 45, ch. 149, sec. 1.

That if, at the time the right shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the period of fifteen years shall have expired, make an entry on, or bring an action to recover such land, within ten years next after the time at which the person to whom such right shall have first accrued, shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened. *Ib.*, sec. 3.

A subsequent section makes the foregoing limitations of the right of entry on or action for land subject to these provisos: that no such entry shall be made or action brought, by any person [325] who, at the time at which his right to make or bring the same shall have first accrued, shall be under any such disability, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person, under disability at such time, may have remained under the same during the whole of such thirty years, or although the term of ten years from the period at which he shall have ceased to be under any such disability, or have died, shall not have expired. And, further, when any person shall be under any such disability at the time at which his right to make an entry or bring an action shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry, or to bring an action, beyond the fifteen years next after the right of such person shall have first accrued, or the ten years next after the period of his death, shall be allowed by reason of any disability of any other person. Sec. 4.

Recurring to the facts stated in the special verdict, it will be observed that Polly Wagoner was under the disability of coverture at the time she inherited the lands in controversy. The interest, thus inherited, nevertheless, passed to Riley by the conveyance of January, 1868, unless *her* rights had been previously lost through adverse possession or hostile claim by others. But whether there was, prior to that conveyance, any such adverse possession or hostile claim, even as against the husband, is not distinctly found. The special verdict, it is true, states that the husband's right to recover against the defendant's was barred by the Statute of Limitations. That, we think, is a conclusion of law, rather than a statement of facts upon which it rests. If, however, we give that finding the fullest effect claimed for it, viz.: that the defendants had held continuous adverse possession of or had asserted a hostile claim to the lands, long enough to bar an action upon the part of the husband, we are still not informed by the special verdict as to the time such adverse possession, in fact, commenced, or when such hostile claim was, in fact, first asserted by defendants. It may have existed for only fifteen years prior to the convey- [326] ance by Wagoner and wife to Riley. If it continued for that length of time, the husband's right to the possession of the lands would, under the statute, have been lost. But if adverse possession, or an adverse claim by defendants, for that length of time, be conceded—and there is no reason why it should be presumed to have

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contiued for a longer period—it would not follow that the wife's right of entry was barred. The statute expressly declares that a woman shall not be barred of her right of entry into land, even by a judgment in her husband's lifetime, by default or collusion; and, further, that, "No conveyance, or other act suffered or done by the husband only, or any land which is the inheritance of the wife, shall be or make any discontinuance thereof, or be prejudicial to the wife or her heirs, or to anyone having right or title to the same by her death, but they may respectively enter into such land, according to their right and title therein, as if no such act had been done." Va. Code, 1860, ch. 133, sec. 2, p. 608.

If the special verdict had stated that defendants, and those under whom they claim, had adversely held and claimed the land for a period sufficiently long, anterior to January, 1868, to show that the wife, notwithstanding the disability of coverture, had been barred of her right of action, then the law would be with the defendants. But no such facts are found. The verdict is, as we have seen, wholly silent as to when their adverse possession or claim commenced; and the court is asked to adjudge, as matter of law, that the wife was barred, simply because, at the date of the conveyance to Riley, the husband's right to recover was cut off by limitation. The wife, by the express words of the statute, had ten years after the disability of coverture was removed, in which to assert her right of entry, provided such time did not exceed thirty years from the date when her right first accrued. Notwithstanding, therefore, her husband, as to his right of possession, may have been barred, when the deed to Riley was made, that conveyance, in the absence of evidence that the wife was barred, must be held to have passed to Riley whatever interest she then had in the lands.

Farther, if it be conceded, as perhaps it must be, that the husband and wife, the former being barred, could not, during the lifetime of the [327] husband, have brought a joint action to recover the lands, and that Riley could not assert his rights, as against the defendants, until after the death of the husband, it would not follow that Riley got nothing by the conveyance to him. He certainly did acquire the wife's interest; and, when the disability of her coverture was removed, he could enter upon the land, or bring an action for its recovery, precisely as the wife could have done, upon the death of the husband, had she not joined in the conveyance. This is clear from a comparison of the limitation Act of Virginia, passed February 25, 1819, with the provision of the Code of 1860. The former, while prescribing twenty years as the time within which an action for the recovery of land must be brought, gave to infants, *femes covert*, and others under disability, and to their *heirs*, ten years after such disability was removed, in which to sue, notwithstanding twenty years may have passed after the right to sue accrued. Rev. Code of Va., 1819, Vol. 1, p. 488. On the other hand, the Code of 1860, as we have seen, saved the rights of those who *claimed through* the person to whom the right of entry or action accrued. Riley, undoubtedly, claimed through the wife, and could sue by virtue of his ownership of her interest, because she could have sued, had no conveyance been made.

But it is argued that the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties, and cannot, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record. It is not necessary, in the view we take of this case, to controvert any of these propositions. They, undoubtedly, embody a correct statement, as far as it goes, of the law in reference to special verdicts. But we do not perceive that their application in this case would lead to any result different from the one already indicated. We have taken the special verdict as presenting the whole case as to Polly Wagoner's interest in the lands. It shows that Swetzer, under whom both sides claim, was, at his death, the owner of the land; that upon his death an undivided third thereof was inherited by his daughter, Polly; and that her interest was [328] conveyed, in 1868, to Riley, by the joint deed of herself and husband. No fact is stated justifying the conclusion that *her* interest in the land had been lost, prior to the conveyance, either by adverse possession or by adverse claim. If such fact existed it was the duty of the defendants, who relied upon limitation, to have established it by proof, and caused it to be stated in the special verdict. The record contains no bill of exceptions, and were we at liberty to look beyond the special verdict, we should find in the record no evidence whatever upon that point. We cannot presume that any such evidence was offered. It was not for the plaintiff to prove that the right of the wife had not been lost by adverse possession or adverse claim by others. That was matter of defense. Counsel for plaintiffs in error have proceeded, in their argument, upon the assumption that the special verdict sets forth facts showing that the wife's right was barred, at the time she and her husband conveyed to Riley, or at the time this action was commenced. But evidently it shows nothing more than that the husband was barred as to *his* right of possession.

Another proposition advanced by counsel for plaintiffs in error deserves notice. It is, that the special verdict does not show that they were, at the institution of the suit, in possession of, or claimed title to, the interest of Polly Wagoner in the lands in dispute.

By the Code of Virginia of 1860 it is declared that "If the jury be of opinion [in actions of ejectment] for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof, *or* claimed title thereto, at the commencement of the action." P. 612. There was a similar provision in the Code of 1849, p. 561. The verdict in this case is in substantial conformity with this statutory requirement. The issue to be tried was whether the defendants unlawfully withheld from the plaintiff the premises described in the declaration. The verdict finds for the defendants as to the undivided two

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thirds of the land in dispute. If that be not, in legal effect, a finding that defendants were in [329] possession of the entire land, there is a finding that defendants respectively, claimed title to the several tracts in controversy. The verdict describes by metes and bounds each tract embraced in the suit, giving the name of each defendant by whom it is claimed and finding for defendants as to two thirds, undivided, of the respective tracts. It then proceeds to find as "to the remaining one third of the lands hereinbefore excepted, and *claimed by said defendants.*" Although the verdict does not state, in terms, that the defendants were in possession, it does state that they claimed the lands in dispute. And that seems to be sufficient under the local law. In reference to the case of *Southgate* v. *Walker*, 2 W. Va., 427, it is sufficient to say that it related to an action of ejectment commenced in 1848, before the adoption of the above-recited provision. We are referred to no decision of the state court in conflict with the construction we have given to that provision.

We deem it unnecessary to comment upon any other objections urged against the special verdict. *There is no error in the judgment, and it is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

Cited—107 U. S., 500.

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[333] FRANCES LEE EGBERT, EXTX. of SAMUEL H. BARNES, Deceased, *Appt.*,

v.

PHILLIPP LIPPMANN ET AL.

(See S. C., 14 Otto, 333-339.)

Public use of patented invention—what is—void letters patent.

1. To constitute the public use of an invention, it is not necessary that more than one of the patented articles should be publicly used; such use may be of an invention, by its character, only capable of being used where it cannot be seen nor observed by the public eye.

2. Whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known.

3. Re-issued letters patent to Frances Lee Barnes, executrix, for an improvement in corset springs, are void on account of two years' public use, by the consent and allowance of the inventor, before he made application for letters patent.

[No. 89.]

Argued Nov. 11, 14, 1881. Decided Dec. 12, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **J. C. Clayton,** *Geo. Gifford* and **Anthony L. Keasbey,** for appellant.

Mr. **John B. Staples,** for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

This suit was brought for an alleged infringement of the complainant's re-issued letters patent, No. 5216, dated January 7, 1873, for an infringement in corset springs.

The original patent bore date July 17, 1866, and was issued to Samuel H. Barnes.

The re-issue was made to the appellant, Frances Lee Egbert, executrix of the original patentee.

The specifications for the re-issue declared:

"This invention consists in forming the springs of corsets of two or more metallic plates, [334] placed one upon another, and so connected as to prevent them from sliding off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other in the direction of their length or longitudinally, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained."

The second claim was as follows:

"A pair of corset springs, each member of the pair being composed of two or more metallic plates, placed one on another and fastened together at their centers, and so connected at or near each end that they can move or play on each other in the direction of their length."

The bill of complaint alleged that Barnes was the original and first inventor of the improvement covered by the re-issued letters patent, and that it had not, at the time of his application for the original patent, been for more than two years in public use or on sale, with his consent or allowance.

The answer took issue on this averment and also denied infringement. The circuit court dismissed the bill and the complainant appealed to this court.

As to the second defense above mentioned, it is sufficient to say that the evidence establishes beyond controversy the infringement by defendants of the second claim of the re-issued letters patent above set forth.

We have, therefore, to consider whether the defense of the public use of the patented invention, with the consent of the inventor, for more than two years prior to his application for the original patent, is sustained by the testimony in the record.

The 6th, 7th and 15th sections of the Act of July 4, 1836, 5 Stat. at L., 117, as qualified by the 7th section of the Act of March 3, 1839, 5 Stat. at L., 353, were in force in 1866, when Barnes applied for his patent.

The effect of these sections is to render letters patent invalid, if the invention which they cover was in publi cuse, with the consent and allowance of the inventor, for more than two years prior to his application for a patent. Since the passage of the Act of 1839 it has been strenuously contended that a public use of an invention, for more than two years before the [335] application for a patent, even without the consent and allowance of the inventor, rendered the patent therefor void.

It is unnecessary in this case to decide this question, for the alleged use of the invention covered by the patent to Barnes is conceded to have been with his express consent.

The evidence on which the defendants rely to establish a prior public use of the invention, consists mainly of the testimony of the complainant herself, who is the executrix of the original patentee.

She testifies that Barnes invented the improvement covered by his patent between January and May, 1855; that between the dates named the witness and her friend, Miss Cugier, were complaining of the breaking of their corset steels. Barnes, who was present, and was an

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intimate friend of the witness, said he thought he could make her a pair that would not break. At their next interview he presented her with a pair of corset steels which he himself had made. The witness wore these steels a long time. In 1858 Barnes made and presented to her another pair, which she also wore a long time. When the corsets in which these steels were used wore out, the witness ripped them open and took out the steels and put them in new corsets. This was done several times.

It is admitted and, in fact, is asserted, by complainant that these steels embodied the invention afterward patented by Barnes and covered by the re-issued patent on which this suit is brought.

Joseph H. Sturgis, another witness for complainant, testifies that in 1863 Barnes spoke to him about two inventions made by himself, one of which was a corset steel, and that he went to the house of Barnes to see them. Before this time, and after the transactions testified to by the complainant, Barnes and she had intermarried. Barnes said his wife had a pair of steels made according to his invention in the corsets which she was then wearing, and if she would take them off he would show them to witness. Mrs. Barnes went out and returned with a pair of corsets and a pair of scissors and ripped the corsets open and took out the steels. Barnes then explained to witness how they were made and used.

This is the evidence presented by the record, on which defendants rely to establish the public [336] use of the invention by the patentee's consent and allowance.

The question for our decision is, whether this testimony shows a public use within the meaning of the statute.

We observe in the first place that to constitute the public use of a patent it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof of public use, but one well defined case of public use is just as effectual to annul the patent as many.

For instance, if the inventor of a mower, a printing press or a railway car, makes and sells only one of the articles invented by him, and allows the vendee to use it for two years, without restriction or limitation, the use is just as public as if he had sold and allowed the use of a great number.

We remark, secondly, that, whether the use of an invention is public or private, does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the use and knowledge of the use may be confined to one person.

We say thirdly, that some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye. An invention may consist of a lever or spring, hidden in the running gear of a watch, or of a ratchet, shaft or cog-wheel covered from view in the recesses of a machine for spinning or weaving. Nevertheless, if its inventor sells a machine of which his invention forms a part, and allows it to be used without restriction of any kind, the use is a public one, within the meaning of the law. So, on the other hand, a use necessarily open to public view, if made in good faith solely to test the qualities of the invention, and for the purpose of experiment, is not a public use within the meaning of the patent law. *Elizabeth* v. *Pavement Co.*, 97 U. S., 126 [XXIV., 1000]; *Shaw* v. *Cooper*, 7 Pet., 292. [337]

Tested by these principles, we think the evidence of the complainant herself shows that there was a public use of the invention, covered by the original patent to Barnes, for more than two years before the application for the patent, and by his consent and allowance. He made and gave to the complainant two pairs of corset steels, constructed according to his device, one in 1855 and one in 1858. They were presented to her for use. He imposed no obligation of secrecy, or any condition or restriction whatever They were not presented for the purpose of experiment or to test their qualities. No such claim is set up in the testimony of complainant. The invention was at the time complete, and there is no evidence that it was afterwards changed or improved. The donee of the steels used them for years for the purpose and in the manner designed by the inventor. They were not capable of any other use. She might have exhibited them to any person she pleased, or might have made other steels of the same kind, and used or sold them without violation of any condition or restriction imposed on her by the inventor.

According to the testimony of complainant, the invention was completed and put in use in 1855. The inventor slept on his rights for eleven years. The patent was not applied for till March, 1866. In the meantime, the invention had found its way into general, and almost universal use. A great part of the record is taken up with the testimony of the manufacturers and venders of corset steels, showing that before Barnes applied for his patent the principle of his device was almost universally used in the manufacture of corset steels. It is fair to presume that having learned from this general use that there was some value in his invention, Barnes attempted to resume, by an application for a patent, what by his acts he had clearly dedicated to the public.

"An abandonment to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the law. The effect of the law is that no such consequence will necessarily follow from the invention being in public use or on sale with the inventor's consent and allowance, at any time within two years before his application, but that if the invention is in public use or on sale prior to that time, it will be conclusive evidence of abandonment, and the patent will be void." *Elizabeth* v. *Pavement Co.*, *supra*.

We are of opinion that the defense of two [338] years' public use, by the consent and allowance of the inventor, before he made application for his patent, is satisfactorily established by the evidence. *The decree of the Circuit Court is, therefore, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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Mr. Justice **Miller**, dissenting:

The 6th section of the Act of 1836 [5 Stat. at L., 117] made it a condition of the grant of a patent that the invention for which it was asked should not, at the time of the application for a patent, "have been in public use or on sale with the consent or allowance" of the inventor or discoverer; and section 15 of the same Act declared that it should be a good defense to an action for infringement of the patent, that it had been in public use or on sale with the consent or allowance of the patentee before his application. This was afterwards modified by the 7th section of the Act of 1839 [5 Stat. at L., 353], by declaring that no patent should be void on that ground unless the prior use had been for more than two years before the application.

This is the law under which the patent of plaintiff in this case is held void by the opinion just delivered. The previous part of the same section requires that the invention must be one "not known or used by others" before the discovery or invention made by the applicant. In this limitation, though in the same sentence as the other, the word "public" is not used, so that the use by others which would defeat the applicant, if without his consent, need not be public, but where the use of his invention is by his consent or allowance, it must be public or it will not have that effect.

The reason of this is, undoubtedly, that if others have used the machine, composition or manufacture, without his consent, it is strong proof that it was not his discovery, and in that case he was not entitled to a patent as the first inventor; while, if the use was with his consent or allowance, the fact that such consent or allowance was first obtained, is evidence that he was the inventor and claimed to be such. In such case he was not to lose his right to a pa-
[339] tent unless the use which he permitted was such as showed an intention of abandonment of his invention to the public. It must, in the language of the Act be *in public use* or on sale. If on sale, of course the public who buy can use it, and if used in public with his consent, it may be copied by others, and in either event there is an end of the exclusive right of use or sale by the inventor.

The word *public* is, therefore, an important member of the sentence. A private use with consent, which could lead to no copy or reproduction of the machine, which taught no one but the party permitted the nature of the invention, which left the public at large as ignorant of this as it was before the author's discovery, was no abandonment to the public, and gave no right to defeat his claim for a patent. If the little steel spring inserted in a single pair of corsets, and used by only one woman, covered by her outer clothing, and in a position always withheld from public observation, is a *public* use of that piece of steel, I am at a loss to know the line between a private and a public use.

The opinion argues that the use was public, because with the consent of the inventor to its use no limitation was imposed in regard to its use in public. It may be well imagined that a prohibition to the party so permitted against exposing her use of the steel spring to public observation, would have been supposed to be a piece of irony. An objection quite the opposite of this suggested by the opinion is, that the invention was incapable of a public use; that is to say, that while the statute says the right to the patent can only be defeated by a use which is public, it is equally fatal to the claim, when it is permitted to be used at all, that the article can never be used in public.

I cannot, on such reasoning as this, eliminate from the statute the word *public*, and disregard its obvious importance in connection with the remainder of the Act, for the purpose of defeating a patent otherwise meritorious.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 344; 107 U. S., 97; 108 U. S., 465, 466.

ELIZA DAVIS, Widow and Admrx. of MINOR KENNER, Deceased, and Tutrix of Her Minor Children, *Appt.*, [386]

v.

MYRA CLARK GAINES.

(See S. C., 14 Otto, 386-407.)

Louisiana law—probate sale—adjudication—evidence—repayment—prescription—purchase in good faith.

*1. According to the law in force in Louisiana in 1813, the fact that the heir, whether forced or voluntary, of a testator, was absent from the State, gave the probate court jurisdiction to order a sale of the property of the testator's estate.

2. The will of a testator having been duly proved, the probate court which had jurisdiction, upon the petition of the executor, made an order for the sale of all the property of the estate. By virtue of the order the property was sold according to law at public vendue, and was duly conveyed in pursuance of the sale to a purchaser in good faith for a valuable consideration; *held*, that his title was not affected by the fact that a later will of the testator appointing another person executor, and making a different disposition of his property, was discovered and admitted to probate.

3. The fact that a court of probate has made an order for the sale of a testator's estate, is of itself an adjudication that all the facts, necessary to give it jurisdiction to make the order, really existed.

4. The deed of an executor conveying property sold by order of a probate court, under which possession had been held for over sixty years, and which recites that the sale was made, "after the publications and delays prescribed by law," and the account of the executor of record in the probate court for fifty years, which shows that he had paid a specified sum for advertising the sale of the property conveyed, are competent as evidence to prove the advertisement of the sale, and being uncontradicted are sufficient to establish the fact.

5. To entitle one to claim the benefit of the prescription applicable to immovables, the jurisprudence of Louisiana requires that he should have obtained the property prescribed for, in good faith and by a just title, that is to say, a title derived from one whom the possessor believed to be the true owner, and which, by its nature, was sufficient to transfer the ownership, if it had in fact been derived from the true owner.

6. The prescription of five years declared by article 3543 of the Civil Code of Louisiana, against all informalities connected with or growing out of any public sale by any person authorized to sell at public auction, may be pleaded by one who purchases in good faith at the sale of an executor or register of wills, and who holds by a just title, against the averment that the sale was not advertised, that the inventory of the estate was not completed before the order of sale was made, or that it was partly made by appraisers appointed by the testamentary executor, or that it was signed by only one of the two appraisers so appointed. Such informalities are cured by the lapse of five years.

7. When the purchase money paid by a purchaser

*Head notes by *Mr. Justice* WOODS.

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in good faith, of the real estate of a decedent ordered to be sold by a probate court, has been applied to the extinguishment of a mortgage executed by the decedent upon the property sold, and constituting a valid incumbrance thereon, and it turns out that the sale was irregular or void, the purchaser cannot be ous'ed of his possession upon a bill in equity filed by the heir or devisee without a repayment or tender of the purchase money so paid and applied.

[No. 29.]

Argued Jan. 27, 1881. *Decided Dec. 12, 1881.*

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **J. D. Rouse,** for appellant.

Mr. **John S. Whitaker,** for appellee.

[387] *Mr. Justice* **Woods** delivered the opinion of the court:

This was a bill in equity filed by Myra Clark Gaines, the appellee, against Minor Kenner, the intestate of the appellant, and a large number of other defendants, to recover real estate, of which she claimed to be the devisee under the will of her father, Daniel Clark. The defendants were alleged to be in possession respectively of distinct parcels of the property sued for.

The facts, so far as they concern the controversy between the appellant and appellees, were as follows:

Daniel Clark, the testator, purchased the real estate in dispute between the parties to the appeal from one Stephen Henderson, on December 16, 1812, wholly upon credit. The purchase price was $120,000, to secure which a mortgage was retained in the act of sale.

On May 20, 1811, Daniel Clark executed and published what then purported to be his last will and testament, as follows:

"In the name of God, amen. I, Daniel Clark, of New Orleans, do make this my last will and testament.

Imprimis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate and appoint my friends, Richard Relf and Beverly Chew, my executors, with power to settle everything relative to my estate.

New Orleans, 20 May, 1811.

DANIEL CLARK."

He died August 16, 1813, and on the next day, August 17, the will was proven before the Probate Court for the Parish of Orleans, and on August 27, letters testamentary were issued to Richard Relf as sole executor, Chew being absent from the State.

The appellant claimed title to the plantation under a sale thereof made by Thomas Beale, register of wills, at public auction, on November 8, 1813, to Michel Fortier and Omer Fortier, for $120,000, by authority, as she asserted, of an order of the probate court. Relf, the executor, in pursuance of the sale, conveyed the property to the purchasers by deed, in which he stipu- [388] lated to apply the purchase money, as fast as received, to the discharge of the mortgage of $120,000 placed on it by Daniel Clark.

The purchase money was so applied, and the entire sum secured by the mortgage executed by Clark, with the interest thereon, was thus discharged.

The property came into the possession of Minor Kenner, whose estate the appellant represents, as owner, by regular chain of conveyances from the vendees of Michel and Omer Fortier.

The title of the appellee, who was complainant below, was derived under the will of Daniel Clark, executed July 13, 1813, which was filed for probate in the Probate Court of the Parish of Orleans on January 18, 1855, and which by the judgment of the Supreme Court of Louisiana on December 17, 1855, was recognized as the last will and testament of Daniel Clark, and ordered to be recorded and executed as such.

The second item of this will was as follows: "Second, I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named."

Both parties, therefore, trace title to Daniel Clark.

Prima facie the title of the appellee to the property in dispute under the provision of this will, which is the later and last will of Daniel Clark, is clear.

The controversy, therefore, depends upon the three defenses set up by the appellant.

The record shows that the will of May 20, 1811, was duly admitted to probate by the Probate Court of the Parish of Orleans, and ordered to be executed; that within the year following the order of probate, to wit: on August 27, 1813, upon the petition of his executor, an order for the sale of the real and personal property of the testator was made by the court having jurisdiction thereof; that an inventory was begun by Thomas Beale, register of wills for the Parish of Orleans, on August 28, 1813, under the direction of said probate court, in which the plantation sued for was included as a part of the estate of Daniel Clark; that on November 8, [389] 1813, pursuant to said order, Beale, the register of wills, sold and adjudicated the plantation to Michel Fortier and Omer Fortier for the sum of $120,000, and that on November 11, 1813, Relf, the executor, executed an act of sale to the purchasers.

The appellant, therefore, contends, first, that by virtue of said will and its probate, and the order of sale, and the sale and conveyance thereunder, a good and valid title to said premises was vested in the said Michel and Omer Fortier, and that by *mesne* conveyances from them the appellant's intestate had title to said premises.

The record further shows that the act of sale recited the existence of the mortgage for $120,000 placed upon the property by Daniel Clark in favor of Stephen Henderson, on December 16, 1812, and his executor bound himself to discharge the same out of the purchase money, as it should be paid by the purchasers, the Fortiers, and that said mortgage was in fact discharged and paid by the application thereto of said purchase money.

The appellant, therefore, contends, secondly, that there can be no decree in favor of appellee for the property until the purchase money which was applied to the payment of the debts of the testator is repaid or tendered, if it shall turn

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out that the Fortiers were purchasers in good faith.

Appellant contends, thirdly, that from the said 8th day of November, 1813, until January 3, 1866, when process was served in this case, the appellant and those under whom she claims, held continuous, peaceable and unequivocal possession of said plantation, and that said Michel and Omer Fortier, at the time they purchased said plantation, on November 8, 1813, and all those through whom appellant claimed title subsequent to that date, had no knowledge, information or belief of the making or existence of the last will of Daniel Clark, executed in 1813; that the various persons who claimed title to said property, under the sale made to Michel and Omer Fortier, possessed the same in good faith and under a just title as owners, and that each of said owners had the right to acquire said property by prescription, and appellant pleads the prescription of ten, twenty and thirty years in bar of the appellee's bill.

The first question for consideration is, whether or not the proceedings of Relf, the executor, [390] under the will of 1811, and the sale made by the register of wills under the order of the probate court, and the deed executed by Relf as executor in pursuance thereof, vested a title to the plantation in Michel and Omer Fortier the purchasers.

The Code of 1808 was in force when the proceedings which resulted in the sale to the Fortiers were taken. Article 169, book 3, tit 2, of that Code declares:

"When of the testator's heirs some are absent or not represented in this territory, the testamentary executor, whether the seisin be granted to him or not, and whether those heirs be forced or voluntary, shall be authorized to take possession of the property of the succession, to cause it to be sold, and to remain in possession of the portion accruing to the absent heir or heirs, deducting the debts and legacies, until those heirs shall have sent their power of attorney, or till the expiration of the year of the testamentary execution."

By the will of 1811 it appeared that Mary Clark, the mother of testator, who was constituted thereby his universal legatee, and thereby became his heir (Civil Code, art. 880), was absent from the State of Louisiana. Moreover, "The granting of the license to sell was an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal was taken." *Grignon* v. *Astor*, 2 How., 319.

It is, therefore, not disputed that, upon the ground of the absence from the State of the universal legatee alone, it was competent for the probate court, upon the application of the executor, to make an order for the sale of the testator's property.

The jurisdiction of the Probate Court of the Parish of Orleans to admit to probate and record the wills of deceased persons is unquestioned.

Its power and authority to order a sale of the property of a testator, by virtue of article 169, book 3, title 2, of the Code of 1808, cannot be and is not disputed. If the Fortiers purchased in good faith under an order of sale made by the probate court, for a valuable consideration, without any knowledge of the later will of Daniel Clark, and while the authority of the executor appointed and qualified under the first will continued, and there was no fatal defect in the [391] proceedings antecedent to the sale and conveyance to them, does the fact that a subsequent will of Daniel Clark, making other dispositions of his property, was discovered and admitted to probate, render void their title?

We think this question must be answered in the negative.

A sale by order of a probate court is a judicial sale. *Moore* v. *Shultz*, 19 Pa. St., 98; *Grignon* v. *Astor* [*supra*]; *Thompson* v. *Tolmie*, 2 Pet., 157; *Lalanne* v. *Moreau*, 13 La., 481; *Howard* v. *Zeyer*, 18 La. Ann., 407.

Such sales are, therefore, protected by the rule that a title acquired at a decretal sale of lands, made by a court in the exercise of competent jurisdiction, is not rendered invalid by the reversal of the decree. *Ward* v. *Hollins*, 14 Md., 158; *Irwin* v. *Jeffers*, 3 Ohio St., 389; *Gossom* v. *Donaldson*, 18 B. Mon., 230; *Fergus* v. *Woodworth*, 44 Ill., 374; *Gray* v. *Brignardello*, 1 Wall., 627, 634 [68 U. S., XVII., 693, 697].

In the case last cited this court said: "Although the judgment or decree may be reversed, yet all rights acquired at a judicial sale, while the decree or judgment was in full force, and which they authorized, will be protected." And the court added: "It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale."

In the case of *McCullough* v. *Miner*, 2 La. Ann., 466, the Supreme Court of Louisiana said: "The jurisdiction of the court was undoubted, and the jurisprudence of the State has long been settled that a *bona fide* purchaser at a judicial sale is protected by the decree."

But it is not necessary to rely solely on this general doctrine. This court and others have directly applied the law which governs judicial sales, to sales made by order of probate courts.

Thus, in *Thompson* v. *Tolmie* [*supra*], this court said: "The law appears to be settled in the States that courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of the orphans' courts. When there has been a fair sale the purchaser will not be bound to look beyond the [392] decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings."

See, also, *Grignon* v. *Astor* [*supra*]. By a law of Michigan passed in 1818 the county courts had power under certain circumstances to order the sale of the real estate of a deceased person for the payment of debts and legacies. In reference to a sale of real estate made under this law the court said in that case: "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not, is wholly immaterial if no appeal is taken. The rule is the same whether the law gives an appeal or not; if none is given from the final decree it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can only be impeached for fraud in the party who obtains it; a purchaser under it is not bound to look beyond the decree;

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if there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction."

"In the orphans' court, and all courts who have the power to sell the estates of intestates, this action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title but one paramount. The estate passes to him by operation of law. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties, which devests the title of the deceased." See, also, *Erwin* v. *Lowry*, 7 How., 181; *Griffith* v. *Bogert*, 18 How., 158 [59 U.S., XV., 307]; *Florentine* v. *Barton*, 2 Wall., 210 [69 U. S., XVII., 783]; *McNitt* v. *Turner*, 16 Wall., 352 [83 U. S., XXI., 341].

On the same subject the Supreme Court of [393] Appeals of Virginia, in *Ballow* v. *Hudson*, 13 Gratt., 672 said: "Considerations of public policy require that all questions of succession to property should be authoritatively settled. Courts of probate are, therefore, organized to pass on such questions when arising under wills, and a judgment by such a court is conclusive while it remains in force, and the succession is governed accordingly. A judgment of this nature is classed among those which in legal nomenclature are called judgments *in rem*. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all other courts."

In *Lalanne* v. *Moreau* [*supra*], the Supreme Court of Louisiana said: "Sales directed or authorized by courts of probate are judicial sales to all intents and purposes, and the purchaser is protected by the decree ordering them."

So in *Howard* v. *Zeyer* [*supra*], the same court said: "A warrantor is not bound to look beyond the decree of the court ordering the sale of succession property, and he acquires all the right of the deceased to said property and no more."

In *Grignon* v. *Astor* [*supra*], this court said: "Proceedings in a probate court to sell property of a decedent have been held to be proceedings *in rem*, to which all claiming under the decedent are parties."

In *McPherson* v. *Cunliff*, 11 Serg. & R., 422, the court said that the decree of an orphans' court for the sale of land was conclusive; that the proceeding was purely *in rem* against the estate of the intestate and not *in personam*.

The same ruling has been made by the Supreme Court of Louisiana in *Lalanne* v. *Moreau* [*supra*], where it was said "That the decree of the court of probate ordering a sale of the property of miners is so purely *in rem* and against the property, that a sale made under it extinguishes all the mortgages existing in the name of the owner on the property sold."

In the case of *Green* v. *Baptist Ch.*, 27 La. Ann., 563, the same court held that purchasers are not bound at their peril to inquire, when property is advertised for sale by an executor, whether anything has occurred outside the court to destroy the will under which he is acting.

In the case of *Gaines* v. *De La Croix*, 6 Wall., 719 [73 U. S., XVIII., 967], which was a bill filed by the appellee in the present case against [394] De La Croix, to recover certain slaves claimed by him under a sale made to him by Relf, as executor of the will of 1811 of Daniel Clark, the defendant claimed that his titles, derived by the purchase from Relf, were valid, because he purchased within the year, while the functions of Relf, as executor, were in full force. In passing upon this point the court said: "This is true if he purchased in good faith, and the requisites of the law on the subject of the sales of succession property were complied with."

The case involved two purchases of slaves, and both were held invalid; one because it was made at private sale and, consequently, the purchaser acquired no title; and the other because, though made at public auction, the court found that De La Croix had knowledge of the will of 1813 and its contents, and "that he knew the will under which he was buying was not the true will of Daniel Clark," and he, therefore, "got the property in bad faith."

It is objected, however, that the discovery of a later will and its probate, showed that the will of 1811 was utterly void and could furnish no valid ground for the order of sale. But it must be borne in mind that the will of 1811 had been duly admitted to probate by a court which had jurisdiction of the subject-matter, and whose duty it was to ascertain and declare whether the will presented to it was, in fact, the genuine last will and testament of the testator. Having declared the will of 1811 to be the genuine last will of Daniel Clark, acts done under that probate in a lawful manner, until the discovery of a later will were valid and binding.

The English authorities hold that the record of probate and qualification of executor are conclusive evidences of the existence of the will and of the authority of the executor.

The case of *Allen* v. *Dundas*, 3 T. R., 125, was an action on the case brought by Allen as administrator of Priestman against Dundas for money had and received to the use of the intestate and to the use of the plaintiff as administrator. The defendant pleaded the general issue. On the trial a special verdict was found stating, in substance, as follows: the defendant, as treasurer of the navy, was indebted to the intestate in his lifetime £58, etc., for money had and received to his use. Priestman died June 2, 1784; on August 13, 1785, one Robert Brown [395] proved in the prerogative court of the Archbishop of Canterbury a forged paper writing, dated May 18, 1784, purporting to be the last will of Priestman, whereby he was supposed to have appointed Brown the sole executor thereof, and a probate of that supposed will issued in due form of law under the seal of that court on the same day in favor of Brown. The defendant, not knowing the will to have been forged, and believing Brown to be the rightful executor, on Brown's request paid him the £58, being the whole balance then due from the defendant to Priestman. Afterwards, on July 21, 1787, upon citation to Brown in the same court, the will and probate were declared void, and it was further declared that Priestman died intestate.

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On March 31, 1788, letters of administration on the goods of Priestman were granted to the plaintiff. Upon this verdict judgment was entered for defendant. Upon this case Buller, *J.*, said: "The first question to be considered is, what is the effect of a probate? It has been contended by the plaintiff's counsel, *first*, that it is not a judicial act; and, *secondly*, that it is not conclusive. But I am most clearly of opinion that it is a judicial act, for the ecclesiastical court may hear and examine the parties on the different sides whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive until it be repealed, and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person, but in such a case the ecclesiastical courts have no jurisdiction and the probate can have no effect; their justification is only to grant probate of the wills of dead persons. The distinction is this: if they have jurisdiction, their sentence, as long as it stand unrepealed, should avail in all other places; but when they have no jurisdiction, their whole proceedings are a nullity." The judgment was concurred in by *Justice* Grose and, as appears by a note at the end of the case, was approved by *Lord* Kenyon.

The same principle, that a probate is conclusive until repealed, was adverted to in an indictment for forging a will in *Rex* v. *Vincent*, 1 Stra., 481, where, on an indictment for forging a will of personal estate, on the trial a forgery was proved, but the defendant producing a probate, that was held to be conclusive evidence in support of the will. [396]

To the same effect is the case of *Wooley* v. *Clark*, 5 B. & Ald., 746. See, also, Williams on Executors, 6th Am. ed., 590, and *n. x*, where many cases to the same effect are cited.

In *Packman's Case*, 6 Co., 19, it was held that, though letters of administration be countermanded and revoked, a gift or sale made by the administrator acting under the probate was not thereby defeated.

To the same effect is the case of *Semine* v. *Semine*, 2 Lev., 90.

So in *Graysbrook* v. *Fox*, 1 Plowd., 282, it was held that where one is not executor of right but of wrong, yet if he had paid any debt due by specialty or other thing which the law will force the executor to pay, the true executor should have been bound by it and should have been obliged to allow it because the other was compellable to pay it, and the true executor had no prejudice by it, forasmuch as he himself should have been bound to pay it.

In *Thompson* v. *Harding*, 2 El. & Bl., 630, *Lord* Campbell, *Ch. J.*, said: "When the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property."

The same doctrine is held in *Parker* v. *Kett*, 1 Ld. Raym., 661.

The American cases are to the same effect. In *Waters* v. *Stickney*, 12 Allen, 15, it was said that a new decree of probate establishing a later will or codicil would not necessarily avoid payments made or acts done under the old decree while it remained unrevoked.

See, also, *Public Appeal of Peebles*, 15 Serg. & R., 39; *Kittridge* v. *Folsom*, 8 N. H., 98; *Stone* v. *Peasley*, 28 Vt., 716.

In *Steele* v. *Renn*, 50 Texas, 467, a question similar to the one now under consideration was passed upon by the Supreme Court of Texas, which held that "The title of a purchaser in good faith of land, from a legatee under a will duly admitted to probate, is not affected by proceedings subsequently instituted and resulting in annulling the will as a forgery." [397]

Under the English law, by which probate of a will was only required in reference to personal estate, it might well be that the devisee of land took no title if the will were afterwards discovered to be void. But in this country, in most of the States, Louisiana included, probate is required as well of wills of land as of goods, and the same effect should be given to it as a judicial act as to the probate of wills of personal estate in England.

Upon the doctrines and authorities above referred to, we are of opinion that a sale of land duly made by order of the probate court having jurisdiction, and a conveyance thereof by the executor of a will duly admitted to probate, while his functions were in full force, to a *bona fide* purchaser for value, vested the purchaser with a good and valid title, which was not affected by the discovery of a later will and its admission to probate and record.

The validity of the title of the Fortiers, under whom the appellant claims, depends, therefore, on the two questions: first, whether there was any fatal defect in the proceedings and sale under which their title was derived; and, second, whether they were purchasers in good faith.

We have already seen that the proceedings and sale all took place within the year after the appointment of the executor, and that it was competent for the court to order the sale by reason of the absence from the State of the universal legatee named in the will of 1811.

The appellee contends that there were fatal defects in the proceedings and sale which rendered the title of the purchasers under Relf, void.

Firstly, it is said that there was no order for the sale of the property in dispute, or rather that the order of sale made by the probate court did not include it.

There is little ground for this objection. The petition was for leave to sell all the property of the succession, movable and immovable, and the order of the court directed a sale accordingly. There is no dispute; in fact, it is the basis of the appellee's title, that the property sold was the property of the succession, and before the sale took place an inventory was filed in which the property in dispute was returned as belonging to the succession of Clark. [398]

There can be no question, therefore, that the order of sale included the property which is the subject of this controversy. But it has been expressly held by the Supreme Court of Louisiana "That a purchaser of land at a probate sale, under the order of a court of competent jurisdiction, directing a sale of *all* the property of the succession, is not affected by the failure of the executor to have such land placed on the inventory, or to have it accurately described in

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the inventory." *Mitchell* v. *Levi*, 23 La. Ann., 630.

It is said, secondly, that the sale was not preceded by the advertisements required by law; and thirdly, that the inventory of the property of the estate, in which was included the plantation in controversy, was not made until after the order of sale, and that the part of the inventory which included the property in dispute, was not made by the two appraisers appointed by the parish judge, but by appraisers chosen by the testamentary executor, and it was only signed by one of them.

There is evidence in the record tending to show that the sale was duly advertised. The executor's conveyance recites that the sale was made after "the publications and delays prescribed by law," and the account, of the executor, which had been of record in the probate court for more than fifty years, shows that he paid for advertising the sale of the property in question the sum of $232.

As possession had been held under the deed for over sixty years, its recitals are evidence even against strangers. *Carver* v. *Jackson*, 4 Pet., 83. And it has been held by the Supreme Court of Louisiana, that the account of an executrix, recorded in the probate court, is competent evidence to prove the advertisement of a sale. *Woods* v. *Lee*, 21 La. Ann., 505. The account was subject to exception. It passed under the scrutiny of the probate court, whose duty it was to ascertain the balance due upon it to the heir and render a final judgment therefor. Civil Code, articles 1183, 1184. It was, therefore, necessary for the court to allow or disallow the item charged for advertising the sale. As this item remains in the account as recorded, it may be presumed that it was allowed by the court, and after it has been of record for over fifty years, as in this case, may be considered as competent evidence to prove that the advertisement of the sale was made. [399]

This evidence, uncontradicted as it is, is sufficient to prove the fact of the advertisement. But whether this is so or not, is immaterial; for on March 10, 1834, an Act of the Legislature of Louisiana was passed, the 2d section of which declares:

"When a question shall arise out of any public sale heretofore made by the sheriff, auctioneer, or other public officer, and which sale was required by law to be preceded by advertisements, the fact of sale being proved, it shall make *prima facie* evidence that the required advertisements were regularly made."

And this section has been continued in force to the present time. See, Voorhies, Revised Statutes, 1876, p. 867, sec. 3391. But even if it were affirmatively shown that there had been no advertisement of the sale, that defect, as well as the alleged irregularities in regard to the inventory, is cured by the rule of prescription established by the 4th section of the said Act of March 10, 1834, which is as follows:

"All informalities connected with or growing out of any public sale made by a sheriff, auctioneer, or other public officer, shall, after the lapse of five years from the time of making the same, be prescribed against by those claiming under such sales, whether they be minors, married women, or persons interdicted."

This section continued in force until 1870. It was then substantially re-enacted by the general provision contained in the Revised Statutes of 1870, section 3392, p. 659, and by article 3548 of the Civil Code published in the same year, which declares as follows:

"All informalities connected with or growing out of any public sale made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

This section is still in force. See, Voorhies, Rev. Stat., 1876, sec. 3392. [400]

To entitle a party to claim the benefit of this provision of this or any other prescription, it is made necessary by the jurisprudence of Louisiana that he should have acquired the immovable in good faith and by a just title. By the term "just title," in cases of prescription, is not meant that which has been derived from the true owner, but that which has been received from any person whom the possessor honestly believed to be the true owner, provided it were such as to transfer the ownership of the property; that is, such as by its nature would have been sufficient to transfer the ownership if it had been derived from the real owner, such as a sale, exchange, legacy, or donation. See articles 3484 and 3485 Civil Code, and *Pike* v. *Evans*, 94 U. S., 6 [XXIV., 40].

The deed of Relf, executor, to the purchasers falls within the category above mentioned, or, in the language of the civilians, it is translative of property. There is no defect upon the face of it. The only questions, therefore, which arise upon the prescription of five years declared by section 4 of the Act of March 10, 1834, and its substitute article 3453 of the Civil Code, are, were the Fortiers purchasers in good faith, and are the defects in the title, insisted on by the appellee, such informalities as are cured by that prescription?

The good faith of the purchaser must be presumed until the contrary is shown. *Packwood* v. *Richardson*, 1 Mart. (N. S.), 410; *Fletcher* v. *Cavalier*, 4 La., 267; *Rivarde* v. *Rousseau*, 7 La. Ann., 3; *Leduf* v. *Bailly*, 3 La. Ann., 8.

There is not a scintilla of proof in the record tending to show any direct notice to the Fortiers, or those claiming under them, of Daniel Clark's will of 1813, or that the will of 1811, under which the sale was made by Relf, was not Clark's last will and testament.

The appellee relies on the fact, which she claims the testimony proves, that there was a general report in New Orleans, then a small town, that the will of 1811 was not the last will of Daniel Clark.

Even if the evidence established this fact, it is entirely too vague and inconclusive as a ground for creating or destroying valuable rights. But the evidence fails signally to establish any such general report, and it fails to show that the Fortiers resided in New Orleans where, if such report existed, it might possibly have come to their ears. [401]

The only other fact relied on to prove the bad faith of the purchasers, was the fact that De La Croix, on August 18, 1813, following the filing in the probate court of the will of 1811, filed in the same court his petition under oath, in which he stated that he had strong reasons to believe,

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and did believe, that the late Daniel Clark had made a testament or codicil, posterior to that which had been opened before that honorable court, and in the disposition whereof he thought he was interested. And the petition prayed that, "Whereas, the double of this will, whose existence was known to several persons, might have been deposited with any notary public of this city, an order might be made that every notary of the city appear before the court within the delay of twenty-four hours, to certify on oath if there does or does not exist in his office any testament or codicil, or any sealed packet deposited by the said Daniel Clark."

The order was made according to the prayer of the petition. Nothing came of it. No subsequent will was found by reason of the steps suggested by the petitioner.

This petition proved that De la Croix had notice of the will of 1813. It was so held by this court in *Gaines* v. *De la Croix*, 6 Wall., 719 [73 U. S., XVIII., 967]. But it proved nothing else. It fails utterly to show any bad faith on the part of the Fortiers. There is not the slightest evidence that either of them ever heard of the petition, or that any rumor that there was a will later than that of 1811 ever came to their knowledge.

There is an absolute failure of proof to establish any bad faith on the part of the purchasers of the property in dispute. They acted as if they believed they were getting a good title to the property, for they agreed to pay and did pay, what was at that time an immense sum of money for it, to wit: $120,000.

The good faith of the Fortiers being beyond question, they and those claiming under them have the right to rely upon the prescription of [402] five years to cure any irregularity in the proceedings which resulted in the sale.

That want of advertisements of the sale is such an irregularity as falls within the prescription, was held in the cases of *Woods* v. *Lee*, 21 La. Ann., 505; and *Pasiana* v. *Powell*, 21 La. Ann., 584. And it would seem that when property was sold at public sale, and as in this case brought its full value, the want of previous advertisement was a very immaterial matter.

The other alleged defects in the proceedings clearly fall within the prescription of five years. The fact that the inventory of the estate was not completed before the order of sale, the fact that the inventory was partly made by appraisers appointed by the testamentary executor, and that it was signed by only one of two who were so appointed, are certainly most trifling and inconsequential irregularities when there is no proof or even charge that the inventory was not fairly made or the sale fairly conducted, and when the property sold brought its full value. If these irregularities do not fall within the prescription of five years, it would be hard to conceive of any that would. *Fraser* v. *Zylicz*, 29 La. Ann., 537.

The irregularities in the sale alleged by appellee are, therefore, cured by the lapse of five years, and can have no more influence on the title of the appellant than if they never existed.

We find, therefore, that the appellant derives her title under a public sale made by a public officer by authority of the order of the probate court; that the sale took place and the deed, which on its face was without defect, and was translative of property, was made by the executor within the year following his appointment; that the purchasers purchased in good faith for a full consideration, and that there were no nullities or informalities in the sale which have not been cured by the prescription of five years.

In the cases heretofore decided by this court in favor of appellee, except the case of *Gaines* v. *De la Croix* [*supra*], the defendant claimed title from Relf, or Relf and Chew, executors of the will of 1811, under private sale, made by them as agents of Mary Clark, devisee under that will, and in their pretended capacity as executors, after their term of office had expired, and without any order of court. See, *Gaines* v. *New Orleans*, 6 Wall., 642 [73 U. S., XVIII., [403] 950].

In the case of *Gaines* v. *De la Croix* [*supra*], the court decided, and on most satisfactory proof, that De la Croix was a purchaser in bad faith, and upon that ground his title was declared invalid.

In her bill in this case the appellee, knowing that it was a vital fact in her case, charged that the sale of Relf, the executor, to the Fortiers was made after the expiration of a year from the date of his appointment and at a time when he had no authority to sell. But, as the proof shows, that averment is not true. The record shows that Relf was appointed executor August 27, 1813, and the sale was made on November 8 following, under an order of court, and the conveyance three days later, on November 11.

Upon the facts of the case, therefore, the title derived by the appellant under the sale to the Fortiers appears to be a good and valid title.

But conceding that the title acquired by the Fortiers at the sale made by the register of wills was void, should there be a decree in favor of the complainant, establishing her title to the lands in question, and placing her in possession, until she has returned or tendered the money which the Fortiers paid on their purchase? This inquiry presents the second ground of defense relied on by appellee.

Clark bought the property for $120,000, wholly on credit, and gave a mortgage on it to secure the purchase money. The property was sold for the same price to the Fortiers, who purchased in good faith, and every cent of the purchase money was paid and was applied to the extinguishment of the mortgage executed by Clark, and for which his estate was liable. No repayment or tender of this sum or any part of it is averred in the bill. Upon this state of facts, we do not think the complainant is entitled to a decree.

To allow the heir or devisee of a mortgagor, under the circumstances of this case, to recover the property without repaying the money for which it had been sold, and which had been paid by a *bona fide* purchaser, and had been applied to clear the property of a mortgage which rested upon it, and for which the estate of the [404] mortgagor was bound, would be most inequitable and unjust. It would be an utter disregard of the rule that they who seek equity must do equity. No support for such a decree can be found in the adjudged cases.

On the contrary, in *Scott* v. *Dunn*, 1 Dev. & B. Eq., 425, it was held that where an executor

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sold lands and applied the proceeds to the payment of the debts under a mistake of his power, and the purchaser was evicted by the devisee, the land in equity would be subjected to indemnify the purchaser to the extent to which the purchase money was applied to the payment of the debts over and above the personal estate.

So in *Valle* v. *Fleming*, 29 Mo., 152, it was held that when land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and the purchase money is applied in extinguishment of a mortgage to which such land was subject in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase money.

To precisely the same effect are the cases of *Blodgett* v. *Hitt*, 29 Wis., 169, and *Hudgin* v. *Hudgin*, 6 Grat., 320; see, also, *Mohr* v. *Tulip*, 40 Wis., 66; *Grant* v. *Lloyd*, 12 Sm. & M.(Miss.), 191; *Short* v. *Porter*, 44 Miss., 533; *Haynes* v. *Meeks*, 10 Cal., 110. And see Freeman on Void Judicial Sales, sec. 51, where the authorities on this question are collected and discussed.

The views held in the cases above referred to, are sanctioned also by the jurisprudence of Louisiana. Thus, in *Barelli* v. *Gauche*, 24 La. Ann., 324, it was held that an action to annul a judicial sale of real property on the ground of irregularities in the proceedings, cannot be maintained against the purchaser unless the parties claiming its nullity have paid or offered to reimburse the purchaser the amounts of the mortgages resting on the property, which he has paid since the purchase. A tender of the amounts thus paid is an essential prerequisite to the prosecution of a suit to annul.

[405] So in *Davidson* v. *Davidson*, 28 La. Ann., 269, it was held that a sale made by an administrator to pay debts, "Could not be disturbed unless the heirs previously returned or offered to return the price of the adjudication."

In *Jouet* v. *Mortimer*, 29 La. Ann., 207, the court said: "Nothing could be more unjust than to permit a debtor to recover back his property because the sale is irregular, and yet allow him to profit by that irregular sale to discharge his debt."

See, also, *Dufour* v. *Camfranc*, 11 Mart. (La.), 607; *Coiron* v. *Millaudon*, 3 La. Ann., 664; *Seawell* v. *Payne*, 5 La. Ann., 255; *Barret* v. *Emerson*, 8 La. Ann., 503.

The same rule prevailed in the civil law. It was said by *Mr. Justice* Story, in *Bright* v. *Boyd*, 2 Story, 605: "There is still another principle of the Roman law, which is applicable to the present case. It is, that where a *bona fide* purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him."

See, also, Dig., lib. 6, tit. 1, l. 65; Pothier, Pand., lib. 6, tit. 1, *n.* 43; Pothier, *De la Propriété*, *n.* 343.

The authorities cited, settle conclusively the proposition that the complainant is not entitled to the decree she seeks without repayment or tender of the purchase price of the lands in controversy, which has been applied to the extinguishment of a mortgage thereon.

No case is cited by counsel for appellee where the court refused to give a purchaser in good faith the benefit of this rule. The authorities relied on by him, Sugden, Vend., ch. 16, p. 483; [*Sheffield* v. *Orrery*], 3 Atk., 287, apply only to purchases in bad faith.

We are aware that some of the courts have held that a purchaser at an irregular or void judicial or execution sale is not subrogated to the rights of the judgment creditor. *Richmond* v. *Marston*, 15 Ind., 134; *Newton* v. *Colt*, 1 Ohio, 236.

But the weight of authority is against this position. *McLaughlin* v. *Daniel*, 8 Dana, 182; *Bentley* v. *Long*, 1 Strob. Eq., 43; *Howard* v. [406] *North*, 5 Tex., 290; *Jackson* v. *Bowen*, 7 Cow., 13. And this court has expressly held that an irregular judicial sale, made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such. *Brobst* v. *Brock*, 10 Wall., 519 [77 U. S., XIX., 1002].

But it is not necessary for the appellant to stand upon the doctrine of subrogation. She is in possession and ought not to be deprived thereof upon a proceeding in equity, unless the plaintiff offers to do equity. What we decide on this branch of the case is this: when the purchase money, paid by a purchaser in good faith, of real estate of a decedent ordered to be sold by a probate court, has been applied to the extinguishment of a mortgage executed by the decedent upon the property sold, and constituting a valid incumbrance thereon, and it turns out that the sale is irregular or void, the purchaser cannot be ousted of his possession upon a bill in equity filed by the heir or devisee, without a repayment or tender of the purchase money so paid and applied.

As the points already decided are conclusive of the case against the appellee, it is unnecessary to express any opinion on the third defense set up by appellant, namely: the prescriptions of ten, twenty and thirty years declared by the Civil Code of Louisiana.

The litigation, of which this case forms a part, has been before this court in various forms in the following cases: *Ex parte Myra Clark Whitney*, 13 Pet., 404; *Gaines* v. *Relf*, 15 Pet., 9; *Gaines* v. *Chew*, 2 How., 619; *Patterson* v. *Gaines*, 6 How., 550; *Gaines* v. *Relf*, 12 How., 472; *Gaines* v. *Hennen*, 24 How., 553 [65 U. S., XVI., 770]; *Gaines* v. *New Orleans*, 6 Wall., 642 [73 U. S., XVIII., 950]; *Gaines* v. *De la Croix*, 6 Wall., 719 [73 U. S., XVIII., 967]; *Gaines* v. *New Orleans*, 15 Wall., 624 [82 U. S., XXI., 215]; *Gaines* v. *Fuentes*, 92 U. S., 10 [XXIII., 524].

We think the facts of this case distinguish it from all the cases above mentioned, and our opinion is, that upon the averments made in this bill and the evidence adduced to support it, the appellee, Mrs. Gaines, is not entitled to a decree against the appellant. So much, therefore, of the decree of the Circuit Court as relates to the property bought by Michel Fortier and Omer Fortier, and now claimed by the widow and heirs of Minor Ken- [407] *ner, deceased, must be reversed, and the cause remanded with directions to dismiss the bill, so far as it concerns the appellant.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[427] JOHN W. BOUGHTON, *Plff. in Err.*,

v.

AMERICAN EXCHANGE NATIONAL BANK.

(See S. C., 14 Otto, 427, 428.)

Jurisdiction over state judgments.

To give this court jurisdiction for the review of a judgment of a State Court, the record must show, affirmatively or by fair implication, that some federal question was involved which was necessary to the determination of the cause.

[No. 820.]

Submitted Nov. 14, 1881. Decided Dec. 12, 1881.

IN ERROR to the Supreme Court of the State of Pennsylvania.

On motion to dismiss.

The case is sufficiently stated by the court.

Messrs. W. W. Montgomery and **Samuel Wagner,** for defendant in error for motion.

Mr. **Thomas Greenbank,** for plaintiff in error *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

To give us jurisdiction for the review of a judgment of a State Court, the record must show affirmatively or by fair implication, that some federal question was involved which was necessary to the determination of the cause. The defense set up in this case was, that the notes sued on were void for usury under the laws of New York, where they were made. Judgment was given against the plaintiff in error for want of a sufficient affidavit of defense. This judgment would be right if the affidavit was not such as was required by law or the practice of the court for the presentation of a defense like that relied on. As it is incumbent on the plaintiff in error to show by the record, not only that this was not [428] the ground of the decision below, but that some wrong determination of a federal question was —and it has not been done—we might dismiss the suit without further examination; but on looking into the opinion, which has been sent up with the record, we find that the court of appeals based its judgment, which alone we can review, entirely on the fact that the affidavit was not sufficiently specific in its averments to meet the requirements of the rules of pleading applicable to such cases.

It is clear, therefore, that we have no jurisdiction, *and the motion to dismiss is granted.*

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James H. McKenney, Clerk, Sup. Court, U. S.

NOTE.—*Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.* See, *note* to Matthews v. Zane, 8 U. S. (4 Cranch), 382; *note* to Martin v. Hunter, 14 U. S. (1 Wheat.), 304; and *note* to Williams v. Norris, 25 U. S. (12 Wheat.), 117.

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[441] SUSAN VIGEL, *Appt.*,

v.

SUSAN HOPP.

(See S. C., 14 Otto, 441, 442.)

Answer in equity case, as evidence.

Where the answer denies allegations of fraud and is responsive to the bill, before the relief which is asked can be granted, these denials must be overcome by the satisfactory testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another.

[No. 147.]

Submitted Nov. 23, 1881. Decided Dec. 12, 1881.

APPEAL from the Supreme Court of the District of Columbia.

The case is sufficiently stated by the court.

Mr. **Saul S. Henkle,** for appellant.

No counsel appeared for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity begun by the appellee to set aside a deed executed by her to the appellant, on the ground that the deed, though absolute on its face, was intended only as security for a debt, which has since been paid in full. There are numerous allegations of fraud, but the whole scope and purpose of the suit is to establish a trust, and get back the property in [442] that way. The answer denies every allegation of fraud and trust, and insists that the deed was intended as an absolute conveyance, and not as security. This is responsive to the bill, and before the relief can be granted which is asked, these denials must be overcome by the satisfactory testimony of two witnesses, or of one witness, corroborated by circumstances which are equivalent in weight to another. 2 Story, Eq., sec. 1528. The appellee is the only witness in support of the bill, and the corroborating circumstances are not, in our opinion, sufficient to overcome the answer. It will serve no useful purpose to enter into analysis of the testimony.

The decree is reversed and the cause remanded, with instructions to dismiss the bill.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

NOTE.—*Equity; more than one witness required to overcome sworn answer; answer of defendant verified is evidence.* See, *note* to Hughes v. Blake, 19 U. S. (6 Wheat.), 453.

RUTH ELIZA THOMPSON, *Plff. in Err.*, [252]

v.

KNICKERBOCKER LIFE INSURANCE COMPANY.

(See S. C., 14 Otto, 252-261.)

Payment of premium on policy—excuses for non-payment—usage—parol agreement—extension of time—objection, fatal.

1. Where a policy contains an express condition that it shall be void if any note given in payment of premium shall not be paid at maturity, whilst the primary condition of forfeiture for non-payment of

NOTE.—*Life insurance; forfeiture of policy for non-payment of premium; waiver.*

A policy is not forfeited for non-payment of the premium, under the forfeiture clause, where a note has been received for the same. McAllister v. N. E. Mut. L. Ins. Co., 101 Mass., 558; S. C., 3 Am. Rep., 404; N. E. Ins. Co. v. Hasbrook, 32 Ind., 447.

Where the policy is forfeited by its terms if the premium or any note given for it is unpaid, then failure to pay the note terminates it. Pitt v. Berkshire Ins. Co., 100 Mass., 500; Catoir v. Am. Ins. Co., 33 N. J., 487; Baker v. Union Ins. Co., 43 N. Y., 283; Rochner v. Knickerbocker Ins. Co., 63 N. Y., 160.

War does not dissolve the contract of insurance, and although the policy was forfeitable by non-pay-

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premium is waived by the acceptance of notes, yet the policy will be void if the notes are not paid at maturity.

2. Sickness or incapacity is no ground for avoiding such forfeiture of a life policy, or for granting relief in equity against forfeiture; if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it.

3. Usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice, is no excuse for non-payment.

4. A parol agreement of the insurers, made on receiving the promissory note, that the policy should not become void on the non-payment of the note at maturity, is in direct contradiction to the express terms of the policy and the note itself, and cannot affect them, but is itself void.

5. Usage of the insurers, not to demand punctual payment of the note at the day, but to give days of grace, to wit: for thirty days thereafter, is not a waiver of the clause of forfeiture.

6. It is a fatal objection to the entire case set up by the plaintiff, that payment of the premium note in question has never been made nor tendered at any time.

[No. 67.]

Argued Nov. 1, 1881. *Decided Dec. 19, 1881.*

IN ERROR to to the Circuit Court of the United States for the Southern District of Alabama.

The case is stated by the court.

Messrs. **J. Hubley Ashton** and *Thomas N. McCartney*, for plaintiff in error.

Messrs. Winfield S. Lewis, **Fletcher P. Cuppy** and *Thomas H. Herndon*, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action at law on a policy of insurance for $5,000, issued by the defendant in error, on the life of John Y. Thompson, for the benefit of his wife, the plaintiff in error. The policy bore date January 24, 1870, and was to continue during the life of the assured, in consideration of an annual premium of $410.20 payable on or before the 24th day of January in every year. Thompson died November 3, 1874. The complaint was in the usual form, setting forth the contract contained in the policy, the death of the assured, and the performance of the conditions of the policy by the assured and the [253] plaintiff. The Company pleaded the general issue, and two special pleas, which set up in substance the same defense. The second plea, which is all that is necessary to state in detail, after setting forth the provisions of the policy for the payment of the annual premium, proceeds as follows:

"Under said policy an annual credit or loan of a portion of said premium was provided for, and said policy also contained a condition or proviso that the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or that the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein.

The defendant further says that the said annual premium was not paid on or before the 24th day of January, A. D. 1874, and thereupon the defendant did give time for the payment of said premium upon the condition named in the note hereinafter mentioned, and for the payment of said premium did take certain promissory notes of said Thompson, one of which was as follows:

$109.] NEW YORK, Jan'y 24th, 1874.

Nine months after date, without grace, I promise to pay to the Knickerbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334, which policy is to be void in case this note is not paid at maturity, according to contract in said policy.

No. 2334 was an error, No. 2331 being intended."

It then avers that the note was not paid when it became due, October 24, 1874, and that by reason thereof the policy became void and of no effect before the death of the assured.

To these pleas four replications were filed, numbered 2, 3, 4 and 5, as follows:

"2. That the said policy of insurance was renewed by said defendant on the 24th day of January, 1874, and continued in force until January 24, 1875. That the payment of said note at maturity was not a condition precedent as alleged. That the said Thompson had the money in hand, was ready and willing and intended to pay said note, but that before the maturity thereof he was taken violently ill, and before and at the time the same fell due was in bed, prostrated by a fatal disease, and in this condition remained until he died on the third day of November, 1874; [254]

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ment, the assured may recover, less premiums which were unpaid by reason of war. Manhattan L. Ins. Co. v. Warwick, 20 Gratt., 614; S. C., 3 Am. Rep., 219; N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; S. C., 3 Am. Rep., 290; Statham v. N. Y. L. Ins. Co., 45 Miss., 561; S. C., 7 Am. Rep., 737; Hamilton v. Mut. L. Ins. Co., 9 Blatchf., 234; Martine v. International L. Ins. Soc., 53 N. Y., 339; S. C., 13 Am. Rep., 529; Mut. Ben. L. Ins. Co. v. Atwood, 24 Gratt., 497; S. C., 18 Am. Rep., 652; *Contra*, Dillard v. Manhattan L. Ins. Co. 44 Ga., 119; S. C., 9 Am. Rep., 167; Worthington v. Charter Oak L. Ins. Co., 41 Conn., 372; S. C., 19 Am. Rep., 495.

Where there was a usage and agreement to receive the premium within a reasonable time after due, the policy was held in force, insured having been stricken with paralysis on the day the premium was due, and the same was tendered within a few days, but after his death. Howell v. Knickerbocker L. Ins. Co., 44 N. Y., 276; S. C., 4 Am. Rep., 675.

The forfeiture is for the benefit of the company, and waiver of strict compliance, as acceptance of the overdue premium, continues the policy. Mut. Ben. L. Ins. Co. v. Robertson, 59 Ill., 123; S. C., 14 Am. Rep., 8; Wing v. Harvey, 27 Eng. L. & E., 140; F. & M. Ins. Co. v. Chestnut, 50 Ill., 111; Ætna Ins. Co. v. Maguire, 52 Ill., 342; Bauton v. Am. L. Ins. Co., 25 Conn., 542; Goit v. Nat. Prot. Ins. Co., 25 Barb., 189; Mut. L. Ins. Co. v. French, 30 Ohio St., 240; S. C., 27 Am. Rep., 443; Walsh v. Ætna L. Ins. Co., 30 Iowa, 133; S. C., 6 Am. Rep., 664; Ins. Co. v. Stockblower, 26 Pa. St., 199.

The receipt of an over-due premium by an agent of the company, and its transmission to and retention by the company, without knowledge that the agent has so received it, is not a waiver of forfeiture, the agent not having power to waive the condition of the policy. Busby v. N. Am. L. Ins. Co., 40 Md., 572; S. C., 17 Am. Rep., 664.

Where a company is accustomed to give notice when the premium falls due, it cannot exact forfeiture without giving such notice. Mayer v. Mut. L. Ins. Co of Chicago, 36 Iowa, 304; S. C., 18 Am. Rep., 34; Ins. Co. v. Eggleston, 96 U. S., LXIV., 341; S. C., 17 Alb. L. J., 366; Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St., 459; S. C., 31 Am. Rep., 555; Meyer v. Knickerbocker L. Ins. Co., 73 N. Y., 516; S. C., 29 Am. Rep., 200.

A custom, to receive premiums on a later day than specified on a particular policy, waives forfeiture for non-payment on the date the premium was due. Cotton States L. Ins. Co. v. Lester, 62 Ga., 247; S. C., 35 Am. Rep., 122; Ins. Co. v. Warner, 80 Ill., 410.

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that during all this time he was mentally and physically incapable of attending to his business, or knowing of and performing his obligations, and was *non compos mentis;* that the existence of said note was not known to the plaintiff.

3. That it was, and had been for many years before, and on the day said note fell due, the uniform usage and custom of said defendant in such cases to give notice of the day of payment to its policy holders; such is and was the uniform usage and custom with all insurance companies, and the said defendant had in all cases adopted and acted on said usage, and in all its dealings with said Thompson had adhered to said usage, and gave notice of the day when such payments fell due; yet said defendant in this case failed to give any notice of the day of payment of said note, notwithstanding they knew said Thompson was in the City of Mobile and was sick; and plaintiff avers that said Thompson was ready and willing to pay, had said notice been served as in previous cases, but acting on said usage was deceived by want of said notice, and that this plaintiff had no notice of the existence of said note, or when the same fell due, wherefore and whereby said note was not paid.

4. That on the 24th day of January, 1874, said policy was renewed and entered in full force for one year, to wit: until January 24, 1875. That said note was for the balance of the premium of that year, which defendant agreed should be deferred and paid as set out on said note: that by said agreement said policy was not to become void on the non-payment of the note alone at maturity as alleged in said plea, but was to become void at the instance and election of said defendant, and plaintiff avers that said defendant did not elect to cancel said policy or take any steps to avoid it or give any notice of such intention during the life of said John Y. Thompson, or since, and still holds said note against said estate of said Thompson; wherefore, etc.

[255] 5. And for further replication to the first and second special pleas, by said defendant pleaded, plaintiff says that it was the general usage and custom adopted by said defendant, and practiced by them before and after the making of said note, not to demand punctual payment of such premium notes on the days they fell due, but to give days of grace thereon, to wit: for thirty days thereafter, and the said defendant had repeatedly so done with said Thompson and others, and they led said Thompson to believe and rely on such leniency in this case, and thereby said Thompson was deceived, and said note not paid, and he did rely on them for such notice."

Demurrers to these replications were sustained by the court. The case was then tried before a jury upon the plea of the general issue, and the same questions raised on the rejection of evidence at the trial which were presented by the replications. Exceptions were taken in due form and preserved on the record.

The case is now here on writ of error, and the rulings of the court on the demurrers are pre-
[257] sented for review.

It appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity.

The replications do not pretend that the note given for premium, which became due on the 24th day of October, 1874, was ever paid, or that payment thereof was ever tendered, either during the life of Thompson or after his death; but it is contended that such payment was not necessary in order to avoid the forfeiture claimed by the defendant.

First, it is contended that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture; and for this reference is made to the case of *Ins. Co.* v. *French*, 30 Ohio St., 243. But, in that case, no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes; yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity.

Besides this general answer, the plaintiff set up, in her replications, various excuses for not paying the note in question, which are relied on for avoiding the forfeiture of the policy.

In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. [258]
We have lately held, in the case of *Klein* v. *Ins. Co.* [*ante*, 662], decided at the present Term, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract, as was decided in the case of *Ins. Co.* v. *Statham*, 93 U. S., 24 [XXIII., 769]. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all

The third replication sets up a usage, on the part of the Insurance Company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums be-

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came due. The case of *Ins. Co.* v. *Eggleston*, 96 U. S., 572 [XXIV., 841], is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the Insurance Company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The Company is under no obligation to give such notice and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange; [259] but they are not obliged to give such notice and their neglect to do it would furnish no excuse for non-payment at the day.

The fourth replication sets up a parol agreement of defendant made on receiving the promissory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void. We did hold, in *Eggleston's Case*, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note, cannot be set up to contradict the express terms of the note itself, and of the policy under which it was taken.

The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit: for thirty days thereafter, and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the Company, or, as the plaintiff herself calls it, an act of "leniency." It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the Company's prejudice, that they [260] were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time, and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public.

But a fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all.

Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case, and that it does not come up to the line of any of the previous cases referred to, in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the [261] part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground; one on which the assured has a right to rely.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 37; 17 N. W. Rep., 783; 62 Md., 207.

Ex Parte WILLIAM W. WOOLLEN ET AL. [300]

(See S. C., 14 Otto, 300-303.)

Dismissing appeal in bankruptcy.

The Circuit Court may dismiss an appeal by a creditor from a decision of the District Court in bankruptcy rejecting his claim, if the appeal is not filed in the Circuit Court then sitting, within ten days after it is taken.

[No. 3, Orig.]

Submitted Oct. 31, 1881. Decided Dec. 19, 1881.

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PETITION for a writ of *mandamus*.

The case is sufficiently stated by the court.

Messrs. **Joseph E. McDonald, John M. Butler** and **Philip Phillips,** for petitioners.

Messrs. **Samuel Shellabarger** and **Jeremiah Wilson,** and *Herod & Winter*, for respondent.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The petition in this case shows that a claim against a bankrupt estate was rejected by the District Court for the District of Indiana on the 19th of December, 1879, and that on the same day the creditor took an appeal to the Circuit Court under section 4980 of the Revised Statutes. When the appeal was taken, a Term of the Circuit Court, which began on the first Tuesday in November before, was in session, and it continued without a final adjournment until late in April, 1880. The next Term did [301] not begin until the first Tuesday in May. On the 28th of March the assignee moved the Circuit Court to dismiss the appeal because it had not been entered in that court. This motion was resisted by the creditor on the ground that he had until the next Term to enter the case. The court, after hearing, granted the motion, and we are now asked to require, by *mandamus*, a re-instatement of the appeal.

Many objections are made to this application, but as it is conceded that if the question, which lies at the foundation of the whole proceeding, is decided adversely to the petitioners, the writ must be denied, we pass everything else by and proceed at once to the consideration of that question, which is, whether, under the law, the creditor had until the May Term, 1880, to enter his appeal in the Circuit Court.

The original Bankrupt Law required the appeal to "Be entered at the Term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same." 14 Stat. at L., 520, ch. 176, sec. 8. The same Act also provided, sec. 10, p. 521, that the Justices of this court should frame "general orders," among other things, "for regulating the practice and procedure upon appeals." Under this authority the Justices could not by their orders alter or amend the law, but they could prescribe rules and regulations to aid in carrying into effect what had been enacted. Anything not inconsistent with the law as it stood might be ordered for the dispatch of business. It was not in so many words provided that appeals might be entered in the Circuit Court at the first Term which began its session after the expiration of ten days from the time they were claimed, and so the justices in framing their orders at the December Term, 1866 (May 16, 1867), provided (No. 26) that appeals by a creditor from a decision of the District Court rejecting his claim should be filed in the clerk's office of the Circuit Court within ten days after they were taken. As this was evidently done to promote the speedy settlement of bankrupt estates, which we have often said was the obvious policy of the law, *Bailey* v. *Glover*, 21 Wall., 346 (88 U. S., XXII., 688); *Wiswall* v. *Campbell*, 93 U.S., 350 [XXIII., 924], there would, in our opinion, be no difficulty in sustaining the regulation if the matter stood as it was originally. The law and the regulation are perfectly consistent with [302] each other. In effect it was judicially determined that the law required (sec. 8) appeals to be filed during the first Term which happened to be in session after the expiration of the ten days, and the regulation simply fixed the time in that Term when the filing must be done. Undoubtedly, the provisions of the regulation were directory rather than mandatory. If the entry of the cause was not made in the Circuit Court within the prescribed time, it would be within the power of that court, in the exercise of its discretion, to allow it to be done afterwards, but after the time had gone by, the assignee could appear and ask to have the appeal dismissed.

But whatever may have been the condition of the law in this particular originally, there can be no doubt what it has been since the Revised Statutes, section 4990 of which is as follows:

"The general orders in bankruptcy heretofore adopted by the Justices of the Supreme Court, as now existing, may be followed in proceedings under this title; and the justices may, from time to time, subject to the provisions of this title, rescind or vary any of those general orders, and may frame, rescind or vary other general orders for the following purposes: * * Fourth. For regulating the practice and procedure upon appeals." * * *

Order No. 26 was then in force, and there was in this section a distinct legislative recognition of its validity. In section 4982 the word "first," where it occurs in that part of section 8 of the original Act quoted above, was omitted, so that the provision in the Revised Statutes is that "Such appeals shall be entered at the Term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same." By this change the original meaning was not materially altered, but if it had been, the result would be the same so far as the question now under consideration is concerned, because in so many words it was provided (sec. 4990) that the old orders as they stood should be applicable to the revision. In amending the general orders at the October Term, 1874, the justices continued No. 26 in the same form it was originally adopted.

Such being the condition of the law when the [303] proceedings now complained of were had in the Circuit Court, we think it was clearly in the power of that court to dismiss the appeal because it had not been entered in time.

The petition for a mandamus *is denied.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM LIBBY AND GEORGE FOX, Survivors of ALEXANDER T. STEWART and FRANCIS WARDEN, Deceased, *Plffs. in Err.*, [303]

v.

LEWIS C. HOPKINS AND MARIA W. HOPKINS, AND ISAAC M. JORDAN, Trustee in Bankruptcy of LEWIS C. HOPKINS.

(See S. C., 14 Otto, 303-310.)

Application of payments—set-off, rule as to.

1. Under the 20th section of the Bankrupt Act of

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1867, a creditor is not entitled to set off an unsecured account due to him from his debtor, against moneys remitted to him by such debtor with directions to credit them on his mortgage debt, and which he refused so to apply.

2. To authorize a set-off there must be mutual credits or mutual debts. The remitting of certain moneys by a debtor to his creditors, to be applied by them according to his instructions, did not make them his debtors, but his trustees.

[No. 175.]

Argued Dec. 9, 1881. Decided Dec. 19, 1881.

IN ERROR to the Supreme Court of the State of Ohio.

Statement of the case by *Mr. Justice* **Woods:**

The suit was brought in the Superior Court of Cincinnati by the plaintiffs in error, against Lewis C. Hopkins and wife, and Isaac M. Jordan, trustee in bankruptcy of Hopkins.

It appears from the record that the plaintiffs, A. T. Stewart & Co., merchants of the City of New York, on June 6, 1866, loaned to Lewis C. Hopkins, one of the defendants, a merchant of Cincinnati, Ohio, $100,000, and took his promissory note of that date therefor, payable on demand, with interest from date. To secure the payment of this note Hopkins executed and delivered to Stewart & Co. several mortgages on real estate in Cincinnati and its vicinity. Both before and after June 6, 1866, Hopkins bought of Stewart & Co. large quantities of goods, and as a matter of convenience kept with them two accounts, one a cash and the other a merchandise account. They were the bankers of Hopkins. All his remittances were sent to them and were credited to him in the cash account. He paid his debts for merchandise to Stewart & Co. and other New York merchants by drafts thereon. It was to replenish this cash account that Hopkins borrowed of Stewart [304] & Co. the $100,000 above mentioned, and it was carried to his credit in that account. On May 4, 1867, Hopkins paid on his note to Stewart & Co., $25,000. On November 12, 1867, he remitted to them $10,000; on December 27, 1867, $17,000; on the 28th of the same month $10,000, and on the 30th, $48,025. He directed all these remittances to be applied to the payment of his note for $100,000, and to be credited thereon. It is now no longer disputed that the first three of these remittances were applied by Stewart & Co. towards the payment of the note. The last two remittances, amounting to $58,625.51, with the interest thereon, constitute the sum now in controversy.

On January 1, 1868, Hopkins suspended business, insolvent. At that time he owed A. T. Stewart & Co. $231,515 on account, and unsecured. His liabilities to others amounted to more than $500,000.

On February 29, 1868, a petition in bankruptcy was filed against him, and on March 30 he was adjudicated a bankrupt; and on April 30 Isaac M. Jordan was appointed trustee of the bankrupt estate.

As to the foregoing facts there is no dispute.

In August, 1868, on what day the record does not show, Stewart & Co. commenced this suit for the foreclosure of the mortgages executed by Hopkins to secure his note to them, claiming as due the full amount of the note, less the payment of $25,000.

The answer, besides other defenses not necessary to notice, because they are not pertinent to any contention now raised by plaintiffs in error, averred that Hopkins had paid on the note not only the said sum of $25,000, but also the remittances above mentioned, making the total amount paid on the note $110,025; and alleging that said payments were made in fraud of the Bankrupt Act, demanded, by way of counterclaim, a judgment against Stewart & Co. therefor.

The reply admitted that Hopkins requested Stewart & Co. to credit said remittances on his mortgage debt, and averred that they held them subject to the order of Hopkins, and continued so to hold them, up to the time when the rights of Jordan, trustee, attached, subject to such law of set-off as is provided in the Bankrupt Act. It nowhere appeared in the pleadings that Hopkins was indebted to Stewart & Co., on any unsecured claim, or in any other way, except upon the note for $100,000. No unsecured debt of Hopkins was pleaded as a set-off or otherwise.

The superior court made a final decree, in which it found that the mortgages of Hopkins to the plaintiffs in error were valid, and were the first and best lien on the premises therein described, and that there was due thereon, including interest, the sum of $75,957.06, [305] for which sum it rendered its decree in favor of Stewart & Co.

The court further found that when Hopkins made said last two remittances, one of $10,000 and the other of $48,025, respectively, it was with the intent and express instruction in writing to Stewart & Co. that they should be applied in discharging said mortgage claim, but that Stewart & Co. refused, and had a right to refuse, so to apply them, but that they assumed to apply and did apply the said remittances to the credit of Hopkins on their general account against him for merchandise due said plaintiffs in error, but that Hopkins did not authorize or consent to such application of said remittances; and that Stewart & Co. had no right to make such application; and that said remittances remained in their hands as the moneys of Hopkins from the several days of their payment until February 29, 1868, when the title of Jordan as trustee attached thereto; and that the said two several sums were not subject to any claim of set-off or cross demand, or of mutual debts or credits, on the part of Stewart & Co., under section 20 of the Bankrupt Act, or otherwise.

The court, therefore, rendered a decree in favor of Jordan, trustee, against the plaintiffs in error, for $58,025, the aggregate of said last two remittances, with interest, amounting in all to the sum of $75,981.36.

The case was carried, by the petition in error of Stewart & Co., and the cross petition in error of Jordan, trustee, to the Supreme Court of Ohio, by which the decree of the superior court was affirmed.

The original plaintiffs, A. T. Stewart & Co., have brought the case here by writ of error for the consideration of this court.

Messrs. **Aaron F. Perry** and *Isaac C. Collins*, for plaintiffs in error.

Messrs. **Jackson A. Jordan** and **Isaac Dayton**, for defendants in error.

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Mr. Justice **Woods** delivered the opinion of the court:

The only question to which our attention is directed by the plaintiffs in error is that of set-off under the 20th section of the Bankrupt Act. That section, now embodied in section 5073 Revised Statutes, as originally passed, and as it stood at the time of the trial in the superior court, provided as follows: "In all cases of mut-
[306] ual credits between the parties the account between them shall be stated and one debt set off against the other and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of any claim in its nature not provable against, or of a claim purchased by or transferred to him after the filing of the petition."

The contention of the plaintiffs in error is, that they were entitled under this section to set off an unsecured account due them from Hopkins, against the $58,025 remitted to them by him with directions to credit it on his mortgage debt, and which they refused so to apply.

Waiving the difficulty that they have not pleaded their unsecured debt as a set-off, we shall consider the question made by them. Their unsecured account against Hopkins is a claim provable against the bankrupt estate, and it was not purchased by or transferred to them after the filing of the petition in bankruptcy. The controversy is, therefore, reduced to this issue: were the unsecured account of plaintiffs in error against Hopkins, and the money transmitted by him to plaintiffs in error, and held and not applied by them to the mortgage debt of Hopkins, mutual credits, or mutual debts which could be set off against each other under the 20th section of the Bankrupt Act?

The plaintiffs in error insist that the term "mutual credits" is more comprehensive than the term "mutual debts" in the statutes relating to set-off; that the term "credit" is synonymous with "trust," and the trust or credit need not be money on both sides; that where there is a deposit of property on one side without authority to turn it into money, no debt can arise out of it; but where there are directions to turn it into money, it may become a debt, the reason being that when turned into money it becomes like any other mutual debt. They say that the first of the two remittances under consideration is not proved to have been other than money, but as it was only $10,000 its application to the note could not be required. The larger remittance was in drafts and their application could not be required. But there was authority to turn them into money, and that to get the money on them it was necessary
[307] that the drafts should be indorsed by the plaintiffs in error; and that the indorsement to and collection by the plaintiffs in error put the money received in the same plight as if the drafts had been sent to them for collection. We cannot assent to these views of the plaintiffs in error.

Their contention receives but little support from the adjudged cases.

The case *Ex parte Deeze*, 1 Atk., 228, arose under the 28th section of the Statute 5 Geo. II., ch. 30, which provides that "When it shall appear to the said commissioners (in bankruptcy), or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt shall be set against another, and what shall appear to be due on either side on the balance of said account, and on setting such debts against one another, and no more shall be claimed on either side respectively."

In the case just mentioned, a packer claimed to retain goods not only for the price of packing them but for a sum of £500 lent to the bankrupt on his note. *Lord* Hardwicke determined that he had such right on the ground of mutual credits, holding that the words "mutual credits" have a larger effect than "mutual debts," and that under them many cross claims might be allowed in cases of bankruptcy, which in common cases would be rejected.

But this ruling was subsequently made narrower by *Lord* Hardwicke himself, in *Ex parte Ockenden*, 1 Atk., 235, and was in effect overruled in the later case of *Ross* v. *Hart*, 8 Taunt., 499. In that case trover was brought for cloths deposited by the bankrupt previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed, and it was held that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy, for there was no mutual credit within section 28, chapter 30, of the Statute of 2 Geo. II. And the court declared that by the terms "mutual credits" in the Act was meant only such credits as must in their nature terminate in debts.

The rule established in this case, that the credits which can be the subject of set-off, must be such as must in their nature terminate in debts, has been declared in other cases. *Smith* [308]
v. *Hodson*, 4 T. R., 211; *Easum* v. *Cato*, 5 B. & Ald., 861. The effect of these authorities is, that the term "mutual credits" includes only cases where a debt may have been within the contemplation of the parties.

These authorities make it clear that, even under the Bankrupt Act of 5 Geo. II., the plaintiffs in error would have no right to the set-off claimed by them. And they lose sight of the controlling fact that the money and the drafts which they turned into money, were remitted to them with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs in error, and that consent has never been given.

Whether or not Hopkins had the right to direct the application, is immaterial. There was no legal obstacle to the application of the money as directed. The fact that he gave the direction, imposed on the plaintiffs in error the obligation to apply the money as directed, or to return it to him.

They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from Hopkins to another of his creditors; or than they had to apply money left with them by Hopkins as a special deposit, to the payment of a debt due from him to them.

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The money and drafts were sent to them upon the faith and trust that they would be applied according to the instructions of Hopkins. The refusal of the plaintiffs in error so to apply them did not change the relations of the parties to this fund. It did not make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. The authorities cited by the plaintiffs in error to support their contention, *Winslow* v. *Bliss*, 3 Lans., 220; *Scammon* v. *Kimball*, 92 U. S., 362 [XXIII., 483], are cases where a bank or banker was allowed to set off the money of a depositor against a debt due from him to the bank. The answer to these authorities is, that the relation between a bank and its general depositor is that of debtor and creditor. When money is deposited with the bank, the bank becomes the debtor of the depositor to the amount of the deposit. *Foley* v. *Hill*, 2 H. L. Cas., 28; *Bk.* v. *Millard*, 10 Wall., 152 [77 U. S., XIX., 897]; *Bullard* v. *Randall*, 1 Gray, 605. When, therefore, the de- [309] positor becomes indebted to the bank, it is a case of mutual debt and credit which may well be set off against each other.

But in this case there was no deposit. The relation of banker and depositor did not arise; consequently, there was no debt. When A sends money to B, with directions to apply it to a debt due from him to B, it cannot be construed as a deposit, even though B may be a banker. The reason is plain. The consent of A that it shall be considered a deposit, and not a payment, is necessary and is wanting.

Another answer to the contention of the plaintiffs in error is found in the language of the 20th section of the Bankrupt Act, which differs materially from that of the 28th section of the Act of 2 Geo. II. In our Act the terms "credits" and "debts" are used as correlative. What is a debt on one side is a credit on the other, so that the term "credits" can have no broader meaning than the term "debts." We find no warrant in the language of the section or its context for extending the term "credits" so as to include trusts. Generally, we know that "credit" and "trust" are not synonymous terms. They have distinct and well settled meanings, and we see no reason why they should be confounded in interpreting the 20th section of the Bankrupt Act.

To authorize a set-off, there must be mutual credits or mutual debts. The remitting by Hopkins to the plaintiffs in error of certain money assets, to be applied by them according to his instructions, did not make the plaintiffs in error his debtors, but his trustees. So that there were in the case no mutual credits or debts. The indebtedness was all on the side of Hopkins. The plaintiffs in error owed him nothing. They held his money in trust to apply it as directed by him.

They refused to make the application as he directed. They held it, therefore, subject to his order. They continued so to hold it until the rights of the trustee in bankruptcy attached, and until he sought to recover it by his counterclaim filed in this case.

The only contention of the plaintiffs in error set up in this court is, that the Supreme Court of Ohio approved of the action of the Superior Court of Cincinnati in refusing to allow the plaintiffs in error to set off the unsecured debt [310] due to them by Hopkins against funds intrusted to them by him for an entirely different purpose. We are of opinion that the decision of the superior court was correct. *The judgment of the Supreme Court of Ohio must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—96 N. Y., 36.

WILLIAM H. WOOD, *Appt.*, [329]
v.
BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, IN NEBRASKA.

(See S. C., 14 Otto, 329-333.)

Railroad land-grant—effect of—superior right.

1. In all grants which are to be satisfied out of sections along a line of a railroad, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest, undisposed of sections, of the character mentioned.
2. The grant to the appellee by the Act of 1864, was one *in presenti*, and when the sections granted were ascertained, the title to the land took effect by relation as of its date, except as to the reservations named.
3. The land to which the complainant asserts a homestead claim, is embraced in one of the sections covered by said Act, and his claim necessarily falls before the superior right of the Company.

[No. 815.]

Submitted Dec. 5, 1881. Decided Dec. 19, 1881.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

This action was commenced in the court below, by the appellant against the appellee, for the purpose of obtaining the legal title to certain land in Lancaster County, Neb. The appellant claimed title under the homestead law of the United States, approved May 20, 1862. The Railroad Company had obtained a patent to the land in question, under an Act of Congress approved July 2, 1864, 13 Stat. at L., 364. The court below dismissed the bill on demurrer, and the complainant appealed to this court.

Messrs. **John I. Redick, W. J. Conell** and **E. E. Brown**, for appellant.

Messrs. T. M. Marquett, J. M. Krum and *C. H. Krum*, for appellee, did not appear for oral argument.

Mr. Justice **Field** delivered the opinion of the court:

The grant to the Burlington and Missouri [330] River Railroad Company, by the Act of Congress of July, 1862, was of ten sections of land for every mile on each side of the line of its road when located, such sections to be designated by odd numbers, and the land to be only taken which, at the time the line was definitely fixed, had not been sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim had not attached. The grant was one of quantity, with- [331] out any designation, in express terms, of any lateral limit on either side of the road, within which the land was to be selected. In this respect it differed from nearly all other grants of land made by Congress, in aid of the construction of railroads. Other grants usually prescribed a lateral limit. The omission in that

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case was not accidental. Nearly all the land within the distance usually prescribed as a limit, had already been disposed of to another railroad company, or, from the general settlement of the country, was likely to be appropriated before the line of the road could be definitely located. In order, therefore, that its proposed aid might not be defeated, Congress allowed the land granted to be taken on the line of the road wherever it could be found, without regard to the distance from its line to which the grantee might be compelled to go to satisfy its grant, by reason of previous appropriations.

Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selection should be made of alternate sections nearest the road, of which the land had not been previously sold, reserved or otherwise disposed of. The Company was not at liberty to pass beyond land open to its appropriation, and take lands further removed from its road. In all grants which are to be satisfied out of sections along a line of a road, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantees to roam over the whole public domain lying on either side of the road, in search of land desired. The grants must be satisfied out of the first land found which meets the conditions named.

The line of the defendant's road was definitely located in June, 1865, and the alternate sections within a limit of twenty miles were withdrawn from sale in July following. The land embraced by them, so far as it had not been previously sold, reserved or otherwise disposed of, or not covered by a homestead or preemption claim, was thus appropriated to the satisfaction of the grant. It could not be subsequently devoted to other purposes or subject to the claim of private parties. It was immediately [332] taken by the grant. Within the twenty mile limit the land would have been sufficient to satisfy the grant in full, if no portion of the odd sections had been previously disposed of, or subjected to other claims. And the grantee could only go beyond that limit, when it was found that there was a deficiency remaining after all within it had been appropriated.

The grant was one *in præsenti*, and when the sections granted were ascertained, the title to the land took effect by relation as of its date, except as to the reservations named. The land to which the complainant asserts a homestead claim is embraced in one of the sections within the twenty mile limit; his claim, therefore, necessarily falls before the superior right of the Company. Its estate had become vested when he took the initiatory steps to secure a homestead right.

The contention of the complainant, so far as we can understand his position, is this: that as there was no lateral limit expressed in the Act of Congress, within which the land granted was to be selected, therefore, it might be selected at any distance from the road, and that no appropriation could be considered as made, or any estate deemed to be vested, until the sections were actually selected; that is, until the patent of the United States was issued. This notion arises from a misconception of the language of our decision in the case of the United States against the same Company, reported in [98 U. S.]. It there appeared that within the twenty mile limit there was not sufficient unappropriated land to meet the grant, and accordingly the Company made application to the Land Department for land outside of that limit for the balance, and patents for such balance were issued to it. A suit was afterwards brought by the United States to cancel those patents. We there held, as in this case, that the grant was one of quantity and we observed that the land was subject only to these limitations: First, that the land must be embraced by the odd section; second, that it must be taken in equal quantities on each side of the road; third, that it must be on the line of the road; and, fourth, that it must not have been sold, reserved or otherwise disposed of by the United States, and a preemption or homestead claim must not have attached to it at the time the line was located. And we said, that the terms [333] of the grant did not require the land to be contiguous to the road; and if not contiguous, it was not easy to say at what distance the land to be selected would cease to be along the line. This language was used with reference to the objection in the case, that land could not be taken beyond the twenty mile limit, where all within that limit had been previously exhausted. We did not intend to intimatethat the land granted could be taken at any distance, without regard to previous appropriations, but only that land could be thus taken where, from previous appropriations, as in that case, the grant could not otherwise be satisfied.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—15 N. W. Rep., 317.

JOSIAH H. GAUTIER AND CHARLES E. GREGORY, as J. H. GAUTIER & Co., *Plffs. in Err.*, [345]

v.

CHESTER A. ARTHUR, Collector of the Port of NEW YORK.

(See S. C., 14 Otto, 345-347.)

Duty Act—discriminating Act.

1. Plumbago, imported into the United States by a French vessel, in July, 1873, is exempt from duty under the 5th section of the Act of June, 1872, which places plumbago on the free list, and exempts its importation from duty after August 1, of that year.

2. It was the intention of Congress to put an end, so far as the free list in the 5th section of the Act of 1872 is concerned, to the operation of the discriminating Act of 1864.

[No. 167.]

Argued Dec. 6, 1881. Decided Dec. 19, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Abram Wakeman**, for plaintiffs in error.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for defendant in error.

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Mr. Justice **Field** delivered the opinion of the court:

This is an action to recover duties paid on goods, consisting of over eight hundred barrels of plumbago, imported into the United States by a French vessel, in July, 1873, from Columbo, in the Island of Ceylon.

The plaintiffs, who are the importers, claim that the goods were exempt from duty under the 5th section of the Act of June 6, 1872, 17 Stat. at L., 233, "To reduce duties on imports," which places plumbago on the free list and exempts its importation from duty after the 1st of August of that year. The Collector held that the goods were liable to duty under the 17th section of the Act of June 30, 1864, and the amount exacted was accordingly paid under protest. 13 Stat. at L., 215. That section provides, with certain exceptions not material in this case, that a discriminating duty of ten *per centum ad valorem*, "in addition to duties imposed by law," shall be levied upon all goods subsequently imported in ships or vessels not of the United States.

The contention of the government is, that this 17th section imposes a duty upon all goods imported by foreign vessels—upon such as were previously free as well as those already subjected to duty; and that the 5th section of the Act of 1872 was not designed to affect the discrimination prescribed, and must be, therefore, limited in its application to goods imported in vessels of our own country.

[346] The policy of discriminating against the importation by foreign vessels at all, would seem to require that no distinction should be made between the two classes of goods. The encouragement of importation by vessels of our country would be greater by extending the discrimination to all goods than by limiting it to those upon which a duty was previously imposed. A construction of the section, in harmony with this view, is not an unreasonable one. In our judgment it best carries out the purposes of the Act in imposing a discrimination; and it conforms to the construction given by this court to the succeeding section of the same Act, in *Hadden* v. *Collector*, reported in the 5th of Wallace, 107 [72 U. S., XVIII., 518].

But assuming this construction to be correct, the second part of the contention of the government does not necessarily follow. If the 5th section of the Act of 1872 stood alone, it might, with much reason, be claimed that it was not intended to affect the discrimination prescribed by the Act of 1864. But it does not stand alone. The general repealing clause of the statute declares that all Acts and parts of Acts inconsistent with its provisions are repealed; and it excepts from its operation the provisions of certain other Acts, among which the discriminating section of the Act of 1864 is not mentioned. Both from the general language of the repealing clause, and the enumeration of the provisions of Acts excepted from it, we are forced to conclude that it was the intention of Congress to put an end, so far as the free list in the 5th section of the Act of 1872 is concerned, to the operation of the discriminating Act of 1864. This conclusion necessarily disposes of the case and requires a judgment of reversal.

The circuit court founded its decision upon the 18th section of the Act of 1864, which provided that, after it took effect, there should be levied on all goods "Of the growth or produce of countries east of the Cape of Good Hope" (except raw cotton), when imported from places west of the Cape, a duty of ten *per centum ad valorem* in addition to the duties imposed on such articles when imported directly from the place or places of their growth or production. But it is evident that the section has no application to the case at bar, for the goods upon which the duties were levied were imported di- [347] rectly from Ceylon, which, as we know, is east of the Cape of Good Hope, and not a place this side of it. And in founding its decision on that section the circuit court also seems to have assumed that the plumbago was of the produce of the island; but of that fact there was no proof in the case. Unless it was so proved, even upon the hypothesis of the court, there was no reasonable pretense for exacting the duty. Taking the assumed fact as if found in the case, and the section referred to does not, as stated, apply; nor do the sections of the Act of 1865 and 1872, which re-enact its provisions with the exceptions enlarged.

As the facts in this case are agreed to by counsel, it will not be necessary to order a new trial, but *the judgment will be reversed and the court below directed to enter a judgment for the plaintiffs for the amount of duties paid, with legal interest and costs; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 628.

G. DEROSSET LAMAR, EXR. of GAZAWAY B. LAMAR, Deceased, *Appt.*, [465]

v.

MARY J. C. MICOU, Admrx. of ANN C. SIMS, Deceased.

(See S. C., 14 Otto, 465, 466.)

Jurisdictional amount.

No appeal cannot be taken, by the defendant below, from a decree against him for less than $5,000 where there is no claim of set-off or counter-claim, except to reduce the amount of the recovery.

[No 998.]

Submitted Dec. 12, 1881. Decided Dec. 19, 1881.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss.

The case is sufficiently stated by the court.

Mr. **S. P. Nash**, for appellee, for motion.

Messrs. **Edward N. Dickerson** and **Charles C. Beaman, Jr.**, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court.

This is an appeal by the defendant below from a decree against him for less than $5,000. There is no claim of set-off or counter-claim, except to reduce the amount of the recovery. In

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See, *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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no event can the appellant get any money decree in his favor. All he seeks to do is to defend the claim of the appellee. Consequently, the amount in controversy, so far as this appeal is concerned, is fixed by the decree. *Thompson* v. *Butler*, 95 U. S., 694 [XXIV., 540]; *Sampson* v. *Welsh*, 24 How., 207 [65 U. S., XVI., 632]. In effect, the appellant insists that under the rule of liability established against him in the court below, the decree should have been more than $5,000, and that for this reason he is entitled to an appeal, so that he may show he is not liable at all. This, we think it clear, is not the law.

The case is not changed by the fact that if, under an appeal which is pending in another suit, it shall be found the appellant was credited in this suit with an amount which properly belonged to that, the decree in that suit will be reduced, while the one in this cannot be correspondingly increased. The appellee is satisfied with what she has got by this decree, and has not appealed. The appellant cannot complain if it turns out in the end that she might have re-
[466] covered more but for a mistake which was made in his favor.

The motion to dismiss is granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 173.

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[469] TOWN OF LOUISVILLE, *Plff. in Err.*,

v.

PORTSMOUTH SAVINGS BANK.

(See S. C., 13 Otto, 469-479.)

Fractions of time—subscriptions to railroads—case approved.

*1. The law does not, in general, take cognizance of the fractions of a day; but the courts may do so when substantial justice requires it.

2. The 2d section of article 14, of the Illinois Constitution went into operation on the 2d day of July, 1870. But it did not invalidate township bonds issued in aid of a railroad corporation, pursuant to an election held on that day, at an hour prior to the closing of the polls of the general election at which the people of the State voted on the adoption of the Constitution—the bonds, so issued, to be applied in discharge of a donation voted in 1868, to be paid by special tax.

[No. 1005.]

Submitted Dec. 5, 1881 Decided Dec. 19, 1881.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Messrs. **W. J. Henry** and *Hagle & Finch*, for plaintiff in error.

Messrs. Scholes & Mather and **Shelby M. Cullom**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The bonds, coupons of which are here in suit, were issued by the plaintiff in error, a township of Clay County, Illinois, to aid in the construction of what was originally known as the Illinois Southeastern Railway. They were delivered by the township authorities to the Springfield and Illinois Southeastern Railway Company, a corporation formed, by the consolidation, in February, 1870, of the Illinois Southeastern Railway Company with the Pana, Springfield and Northwestern Railroad Company. They contain the same recitals as the bonds of Harter Township in the same county, the validity of which was determined in *Harter* v. *Kernochan* [*ante*, 411]. Like the bonds of that township, they purport to have been issued in pursuance, as well of authority conferred by an Act of the General Assembly, incorporating the Illinois Southeastern Railway Company, approved February 25, 1867, and an Act amendatory thereof, approved February 24, 1869, as of an election of the legal voters of the township, held on the 10th of November, 1868. The same questions which, in that case, arose on the validity, construction and scope of those enactments, and the delivery of the bonds to the consolidated company, are presented for determination in reference to the bonds issued by the plaintiff in error. We perceive no reason for withdrawing or qualifying the conclusions we [470] then announced.

There is, however, one question of some importance in the present case which did not arise in *Harter* v. *Kernochan*. In that case it appeared that the election held under the Act of February 25, 1867, on November 10, 1868, at which the township voted a donation to be raised by special tax, payable in three equal annual installments, was supplemented by an election held, under the authority of the amendatory Act, on the 20th day of May, 1870, at which Harter Township directed bonds to be issued in payment of its donation previously voted. In the present case, while the election at which the Township of Louisville voted a similar donation, to be raised by like special tax, was also held on the 10th of November, 1868, the one at which that Township voted to issue bonds in payment of such donation was not held until the 2d of July, 1870. On the day last named the people of Illinois voted in favor of the adoption of a new Constitution, the 2d section of the 14th article of which was separately submitted, [471] and is in these words: "No county, city, town, township or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donations to or loan its credit in aid of any such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." In *Concord* v. *Bank*, 92 U. S., 625 [XXIII., 628], we held that *donations* by counties or other municipalities in Illinois to railroad companies were prohibited by the State Constitution, and could not lawfully be made after July 2, 1870, though authorized by a prior statute and a popular vote before the adoption of the Constitution. This ruling was made in ignorance of the fact, to which our attention was not at the time called, that the Supreme Court of Illinois had, in an unreported case, decided that the intention of the framers of the Constitution

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Computation of time; days "after the expiration"; "before"; Sundays; "within." Fractions of a day, when regarded and when not.* See, *note* to Griffith v. Bogert, 59 U. S., XV., 307.

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was not to prohibit donations authorized under pre-existing laws by a vote of the people prior to the adoption of that instrument, but to place subscriptions and donations on the same footing. Consequently, in the later case of *Fairfield* v. *Galatin Co.*, 100 U.S., 50 [XXV., 545], the ruling was modified, and the construction placed upon the organic law of Illinois by its highest court, accepted and enforced. It may, therefore, be regarded as the settled law of Illinois that its Constitution recognized as binding, donations as well as subscriptions, by a township in aid of a railroad corporation, which were authorized, under existing laws, by a vote of the people prior to the adoption of that instrument.

We have seen that the people of Louisville Township did, prior to the adoption of the Constitution of 1870, vote a donation, to be raised by special tax, for a limited period, in aid of this railroad enterprise. That donation was, beyond question, unaffected by the provisions of the Constitution prohibiting municipal aid to railroad or private corporations. When that instrument was adopted the Township had ample authority, conferred by vote of the people, to raise, by special tax, a specific amount to be donated for the purpose indicated.

[472] But the argument, on behalf of the plaintiff in error, proceeds upon these grounds. that this is not a suit to enforce the levy of a special tax in payment of the donation voted November 10, 1868, but a suit on the bonds voted on the 2d day of July, 1870; that, by the settled course of decisions in the Supreme Court of Illinois (82 Ill., 568; 92 *Ib.*, 27), the township officers could not legally issue *bonds* in payment of a donation, previously voted to be raised by special tax, without the consent of the people expressed at an election duly called and held for the purpose of determining that question; that no election could confer authority to issue bonds unless held before the 2d section of article 14 of the Constitution of 1870 went into effect; that that section and article, having been adopted by popular vote on the 2d of July, 1870, was in operation from the first moment of that day; and that, consequently, the the township election held on the same day was, in view of the constitutional inhibition, unavailing to confer authority to substitute a donation of interest bearing bonds maturing many years after date, for a donation to be satisfied by a special annual tax for three years. In other words, that a popular vote authorizing an issue of bonds, in order to escape the constitutional prohibition, must have been had prior to the *day* on which the Constitution was adopted.

Passing by, as unnecessary to the determination of this case, the propositions of law embodied in the first branch of this argument, we proceed to inquire as to the time when the Constitution of 1870, including the provisions inhibiting municipal aid to railroad corporations, became the fundamental law of the State, and what effect it had on the township election held on the 2d of July of that year.

At what precise hour on that day the Constitution was adopted by popular vote, cannot be stated. But we know that it could not have occurred before sunset, since the schedule, providing for the submission of the Constitution to the popular vote, expressly required the polls to be kept open for the reception of ballots until that hour. Nor are we able to ascertain, from the record, the exact moment when the Township of Louisville voted in favor of the issue of these bonds. But it does appear that the town-meeting to determine whether bonds should be issued, in lieu of a special tax, was called for nine o'clock in the forenoon; that such meeting was held pursuant to notice, and that only fifty-four votes were cast, of which [473] fifty-two were in favor of issuing bonds. The presumption may, therefore, be fairly indulged that the Township had, in fact, voted for issuing bonds before the close of the general election, on the same day, at which the people of the State voted on the adoption of the particular sections of the Constitution, separately submitted, which prohibited municipal subscriptions and donations in aid of railroad corporations.

The schedule provided that if a majority of the votes polled were for the Constitution, so much of it as was not separately submitted should be the supreme law of the State on and after August 8, 1870. The Supreme Court of Illinois, in *Schall* v. *Bowman*, 62 Ill., 321, declared that although the result of the election could not have been officially ascertained and declared before the expiration of some weeks from the election, the provision relating to municipal aid to railroad corporations "Was so framed that it could, appropriately and effectually, become a part of the original law, without the disturbance of any of its elements, and was a declaration of the people *on* the 2d day of July, 1870, that *from* and *after that day*, no matter what may become of the new Constitution, no county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donations to, or loan its credit in aid of such corporation." Further, in the same case, it was said: "We are unable to find anything in the Constitution itself, or in the schedule thereto, militating against the view we have taken, that this separate article of the Constitution of 1870 went into full effect on the day of its adoption by a vote of the people; that is, on the 2d day of July, 1870. There is no provision of the Constitution requiring a different construction." The subscription, the validity of which was there involved, we remark, in passing, was made in pursuance of a municipal election held on the 3d day of August, 1870.

The next case was *Richards* v. *Donagho*, 66 Ill., 73, which related to a proposed municipal subscription in pursuance of an election called July 12, 1870, and held August 2, 1870. The court adhered to the decision in *Schall* v. *Bowman*. The remaining case to which our attention has been called is *Wright* v. *Bishop*, 88 Ill., [474] 302. There the vote for an issue of bonds was given at an election held on the 2d day of August, 1870. The court, referring to the preceding cases, said: "This, we have held, was too late. The clause in the Constitution, containing the prohibition against municipal subscriptions or donations in aid of railroad companies and other private corporations, took effect on the 2d day of July, 1870; and all such subscriptions or donations, not authorized by a vote of the municipality, prior to that time, are void."

It is thus seen that the cases related to an election held in the month of August, 1870. Neither of them involved the validity of a sub-

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scription or a donation made in pursuance of an election held on the 2d of July, 1870; and, consequently, that learned tribunal has not indicated its opinion as to whether the constitutional inhibition forbade a municipal subscription or donation, in pursuance of an election held on the very day of the adoption of the Constitution. It is true that the court in *Wright* v. *Bishop*, after saying that the provisions in question "took effect on the 2d of July, 1870," remarked that "All such subscriptions or donations, not authorized by a vote of the municipality, prior to that time, are void." But that language must be interpreted with reference to the facts of the particular case presented for judicial determination. It is not clear that the phrase "prior to the time," was intended to refer to the day on which the constitutional provision took effect, as distinguished from the precise moment of its adoption by popular vote. The case involved no such question.

We are justified in so interpreting the decision in *Wright* v. *Bishop* by what was said in *Grosvenor* v. *Magill*, 37 Ill., 239, the doctrines of which have not, so far as we are able to find, been modified by any subsequent ruling of the state court. That was an adjudication upon the general question, whether the law regards fractions of a day. The court, speaking by *Mr. Justice* Lawrence, said: "It is true that, for many purposes, the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the fractions of any other unit of time. 2 Bl. Com., 140, [475] *notes*. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules."

The views exressed in the last case are consistent with sound reason and public policy. They accord with our own judgment, and are in line with the settled course of decisions in other courts.

In *Arnold* v. *U. S.*, 9 Cranch, 120, it was declared to be the general rule that where computation is to be made from an act done, the day on which the act is to be done shall be included. Hence, an Act of Congress, imposing additional duties to be levied and collected upon all goods imported from and after its passage, was adjudged to be in force on the day of its approval by the President. And it has been said in some cases that a statute is operative from the first moment of the day on which it takes effect—this upon the principle that the law will not take cognizance of fractions of a day. But to these general rules there are established exceptions, as an examination of the adjudged cases and the elementary treatises will show.

The question is discussed with fullness by *Mr. Justice* Story in *Richardson's Case*, 2 Story, 571. By an Act approved March 3, 1843, the statute establishing a uniform system of bankruptcy throughout the United States, approved August 19, 1841, was repealed. But it contained a proviso that the Act should not affect any cause or proceeding in bankruptcy *commenced before its passage*, or any pains, penalties or forfeitures incurred under said Act; but that "every such proceeding might be continued to its final consummation," in like manner as if that Act had not passed. A petition in bankruptcy was filed by Richardson on the 3d of March, 1843, and the question arose whether it was cut off by the repealing Act approved on the same day.

It appeared that the petition was filed about noon, while the repealing Act was not, in fact, approved by the President until late in the evening of the same day, several hours after the filing of the petition. It was ruled, upon the case [476] presented, that the Act of Congress should be held to have taken effect only from the Act of approval by the President, and not by relation from the commencement of the day on which such approval was given. After a review of the English decisions, the court said: "So that we see that there is no ground of authority and, certainly there is no reason to assert that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice."

In *Lapeyre* v. *U. S.*, 17 Wall., 198 [84 U. S., XXI., 607], it was said that an Act of Congress, unless it is otherwise declared by law, becomes operative from the first moment of the day of its passage; and further, that "fractions of the day are not recognized," and "an inquiry involving that subject is inadmissible." In reference to that case we remark that the question presented for determination was not as to fractions of a day, but whether a proclamation of the President, bearing date June 24, 1865, took effect on that day or on the 27th June, 1865, when it was first promulgated by publication in the newspapers. That case did not require a determination of the question of law now before us. The language quoted from the opinion must, therefore, be taken as a declaration of the general rule which obtains when the evidence does not show the necessity of regarding fractions of a day.

In *U. S.* v. *Norton*, 97 U. S., 170 [XXIV., 909], the court, while declaring, upon the authority of *Lapeyre* v. *U. S.*, that the President's Proclamation of June 13, 1865, removing all restrictions upon internal, domestic and coastwise intercourse and trade, took effect as of the beginning of June 13, 1865, and covered all the transactions of that day to which it was applicable, said: "We do not think this is a case in which fractions of a day should be taken into account." This language of the *Chief Justice* clearly implies that there were cases in which the court would regard fractions of a day. Besides, there was no question in that case, nor any proof made, as to the particular hour of the day when the Proclamation of the President was issued.

At the same Term of the court the case of [477] *Burgess* v. *Salmon*, 97 U. S., 381 [XXIV., 1104], was decided. An Act of Congress increased the tax on tobacco from twenty to twenty-four cents per pound, but contained a proviso that the increased tax should not apply to tobacco "on which the tax under existing laws shall

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have been paid when this (that) Act takes effect." It was approved on the afternoon of March 3, 1875, while the tobacco of Salmon was stamped, sold and removed for consumption or use from the place of manufacture, in the forenoon of the same day. It was ruled that the court could inquire as to the time of the day when the President approved the Act, and that "The time of such approval points out the earliest possible moment at which it could become a law, or, in the words of the Act of March 3d, 1875 [18 Stat. at L., 339], at which it could take effect." It was, consequently, adjudged that the tobacco was not subject to the increased tax imposed by a statute which was not, in fact, approved and did not take effect until after the removal, on the same day, of the tobacco. In that case the parties agreed as to the respective hours of the day when the tobacco was, in fact, stamped and removed, and when the Act was approved by the President. But such an agreement could not have authorized an inquiry into fractions of a day unless such inquiry were permissible by the established rules of law.

The cases in the state courts, bearing upon this question, and taking substantially the same view, are numerous. We refer to only two of them. In *Kennedy* v. *Palmer*, 6 Gray, 316, the question was as to the jurisdiction of a justice of the peace of a particular county to hear and determine an action, commenced May 7, 1865, on which day the Governor of the State approved an Act, by which the exclusive jurisdiction of all such actions, "not already pending," was vested in a police court thereby established, the Act providing that it should take effect from and after its passage. The evidence did not show either the hour of the day when the action was commenced, nor the hour when the Governor approved the Act. The court adjudged that the justice had jurisdiction until the precise point of time when the Act was approved, and thus became a law; and that since it did not appear that the suit was instituted [478] after the approval of the Act, it must be treated as one pending at the passage of the Act and, therefore, as unaffected by its provisions.

The other case is *People* v. *Clark*, 1 Cal., 406. The facts of that case were these: Clark was elected county judge at an election regularly appointed and held. On that day the Legislature passed an Act repealing the one by virtue of which the election was held, and conferring upon the Governor the power of appointment. The repealing Act was approved the same day, but at what hour of the day did not appear. Some days thereafter the relator was, by the Governor, appointed county judge. The court sustained the validity of the election, remarking that "The time of the approval of the Executive is a fact which can be ascertained and proven and, in all cases, where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when the event (the passage of the Act) occurred, should be had."

There are decisions in the English courts to the same effect. In *Roe* v. *Hersey*, 3 Wils., 274, the court characterized, as a mere fiction of law, the general proposition that there were no fractions of a day; that "by fiction of law, the whole time of the assizes, and the whole session of Parliament may be and sometimes are considered as one day; yet the matter of fact shall overturn the fiction in order to do justice between the parties." *Fictio cedit veritati. Fictio juris non est ubi veritas.* In *Combe* v. *Pitt*, 3 Burr, 1423, 1434, *Lord* Mansfield expressed similar views. He said: "but though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour of the day may not be so, too, when it is necessary and can be done; for, it is not like a mathematical point, which cannot be divided."

In view of the authorities, it cannot be doubted that the courts may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the Executive. But it may be argued that the rule does not apply where the inquiry is as to the time when constitutional provisions became operative by popular vote; that a popular vote, given at an election covering many hours of the same day, should be deemed one indivisible act, effectual, by relation, from the moment the electors entered upon the performance of that act, to wit: from the opening of the polls. But we are of [479] opinion that no such distinction can be maintained. In determining when a statute took effect, no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the Executive. We look to the final act of approval by the Executive to find when the statute took effect and, when necessary, inquire as to the hour of the day when that approval was, in fact, given. So, in ascertaining when a constitutional provision was adopted, we perceive no sound reason why the courts may not, in proper cases, inquire as to the hour when such approval became effectual, to wit: as to the time when, by the closing of the polls, the people had adopted such provision. In this case all difficulty is removed by the fact, made certain by the schedule to the Constitution requiring the polls to be kept open until a certain hour of the day of election. That fact should not be disregarded or ignored in ascertaining when the constitutional provision was adopted, especially since it expressly saved the obligations and rights of municipalities which had, before its adoption, under the authority of pre-existing laws, voted subscriptions or donations.

We are of opinion that, within the fair meaning of the State Constitution, the township election of the 2d of July, 1870, was held prior to the adoption of the section forbidding municipal subscriptions or donations in aid of railroad corporations, and under the authority of valid enactments in force when such election was held. The bonds, the coupons of which are in suit, were, consequently, unaffected by the prohibitions of the State Constitution. All other material objections to their validity have been considered and overruled in *Harter* v. *Kernochan*.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Bradley** and *Mr. Justice* **Miller.**

Cited—105 U. S., 5

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[786] JAMES M. WOOD, *Plff. in Err.*,

v.

JOSEPH W. WEIMAR.

(See S. C., 14 Otto, 786-797.)

Replevin by mortgagee—review of judgment for costs—form of mortgage—lien of chattel mortgage—objection not considered—extent of mortgagee's remedy—equitable assignment.

1. Replevin will lie, in favor of a mortgagee against a sheriff, for personal property covered by a chattel mortgage, seized under an attachment against the mortgagor while the mortgagor was in possession.
2. No writ of error lies from a judgment, as to costs alone.
3. A mortgage is not invalid because it does not truthfully describe the indebtedness secured, where the real transaction is not set forth in detail, but the amount is correctly stated and there is no fraud.
4. It is no objection that the lien of the mortgage was lost after the suit begun, because of a failure to comply with the requirements of the recording Acts, where the property was replevied before the year expired, and while the mortgage was in full force under the recording Acts.
5. An objection not made in the court below, comes too late here.
6. The mortgagee cannot enforce his lien on the goods mortgaged, beyond the amount which is actually due him on the mortgage debt when the judgment is rendered.
7. Where the payee of a note dies intestate, and no administrator is appointed, his heirs may assign the equitable title thereto.

[No. 83.]

Argued Nov. 9, 10, 1881. Decided Dec. 19, 1881.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is stated by the court.

Messrs. **L. D. Norris** and *George S. Clapp*, for plaintiff in error.

Messrs. George W. Lawton, **Edward Bacon** and *N. A. Hamilton*, for defendant in error.

[787] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This was a suit in replevin begun by Wood, the mortgagee of a stock of goods in a hardware store at St. Joseph, Michigan, against Weimar, a sheriff, who had seized the mortgaged property under certain writs of attachment, issued by the Circuit Court of Berrien County, Michigan, against Charles A. Stewart, the mortgagor. The case was tried by the court under a stipulation of the parties waiving a jury, and comes here on the facts and a bill of exceptions. The facts are very inartificially presented; a part appearing in the findings of the court incorporated into the opinion of the Judge and mixed up with his reasoning in deciding the case, and the rest in two stipulations filed in the progress of the trial, one of which was omitted from the record as originally sent here, but has been brought up since. An objection is made to our considering these stipulations, but we think the case stands upon agreed statements as to part of the facts and findings as to the rest.

The facts thus appearing material to the questions presented by the assignments of error may be stated as follows:

On the 25th of May, 1875, Charles A. Stewart mortgaged his stock of goods to Wood to secure the payment of a debt of $10,465.46 and interest, on or before November 25, 1875. This was done in good faith and without any intention to hinder or defraud creditors. The mortgage was filed in the town clerk's office the day it was executed, in accordance with the requirements of the Michigan Statute. [788] The mortgaged property remained in Stewart's possession after the mortgage, and he continued his sales from the stock in the usual course of business. There was no express agreement between the parties that this might be done, neither was it prohibited. The mortgage contained the usual power of sale in case of default, and authorized the mortgagee to take possession at any time, if he deemed himself insecure.

The mortgage purported on its face to be executed to secure a debt owing to Wood. The debt was represented by seven notes, none of which were described. Of these notes five only actually belonged to Wood. The five all bore date May 25, 1875, the same as the mortgage, and were payable to Wood's order. One for $1,263.43, payable one month after date, with interest at ten per cent, and another for $250, also payable one month after date, with interest from June 22 at ten per cent, were taken in good faith for interest supposed to be past due on a mortgage of lands in Berrien County for $5,000, dated December 22, 1868, and payable in five years, executed by Charles A. Stewart to one Terwilliger. This mortgage, together with the note it secured, Wood bought in good faith, supposing it to be valid and subsisting, on the first day of May, 1875, after its maturity, and paid for it $5,000 and accrued interest. Both the note and mortgage were delivered to him when his purchase was made, and he had them with him at the time the chattel mortgage was taken. Stewart gave the notes to Wood under the impression that he owed the interest they represented, and the transaction securing their payment by the chattel mortgage was in entire good faith.

Full payment of interest to June 22, 1872, was indorsed on the Terwilliger note on the 29th of August of that year. On the next day, the 30th of August, Terwilliger released twenty acres of land covered by the mortgage, and on the 19th of October afterwards there was recorded in the records of Cook County, Illinois, what purported to be a deed, with covenants of warranty, except as to certain incumbrances, dated September 21, 1872, and executed by [789] Charles A. Stewart to Terwilliger, conveying one undivided half of certain lands in Chicago, "In consideration of the sum of five thousand dollars, which is paid by way of the release of a mortgage for that sum, recorded in liber No. 4 of mortgages, in the office of the register of deeds of Berrien County, * * * the receipt whereof is hereby acknowledged." There was no other evidence except the record tending to show that this deed was ever delivered to Terwilliger, or that he knew of its being recorded. Wood had no knowledge of the deed when he bought the mortgage. The note was never surrendered to Stewart, and the mortgage was never discharged on the records of Berrien County. When Wood took the chattel mortgage he understood that Terwilliger claimed to own an interest in the Chicago lands in com-

NOTE.—*Chattel mortgages, necessity of filing; against whom need not be filed.* See, *note* to Herryford v. Davis, *ante*.

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mon with Stewart, and on the 27th of May, two days after the chattel mortgage was executed, Stewart made another deed to Terwilliger for an undivided half of the Chicago lands, which he delivered to Wood as agent for Terwilliger. In connection with these facts, the court below said in its findings: "But although there is some confusion about the facts as to whether the mortgage debt of $5,000 was understood by Stewart and Terwilliger as having been paid, on the whole evidence it should be regarded as paid as to creditors."

To prove the deed from Stewart to Terwilliger, bearing date September 21, 1872, a copy from the records of Cook County, certified by the recorder under his seal of office, was offered in evidence. There was no other authentication. This deed was objected to, "for that it was incompetent, immaterial and irrelevant." The objection was overruled and the deed admitted. Exception was taken, which was in due form embodied in a bill of exceptions and made part of the record.

As to two other of the notes to Wood, one for $800 and the other for $1,890, the first payable one month from date, with interest at ten per cent, and the other one month from date, with interest at the same rate after June 18, it was found that after the commencement of this suit, Wood realized from other securities which he held for the payment of the debt of which these notes represented the interest, enough to satisfy both, less the sum of $477.

As to another note given to Wood for $669.91, payable in six months from date, no special facts are found.

The sixth note was for $3,300, payable one day after date, January 1, 1873, with interest at [790] ten per cent, to the order of Elizabeth Stewart. The payee of the note had died intestate before the execution of the chattel mortgage, and no administrator had been appointed on her estate. She left no creditors, so far as the proof shows, but several heirs. One of the heirs was Cornelia Stewart, and all the others united in an assignment of this note to her. Wood was in some way related to Elizabeth and Cornelia Stewart, and Cornelia Stewart had indorsed the note to him to collect or get security. When he took the chattel mortgage he had the note and the assignment from the heirs in his possession. There was due on the note at the time $4,092.12, and Charles Stewart wished to secure it by the chattel mortgage. What was done was for the benefit of Cornelia Stewart.

The seventh note belonged to Harriet A. Stewart, but upon this no questions arise here, as the judgment below was in favor of Wood for all he claimed.

When the attachments under which Weimar claims were put on the property, Charles A. Stewart was in possession. The attachment was not made subject to the chattel mortgage, and in the pleadings in this case it is insisted by the sheriff that the goods were not the property of Wood, and that the chattel mortgage was without consideration, and void as to creditors. The value of the property taken by the replevin was $8,870.46.

The attachments were served on the 15th of July, and were for debts, amounting in all to $7,601.77. On the 11th of October, 1875, Wood demanded the goods of the sheriff, who then had them in possession, but the delivery was refused. This suit was begun on the same day, but after the demand and refusal. Weimar, at the trial, waived a return to him of the goods, and prayed a judgment for their value.

Upon this state of facts the court below ruled:

1. That replevin would not lie in favor of a mortgagee against a sheriff for personal property covered by a chattel mortgage, seized under an attachment against the mortgagor, while the mortgagor was in possession, and that, consequently, Weimar was entitled to a judgment, the only question being as to the amount of his [791] recovery;

2. That Wood could claim nothing under the chattel mortgage on account of the notes given for what was believed to be past due interest on the Terwilliger debt;

3. That his lien on account of the two notes of $800 and $1,890 could only be enforced for $477, the balance that remained due after deducting what had been realized from the proceeds of other securities since this suit was begun; and

4. That he could claim nothing on account of the Elizabeth Stewart note, as, until administration on her estate and distribution, her next of kin had no right or title to the note, legal or equitable, which they could convey for collection or otherwise, and that, consequently, there was no one capable of taking or holding security for it.

The result was that the lien of Wood, under his mortgage, was fixed at $3,295.36. This amount he was allowed to retain out of the value of the goods in his hands, and a judgment was given against him in favor of Weimar for the balance, being $5,575.10 and costs. To reverse this judgment against him the case has been brought here by Wood. The errors assigned present for our consideration the foregoing rulings below and the exception to the admission in evidence of the deed recorded in Cook County.

1. As to the right to bring an action of replevin. Practically, this involves only a question of costs, for in the progress of the cause Wood was given the same kind of relief he would have been entitled to if the court had held that his suit was properly brought. By a statute of Michigan (C. L. of 1871, sec. 6754), "When either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages in all cases arising under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

Confessedly, Wood was only a lienholder. The goods were delivered into his possession under the writ, and their value was agreed on. [792] Weimar did not ask their return, but was content with a judgment for the value of what had been wrongfully taken from him. His interest in the property was only that which the attaching creditors could subject to the payment of their debts. Another provision of the Michigan Statute is (C. L. of 1871, sec. 6759), that "Whenever the defendant shall be entitled to a

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return of the property replevied, instead of taking judgment for such return, * * * he may take judgment for the value of the property replevied, in which case such value shall be assessed on the trial, or upon the assessment of damages, as the case may be, subject to the provisions of section 29 of this chapter." Section 29, here referred to, is the same as section 6754, *supra*. As the court below found as a fact that Wood had a valid mortgage, it proceeded, notwithstanding the suit was improperly brought, to ascertain the amount and value of his lien and adjudge accordingly. This is all that could have been done if the ruling had been the other way upon the right to maintain the action.

If this were all there was in the case we should, under our uniform practice, decline to consider it. No writ of error lies from a judgment as to costs alone. *Canter* v. *Ins. Co.*, 3 Pet., 307; *Elastic Fabrics Co.* v. *Smith*, 100 U. S., 112 [XXV., 547]. But there are other questions, and this may, therefore, properly be taken up. Since the judgment below, the Supreme Court of Michigan has held, in *King* v *Hubbell*, 4 N. W. Rep.; 440 [42 Mich., 597], that although goods mortgaged could be taken under an attachment, if in the possession of the mortgagor, the officer must surrender them to the mortgagee on demand, after his inventory and appraisement have been completed, unless the attaching creditors dispute the validity of the mortgage. This clearly implies that replevin will lie if a delivery to the mortgagee is refused when properly demanded. We hold, therefore, on the authority of that case, that there was error in deciding that the action was improperly brought.

Before taking up the questions arising on the [793] assessment of damages, it is necessary to consider some objections which have been urged to the mortgage. It has been found as a fact that the mortgage was executed in good faith to secure what were supposed at the time to be valid and subsisting obligations, and with no intent to defraud other creditors. We are, therefore, to enter on our inquiries with this established. It is insisted, however, that notwithstanding the good faith of the parties, the mortgage is invalid, because it does not truthfully describe the indebtedness secured. It is conceded that the real transaction was not set forth in detail. The amount of the indebtedness the parties intended to have secured is correctly stated, though the several items which made it up are not specified. They were, however, identified at the trial, and the honesty of the transaction established. In *Shirras* v. *Caig*, 7 Cranch, 50, where a mortgage purported to secure a debt of £30,000, due to all the mortgagees, but was, in fact, intended to secure different sums due at the time to particular mortgagees, and advances afterwards to be made and liabilities to be incurred to an uncertain amount, *Chief Justice* Marshall said: "It is not to be denied that a deed, which misrepresents a transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the representation." Here it has been found that all was fair. It was material for creditors to know the amount of the indebtedness secured, and the property covered. These are truly stated. To enforce his [794] mortgage, the mortgagee must prove his debt, and he can only recover to the extent of what he proves. If the items which make up the debt are particularly described in the mortgage, it may save trouble in establishing the facts; but if there has been no fraud, and subsequent creditors have not been injured by the omission of specifications, identity may be established by parol. In making the proof, the debt must come fairly within the general description which has been given; but if it does, and the identity is satisfactorily made out, the mortgage will be sustained where good faith exists.

It matters not in this case that the notes actually intended to be secured became due at different dates, and not at the time fixed by the mortgage. Suits might be brought on the notes when they matured, for the recovery of the debt, but the mortgage could only be enforced according to its terms. Possession might be taken under the mortgage when necessary for the preservation of the security, but no sale of the mortgaged property could be made until after the condition was broken; that is to say, until after a failure to pay on the 25th of November.

It is, also, claimed that the lien of the mortgage was lost after the suit was begun, because of a failure to comply with the requirements of the recording Acts. These Acts prescribe that where mortgages of chattels are not accompanied by immediate delivery and followed by an actual and continued change of possession, they shall be void as against creditors and subsequent purchasers in good faith, unless copies are filed in the proper office. Another provision is, that every such mortgage shall cease to be valid, as against creditors and subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall annex to the instrument on file an affidavit setting forth the interest which the mortgagee has, by virtue of his mortgage, in the property mortgaged. The goods in this case were replevied before the year expired, and while the mortgage was in full force under the recording Acts. The possession of the property was then taken by Wood. After that the recording Acts did not apply, unless the property was again put into the possession of the mortgagor. Nothing of this kind appears in the findings, and the presumptions are all the other way. We conclude, therefore, that at the time of the replevin the lien of the mortgage was valid and subsisting to the extent of the debt secured by it as established by the findings.

This brings us to the questions arising on the assessment of damages.

1. As to the notes given for the interest on the [795] Terwilliger mortgage.

The court found as a fact that the Terwilliger note was "paid as to creditors." By this we understand that, as between Stewart and Ter-

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williger, the debt had been satisfied, and that there was, consequently, no consideration for the interest notes given Wood. Such being the case, he could not enforce those notes against creditors. Although Stewart might, if he saw fit, recognize the debt in the hands of Wood, and pay it if the rights of creditors did not intervene, as against creditors an agreement to pay would not be binding. The court has found the transaction fair and *bona fide* as between Wood and Stewart. This saves the mortgage as to the remainder of the indebtedness secured, but does not make the notes themselves of any avail against the attaching creditors. We cannot consider the evidence on which this finding was made. That was the province of the court below.

In this connection it is proper to consider the exception which was taken to the introduction in evidence of the deed from Stewart to Terwilliger. The language of the exception, as recorded in the bill of exceptions, is as follows: "To the reading in evidence of which deed, plaintiff, by his counsel, objected, for that it was incompetent, immaterial and irrelevant." It is now insisted that "The attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form, and by the proper officer, as required by the Act of Congress of March 27, 1804 [2 Stat. at L., 298], prescribing the mode in which the public records in each State shall be authenticated, so as to take effect in every other State." This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly. It is clear that the ruling complained of in this case was in respect to the effect to be given the deed when proved, and not to the form of making the proof. We see no error in the judgment below as to this item in the claim for allowance under the mortgage.

2. As to the notes of $800 and $1,890. It is insisted by Wood that collections made by him on the mortgage debt since the commencement of the suit cannot be taken into account in stating the amount of his lien; and if they could, that what was realized by him from his other securities should be applied on the principal of the debt rather than on these notes, which represent only the interest. Wood ought not to be permitted to enforce his lien on the goods he holds, or their value, beyond the amount which is actually due him on the mortgage debt when the judgment is rendered. The judgment must be such as shall "be just between the parties." If, when the suit was begun, his lien was equal to the full value of the property, and it was reduced by payment afterwards, he must account in the judgment for what is left after his debt is eventually satisfied, but will be protected in respect to costs.

[796]

From the finding it may fairly be inferred that the entire debt, principal and interest, was paid from the proceeds of the other securities, except the sum of $477. Certainly there is nothing inconsistent with such a presumption. Before a judgment can be reversed because it is not supported by the findings, the error must be apparent. All intendments are in favor of what has been done. This assignment of error has not been sustained.

3. As to the Elizabeth Stewart note. The court has distinctly found that this was a valid debt which Charles A. Stewart wished to have secured by the chattel mortgage. There was no fraud intended, but, on the contrary, everything was done in good faith. Inasmuch, however, as Mrs. Stewart was dead and no administration had been granted on her estate, it was decided that Wood had no lien on the property for the security of this note. In this, we think, there was error. There can be no doubt, from the facts as found, that in equity the debt was owing to Cornelia Stewart. There were no creditors, and all who would have been distributees under an administration of the estate of Elizabeth Stewart had assigned to her their interest in the note. This assignment, with the necessary authority from Cornelia Stewart, Wood had in his possession. There can be no doubt that if Charles Stewart had taken up the old note, and given another to Wood or Cornelia Stewart in its place, the new note would have been good as against every one but a creditor of Mrs. Stewart. So, too, if he had actually paid the debt instead of securing it, his creditors could not complain. Such being the case, we do not see why the security he gave may not be enforced. He owed the debt and had the right to provide for it without waiting for administration on the estate of Mrs. Stewart, if it could be done with safety. Of that he was to judge, if he acted in good faith, and not his creditors. All they can ask is that his property shall not be charged with its payment more than once. While, therefore, Wood, as the indorsee of Cornelia Stewart, may not have had the legal title to the note, he certainly held the equitable title which Charles A. Stewart was at liberty to recognize if he would. Having recognized it in good faith and acted accordingly, his creditors cannot interfere. He was at liberty to select such trustee as he chose to hold the security he desired to give. If there was fraud or bad faith, the case would be different. The court has found against any such claim and in our judgment a valid lien was created on the property in favor of Wood for the benefit of Cornelia Stewart, whose interest she rightfully represented, and whose trustee he was.

[797]

The judgment is reversed and the cause remanded, with instructions to enter a judgment in favor of Wood for the costs of the suit, and against him for only $1,482.98, the difference between the value of the mortgaged property and the amount due on the mortgage debt, including the amount adjudged in his favor below and the Elizabeth Stewart note; the judgment so to be rendered to bear interest from and after the 12th day of June, 1878.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[347] NATHAN C. DRAPER, *Appt.*,

v

HENRY S. DAVIS ET AL.

(See S. C., 14 Otto, 347-349.)

Sale of trust property—power of court.

1. Although a deed of trust to secure a debt authorizes the trustee to sell on default of payment, yet, where a trustee attempts to sell property subject to conflicting liens, some of which, it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly.

2. Such court has full power to take the trustee under its control, and to direct him to dispose of the trust fund and to adjust all the equities of the parties.

[No. 65.]

Argued Nov. 1, 1881. Decided Jan. 9, 1882.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. **William A. Meloy,** for appellant.

Messrs. **John Selden, Leigh Robinson** and *Elliot & Robinson*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

The circumstances out of which this case grew were as follows: In 1867, Draper, Thomas and Bodine, partners in business, having purchased a planing-mill with its fixtures, machinery and chattels, from one Henry S. Davis, executed to Fendall and Winder a deed of trust [348] to secure the payment of notes to the amount of $20,000, given to Davis for the purchase money. The deed embraced the lot, the mill, machinery, and all other goods and chattels on the premises, and also all other machinery and other articles then in and on said premises, or which might thereafter be placed in and upon them. This debt was reduced by payments to an amount somewhat less than $10,000.

In July, 1872, Bodine sold his interest to Draper and Thomas, and to pay him they borrowed $10,000 of one Mrs. Forest, and executed as security therefor, a trust-deed to Anthony Hyde, upon the same lot, mill, machinery, fixtures and furniture then on the premises, and also upon several other lots not embraced in Davis' trust-deed.

In February, 1875, the mill burned down, and Draper and Thomas rebuilt it at an expense of about $3,600, Davis furnishing the money.

Draper and Thomas failing to pay their interest, in March, 1877, Hyde, as trustee for Mrs. Forest, advertised for sale the property embraced in her deed of trust, including the fixtures, machinery and personal property in the planing-mill. The original bill in this case was filed by Draper to restrain the sale. The principal grounds on which the bill was founded were, that Hyde threatened to sell more property than was embraced in his trust-deed; that the sale at that time would be attended with a great sacrifice; that Davis' trust-deed was prior to that of Mrs. Forest's; that her deed did not cover the machinery and chattels procured since the fire, or since its execution; that Thomas in 1870 had executed a trust-deed on his share to the complainant Draper to secure $2,600; that Mrs. Forest's trust-deed covered other property; and that to secure a just and equitable distribution of the proceeds there should be a sale under a decree of the court. The bill prayed an injunction to prevent Hyde from making a sale as proposed by him, especially as to the machinery and personal property, and made Thomas and his wife, Davis and his surviving trustee, Winder, and one Champlin, parties defendant. A temporary injunction was granted. Answers were filed and proofs were taken. In June, 1877, [349] whilst the suit was pending, Davis directed his trustee, Winder, to advertise for sale the property embraced in his deed of trust. Draper then filed a supplemental bill to enjoin this sale. The court finally made a decree, directing Winder to sell all the property embraced in the trust-deed, executed to him and Fendall, including the planing-mill, fixtures, machinery and personal property, and to bring the proceeds into court to abide its further order, retaining the cause in the meantime for the purpose of ascertaining the condition of all the parties after the sale shall have taken place. Hyde was enjoined from making a sale until further order.

Draper appealed from this decree. Why he has appealed it is somewhat difficult to see. The decree is substantially in accordance with what he sought by his bill—a judicial administration of the property and a provision for ascertaining the equities of the parties. We think that the decree was a just and proper one. Although a deed of trust to secure a debt usually authorizes the trustee to sell on default of payment, yet where a trustee attempts, as Hyde did in this case, to sell property subject to conflicting liens, some of which it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly. No injury is done by the decree appealed from to Davis or to Mrs. Forest, because they want a sale to be made, and the sale ordered by the court will fully protect their rights as well as those of all the other parties; and, besides, they have not appealed from the decree. It cannot be doubted that the court had full power to take the trustee, Winder, under its control and to direct him to dispose of the trust fund embraced in the deed executed to him, including the personal property in dispute. As it is the purpose of the court to adjust all the equities of the parties in due and regular course, we are unable to perceive anything in the decree which can injuriously affect the appellant.

The decree is, therefore, affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[350] EDWARD MILLER & COMPANY, *Appts.*,

v.

BRIDGEPORT BRASS COMPANY.

(See S. C., 14 Otto, 350-356.)

Invalid letters patent—dedication to public—enlarging claim—legislation—laches.

1. The second re-issue of a patent for an improvement in lamps, originally granted to Joshua E. Ambrose, is not for the same invention which was

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described and claimed in the original patent, and is invalid as to the invention specified in the second claim.

2. A claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed.

3. Nothing but a clear mistake or inadvertence, and a speedy application for its correction, is admissible when it is sought merely to enlarge the claim.

4. It was not the purpose of the legislation on this subject to authorize the surrender of patents for the purpose of re-issuing them with broader and more comprehensive claims.

5. In reference to re-issues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied.

[No. 31.]

Submitted Mar. 1, 1881. Decided Jan. 9, 1882.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The case is sufficiently stated by the court.

Mr. **John S. Beach,** for appellants.

Mr. **C. R. Ingersoll,** for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit brought to restrain the infringement of a patent, and for an account of profits, etc. The patent was for an alleged improvement in lamps, and was originally granted to Joshua E. Ambrose, October 16, 1860, for fourteen years, and was extended for seven years longer. It was twice surrendered and re-issued, once in May, 1873, and again in January, 1876. The court below dismissed the bill on the ground that the second re-issue, on which the suit was brought, was not for the same invention which was described and claimed in the original patent. We agree with the circuit court in the conclusion to which it came. The original patent described a combination of devices, amongst other things, two domes or reflectors, one above the other, elevated above a perforated cap through which a wick tube and a vapor tube ascended. It was claimed that this combination of devices, especially including the two [351] domes, which admitted the external air between them for producing a more perfect combustion, would make a lamp which, without a chimney, and without danger of explosion, would burn those hydro-carbons which are volatile and contain an excess of carbon. The invention proved a failure, but it was found that the use of one of the domes (and the other parts), with the restoration of the chimney, would be a real improvement, and both plaintiff and defendant made such lamps in large quantities. Fifteen years after the original patent was granted, the patentee (or rather his assignee) discovers that the improved lamp was really a part of his original invention, and that, by *inadvertence and mistake,* he had omitted to claim it. We think, however, that the court below was clearly right in holding that the invention specified in the second claim of the re-issued patent, which is the one in question here, is not the same invention which was described and claimed in the original patent. The latter was for a double dome without a chimney, the peculiarity of the supposed invention being, the use of the double dome as a means of dispensing with the chimney. The re-issue is for a single dome with a chimney. It is not only obviously a different thing, but it is the very thing which the patentee professed to avoid and dispense with.

But there is another grave objection to the validity of the re-issued patent in this case. It is manifest on the face of the patent when compared with the original, that the suggestion of inadvertence and mistake in the specification was a mere pretense; or if not a pretense, the mistake was so obvious as to be instantly discernible on opening the letters patent, and the right to have it corrected was abandoned and lost by unreasonable delay. The only mistake suggested is, that the claim was not as broad as it might have been. This mistake, if it was a mistake, was apparent upon the first inspection of the patent, and if any correction was desired, it should have been applied for immediately.

These afterthoughts, developed by the subsequent course of improvement, and intended, by an expansion of claims, to sweep into one net all the appliances necessary to monopolize a profitable manufacture, are obnoxious to grave [352] animadversion. The pretense in this case, that there was an inadvertence and oversight which had escaped the notice of the patentee for fifteen years, is too bald for human credence. He simply appealed from the judgment of the office in 1860 to its judgment in 1876; from the commissioner and examiners of that date, to the commissioner and examiners of this; and upon a matter that was obvious on the first inspection of the patent. If a patentee who has no corrections to suggest in his specification except to make his claim broader and more comprehensive, uses due diligence in returning to the Patent Office, and says "I omitted this," or "my solicitor did not understand that," his application may be entertained and, on a proper showing, correction may be made. But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or if his, he dedicates it to the public. This legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was framed by real inadvertence, accident or mistake, without any fraudulent or deceptive intention on his part; and this should be done with all due diligence and speed. Any unnecessary laches or delay in a matter thus apparent on the record, affects the right to alter or re-issue the patent for such cause. If two years public enjoyment of an invention with the consent and allowance of the inventor, is evidence of abandonment, and a bar to an application for a patent, a public disclaimer in the patent itself should be construed equally favorable to the public. Nothing but a clear mistake or inadvertence, and a speedy application for its correction, is admissible when it is sought merely to enlarge the claim.

The power given by the law to issue a new patent upon the surrender of the original, for the correction of errors and mistakes, has been greatly misunderstood and abused. It was first contained in the Act of July 3, 1832, 4 Stat. at L., 559, and the law was adopted in view of [353] suggestions made in several judgments of this court. But it was carefully confined to cases where the patent was *invalid* or *inoperative* by reason of a failure to comply with any of the

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terms and conditions prescribed by the law for giving a clear and exact description of the invention, and where such failure was due to inadvertence, accident or mistake, without any fraudulent or deceptive intention. This being shown, a new patent, with a correct specification, was authorized to be issued for the same invention. The Act of 1836, 5 Stat. at L., 117, enlarged the power to grant re-issues by adding an additional ground for re-issue, namely: that the patentee had inadvertently claimed in his specification, as his own invention, more than he had a right to claim as new. And, with that addition, the law has continued substantially the same to the present time. The 53d section of the Act of 1870, 16 Stat. at L., 201, which was the law on this subject when the re-issue in the present case was granted, was in the following words: "Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent, and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee." It will be observed that whilst the law authorizes a re-issue when the patentee has claimed too much, so as to enable him to contract his claim, it does not, in terms, authorize a re-issue to enable him to expand his claim. The great object of the law of re-issues seems to have been to enable a patentee to make the description of his invention more clear, plain and specific, so as to comply with the requirements of the law in that behalf, which were very comprehensive and exacting. The Act of 1793, section 3, 1 Stat. at L., 318, required an applicant for a patent "To deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear and exact terms as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same. And in the case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions; and he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings." This careful and elaborate requirement was substantially repeated in the Patent Act of July 4, 1836, sec. 6, with this addition: "And shall particularly specify and point out the part, improvement or combination which he *claims* as his own invention or discovery." Although it had been customary to append a claim to most specifications this was the first statutory requirement on the subject. It was introduced into the law several years subsequent to the creation of re-issues; and it was in the 13th section of this Act of 1836, that provision was made for a re-issue to correct a claim which was too broad in the original. Now, in view of the fact, that a re-issue was authorized for the correction of mistakes in the specification before a formal claim was required to be made; and of the further fact that when such formal claim was required, express power was given to grant a re-issue for the purpose of making a claim more narrow than it was in the original, without any mention of a re-issue for the purpose of making a claim broader than it was in the original; it is natural to conclude that the re-issue of a patent for the latter purpose was not in the mind of Congress when it passed the laws in question. It was probably supposed that the patentee would never err in claiming too little. Those who have any experience in business at the Patent Office know the fact, that the constant struggle between the office and applicants for patents has reference to the claim. The patentee seeks the broadest claim he can get. The office, in behalf of the public, is obliged to resist this constant pressure. At all events, we think it clear that it was not the special purpose of the legislation on this subject to authorize the surrender of patents for the purpose of re-issuing them with broader and more comprehensive claims, although, under the general terms of the law, such a re-issue may be made where it clearly appears that an actual mistake has inadvertently been made. But, by a curious misapplication of the law, it has come to be principally resorted to for the purpose of enlarging and expanding patent claims. And the evils which have grown from the practice have assumed large proportions. Patents have been so expanded and idealized, years after their first issue, that hundreds and thousands of mechanics and manufacturers, who had just reason to suppose that the field of action was open, have been obliged to discontinue their employments, or to pay an enormous tax for continuing them.

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Now whilst, as before stated, we do not deny that a claim may be enlarged in a re-issued patent, we are of opinion that this can only be done when an actual mistake has occurred; not from a mere error of judgment, for that may be rectified by appeal, but a real, *bona fide* mistake, inadvertently committed; such as a court of chancery, in cases within its ordinary jurisdiction, would correct. Re-issues for the enlargement of claims should be the exception and not the rule. And when, if a claim is too narrow, that is, if it does not contain all that the patentee is entitled to, the defect is apparent on the face of the patent, and can be discovered as soon as that document is taken out of its envelope and opened, there can be no valid excuse for delay in asking to have it corrected. Every independent inventor, every mechanic, every citizen, is affected by such delay, and by the issue of a new patent with a broader and more comprehensive claim. The granting of a re-issue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant re-issues, and may justly be declared illegal and void. It will not do for the patentee to wait until other inventors have produced new forms of improvement, and then, with the new light thus acquired, under pretense of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms. Such a process of expansion carried on indefinitely, without regard to lapse of time, would operate most unjustly against

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the public, and is totally unauthorized by the law. In such a case, even he who has rights, and sleeps upon them, justly loses them.

The correction of a patent by means of a re-issue, where it is invalid or inoperative for want of a full and clear description of the invention, cannot be attended with such injurious results as follow from the enlargement of the claim. And, hence, a re-issue may be proper in such [356] cases, though a longer period has elapsed since the issue of the original patent. But in reference to re-issues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied; and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent. And when this is a matter apparent on the face of the instrument, upon a mere comparison of the original patent with the re-issue, it is competent for the courts to decide whether the delay was unreasonable, and whether the re-issue was, therefore, contrary to law and void.

We think that the delay in this case was altogether unreasonable, and that the patent could not lawfully be re-issued for the purpose of enlarging the claim and extending the scope of the patent.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 371, 749; 105 U. S., 58, 166, 547; 106 U. S., 147, 428; 107 U. S., 645; 109 U. S., 649; 111 U. S., 103; 112 U. S., 357, 358, 360, 362, 363, 368, 669.

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[356] THOMAS L. JAMES, *Appt.*,

v.

CHRISTOPHER C. CAMPBELL, CHARLES EDDY, HORACE T. CASWELL AND SAMUEL R. CLEXTON.

SAMUEL R. CLEXTON, *Appt.*,

v.

CHRISTOPHER C. CAMPBELL, Assignee, etc., THOMAS L. JAMES, HORACE T. CASWELL, CHARLES EDDY AND CHARLES EDDY, as Trustee for H. T. CASWELL and SAMUEL R. CLEXTON.

CHRISTOPHER C. CAMPBELL, Assignee, etc., *Appt.*,

v.

THOMAS L. JAMES, CHARLES EDDY, HORACE T. CASWELL AND SAMUEL R. CLEXTON.

(See S. C., 14 Otto, 356-385.)

Void letters patent—re-issue—claim in patent—additional claim—Government's right to use patented invention.

*1. Norton's re-issued patent, dated Oct. 4, 1870, for an improved postoffice stamp for printing the postmark and canceling the postage-stamp at one blow, held to be void, by reason of not being for the same invention specified in the original.

2. If a patent fully and clearly describes and claims a specific invention, complete in itself, so as not to be inoperative or invalid by reason of a defective or insufficient specification, a re-issue cannot be had for the purpose of expanding and generalizing the claim, so as to embrace an invention not specified in the original. Burr v. Duryee, 1 Wall., 531 [XVII., 650] re-affirmed.

3. In such case, the court ought not to be required to explore the history of the art to ascertain what the patentee might have claimed; he is bound by his statement of what his invention was.

4. A patentee cannot claim in a patent the same thing claimed by him in a prior patent; nor what he omitted to claim in a prior patent in which the invention was described; he not having reserved the right to claim it in a separate patent, and not having seasonably applied therefor.

5. A patent for a machine cannot be re-issued for the purpose of claiming the process of operating that class of machines; because, if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention. Powder Co. v. Powder Works, 98 U. S., 139 [XXV., 82] re-affirmed.

6. The Government of the United States has no right to use a patented invention without compensation to the owner of the patent.

Query. Whether an officer of the Government can be sued for using an invention only for and in behalf of the Government; and whether the Court of Claims is not the only tribunal in which the claim for compensation can be prosecuted.

[Nos. 630, 767, 769.]

Argued Jan. 19, 20, 21, 1881. Decided Jan. 9, 1882.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **Chas. Devens,** *Atty-Gen.*, and **Samuel B. Clarke,** for James.

Messrs. **Geo. H. Williams, Benjamin F. Butler** and **M. P. Norton,** for Campbell.

Mr. **Edward B. Bettens,** for Clexton and Caswell, and Charles Eddy, their trustee:

The following is the supplemental brief filed by the counsel for Mr. James on the points "Whether a patent excludes the Government," and "Whether the alleged infringement herein is an Act of State which relieves the government officer from personal liability."

The evidence shows that the postmarking and canceling stamps used at the New York office were purchased with the money of the United States, and were its property, and the use thereof was with the knowledge and approval of the Postmaster-General. It does not appear that the use was originally directed by him. It also appears that Congress knew of and ratified the use.

The Revised Statutes, section 4049, provide that the accounts of the postal service shall be kept in such manner as to show the amount of expenditure, among other things for "postmarking and canceling stamps."

See, also, the Private Resolution of Congress, approved July 14, 1870, which was offered in evidence by Campbell.

I. The grant of a patent for an invention does not exclude the Government from using the thing patented. *Feather* v. *Queen*, 6 Best & S., 257; *Dixon* v. *London Small Arms Co.*, L. R. 10 Q. B., 130; *S. C. in Ct. of App.*, L. R. 1 Q. B. D., 384; *S. C. in H. of L.*, L. R., 1 App. Cas., 632.

The English Judges, in reaching their conclusion, were guided by the following principles:

*Head notes by *Mr. Justice* BRADLEY.

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1. The Sovereign's grant is to be construed against the grantee.

2. The Sovereign is not bound by the general words of a statute or grant, unless expressly named or included by necessary implication.

These principles have been held to apply as much to the sovereignty of the United States as they do to the Crown of England. *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *Bk.* v. *U. S.*, 19 Wall., 227 (86 U. S., XXII., 80).

II. The alleged infringement, consisting in the use of government property by a government officer was an Act of State, which merges the individual liability of the officer and remits the owner of the patent to such remedy against the Government directly as the law affords.

Heaton v. *Quintard*, 7 Blatchf., 73; *Buron* v. *Denman*, 2 Exch., 167; *Wiggins* v. *U. S.*, 3 Ct. of Claims, 422; *Carr* v. *U. S.*, 98 U. S., 433 (XXV., 209); *Langford* v. *U. S.*, 101 U. S., 341 (XXV., 1010); *Doe* v. *Roe*, 8 Mees. & W., 579; *U. S.* v. *McLemore*, 4 How., 286; *Hill* v. *U. S.*, 9 How., 389.

[357] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case is founded on a bill in equity filed by Christopher C. Campbell, the complainant below, against Thomas L. James, United States Postmaster in and for the City of New York, to enjoin him from using a certain implement for stamping letters, which the complainant claims to have been patented to one Marcus P. Norton, by letters patent dated April 14, 1863, and surrendered and re-issued on the 23d of August, 1864; and again surrendered and re-issued on the 3d of August, 1869; and again, finally, on the 4th of October, 1870. The complainant claims to be assignee of Norton, the patentee. Other persons claiming an interest in the patent were made parties to the suit. The circuit court rendered a decree in favor of the complainant, and adjusted the rights of the several parties to the amount of the decree. The defendant, James, appealed. The other parties, not being satisfied with the decree as it affected their mutual interests, also appealed. The case is now before us in all its aspects. Supposing the court below to have had jurisdiction of the case, the first question to be considered will be the liability of the principal defendant, James, to respond for the use of the machine or implement in question.

That the Government of the United States when it grants letters patent for a new invention [358] or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt. The Constitution gives to Congress power "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," which could not be effected if the Government had a reserved right to publish such writings or to use such inventions without the consent of the owner. Many inventions relate to subjects which can only be properly used by the Government, such as explosive shells, rams and submarine batteries to be attached to armed vessels. If it could use such inventions without compensation, the inventors could get no return at all for their discoveries and experiments. It has been the general practice, when inventions have been made which are desirable for government use, either for the Government to purchase them from the inventors, and use them as secrets of the proper department; or, if a patent is granted, to pay the patentee a fair compensation for their use. The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters patent to those who entitle themselves to such grants. The Government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent, the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.

But the mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute. The most proper forum for such a claim is the Court of Claims, if that court has the requisite jurisdiction. As its jurisdiction does not extend to torts, there might be some difficulty, as the law now stands, in prosecuting in that court a claim for the unauthorized use of a patented invention; although [359] where the tort is waived, and the claim is placed upon the footing of an implied contract, we understand that the court has, in several recent instances, entertained the jurisdiction. It is true, it overruled such a claim on the original patent in this case, presented in 1867; but, according to more recent holdings, it would probably now take cognizance of the case. The question of its jurisdiction has never been presented for the consideration of this court, and it would be premature for us to determine it now. If the jurisdiction of the Court of Claims should not be finally sustained, the only remedy against the United States, until Congress enlarges the jurisdiction of that court, would be to apply to Congress itself. The course adopted in the present case, of instituting an action against a public officer, who acts only for and in behalf of the Government, is open to serious objections. We doubt very much whether such an action can be sustained. It is, substantially, a suit against the United States itself, which cannot be maintained under the guise of a suit against its officers and agents except in the manner provided by law. We have heretofore expressed our views on this subject in the case of *Carr* v. *U. S.*, 98 U. S., 433 [XXV., 209], where a judgment in ejectment against a government agent was held to be no estoppel against the Government itself.

But as the conclusion which we have reached in this case does not render it necessary to decide this question, we reserve our judgment upon it for a more fitting occasion.

The subject-matter of the patent on which the bill in this case was founded, is an implement or stamp for postmarking letters and canceling revenue and postage-stamps. The original patent, dated April 14, 1863, exhibited two stamps connected together by a cross-bar which was attached to a handle; one stamp being in-

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tended for printing the postmark, and the other for canceling the postage-stamp, both operations being performed by a single blow. The stamps consisted of small hollow blocks, or cylinders, in which were inserted and fastened the types which produced the impressions desired. In one were placed the lettered types which produced the postmark, and in the other a single type which blotted or canceled the postage-
[360] stamp. The patentee, in his specification, described the invention as follows:

"The nature of my improvements, herein described, consists in the employment and combination of a device for canceling postage or other stamps by means of wood, cork or similar material inserted in a tube or recess therein, for the purpose of effacing or blotting such stamps with indelible ink. It also consists in the combination of a canceling device, having wood, cork, rubber or any similar material for the type or blotter therein, with any postmarking device so as to blot, cancel or efface postage-stamps with indelible ink at the same time and operation of postmarking of letters, packets, etc., etc.

To enable others skilled in the art to which my invention relates to make and use the same, I will here proceed to describe the construction and operation thereof, which is as follows, to wit: I construct the postmarking stamp (D) of any suitable material. (E), Fig. 3, is the mortise or recess of suitable dimensions to receive the type for the month, the day of the month, and the year, around which is the name of the place where used, and is the same as the postmarking device described in my letters patent, bearing date the sixteenth day of December, 1862, and which is secured to the cross-piece (B) in the same manner and by the same means as described and set forth in the said patent, which is also the case with the canceling device (C).

I construct the canceling stamp or device (C) of any suitable material, of any size required in diameter, and in length to correspond to the postmarking device (D). (F), Fig. 3, is the tube or recess in the device (C) for the purpose of receiving the blotting or canceling device (G), Figs. 2 and 5, which device is made of wood, cork, rubber or similar material, so as to closely fit the said tube or recess (F), Fig. 3. The face of this device may contain a plan or form for canceling with indelible ink, like that shown at Fig. 2, or it may have any plan or form for that purpose thought best to devise or use. This device (G) may project somewhat below the lower end of the said tube (F), as seen at Fig. 5, and may also project below the face of the postmarking or rating device (D), Figs. 2 and 3, and it may be driven out of the said tube or recess by means of a pin or bolt operating through the hole (A), Figs. 3 and 5, for the purpose of repairs, or to replace it by a new one. The said tube or recess (G) may be any size in diameter required or any depth desired. The said canceling stamp or device (C) being thus constructed with cork, rubber or other elastic substance for
[361] type or blotter, will receive and hold on the face thereof ink, in quantities sufficient to blot or cancel the postage-stamp in such manner as to prevent the possibility of the said postage-stamp being cleansed of the canceling ink by any chemical or other process, for the said ink would be so effectually put thereon that any attempts to remove it therefrom would entirely destroy the said postage-stamp, and thereby render the same incapable of a second or re-use. The said cork, rubber or other elastic substance, as aforesaid, will render the said stamp capable of an easy and rapid use, for there being a yielding of the same when the blow is given, the operator will not tire as soon by a constant or continued use of the same as though it were of solid metal, and the same will greatly aid in raising the entire stamp from the paper and postage-stamp when the impression shall have been given by the operator. The said blotter or type can be more easily repaired or replaced by a new one at less expense than if made of solid metal. The said cork, rubber or other elastic material may extend upward to the said cross-bar (B), and there be connected to the same by a screw or pin-bolt, if desired, which will be the same in effect and in operation.

Having thus described my invention and improvements in marking and canceling stamps, what I claim and desire to secure by letters patent of the United States of America, therein, is:

1. The canceling device (C) with wood, cork or rubber type or blotter (G) therein, or any device substantially the same, so as to cancel the postage-stamp with indelible ink, substantially as herein described and set forth.

2. I also claim the canceling device (C) with wood, cork or similar material forming the type or blotter (G) therein, in combination with the cross-piece (B), and with the postmarking device (D) substantially as herein described and set forth."

We have given the description and claim in [362]
full for the purpose of better comparing it with the re-issued patent on which the suit was brought, and which is dated October 4, 1870. It will be seen that the invention claimed is very specific and definite in its character. In the first place, the canceling device is claimed separately, consisting of a hollow tube, in which is inserted the canceling type or blotter made of wood, cork, rubber or other elastic substance. The nature of the substance of which the blotter was to be made is emphasized thus: "The said cork, rubber or other elastic substance as aforesaid, will render the said stamp capable of an easy and rapid use, for there being a yielding of the same when the blow is given, the operator will not tire as soon by a constant or continued use of the same *as though it were of solid metal*, and the same will greatly aid in raising the entire stamp from the paper and postage-stamp when the impression shall have been given by the operator. The said blotter or type can be more easily repaired or replaced by a new one, at less expense *than if made of solid metal*." It is plain, therefore, that elasticity in the material of which the blotter was to be composed was a distinctive feature of the blotting device thus separately claimed. Besides the advantages referred to in the foregoing extracts, its superior adaptability to hold indelible ink, was evidently regarded by the inventor as important. From the facts appearing in the case, it is quite clear that a separate claim of this blotting device could not have been sustained had it not presented these special characteristics; had it not, in fact, contained all the elements it did contain. The patentee himself, as will be

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more fully seen hereafter, had, shortly before his application for this patent, obtained a patent for a double stamp exactly like the one patented in this, except that the blotter type was made of "steel, or other material which would answer the purpose." Of course, he could not claim a blotter of like material in the patent now under consideration. And the record is full of evidence to show that hand types for stamping letters and other characters with or without the use of ink had long been constructed of almost every kind of material. The general form of the instrument was old. Stamps fastened to what is called a brad-awl handle, adjusted thereto centrally, so as to balance the pressure, was used for seals and other instruments for making impressions of every sort from time immemorial; and hand-stamps of the same general description, having a cylindrical type-holder in place of a seal, made hollow for inserting and holding the type had long been used in the Postoffice Department. It was not without good cause, therefore, that the separate claim for the canceling device, as a distinct invention, was confined to an elastic type or blotter inclosed in a hollow tube. In like manner, [363] the combination of devices in the entire instrument, forming the subject of the second claim, was necessarily specific in its character, being restricted by the special construction of the canceling device. The specific form of a cross-bar to sustain the type-holder, and balance the effect of the blow or pressure when making the impression, was substantially contained in the common hand-type, long before used for printing names on linen with indelible ink. This instrument consisted of a metallic trough or receiver to hold the type, the bottom of which, at its middle part, was attached to a wooden brad-awl handle. Inserting the types for a postmark in one end of this device, and the type for blotting the postage-stamp in the other, it would be a complete double stamp like that claimed by Norton, the patentee. The fact that it might require a stronger piece of metal for postoffice uses than was required for stamping letters on cloth, or that the type-holder would be better adapted to the purpose by being divided into two compartments, does not detract from the substantial similarity of the instruments. Given, the idea of stamping the postmark and blotting the postage-stamp with one instrument at a single blow, it required but little invention, in view of what was then in common use, to adjust the printing apparatus to the handle by means of a block, shoulder, or cross-bar, or other similar device. The needs and requirements of the instrument would soon be developed, and manifest themselves to any skilled workman in that branch of mechanics.

The evidence does not show to our satisfaction that Norton was by any means the first inventor of a double postoffice stamp, so constructed as to make the postmark and cancel the postage-stamp at one blow. If that fact was important, the burden of proof was on the complainant to show that Norton's invention antedated those of others proven in the cause, of which there were several independent of each other. But there is no satisfactory proof that Norton ever produced, prior to 1862, or, at most, prior to 1861, any other double stamp than one which he patented in 1859. In connection with one C. A. Haskins, he obtained a patent in October, 1857, for a hand-stamp attached to a standard with a projecting arm, and provided with a spring to lift it from [364] the paper automatically, after the blow which made the impression was given. This stamp was an elaborate and complicated contrivance of wheels and cylinders for arranging and manipulating the types for making letters and figures showing the month and day of the month in the postmark. It had no hint of any secondary apparatus for effacing a postage-stamp at the same time. But in August, 1859, Norton obtained a patent for the use of his assignees, Reynolds and Low, which did contain a device for effacing the postage-stamp. Low seems to have been associated with him in the patent of 1857 in the way of furnishing money, but what was the nature or extent of the assignees' real interest in the patent of 1859 is not made to appear. The application for this patent was dated May 3, 1859, but when filed in the Patent Office is not shown. The principal feature of the stamp described in this patent was also an elaborately contrived device for arranging the types for the letters and figures in the postmarking stamp, something in the same line with that described in the patent of 1857; no claim for which, however, was allowed. But to the postmarking stamp, which was fixed to the handle in the ordinary way, was attached, on one side, entirely outside of the bearing of the handle, a flat piece of metal to be used as a blotter, for which, in combination with the postmarking stamp, a claim was allowed. It is clear to us that this was the stamp to which Norton alluded, and which he asked to have the privilege of testing in the postoffice at Troy, in his letter to the Assistant Postmaster-General of the 11th of April, 1859, on which much stress has been laid by the complainants. The letter does not give a description of the stamp he wished to test, but it concludes with these words: "I herewith inclose you an envelope containing a postmark from the stamp on the left, and an erasure upon the stamp made at the same operation of postmark. As *now* constructed, it is believed to work well." This is a clear intimation that what he desired to have tested had been recently brought to its existing form. In a former part of the letter he had said: "While the order given by your department was in force, I was unable, in consequence of sickness, to thoroughly test my stamp. It was used upon about three thousand letters only during that time. I have since made some changes in it which seem to make it a much better thing [365] for the purpose designed. Now I ask the opportunity to test it without any expense to the government." An order was made by Mr. King, the Assistant Postmaster-General, on the 4th of May, 1859, authorizing the postmaster at Troy to use for postmarking letters at his office for the term of three months "Norton's improved marking stamp." The application for the patent had been prepared and sworn to, the day previous to this order, namely: May 3, 1859. In this application the description of the invention commences thus:

"The nature of my invention consists in constructing, combining, and arranging a hand-stamp, hereinafter described, so as to contain a cylinder with the initials of each and every month in a year, and two other cylinders with figures for the respective days of each and every

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month; also a cylinder with figures to represent ten years, more or less as the case may be, which cylinders shall revolve upon the same shaft with each, and within a stationary form of type, and thereby print the month, the day of the month, and the year in connection with each, and each in connection with and at the same time of the printing of the subject-matter upon the aforesaid stationary form of type. It also consists in attaching a blotter, hereinafter described, to the hand-stamp aforesaid, upon one or two sides thereof, for the purpose of cutting, blotting, canceling or effacing 'the frank' or postage-stamp, so as to prevent a second use of the same, while at the same time the name of the 'postoffice,' the year, the month, and the day of the month is printed upon the envelope and one side of the said frank or postage-stamp, thereby giving a good impression of the same, and prevent undue wear of the said postmarking stamp in consequence of being used upon the uneven surface made by the said frank or postage-stamp."

Now, if Norton had, as he pretends, invented, as early as 1854, the stamps for which he took out his subsequent patents in 1862 and 1863, it is hardly conceivable that he should have taken out the patents for 1857 and 1859 in the form in which they stand. The fact that he did take [366] them out reduces it almost to a demonstration that he had not invented any such stamps at this time.

It is true he produces a *caveat* filed by him in 1853, which has, or had, an amendment bearing date "Tinmouth, Vt., August 7, 1854," which amendment contained a full description of the double stamp as finally exhibited in his patent of 1863, and the re-issue thereof. But this amendment was shown to have been surreptitiously introduced by him amongst the papers of the office, certainly as late as 1864, ten years after its pretended date. In his examination as a witness in this cause, he admitted that he made the paper referred to in the summer of 1864, when his assignees, Shavor and Corse, were applying for a re-issue of the original patent now in question, and that it was used in that application; but he pretends that it was a copy of a paper which he made and sent to the Patent Office in 1854. No such original paper, however, has ever been found in the Patent Office, and on a regular charge for the offense of making the surreptitious paper and introducing it amongst the files, he was found guilty in September, 1871, and debarred, by order of the Commissioner of Patents, from further access to the papers of the office.

This amended *caveat*, therefore, as well as the testimony of Norton on the subject, may be laid out of view.

A witness by the name of Sherwood, a machinist and model-maker, was examined, who produced a sheet or two of items of account, copied from his books, showing charges against Norton for work on "stamps" in 1857, 1859, 1860 and 1862. There were four items in 1857 under date of May, for certain hours of work, charged thus: "May 8. To three hours, finish [388] stamp." There was a large number of items of similar character in the other years named, particularly in January and March, 1859, and August, September, November and December, 1862, corresponding, as will be observed, with the times when Norton must have been getting up his models for his different patents. The witness was unable to distinguish the kind of stamps he worked on at these different dates, except that he professed to feel quite sure that the first one would postmark a letter and cancel a stamp thereon at the same time. Describing, on his cross-examination, the stamp which he thus referred to, he says: "It was a dating wheel-stamp, the wheels giving the dates, with a die for the office and year in the top of the frame that held it, blotting or canceling at one end the impression given by a blow on the lever by the hand." Now this description applies aptly [367] to both the stamp patented in 1857 and to that patented in 1859, except that it was the latter only which had the blotting attachment. We think it perfectly apparent that the witness had, by a very natural mental process, confounded the instruments together, and imagined that the blotter was attached to the first instead of the second invention. His examination took place twenty years after the date of the accounts, and he relied solely on his memory as to the character of the articles which he worked upon.

This is really the strongest evidence that can be found in the record affording any ground for the conclusion that Norton ever produced any double stamp at all prior to the one he patented in 1859. The testimony of Mr. King, the former Assistant Postmaster-General, when compared with his own contemporary letters and other circumstances, clearly indicates that he had, quite naturally, confounded the device of one date with that of a later date. Other evidence was relied on, but all of such a loose and indefinite character that no reliance can be placed on it in support of the complainant's theory. And it is quite significant that no stamp of the kind claimed, made at the period in question, was produced in the examination. Had such stamps ever been in existence, it is strange that they should have altogether disappeared.

Now, there is abundant evidence in the record to show that double stamps were conceived of and used before 1859, and that about that time they sprung up spontaneously in various parts of the country. It was but recently that there had been any demand for their construction, since postage-stamps had not been in general use in the country for any long period. They were first authorized to be issued and used by the Act of March 3, 1847, 9 Stat. at L., 188; but it was optional to use them or not. By the Act of 1851, postage on single letters was reduced from five cents to three on being prepaid. 9 Stat. at L., 587. It was not till the passage of the Act of March 3, 1855, 10 Stat. at L., 641, that all postage was required to be prepaid. This law first brought postage-stamps into universal use; and as they must be canceled, two impressions had to be made on a letter, one for the ordinary postmark, giving the [368] place and date of mailing the letter; the other for canceling or effacing the postage-stamp. This required two blows and produced double work. But without any great exercise of ingenuity, postmasters and clerks in various places improvised double stamps, generally by screwing, welding or binding to the side of the common stamp an appendage to serve as a blotter at the same time. This was done by Ezra Miller, at Janesville, Wisconsin, as early as January, 1859, or in 1858; and by Gen. Dix, in New

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York, and one Powers in Buffalo, in the summer of 1860. There is also evidence that a similar appendage for the purpose of stamping a large figure 5, to show the postage due, was invented and used by one Rees in the Philadelphia postoffice as early as 1845, when the rates of postage were 5 and 10 cents; and that one Ireland devised and used at the same office a like appendage for canceling postage stamps as early as 1853. Other similar devices were referred to in the evidence. The adoption of a more artistic and convenient form of the instrument thus spontaneously originated, as its use was continued and became more imperative, was a matter of course. Norton's particular form and construction of the double stamp, as described in his patent of 1863, was undoubtedly an improvement; but we should expect to find, as we do find, that he was restricted in his claim to the particular form and construction set forth in his specification.

A reference to Norton's application for the original patent in question in this case, a copy of which is in evidence, and which, being preserved of record in the Patent Office, may properly be referred to, shows that the functionaries of that office regarded it important that the instrument sought to be patented should be specialized with particularity. This application was presented to the office on the 5th of January, 1863, and was rejected on the 21st of February. On the 21st of March, 1863, the application was renewed in a letter addressed by Norton to the Commissioner of Patents, and after certain amendments were made to the specification, the patent was allowed to pass. The most important amendment was the insertion of that portion of the specification commencing with the words, "The said canceling stamp or device (C) being thus constructed with cork, rubber or other elastic substance for type or blotter," and so on, to the end of the paragraph. This amendment derives further importance and illustration from the letter of Norton above referred to, in which a renewal of the application was made, and which was dated at the National Hotel, in Washington, March 21, 1863. In that letter the writer says: [369]

"I do not understand that the device referred to in your letter of the 21st of February last is 'a common ink canceling stamp, such as has been used for years in our postoffices for blotting and thus canceling postoffice stamps.' The devices to which you undoubtedly refer have always been made of metal entirely or of wood entirely. Wood was found to answer no purpose, because not at all durable, so metal ones were used. *Now, this device consists of a barrel or tube, into which wood, cork, rubber or some such material is inserted, for the purpose of holding an indelible ink in quantities sufficient* to blot the postage-stamp so thoroughly as to prevent the same being washed or cleansed by a chemical mixture and again being used in payment of postage. *This tube or barrel holds firmly the elastic substance therein, and prevents the same from undue wear and exposure. The elastic substance therein being worn out, can again be replaced* at the office where used, thus saving the trouble and expense of returning the same to the gov't contractors for such repairs. *This, therefore, constitutes a new device*, composed of two distinct parts in combination, producing new results, besides blotting the postage-stamp.

This device being new, its combination with the postmarking device, for the purposes set forth in the specification, is of course new. Upon these two claims I, therefore, most respectfully ask a patent."

On the same day that this letter was received, according to the memorandum on the file-wrapper, the specification was returned to the applicant to enable him to amend it, and was re-examined on the 26th of March, and favorably passed upon on the 1st of April. No one can read the patent in the light of these contemporary documents, and of the previous history of the stamp, without arriving at the conclusion that, so far as the blotting device was separately concerned, the invention consisted of and was confined to a tube containing a type-blotter made of an elastic substance, as contradistinguished from iron or other hard substance. The iron or steel blotter had been patented in 1862, as already mentioned, and as will be shown more fully hereafter. There was not, there could not have been, any inadvertence or mistake in confining the invention to the combination described and claimed in the patent. [370]

The second claim is merely that of a combination of this specific device with the other parts of the apparatus. As the patentee says, in his letter to the commissioner, "This device being new, its combination with the postmarking device for the purposes set forth in the application is, of course, new." In other words, the substantive invention, for which the applicant desired a patent, was the blotting device constructed specifically in the manner and for the purpose described. The addition of the combination claim was for the purpose of possibly securing the combination, if the principal claim should be found to be untenable.

Perhaps we have gone more minutely into the evidence relating to the progressive improvements in this instrument than was necessary to show that the claim of the patent was not more restricted than it should have been. The court ought not to be called upon to explore the entire history of an art in order to ascertain what a patentee might have included in his patent had he been so disposed. If he was the author of any other invention than that which he specifically describes and claims, though he might have asked to have it patented at the same time, and in the same patent, yet if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent. When a patent fully and clearly, without ambiguity or obscurity, describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a re-issue cannot be had for the purpose of expanding and generalizing the claim so as to make it embrace an invention not described and specified in the original. It is difficult to express the law on this subject more aptly and forcibly than in the words of *Mr. Justice* Grier, in the case of *Burr v. Duryee*, 1 Wall., 577 [68 U. S., XVII., 660], where, in delivering the unanimous opinion of the court, he says: "The surrender of valid patents, and the granting of re-issued patents thereon, with expanded or equivocal claims, where the [371]

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original was clearly neither 'inoperative nor invalid,' and whose specification is neither 'defective or insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive and, therefore, more 'available' for the suppression of all other inventions." Of course, if, by actual inadvertence, accident or mistake, innocently committed, the claim does not fully assert or define the patentee's right in the invention specified in the patent, a speedy application for its correction, before adverse rights have accrued, may be granted, as we have explained in the recent case of *Miller* v. *Brass Co.* [*ante*, 783]. But where it is apparent on the face of the patent, or by cotemporary records, that no such inadvertence, accident or mistake, as claimed in a re-issue of it, could have occurred, an expansion of the claim cannot be allowed or sustained.

Turning now to the re-issued patent on which the present suit was brought, which is the third re-issue, dated October 4, 1870, we find the invention described as follows:

"The nature of my said invention and improvements herein contained and described consists in the employment and combination of a device or die used for the more complete and perfect cancellation of postage-stamps or letter-franks by means of soft wood used endwise, or of cork, rubber *or other suitable material*, whereby such stamp or frank is effaced and canceled, in and by indelible or other ink, in the manner substantially as herein described and set forth.

[372] It also consists in the combination of a postage-stamp canceling device or die, constructed of wood, cork, rubber, *or any suitable material*, with any suitably arranged and constructed postmarking stamp or device, so as to cancel, efface or destroy the postage-stamp or letter-frank with indelible or any suitable ink at the same time, blow, or operation of the stamp or instrument by which the postmark is given or made upon the letter, envelope or packet, substantially as herein described and set forth.

It also consists of the postmarking of letters, envelopes or packets, and in the cancellation of the postage-stamp or stamps thereon, with, in, or by any suitable ink, or similar material, by means of some soft wood used endwise against the postage-stamp, or by the means of cork, rubber, *iron or steel, or by means of any other suitable material* so combined with the postmarking stamp or instrument as to cancel, efface or destroy the postage-stamp or stamps at one and the same blow or operation of the entire instrument thus constructed for that purpose, whereby to prevent a second or re-use of such postage-stamp or stamps."

After some details as to the mode of construction, the specification proceeds:

"The said canceling type or dye can be easily repaired, or replaced by a new one, whenever desired, and at very little expense; and such canceling dye or type G may extend upward to the said cross-bar B, and there be connected to the same by means of a screw, pin or small bolt. In *such case there would not be any tube or pipe surrounding said canceling dye or type* G. The operation and effect produced would in such case of construction be the same.

The said postage-stamp canceling device, die or type G may be of any desired distance from the aforesaid postmarking or dating device or stamp D, or it may be securely *fastened to the immediate side* of the said postmarking and dating part or stamp or device D by any convenient and suitable mechanical means.

The said canceling dye, type or device G I prefer to use made of cork, as it will hold a much greater quantity of canceling ink upon and in the lower face thereof, and when it comes in contact with the printed surface of the postage stamp, such surface will become somewhat and sufficiently broken by means thereof, and thus and thereby inject into or impregnate such broken surface with the said canceling ink, whereby such postage-stamp, so operated upon and filled with such ink, cannot be sufficiently cleansed by any means as to enable it to be re-used, or used a second time, in fraud upon the postal revenue, without immediate detection of the same.

Soft wood, used endwise, will answer nearly the same purpose. Still, long and continued use after the granting of my said patent, April 14, 1863, has fully proven the superiority of the cork for the canceling dye or type used upon postage-stamps as aforesaid. * * *

I also construct my said postage-stamp canceling device, die or type of *cast iron, steel or other suitable metal*, substantially as shown at [373]
G', Figs. 5 and 6, and which may be secured to the said cross-bar or piece B in like manner as the said tube or cylinder C, Figs. 2 and 4, and which is done either by screw and nut where the same unites with the said cross-bar, or it may there be firmly fastened by means of suitably constructed and arranged pins or rivets, or the same may be soldered to the under side of said cross-bar or piece B, or otherwise attached thereto. * * *

The *aforesaid metal canceling device, die or type* G', Figs. 5 and 6, *may also be fastened or secured to the immediate side of the said postmarking device by any good and sufficient means*, substantially as hereinbefore described and set forth, in reference to the said device C, or tube or cylinder, constructed to receive and contain the said type or die G, Figs. 2, 3 and 4.

Such metallic device, dye or type may also have upon its lower face or lower surface any suitable configuration deemed best to use for the purpose of canceling the postage-stamp in, with, or by any suitable ink at the same time, blow and operation of the instrument or apparatus, as hereinbefore stated and set forth.

In any and every case the postmarking of the letter, envelope or packet, and the effacing or cancellation of the postage-stamp or letter-frank thereon representing value, are done at the same time and by the same blow or operation of the said several devices and parts, constructed and combined in the manner and by the means substantially as herein described and set forth.

Both the postmarking and cancellation of the said postage-stamp are done with indelible or other and suitable ink, used for such cancellation or effacing of the postage-stamp."

Omitting much more of this verbose specification, containing, amongst other things, a dissertation on the supposed advantages and importance of the invention, we add the summary of the patentee's claims, which is as follows:

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"What I claim, and desire to secure by letters patent of the United States of America, is:

1. The postage-stamp canceling device, cylinder, or tube C, containing a die or type G, made of cork, wood, *or other suitable material, or any equivalent for said cylinder* or tube C, *or for the said canceling die* or type G, whereby to efface, cancel or destroy the postage-stamp with indelible or other ink, in the manner and for the purposes substantially as herein described and [374] set forth.

2. The canceling device, cylinder, or tube C, with cork or wood, or *any substantial equivalent* thereof, forming the die or type G, therein, in combination with the cross-bar or piece B, and with the postmarking device D, substantially as and for the purposes herein described and set forth.

3. *The postmarking of letters, envelopes and packets, and the cancellation of the postage-stamps* thereon with ink, at one and the same blow or operation of the instrument, in the manner and by the means substantially as herein described and set forth.

4. *The employment and combination of a postmarking device, with a postage-stamp canceling device,* both being operated by one and the same handle, for the postmarking of letters, envelopes or packets, and for the cancellation of the postage-stamps thereon with indelible or other ink, in the manner substantially as herein described and set forth."

By these extracts from the specification, and the summary of claims, it appears perfectly obvious that the patentee has embraced in the reissued patent several matters of supposed invention different from and additional to the invention which formed the subject of the original patent. And it is principally, if not wholly, these new and additional claims which the appellant James, as postmaster of New York, is charged with infringing.

In the first place, a new form of the canceling device is set forth and claimed, different from that described in the original patent, to wit: a canceling type or die attached directly to the cross-bar, without any tube or pipe surrounding and holding the same. This is not contemplated or hinted at in the original patent. The latter does suggest, it is true, that "The cork, rubber or other elastic material may extend upward to the cross-bar, and there be connected to the same by a screw or pin-bolt, if desired;" but this suggestion had reference to a type inclosed, at the same time, by a surrounding cylinder, which formed the distinctive feature of the invention. The context shows that nothing more was intended by the suggestion than the extension of the type upward through the cylinder and fastening it in a particular way. The thought seems to have occurred to the patentee [375] that it might be an advantage, under some circumstances, in addition to fastening the type in the cylinder by compression, to extend it through the cylinder and fasten it to the bar to secure it from any danger of falling out of the cylinder by becoming loose. Not a hint was given that the cylinder could be dispensed with. This was an afterthought. The cylinder was clearly and distinctly set forth as a necessary constituent of the device, and an essential element in the combination of which the blotting device consisted.

The bearing which this new feature in the reissued patent has on the case, is evinced by the fact that one of the devices used for several years in the postoffice, which is complained of as an infringement of the patent, was a naked blotter made of cork, directly attached to the cross-bar, without any inclosing cylinder to support it; also by the fact that the other device used in the postoffice during the defendant's term of office consisted of an iron blotter directly attached to the side of the postmarking stamp without any inclosing cylinder.

In our judgment, this addition to the patent was no part of the original invention, and could not lawfully be embraced in the re-issue, and that the claim for it is, therefore, void. It is true that this particular feature is not made the subject of a distinct claim. But it is described as part of the invention, and would, probably, be included in the general and sweeping terms employed in the claims that are made. Regarded as not being a part of the original invention, those claims cannot stand if they are construed to include it; if they are construed so as not to include it, then the use of this form of device by the defendant cannot be adjudged an infringement of the patent.

Another new matter, forming no part of the original invention, but expressly disclaimed in the original patent, is the making of the blotter of cast iron, steel or other suitable material. The original specification, in various forms of expression, excludes such materials. The words "wood, cork, rubber or any similar material" have this intention, as shown by the context. A claimed advantage is that "The said cork, rubber or other elastic substance, as aforesaid, will render the said stamp capable of an easy and rapid use; for there being a yielding of the same when the blow is given, the operator will not tire as soon by a constant or continued use of the same *as though it were of solid* [3 *metal.* The said blotter or type can be more easily repaired or replaced by a new one, at less expense *than if made of solid metal.*" This language amounts to an express disclaimer of solid metal. The merit claimed for the invention was that the elastic materials proposed to be used for the blotter, and the use of which the patent throughout supposes possible by the support received from the surrounding cylinder were far superior to solid metal and other solid and inelastic substances. How, after this, it could be supposed that the use of solid metal as a material for the type-blotter was included in the invention, and that a claim for it was omitted through inadvertence and mistake, it is difficult to understand. Besides, as already seen, and will be again adverted to, the use of steel or other material that would answer the purpose had already been described and claimed in Norton's patent of 1862. We think that any claim in the reissued patent which can be fairly construed to embrace a blotter made of metal is void, and that the use of such a blotter by the defendant did not afford the patentee or the complainant any just ground of complaint.

In connection with this branch of the subject, it is observable that the patentee has added two new diagrams to his drawings for the purpose of exhibiting and illustrating this new ground of claim. This fact, though not decisive, is strongly corroborative of the conclusion which we have reached on the subject.

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The third addition in the re-issued patent to the invention described in the original is, that of the *process* of stamping letters with a postmark and canceling the postage-stamp, at one and the same blow or operation of the instrument, in the manner and by the means described and set forth. Leaving out of view the history of the art prior to the invention claimed by the patentee, what possible pretense can there be for contending that the general process was part of the invention which formed the subject of the original patent? Suppose it be true that Norton was the first inventor of this process, was that process the invention which he sought to secure in the original patent? A patent for a [377] process and a patent for an implement or a machine are very different things. *Powder Co.* v. *Powder Works*, 98 U. S., 126 [XXV.,77]. Where a new process produces a new substance, the invention of the process is the same as the invention of the substance, and a patent for the one may be re-issued so as to include both, as was done in the case of Goodyear's vulcanized rubber patent. But a process, and a machine for applying the process, are not necessarily one and the same invention. They are generally distinct and different. The process or act of making a postmark and canceling a postage-stamp by a single blow or operation, as a subject of invention, is a totally different thing in the patent law from a stamp constructed for performing that process. The claim of the process in the present case, however, is not so broad as this. It is for the process or act of stamping letters with a postmark and canceling the postage-stamp at one and the same blow or operation of the instrument, *in the manner and by the means described and set forth*. Perhaps this claim amounts to no more than a claim to the exclusive use of the patented instrument or device. If it is anything more, it is for a different invention from that described in the original patent. If it is not for anything more, the question is brought back to the instrument or device itself which forms the subject of the patent, and which has been already considered.

The last claim, to wit: "The employment and combination of a postmarking device with a postage-stamp canceling device, both being operated by one and the same handle for the postmarking of letters, envelopes or packets, and for the cancellation of the postage-stamps thereon with indelible or other ink, in the manner substantially as herein described and set forth," may admit of two constructions. It may either amount to a claim for a combination of any kind of devices for stamping and blotting, or for a combination of the particular devices described in the patent. Inasmuch as these specified devices, as we have already shown, embrace new devices not described in the original patent, the claim is too broad in either of its aspects to be advanced in a re-issue of that patent, unless the patentee was really the inventor of [378] the general combination of such devices in a double stamp, and was entitled to add a claim therefor to such re-issue. We have seen that his original patent was for a specific blotting device, and for the combination of such specific device with a post-stamping device in the same instrument. Could he, in a re-issue of the patent, lawfully make the broad claim of the combination of any and all devices for blotting and post-stamping, at one and the same time, in one and the same instrument? This would be, it is true, only adding a new claim to his patent, but greatly enlarging its scope and making it to embrace every kind of double stamp that can be conceived. Did he forget to insert this claim in his original patent? Was it admitted through accident or mistake? When we examine his original application, the changes it underwent, the careful exclusions as well as inclusions which it contained, and the particularity of the specific combination which he did claim, could he, after the lapse of more than a year (if we take the date of his first application for a re-issue as the time for consideration), be allowed to return to the Patent Office and pretend that he had inadvertently omitted the principal claim of the whole thing? If he was, or pretended to be, really the inventor of the entire double stamp, did not the patent, on its face, show that the invention was not secured to him, that it contained no such claim? And was not this omission obvious on inspection? The truth is, that when he made his original application, and got his original patent, all the documents show demonstrably that he did not intend it to embrace any such broad invention. That was not the invention he sought to secure. Having obtained a patent for his specific device and combination, if he afterwards wished to claim the general combination, and had not already abandoned it by taking a narrower patent, he was bound to make a new application for that purpose. Patentees avoid doing this when they can, and seek to embrace additional matters in a re-issue, in order to supersede and get possession of the rights which the public, by lapse of time or other cause, have acquired in the meantime. It is for this very reason that the law does not allow them to take a re-issue for anything but the same invention described and claimed in the original patent.

But these broad claims in the re-issued patent, if construed according to the latitude in [379] which they are expressed, are void by reason of embracing inventions which had been patented both in England and in this country prior to the patentee's application for the original patent.

A stamp with a postmarking device and a blotting device combined in one instrument was described in an English patent, dated April 24, 1860, granted to one David G. Berri. As shown in the drawing, the postmarker and blotter were attached to one metallic plate, analogous and equivalent to the cross-bar described in Norton's patent, to the center of which plate the handle was attached, so that the instrument was equally balanced. The particular object of the patent was to secure a method of hinging the plate containing the types on to the fixed plate to facilitate the insertion and change of the types. But the double stamp is fully exhibited; and the patentee, in the specification, says: "In conclusion to the foregoing description, it may be here necessary to note that my improved date stamp may be employed, either in connection with the double or obliterating mark, as represented, or separately, in conformity with the usual requirements."

The same combination of postmarker and blotter in one instrument was also exhibited in Norton's own patent of August 9, 1859. As he

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did not then reserve the process of stamping letters with such an instrument, nor the combination of a postmarker and a blotter, and did not make any simultaneous application therefor, he could not afterwards obtain a patent for such process and combination, but would be restricted to such particular combination or process as might be exhibited in a new device or apparatus.

We have already referred to this patent of 1859, and will here only quote from the specification, to show the construction of the stamp, and the scope which the patentee claimed his invention to possess. He says:

"*The blotter* (J) is fastened to the frame (B) upon one side thereof by the use of the shaft (D), one end of which passes through the upper part of the said blotter, and which is firmly secured to the said frame by means of the nut (E), or by using it for the nut in place of the said nut (E) as aforesaid. This blotter is then and thereby retained in a fixed and strong position by means of the screw (S) in connection with the said shaft (D), the blotter (J) or nut (E), and is for the purpose of cutting, inking, blotting, [380] effacing and effectually canceling the frank or postage-stamp, while, at the same time and operation, the name of the postoffice, the year, the month and the day thereof are given upon the envelope or letter at one side of the said frank or postage-stamp, and not upon it as now practiced, in order to efface and to cancel it under the operation of stamping, which unduly wears out the marking stamp, gives a bad and unintelligible impression, and is in direct violation of the rules or statute of the Postoffice Department. This stamp may have another blotter like (J), which shall be upon the opposite side thereof, by the use of which the frank or postage-stamp would be cut, inked, blotted, effaced and canceled upon any part of the letter or envelope where it may be placed. One blotter like (J), however, is believed to answer the required purpose. *This blotter* (J) *may be made of any size or shape, and of any material to answer the end or purpose sought to be obtained.* The face, which receives the ink, and which comes directly upon the frank or postage-stamp, is grooved or cut, thereby leaving various projections, which have a sharp or knife-edge sufficient for each to cut entirely through the frank or postage-stamp, but not through the envelope immediately under the same, while at the same time the places thus cut are inked by the same sharp-edged projections or cutters on the face of the said blotter as aforesaid. The said blotter (J) should be made of the best kind of *cast steel*, and in such shape as not to break any part thereof. The projections upon the face of the said blotter may be kept sharp and in cutting order by filing and sharpening them when dull."

The claim of this patent is as follows:

"Having thus set forth and described my invention, what I claim and desire to secure by letters patent of the United States is:

The blotter (J), connected or attached to the main part of any 'postoffice postmarking stamp' for the purpose of cutting and inking, blotting, and effacing so as to successfully cancel the frank or postage-stamp of any letter or any package at the same time and operation of marking or printing upon such letter or package the name of any postoffice, the year, the month and the day of the month, substantially as and for the purpose herein set forth."

Another patent was taken out by Norton on the 16th of December, 1862, for a double stamp, [381] containing a combination of the postmarker and blotter and the cross-bar connecting them, and to which they were attached. The drawings attached to this patent, exhibit exactly the same form of instrument which is exhibited and described in the drawings and specification of the patent sued on in this case. The blotter, however, instead of being confined to wood, cork or other elastic material, was proposed to be made of "steel or other material which will answer the purpose," and to have on its face circular cutters, inclosed in circular rings, to cut the postage-stamp at the same time that it defaced it with ink. The invention is described in the specification as follows:

"The nature of my improvement consists in so constructing canceling stamps that the same shall cut the postage-stamp, or any stamp similar thereto, without injury to the contents of the envelope or packet inclosed therein, and at the same time cause a heavy circular mark upon the inside, and one upon the outside of that part of the stamp or letter-frank canceled by the cutting device, so that said postage-stamp or letter-frank shall readily show cancellation in ink, and when removed from the letter or packet on which the same may have been canceled it shall be reduced to parts or pieces whereby a second use of the said stamp or frank is thus prevented, although it may have been previously cleaned by a chemical or other process.

It also consists in the employment and combination of a canceling stamp with a cutting and inking device thereon, with a postmarking or rating stamp, so that the canceling of the letter-frank and the postmarking on the envelope or packet shall be effectually done by the means fully described hereinafter:

To enable others skilled in the art to which my invention relates to make and use the same, I will here proceed to describe the construction and operation thereof, which is as follows, to wit: I construct the postmarking stamp (D) of steel or any material which will answer the purpose. (G) is the mortise or opening to receive the type for the month, the day of the month, and the year, around which is the name of the place where used. (E) is a screw for the purpose of holding the type in the said openings (G). This stamp is secured or firmly fastened to the block or cross-piece (B), Figs. 1, 2, and 3, by means of the screw (K), which is held in its place by means of the small screw (*a*), Figs. 1 and 2, which is placed near one side of the said screw (K) so as to prevent the same from becoming loose by reason of turning backwards."

After further directions as to the construction [382] of the canceling stamp, he adds:

"The cross-piece (B) is made of iron or steel, and in width the same as the diameter of the said rating and canceling stamp, and of any thickness required. The said canceling stamp (*c*) is securely fastened to the said cross-piece (B), and at any desired distance from the said rating stamp, (D), as seen at Figs. 1, 2 and 3, and in the same manner as that of the said stamp (D). (H) is a screw-bolt or stem, the lower end of which is screwed into the center of the said cross-piece (B). The handle (A) is then screwed upon

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the said bolt or stem (H), and firmly upon the said cross-piece (B), thereby making a strong and reliable joining of the handle to the whole stamp."

The claim in this patent is, first, for the canceling stamp separately, and, secondly, as follows:

"I also claim the combination of the canceling stamp (*c*) and the postmarking or rating stamp (D) with the cross-piece (B), substantially as and for the purposes herein described and set forth."

It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he *might* get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared.

Now, a mere inspection of the patents referred to above will show that after December, 1862, Norton could not lawfully claim to have a patent for the general process of stamping letters with a postmark and canceling stamp at the same time; nor for the general combination of a post-stamper and blotter in one instrument; nor for the combination of a post-stamper and blotter connected by a cross-bar; for all these things, in one or other specific form, were exhibited in these prior patents.

Any such claim, therefore, in the re-issued patent of 1870 must be inoperative and void, as well because the thing claimed was anticipated in former patents, as because it would be for a different invention from that contained and described in the original patent. We may, therefore, dismiss from consideration the third and [383] fourth claims of the re-issued patent. If they are to be construed as being broader and claiming more than the original patent, they are void; if to be construed as claiming nothing more, they are simply redundant, because the first and second claims embrace all that was in the original, and more.

The case, then, upon the patent, is narrowed down to the claim of the specific device of the blotter as described and claimed in the original patent; and the combination thereof with the postmarking device in one instrument by means of the cross-bar. This being the case, it will be pertinent next to inquire whether the defendant used that device or combination. If he did not, it is unnecessary to pursue the subject further.

As we have already seen, the canceling stamp or device, described in the patent, consisted of a cylinder, corresponding in length to the postmarking device, and containing a type of wood, cork, rubber or other elastic material slightly projecting therefrom. It does not appear that this device was ever used by the defendant. The stamp used by him until January, 1876, had a blotter of cork, it is true; but it was not the specific device described in the patent, and to which the patent was restricted. The cork was not inclosed in a cylinder as demanded by the patent. It was a naked piece of cork directly attached to the cross-bar by a common wood screw, passing through a hole in the cross-bar, and driven into the cork, firmly holding it to the bar. This device, of course, was different from that which was patented. The only other stamp used by the defendant had a steel blotter, connected with the postmarker by a solid metallic plate or mass of metal, and having no cylinder. Neither of these devices infringed the complainant's patent, construed as we consider it must be in order to have any validity at all.

The decree of the Circuit Court is reversed and the cause remanded, with directions to dismiss the bill of complaint.

This decision, in effect, disposes of all three appeals.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Miller** dissenting:

As regards the right to a patent for an inven- [384] tion like this, which can be of use to no one but the Government of the United States, and which is, therefore, in effect, a contract by the United States that it will not use that which is essential to some of its most important operations without paying to the patentee whatever he may demand for the use of his invention, I have great doubt—a doubt which it would have been necessary to solve in this case if the majority of the court had believed the patent sued on, valid.

In the opinion just delivered they have held, that while the original patent to Norton might have been valid for some purposes, the re-issued patent is void because it is not for the same invention. In this view I do not concur.

The General Postoffice and its branches had long been in search of an instrument which by one blow—one strike of the hand—would mark the name of the place where a letter was mailed and the time, and so deface the postage-stamp on the letter as would make it impossible to be used again.

This had been done by the use of a single die, which held the type indicating date, etc., and which was made to cover the stamp also, so that the date obliterated the stamp by covering it. For reasons not necessary to mention this did not answer, and it became desirable to have an instrument which at one stroke defaced the stamp and made beside, but apart from the stamp, the postmark date.

Many attempts to do this had been made with more or less success. Most of them failed because the handle which conveyed the power from the hand of the operator was so placed in regard to these two marking instruments that they did not strike with entire unity, in point of time, on all the space of the letter to be covered by the two instruments. In my opinion the record shows that Norton was the first man to accomplish this result by uniting these two marking instruments by a cross-bar between them, and placing the shank or handle common to them both so precisely in the center between them on the cross-bar that the stroke brought the type and the obliterating device on to the surface of the paper precisely level, and with precision as to time, over the space which they were designed to cover. [385]

This, I think, was the principal merit of his invention. Connected with it, however, and essential to it, was his device for obliterating

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the stamp. In his original patent this is described as a cylinder into which is fastened something which receives the indelible ink used to obliterate the stamp and which imparts it to the surface of the stamp by the blow or strike already mentioned. This, he said in his original patent was made of wood, cork, rubber, or other suitable material.

It was discovered, by experience, afterwards that iron was a more suitable material than wood or cork or rubber, and in the re-issue of the patent, on which this action is founded, iron is mentioned as one of these suitable materials.

I do not think this should invalidate the re-issue if the original patent was good. If iron was a suitable material it was covered by the original patent. If better than the materials specifically named, that did not exclude it from the original patent nor make the re-issue void.

Nor do I concur in the opinion, that the combination of the printing and erasing instrument by a cross-bar and shank or handle, which brought the force employed in the stroke to act equally and simultaneously on all the surface to be impressed, was anticipated by any other patent or any other invention.

It would serve no good end to go into all the testimony with the elaborate care which characterizes the opinion of the court on these disputed points. I, therefore, content myself with stating the principal points in which I differ with that opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—104 U. S., 749; 105 U. S., 547; 106 U. S., 146, 147, 222, 428; 107 U. S., 645; 109 U. S., 649; 111 U. S., 108; 112 U. S., 359, 669.

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[410] LUCRETIA BRONSON, EXTX. of GREENE C. BRONSON, Deceased, Late Collector of the PORT OF NEW YORK, *Plff. in Err.*,

v.

JOHN W. SCHULTEN ET AL.

(See S. C., 14 Otto, 410-418.)

Vacating judgment—errors in—writ of error—motion—state practice—laches.

*1. It is a general rule of law, that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record and may then be set aside, vacated or modified by that court.

2. It is equally well established that after the term has ended, all final judgments and decrees of the court pass beyond its control unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist they can only be corrected by such proceeding, by writ of error or appeal, as may be allowed in a court which by law can review the decision.

3. To this rule there has always existed an exception founded on the common law writ of error *coram vobis*, which brought before the same court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as the death of one of the parties when the judgment was rendered, coverture of a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the clerk. But if the error was in the judgment itself, the writ did not lie. What was formerly done by this writ is now attained by motion and affidavits when necessary.

4. Some of the state courts have a larger power conferred on them in such cases by statute, and others have extended it by asserting a control over their own judgments and administering equitable relief in a summary way. There is no uniformity among those courts on this subject.

5. Neither the practice of the courts nor the statutes of the States in which the courts of the United States are held, can control those courts on that subject.

6. In the case under consideration, the carelessness and laches of plaintiffs place them outside of any rule justifying relief by setting aside a judgment after the term at which it was rendered.

[No. 107.]

Argued Nov. 21, 22, 1881. Decided Jan. 9, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **Almon W. Griswold, Shellabarger** & *Wilson* and *John E. Parsons*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

On the 26th day of January, 1877, the following order was made of record in the Circuit Court of the United States for the Southern District of New York:

"J. W. SCHULTEN ET AL.
v.
GREENE C. BRONSON and 22 other causes. [411]

A motion having come on to be heard before this court in the above entitled causes to open the judgments therein:

Now, on reading and filing notice of motion dated December 27, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich, on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiffs, and George Bliss, Esq., U. S. District Attorney, in opposition thereto, and due deliberation had, it is ordered that the judgments entered in the above entitled causes upon the verdicts therein be vacated, and that the assessment of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, Esquire, as sole referee.

And it is further ordered that the referee proceed to adjust *de novo* the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases respectively, and that he report the balance, if any, found due the plaintiffs in each of said causes.

The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, and either party may, on the hearing, raise objections, and said referee shall decide thereon; and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring them to a hearing before the court upon four days' notice.

Dated January 26, 1877."

March 8, 1877, another order was made that the action be continued in the name of Lucretia Bronson, executrix of the will of Greene C. Bronson, who had died in 1863. March 10 the referee's report was filed, in which it was found that there was due plaintiffs, in addition to [412]

*Head notes by *Mr. Justice* MILLER.

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what had been paid under the judgment set aside, the sum of $1,205.90, and on this sum interest was allowed to the amount of $2,017.21. For these sums, with added costs, a judgment was rendered in their favor. To reverse this judgment the present writ of error is brought.

Enough of the record of the original suit, the judgment in which is thus set aside, is produced before us to show that the action was against Bronson, as Collector of Customs for the Port of New York, and the claim was for duties in excess of what was authorized by law on a large number of separate importations; that a verdict was given on the trial for plaintiffs for "the amount, with interest, of the difference between duties levied and paid under protest, on commissions at 2½ per cent, and such duties if levied on commissions at 2 per cent," on the class of importations in question. The commissions alluded to were those paid by the importers before shipment to this country. As the amount to be recovered under this verdict was matter of computation and inspection of the custom-house papers, it was referred to Samuel Ogden to make report.

Neither the judgment of the court which was set aside, nor the report of Ogden, on which that judgment must have been entered, nor the plaintiffs' bill of particulars, on which the action was based, is found in the transcript of the record on which we are to consider this case. Nor is there any bill of exceptions, as there should have been, embodying the evidence on which the court acted in setting aside the former judgment. Nor is the date of that judgment to be ascertained from anything in this record, unless we can look at certain affidavits found in the transcript; for neither the notice of the motion to set it aside nor the order granting that motion mention the date of that judgment. It would seem that a party seeking to open or set aside a judgment seventeen years after it had been entered and the amount of it paid, in order that another judgment for a larger amount might be rendered in the same suit, was not very anxious to call attention to dates.

13] This imperfect state of the record has made us hesitate to enter upon a review of the case, but as the order setting aside the original judgment refers to the notice of motion and the annexed affidavits as the foundation of that order, and identifies those papers as they are found in the transcript, we are of opinion that they may be considered as part of the record, so far as the question of the authority of the court to make that order is involved.

Looking to these affidavits, in connection with what is more strictly a part of the record, it appears that the original suit was commenced in one of the state courts, September 2, 1858, and afterwards removed into the Circuit Court of the United States, where plaintiffs filed a declaration containing the common counts. It appears that they also served a bill of particulars, setting out seventy-four entries of goods at the custom-house, on which they had been charged excessive duties by the defendant, Bronson, which they had paid under protest. The affidavit of Murray, a refund clerk in the custom-house, states that in thirty-four of these entries the sums which should have been allowed plaintiffs were omitted in the adjustment. It was on this statement that the judgment rendered on the report of the first referee, Ogden, without objection or exception on either side, on the 5th day of August, 1860, was set aside, and a new reference made. This judgment, it appears, was also paid and accepted by plaintiffs in a few days, we may suppose, after it was rendered. The affidavit of plaintiffs' attorney, who attended to the original action, and on whose motion the original judgment was set aside, states that the adjustments were made by Ogden, who was an auditor at the custom-house, and by the collector of customs and by the clerk of the court; that, in 1864, he discovered that certain errors had been committed in fourteen other cases of a similar character, in which other persons were plaintiffs, to their prejudice, for which new actions were commenced, and held barred by the Statute of Limitations; that as to other cases, including the one now before us, he did not discover that items embraced in the bill of particulars had been omitted, until an investigation of certain recent cases of like character against Collector Redfield; that in the readjustment of these latter cases his attention was turned to the [414] source of the errors in the one now in question. The affidavits of Heydenreich and Murray tend to show that all was not included in the adjustment under the verdict that ought to have been.

We have thus a case in which plaintiffs sue for excessive charges on account of these commissions paid on seventy-four entries of goods, specifically set out in their bill of particulars. A verdict is rendered in their favor, fixing the precise error under which the excessive duty had been exacted, and leaving to a referee to ascertain the amount due on each of these entries. The referee reports as to all but thirty-four, nearly half, of these entries, and as to them makes no report. A judgment is rendered in conformity to the report, the money paid and accepted, and seventeen years afterwards the judgment is opened to correct the omission of these thirty-four entries.

We are of opinion that, if there was any mistake in the report of the referee and in the judgment rendered thereon, it was so clearly due to the negligence and inattention of plaintiffs or their attorney, that no case is made for relief in any of the modes known to the law, of correcting an erroneous judgment after the Term at which it was rendered.

Stress is laid upon the fact in argument, that the referee was one of the clerks in the custom-house, who had access to all the books and papers of the office. It is probable he was selected by both parties because of his familiarity with those accounts, but he is not mentioned in the order of reference as such clerk or officer. Any other person so appointed would have been permitted to examine the necessary books and papers, and in this matter he must be held to be, as no doubt he was, an impartial referee, representing neither the collector nor the government which was to pay the sum found due.

The plaintiffs had the same right to appear before him, examine his report and the evidence on which it was founded, to take and urge to the court exceptions to it, as in case of any other reference. Nothing of the kind was done, and though it is here said that no report at all was made as to thirty-four out of seventy-

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four entries set out in plaintiffs' bill of particulars, no exception was made to the report on that ground, nor any inquiry made as to the reason for such omission. It is obvious that if this had been done, the error which is now complained of would have been corrected before the report of the referee was confirmed and judg-
[415] ment rendered on it.

If, then, there was no question of lapse of time, or of the power of the court over its own judgments after the Term at which they are rendered, and if this were a bill in chancery to set aside this judgment on the ground of mistake, it is clear that no relief could be granted, because of the negligence, carelessness and inattention and laches of the plaintiffs, or of their attorney, in the matter.

Does the power of the court over its own judgment, exercised in a summary manner on motion, after the Term at which it was rendered, extend beyond this?

In this country all courts have terms and vacations. The time of the commencement of every Term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that Term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law, that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the Term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court.

But it is a rule equally well established, that after the Term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that Term, by motion or otherwise, to set aside, modify or correct them, and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the Term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks* v. *R. R. Co* [*ante*, 91]; *Public Schools* v. *Walker*, 9 Wall., 603 [76 U. S., XIX., 650]; *Brown* v. *Aspden*, 14
[416] How., 25; *Cameron* v. *McRoberts*, 3 Wheat., 591; *Ex parte Sibbald* v. *U. S.*, 12 Pet., 488; *U. S.* v. *Glamorgan*, 2 Curtis, 236; *Bradford* v. *Patterson*, 1 A. K. Marsh., 464; *Ballard* v. *Davis*, 3 J. J. Marsh., 656.

But to this general rule an exception has crept into practice in a large number of the state courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert* and the like, or error in the process through default of the clerk. See, Archb. Pr.

In Rolle's Abridgment, p. 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same but in another and superior court.

In the case of *Pickett* v. *Legerwood*, 7 Pet., 147, this court said that the same end sought by that writ is now in practice generally attained by motion, sustained if the court require it by affidavits; and it was added that so far had this latter mode superseded the former in the British practice, that Blackstone does not even notice the writ among his remedies.

It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and, therefore, it does not include the present case.

There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments, some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old fashioned writ of error *coram vobis* did. This practice has been founded in the courts of many of the States on statutes which conferred [417]
a prescribed and limited control over the judgment of a court after the expiration of the Term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the States where a system has been adopted which amalgamates the equitable and common law jurisdiction in one form of action, as most of the rules of procedure do.

It is a profitless task to follow the research of counsel for defendants in error through the numerous decisions of the state courts cited by him on this point in support of the action of the circuit court. The cases from the New York courts, which go farthest in that direction, are largely founded on the Statute of that State, and we are of opinion that on this point neither the Statute of that State, nor the decisions of its courts, are binding on the courts of the United States held there.

The question relates to the *power* of the courts and not to the mode of procedure. It is, whether there exists in the court the authority to set aside, vacate and modify its final judgments after the Term at which they were rendered, and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the Term at which they were rendered, far within the case made out here. If it is an equitable power supposed to

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be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, according to its established principles, have granted the relief which was given in this case.

It is also one of the principles of equity most frequently relied upon, that the party seeking relief in a case like this, must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief.

[18]

As we have already seen, nothing hindered the plaintiffs from discovering the mistake of which they complain, for seventeen years, but the most careless inattention to the proceeding in which they had claimed these rights and had them adjudicated.

There was here an acquiescence for that length of time in the correctness of a judgment which had been paid to them when the error, if any existed, only needed a comparison of their own bill of particulars with the report of the referee, to be seen, or at least to be suggested. Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside.

It follows that the judgment of the Circuit Court is reversed, with directions that the order vacating the former judgment be set aside, and the motion of plaintiffs in that matter be overruled.

Bronson, Exrx., v. *Loeschigk*, No. 108; *Schell*, late Collr., v. *Warburg*, No. 112; *Schell*, late Collr., v. *Grossman*, surviving partner, No. 113; *Redfield et al., Exrs.*, v. *La Chaise*, No. 116; Same v. *Mitchell*, No. 118.

All these cases are governed by the principles announced in the case of Lucretia Bronson, Executrix, v. John W. Schulten and Chauncey D. Heard, *and in each a judgment will be entered reversing that of the Circuit Court, with directions to set aside the order vacating the original judgment, and to overrule the motion on which that order was made.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 505; 134 Mass., 526; 46 N. J. L., 460.

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[420]

HIRAM QUINBY, *Plff. in Err.*, *v.* ANDREW CONLAN.

(See S. C., 14 Otto, 420–427.)

Preemptive rights—settlement—finding of jury in equity case—jurisdiction—decisions of Land Department.

1. The Act of Congress forbids the sale of preemptive rights to the public lands acquired by settlement and improvement.
2. A settlement cannot be made, upon public land already occupied. As against existing occupants, the settlement of another is ineffectual to establish a preemptive right.
3. In an equity case, the finding of the jury is only advisory, and the court may disregard it and follow its own judgment upon the evidence.
4. The courts cannot exercise any direct appellate jurisdiction over the rulings of officers of the Land Department, nor can they reverse or correct them in a collateral proceeding between private parties.
5. It is only when those officers have clearly misconstrued the law and denied to parties their rights, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can interfere and refuse to give effect to their action.

[No. 163.]

Submitted Dec. 2, 1881. Decided Jan. 9, 1882.

IN ERROR to the Supreme Court of the State of California.

The case is stated by the court.

Messrs. **Willis Drummond, Robert H. Bradford** and *A. A. Sargent*, for plaintiff in error.

Mr. **James Coleman**, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This was an action for the possession of certain real property in the County of Los Angeles, in the State of California. The complaint is in the usual form in such actions, according to the system of pleading prevailing in that State, alleging the ownership of the premises by the plaintiff and his right to their possession on a day designated, the wrongful entry thereon by the defendant, and his subsequent occupation thereof, to the plaintiff's damage.

It also alleges the value of the rents and profits during the occupation of the defendant, and prays judgment for restitution of the premises to the plaintiff, for his damages for their occupation, and for the rents and profits lost.

The answer of the defendant denies the several allegations of the complaint, and then sets up in a special count, by way of a cross complaint, various matters which, as he claims, constitute in equity a good defense to the action and entitle him to a decree; that he has an equitable right to the premises and that the plaintiff holds the legal title for him. [421]

Under the system of pleading which obtains in California, an equitable defense of this nature, as well as a defense at law, may be set up to an action for the possession of land. In such case the grounds of equitable relief must be set forth separately from the defense at law. The answer presenting them is in the nature of a bill in equity and must contain all its essential allegations. It must disclose a case which, if established, will justify a decree adjudging that the title be transferred to the defendant, or enjoining the further prosecution of the action. The equitable defense is, therefore, first to be disposed of by the court before the legal remedy is considered. Upon its disposition the necessity of proceeding with the legal action will depend. When that action does proceed, the ordinary rules as to the controlling influence of the legal title will apply. *Estrada* v. *Murphy*, 19 Cal., 248–273; *Arguello* v. *Edinger*, 10 Cal., 150.

This statement will explain what otherwise would appear singular in the record, that one Judge heard the issues raised by the special answer in the nature of a cross complaint in equity, and another Judge, of the same court, subsequently tried the issues in the action at law. There was no more impropriety in this hearing of the different issues by different judges, or incongruity with established modes of procedure, then there would have been had the issues in the cross-action been presented in an independent suit.

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The grounds put forth for equitable relief consist of alleged erroneous rulings of the Land Department upon two matters: the possession and improvement of the lands in controversy by the parties claiming a preemption right to them; and the time when that portion of the lands in controversy, claimed to be within the limits of a confirmed Mexican grant, was shown, by a survey of the grant and the appropriation of other lands to its satisfaction, to be without them and thus open to settlement and preemption.

1. The lands in controversy constitute the west half and the southeast quarter of a quarter-section. [422] The plaintiff, Conlan, entered upon them in February, 1865, occupying a portion thereof, and declaring his purpose to acquire, as a settler, a preemption right to them. The township was surveyed by the authorities of the United States in February, 1868, and the plat filed in the proper land-office in April following. In May, 1868, Conlan filed his declaratory statement in the form required by law, claiming the quarter-section as a preemptor. In May, 1869, four years after Conlan's settlement, the defendant, Quinby, settled upon the quarter-section, occupying a portion thereof, declaring his intention to acquire, as a settler, a preemptive right to the land, and in November, 1871, he filed his declaratory statement claiming it as a preemptor. Previously to his possession, various parties had occupied portions of the section, and had conveyed to him whatever interest they held. It would seem from the answer and the frequent reference to the prior occupation of these parties, that it was supposed that this fact, in some way, increased the equity of his possession and gave him a better preemptive right to the lands than that claimed by the plaintiff. But to this position there are two answers: 1. It does not appear that the grantors of the defendant ever contemplated the acquisition of a preemptive right to the lands by their settlement; and, 2. The Act of Congress forbids the sale of preemptive rights to the public lands acquired by settlement and improvement. The general preemption law declares that all transfers and assignments of rights thus obtained prior to the issuing of the patent, shall be null and void. This court held—looking at the purpose of the prohibition—that it did not forbid the sale of the land after the entry was effected, that is, after the right to a patent had become vested, but did apply to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated. *Myers* v. *Croft*, 13 Wall., 291–295 [80 U. S., XX., 562, 563].

The claim of the defendant to a right of preemption stands, therefore, in no better plight than if there had been no prior occupant of the lands. His own settlement can alone be considered, and that dates, as already said, from May, 1869. He had no claim to the lands when the plaintiff settled upon them, and he acquired none by his purchase of parties who had previously occupied them. [423]

He must also be considered as settling upon them with notice of the plaintiff's prior claim by his declaratory statement filed in the Land Office the year before. The plaintiff could not, it is true, have asserted a preemptive right to the whole quarter-section as against parties at the time of his settlement in the occupation of a portion of them. Had such parties followed up their occupation and improvement by a declaratory statement when the public surveys were extended over the lands, the case would have been different. A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a preemptive right. Such is the purport of our decisions in *Atherton* v. *Fowler* [96 U. S., 513, XXIV., 732], and *Hosmer* v. *Wallace* [97 U. S., 575, XXIV., 1130].

But a settlement upon a portion of a quarter-section, and making the improvements required by law, will sustain a preemptive claim to the whole quarter-section as against parties subsequently settling upon them; and such subsequent settlement is not improved, or in any respect rendered more efficacious, by the fact of purchase from earlier occupants. The settlement which the law of Congress will recognize, except where the claim is made by a widow or heirs of a deceased settler, must be personal to the settler, and not that of others who may have conveyed to him.

2. As to the time when the portion of the land in controversy, originally claimed to be within the boundaries of a Mexican grant, was, by the survey of the grant and the appropriation of other lands to its satisfaction, excluded from them, and thus became open to settlement and preemption, only a few words are necessary.

It does not clearly appear from the record what portion of the land in controversy was covered by the claim under the Mexican grant. It would seem, from the complaint, to have been the southeast quarter of the quarter-section; but it is not material. The court found that the grant was surveyed in January or February, 1868, under the Act of Congress of July 3d, 1866 [14 Stat. at L., 218], entitled "An Act to Quiet Land Titles in California;" that such survey was finally approved and a patent issued upon it, and that the land in controversy was not included within it, but "was public land and subject to preemption" at the time the [424] plaintiff filed his declaratory statement. The jury, it is true, found, generally, the reverse of this: that the land was claimed to be within the boundaries of the grant when the declaratory statement was filed. Hence it is contended that the approval of the survey must be considered as subsequently given. It is also contended that a similar conclusion must follow from the period, required by the Act of July 1, 1864 [13 Stat. at L., 332], for the publication of notice of the survey of a confirmed Mexican grant, before it could be forwarded to the Land-Office at Washington for approval. But to this argument or assumption there is a satisfactory answer. If there be in an equity case—and so far as the issues upon the cross complaint are concerned they are to be treated as arising in a proceeding of that character—a conflict between the finding of the court and that of the jury, the former prevails. The finding of the jury is only advisory, and the court may disregard it, and follow its own judgment upon the evidence. *Basey* v. *Gallagher*, 20 Wall., 680 [87 U. S., XXII., 454].

The survey in the case was made under the 8th section of the Act of 1866, and was not subject to the provisions of the Act of 1864, requiring publication of it before approval by the

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Commissioner of the General Land-Office. The Statute of 1866 declares that in cases where no request is made within ten months after its passage, or within that period after any subsequent final confirmation, for a survey of a claim under a confirmed Mexican grant, pursuant to sections 6 and 7 of the Act of 1864, the Surveyor-General of the United States for California shall cause the line of the public surveys to be extended over the land, and shall set off, in full satisfaction of the grant and according to the lines of the public surveys, the quantity confirmed, and that the land not included in the grant thus set off by him shall be subject to the general laws of the United States. The survey by that officer of the grant, and the application of land to its satisfaction, as thus prescribed, could, undoubtedly, have been disapproved by the Commissioner of the General Land-Office, and had their correctness been contested they might have been treated as inoperative until approved. But the approval by that officer, when given, took effect by relation [425] as of the date when the survey and appropriation were made. They must be held valid from that time, so as to protect proceedings taken in accordance with them.

There was, therefore, nothing in the showing made by the defendant to justify the court below in granting the relief prayed, even if we were to take into consideration the facts stated as grounds of relief.

But, independently of this conclusion, there is a general answer to the alleged erroneous rulings of the officers of the Land Department, as grounds for the interference of the court. Those rulings were upon mere matters of fact, or upon mixed questions of law and fact, which were properly cognizable and determinable by the officers of that department.

The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired, and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys are extended over the lands. By them a Land Department has been created to supervise all the various steps required for the acquisition of the title of the government. Its officers are required to receive, consider and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when preemption rights are claimed and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land-Office, and from him to the Secretary of the Interior. For mere errors of judgment, as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties.

In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department, is negatived by the finding of the court. It would lead to endless litigation [426] and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. *Johnson* v. *Towsley*, 13 Wall., 72 [80 U. S., XX., 485]; *Shepley* v. *Cowan*, 91 U. S., 320-340 [XXIII., 424, 427]; *Moore* v. *Robbins*, 96 U. S., 535 [XXIV., 850].

And we may also add in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them. And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. *U.S.* v. *Atherton* [*ante*, 213].

In the present case the respective claims of the parties to a preemptive right to the land in controversy, from their settlement and improvements, had been the subject of earnest contestation before the officers of the Land Department, and a decision in favor of the plaintiff was finally rendered by the Secretary of the Interior. And the question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and preemption, depended upon matters disclosed by the record of proceedings in the Land Department, namely: that the public surveys had been extended over the land, and that other lands had been appropriated to the satis- [427] faction of the grant.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 452; 111 U. S., 291; 39 Ohio St., 387; 48 Am. Rep., 467.

SAMUEL NESLIN, Impleaded with CHARLES F. SMITH, *Appt.*, [428]

v.

WELLS, FARGO & COMPANY.

(See S. C., 14 Otto, 428-441.)

Recording Act.

Under the laws of Utah in 1872, a junior mortgage taken without notice of a prior mortgage, actual or constructive, and first recorded, is to be preferred in its lien to a mortgage, prior in execution but subsequently recorded.

[No. 98.]

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Submitted Nov. 18, 1881. Decided Jan. 9, 1882.

APPEAL from the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. **J. G. Sutherland** and **J. R. McBride,** for appellant.

Messrs. **Shellabarger** and **Wilson,** for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a suit of an equitable nature, begun by the appellees, in the District Court of the Third Judicial District of the Territory of Utah. Its object was to foreclose a mortgage of real estate, originally made to Kerr, and by him assigned to complainants, the defendant Smith being the mortgagor, and the defendant Neslin, the appellant, claiming to be a prior mortgagee of the same premises, and to be entitled to a lien, preferable to that of the appellees.

A decree for the complainant was rendered in the district court, establishing his mortgage as being the first and best lien upon the mortgaged premises.

A motion for a new trial was made by the defendant Neslin, and a statement on that motion, in writing agreed upon as correct, was signed by the attorneys for both parties, and filed and made part of the record.

This statement embraces the proceedings on the trial, including all the testimony, and also [429] the findings of the court, as to matters of fact, and its conclusions of law, specially and separately stated, together with the decree.

The motion for a new trial was overruled, and the defendant, Neslin appealed to the Supreme Court of the Territory, both from the order overruling the motion for a new trial, and also from the judgment.

On this appeal the Supreme Court affirmed the decree, to reverse which the present appeal is prosecuted.

Under the 2d section of the Act of Congress of April 7, 1874 [18 Stat. at L., 27], concerning the practice in territorial courts and appeals therefrom, as explained in *Stringfellow* v. *Cain*, 99 U. S., 613 [XXV., 422], the present appeal rightly brings into review the decree of the territorial Supreme Court, affirming the judgment of the district court; but we are not at liberty to consider anything as embraced in the statement of facts, required by the statute, except the special findings of the district court, adopted by the Supreme Court in its general judgment of affirmance. This excludes the consideration of the exceptions taken in the district court in the course of the trial, and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves as the sole question for determination here, whether the facts as found justify the decree sought to be reversed.

The facts thus found and stated are as follows:

The defendant Smith, being indebted to Wells, Fargo & Co. in the sum of $17,107.10 executed and delivered to them his promissory note for that amount, dated July 5, 1873, having procured Jno. W. Kerr to indorse the same as surety upon an agreement to indemnify him. In pursuance of that agreement, Smith made and delivered to Kerr, on September 27, 1873, his promissory note for $13,000, secured by mortgage on real estate in Salt Lake City, which Kerr assigned to Wells, Fargo & Co. as collateral security for the note of Smith held by them; in consideration whereof, Wells, Fargo & Co. gave to Kerr additional time for payment of said note, the same being then overdue, no part of which has been paid; neither Kerr nor Wells, Fargo & Co having any notice, actual or constructive, of any prior liens on the property covered by the mortgage at the time when they respectively received the same. The mortgage was recorded in the records of Salt Lake County, on September 29, 1873, at 8 o'clock A. M. [43

On July 5, 1873, and prior thereto, the defendant Smith was in possession of the mortgaged premises, and continued in possession until after the maturity of the note for $13,000, when he surrendered the same to the complainants.

On November 27, 1872, the defendant Smith executed and delivered to the defendant Samuel Neslin a note for $7,000, and a mortgage to secure the same on the same premises described in the mortgage to Kerr, being for the unpaid purchase money therefor, the same having been sold and conveyed by Neslin to Smith by deed duly executed and delivered. This mortgage to Neslin was recorded in the records of Salt Lake County, on September 29, 1873, at 25 minutes past noon. No part of this mortgage debt has been paid.

As a conclusion of law, the court found that the lien of the mortgage to Kerr was entitled to priority over that of the mortgage to Neslin.

This conclusion, which is assigned as error, we are now to examine.

It presents the single question, whether, under the laws of Utah in force at the time of the transaction, a junior mortgage, taken without notice of a prior mortgage, actual or constructive, and first recorded, is to be preferred in its lien to a mortgage prior in execution but subsequently recorded.

Prior to the organization of the Territorial Government of Utah, which was effected by an Act of Congress, approved September 9, 1850 [9 Stat. at L., 453], the people dwelling there, who had set up a government under the name of the State of Deseret, passed an ordinance providing for the election of county recorders. It made it their duty to provide themselves with good and well bound books, suitable for the purpose, and record therein all transfers or conveyances of land or tenements, and all other instruments of writing and documents suitable, necessary and proper to be recorded in a fair and legible manner; and also books for the purpose of recording town and city plats, and plats of all surveys of land, roads and surveys of public works, whenever the same shall be permanently located, and these books of record were [43 required to be indexed in alphabetical order, and were declared to be "free to the examination of all persons," and upon the filing of any paper for record, the recorder was required to indorse upon the back thereof the time of receiving it. Comp. Laws of Utah, 130.

A law on the same subject and in similar terms was passed by the territorial Legislature, January 19, 1855. Comp. Laws of Utah, 131.

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The settlement of the Territory by inhabitants, having preceded the establishment by Congress of the legal organization of the territorial government, and the survey and opening to sale of the public lands, early provision was made for ascertaining and defining the possessory rights of those who, unable to obtain title as against the government, nevertheless had appropriated and improved portions of land. By a territorial law passed June 18, 1855, Laws of Utah, 1851–1870, p. 93, a form was prescribed for the transfer and conveyance of these land claims, as they were called, and it was declared that, to be valid, a transfer must be witnessed by two or more competent persons, be acknowledged before some person authorized to take acknowledgments, be recorded, and the record, page and book be certified thereon by the recorder in the county where the property is located. It is also therein provided that other property than land claims, when disposed of by gift, must be transferred substantially in the same manner, and by specification of kind and number or amount, but unless required, the details may be omitted.

The Civil Practice Act of February 17, 1870, secs. 272 and 273, provides that on the hearing of a case for the partition of real property, the plaintiff shall produce to the court the certificate of the recorder of the county where the property is situated, showing whether there were or not any liens outstanding of record upon the property, or any part thereof, at the time of the commencement of the action; and if, by such certificate, or by the verified statement of any person who may have searched the records, that there are outstanding liens or incumbrances of record upon such real property, which were of record at the time of the commencement of the action, and the parties holding the same have not been made parties thereto, it is made the duty of the court either to order such persons to be made parties to the action, by an [432] amendment to the pleadings, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid; or if not, what amount remains due thereon and their order among the liens or incumbrances severally held by the said persons and the parties to said action. Those who become parties to the action are required to set forth in their answers, if they claim a lien by mortgage, judgment or otherwise, among other particulars, the amount and date of the same, and provision is made for notice to those not made parties to appear before the referee and make proof of their claims. It is also provided that no persons who have or claim any liens upon the property, by mortgage, judgment or otherwise, need be made parties to the action unless such liens be matters of record; and immediately after filing his complaint the plaintiff is required to file with the recorder of the county a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property to be affected thereby, which, from the time of the filing, it is declared shall be deemed notice to all persons. In case of a sale for purposes of partition, it is also provided, (sec. 299) that the conveyance shall be recorded in the county where the premises are situated, and that it shall be a bar against all persons interested, parties to the action.

These are all the statutory provisions in force within the Territory at the time of the transaction involved in this suit; and they continued so to be until the passage of an Act on February 20, 1874, concerning conveyances, which regulates the whole subject and specifically provides "That every conveyance of real estate within this Territory hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, when his own conveyance shall be first duly recorded." This, however, cannot affect the rights of the parties in this controversy, for they had been fixed by the law previously in force.

The legislation on the subject prior to 1874, it will be observed, did not require that a mortgage should be recorded, in order to be valid, and did not, in terms, declare what should be the legal effect of recording or omitting to record it.

That legislation cannot, however, be assumed [433] to be without significance, and its precise meaning must be determined, not only by what it expresses, but by what it necessarily implies.

There can be no reasonable doubt, we think, that the records which the county recorder is bound to keep, which private persons are authorized to employ for recording their instruments and evidences of title, and which the public have a right to inspect, have all the qualities that attach to public records. Such books are mentioned by Greenleaf, 1 Greenl. Ev., sec. 484, as of that description, which "Are recognized by law, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or, at least, under that of official duty;" and "books of this public nature, being themselves evidence, when produced, their contents may be proved by an immediate copy, duly verified;" it being a rule, considered as settled, "that every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy."

It is a mere corollary from this *datum* that these records are, by construction of law, notice to all persons of what they contain. Their contents are matters of public knowledge because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, in order that the knowledge of them may be public and, therefore, imputes to all interested in it, that knowledge, the opportunity to acquire which it has provided. The law assumes the fulfillment and not the defeat of its own ends. It will not permit its policy to be gainsaid, not even by a plea of personal ignorance of its existence or extent. It will not allow, therefore, any man to say that he does not know that of which the law itself says it has informed him. The provisions of the law in reference to these records, either have no purpose at all, which we have no right to assume, or their purpose was, that the public might have knowledge of the titles to real estate of which they are the registers. It would utterly defeat that purpose not to presume, with conclusive force, that the notice which it was their office to communicate had reached the party interested to receive it, for if every man was at liberty to say

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[434] he had failed to acquire the knowledge it was important for him to have, because he had not taken the trouble to search the record which the law had provided for the express purpose of giving it to him, then the ignorance which it was the public interest and policy to prevent would become universal, and the law would fail because it refused to make itself respected.

In this country, differing in that respect from the doctrine maintained by the English courts, it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property. The reasoning upon which this doctrine is founded is the obvious policy of the registry Acts, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance. Story, Eq. Jur., sec. 403.

And the principle applies as well in cases where the conveyances are merely authorized as where they are required by law to be registered.

In the case of *Peppers' Appeal*, 77 Pa., 373, 377, it was decided that under a statute of Pennsylvania which declared that assignments of mortgages *may be* recorded in the office for the recording of deeds, etc., and that the record of such instrument shall be as good evidence as the original, that although the recording of an instrument was discretionary, the record is, nevertheless, notice to a subsequent assignee. After reviewing various statutes of the State on the subject, the court say: "Thus it appears that the language of the Acts of Assembly providing for the recording of written instruments has not generally been mandatory. When recorded, however, we do not understand the effect thereof is in any respect lessened by the absence of an imperative command to record. It is optional whether or not to record. When the election is made and an instrument authorized by law to be recorded, is actually recorded, all the incidents and force of a public record attach to that record. It is an early and well recognized principle that one great object in spreading an instrument of writing on a public record is to give constructive notice of its contents to all mankind."

[435] It is a further inference, which we are judicially bound to make, that records so carefully provided by law, and so useful, were, in fact, the common resort of the community whose dealings in real estate they were meant to register; that the practice of recording conveyances and incumbrances of the title to land, for the purposes of evidence and of information to those who might be affected by them, and the habit of searching the records in order to obtain that knowledge, was general and usual; that such practice and habit had become so common, that men of ordinary prudence in the management of important concerns affecting their own interests, would expect to conform to it themselves, and would act upon the expectation that others of that character would do so likewise. In point of fact, this presumption is verified in the present case, the majority of the judges in the court below declaring in their opinion that, at the times when the mortgages in question were executed, it was a common thing, and of public notoriety, to record mortgages and other conveyances.

The statutes under consideration, it is true, do not in express terms make it obligatory upon one taking a conveyance of or incumbrance upon real estate to record it. The recording is not made essential to its validity as between the parties; nor is it declared that the failure to record shall postpone its operation in favor of a subsequent *bona fide* purchaser for value without notice. And yet the implication is very strong that the latter effect must be intended by it. Otherwise, what valuable and sufficient purpose is there in construing the record to be constructive notice of its contents, except to protect such a purchaser? If, without recording, the conveyance is not only valid between the parties, but good also as against the world, with or without notice, of what public value or use is the provision for keeping such a record and declaring it to be public, open to the examination of all persons? On that supposition its only purpose would be, in the private interest of proprietors, to furnish a convenient and cheap mode of supplying proof, by certified copies, in case of the loss or destruction of title papers. But even that purpose is not expressly declared. It is only an inference based on the nature of the record as public, and the objects which, under the system of registration adopted in this [436] country, in colonial times, and which has since prevailed universally in all the States, have been sought to be attained by it. The chief of these is to secure that publicity in respect to the transfer of titles, which, in the earlier history of the common law, was effected by livery of seisin, and later, by the substituted enrollment of conveyances by way of bargain and sale; and which had in view, as its principal purpose, the protection of innocent purchasers from frauds which might be practiced by means of secret conveyances.

To hold otherwise would be to declare that land should cease generally to be the subject of sale; for no amount of diligence on the part of a purchaser would insure his title. He would, of course, demand of the vendor an inspection of his title deeds. From them he would learn the chain of title. A production and examination of the deeds made in the common form would show by their recitals that none of the preceding owners could have any claim for unpaid purchase money, for the receipt of it, in each instance, is usually contained in the deed. He would, therefore, reasonably deem it unnecessary to make any personal inquiry, and in respect to supposed incumbrances in favor of strangers, would be compelled to rely upon the statements of the vendor. Who would be willing, or could afford to purchase, under such circumstances, if, after every reasonable effort to inform himself of possible incumbrances, a mortgagee, holding an incumbrance of prior date, and whose failure to give such public notice of the fact as the law had furnished the means of giving, had betrayed him into the purchase, should, nevertheless, be permitted to supersede his title, by asserting a paramount lien? Certainly there would be no injustice, and we think no violation of legal principle, in such circumstances, in preferring over his claim, that of the innocent party, who otherwise would

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suffer loss, occasioned by a fraud which his laches alone had made effective.

But coupling together the obvious purposes of the recording Acts in question, and the necessary implications arising thereon, with the general and notorious practice of the people of the territory under them, we have no hesitation in deciding that, under the circumstances of this [437] case, there arose a duty on the part of Neslin, the vendor, to record his purchase money mortgage, towards all who might become subsequent purchasers for value in good faith, a breach of which, in respect to Kerr, the subsequent mortgagee, without notice, constituted such negligence and laches, as in equity, requires that the loss, which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned.

An apposite illustration of the principle involved in this conclusion is found in the case of *Ellis* v. *Ins. & Tr. Co.*, 4 Ohio St., 628, where it was held that, while it was a rule that money paid by a banker in payment of a forged check purporting to be drawn upon him by a depositor, to a holder for value, cannot ordinarily be recovered back, as paid under a mistake of fact, because he is supposed to know the signature of his own customers; yet it does not apply when, either by express agreement, or a settled course of business between the parties or by a general custom of the place, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and by his negligent failure to perform it, has contributed to induce the payee to act upon the paper as genuine, and to advance the money upon it. In that case, a custom was proved whereby a bank, to whom was offered a check, drawn upon another, by a stranger, was expected and required not to receive it, without requiring the party offering, to identify himself as the true owner.

It was decided that the existence of that custom imposed upon the defendants in that case a duty towards the plaintiff, which the latter was entitled to rely upon as performed; and that a breach of that duty constituted negligence, which, if it resulted in a loss to another, the law would cast upon the party in fault. In delivering the opinion of the court, Ranney, *J.*, said: "Nor is it anything remarkable or unusual that such an obligation should arise from a settled course of business between the parties, or be established by the proof of a custom; or that the holder, for his negligent failure to regard it, be deprived of rights which he would otherwise be entitled to demand." * * "When the defendants purchased this check, they knew full well that it deprived the plaintiffs of the ability to make this part of the investigation, and that it would be paid to them without any examination whatever; and if the [438] custom really exists they must have known equally well that in afterwards passing upon the genuineness of the paper, the plaintiffs would have a right to rely, as an important element in forming a conclusion, upon the supposition that the defendants had made the investigation and were satisfied with the result."

Similar effect was given to the existence of a known custom, in creating an obligation, in *Whitbread* v. *Jordan*, 1 You. & Coll. (Ex.), 303, where *Lord* Lyndhurst held that the creditor of a publican in London, who took from the latter a legal mortgage, knowing that he was indebted to his brewers, and was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage, must be postponed to the security of a brewer, who had obtained the title papers by way of equitable mortgage, on the ground that the existence of the custom put him on inquiry, so as to constitute constructive notice of the prior equity.

In the case of *Luch's Appeal*, 44 Pa., 519, it was decided, overruling some remarks of Gibson, *Ch. J.*, to the contrary, in *McLanahan* v. *Reeside*, 9 Watts, 508, that although the registry laws of Pennsylvania did not expressly prescribe that deeds and mortgages should be recorded in separate sets of books for each class of conveyance, that, nevertheless, a division of subjects and books of record had become legalized by necessity and practice upon the registry system, so as to render it available to present and future generations; and that, consequently, the record of a mortgage in a book kept for the record of deeds was not notice to a subsequent purchaser. The court after reviewing the history of the practice, said: "It is clear, therefore, from uniform practice going back so far as to be equivalent in this country to an immemorial usage, that mortgages are and must be recorded in mortgage books, and are of course not properly recorded in any other species of book where they cannot be found by means of the mortgage indexes."

And conversely it was held in *Colomer* v. *Morgan*, 13 La. Ann., 202, that a record of a deed in a book of mortgages "does not convey the information required by the statute," and is therefore, not effectual notice.

The rule to be applied here is merely an extension of that declared by *Lord Chancellor* [439] Macclesfield in *Savage* v. *Foster*, 9 Mod., 37: "When anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, does not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was apparent fault in him not to give notice of his title to the intended purchaser; and in such case infancy or coverture shall be no excuse; neither is it necessary that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it, that it could not be done without their knowledge."

When the public records of conveyances operate as notice of the state of the title to all intending purchasers, it must be that their existence and common use is notice as well to all prior purchasers and incumbrancers, that others will rely upon it as well as themselves; and that to withhold from the record conveyances or incumbrances in their own favor is a waiver of their right, and equivalent to a representation that they do not exist, in favor of innocent subsequent purchasers, who otherwise would be wrongfully affected by them. It is a case for the application of the maxim, *idem est non esse et non apparere.*

It applies to cases of negligence as well as of fraud, for the injurious consequences of both are not distinguishable. It was stated by *Lord* Romilly, Master of the Rolls, in *Briggs* v. *Jones*,

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L. R., 10 Eq., 98, in this comprehensive form: "A person who puts it in the power of another to deceive and raise money, must take the consequences. He cannot afterwards rely on a particular or a different equity." It was applied by *Vice-Chancellor* Kindersley in *Rice* v. *Rice*, 2 Drew., 73, as between a vendor, asserting his equitable lien for unpaid purchase money, and a subsequent equitable mortgagee by deposit of title-deeds. In deciding the case he said, what is very pertinent in the present: "The vendors, when they sold the estate, chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most solemn and deliberate manner, both in the body of the deed [440] and by a receipt indorsed, that the whole purchase money had been duly paid. * * * They thus voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance and adverse equity. * * * The defendant, who afterwards took a mortgage, was, in effect, invited and encouraged by the owners to rely on the purchaser's title. They had, in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute title, both at law and in equity."

See, also, *Waldron* v. *Sloper*, 1 Drew, 193; *Dowle* v. *Saunders*, 2 Hem. & M., 242; *Perry-Herrick* v. *Attwood*, 2 De G. & J., 21; *Darnell* v. *Hunter*, L. R., 11 Eq., 292; *S. C.*, L. R., 7 Ch. App., 75.

The rule applies in favor of the superior equity of a junior mortgagee, even in cases where the prior mortgage conveys the legal estate. Ordinarily the priority between incumbrances is determined by their quality, as each successive conveyance passes only what title remains after satisfying those which precede it. The first mortgage conveys the legal estate; the second, merely an equity of redemption; and as equity follows the law, and the owner of the legal title, by means of it, has a legal right, after condition broken, to the possession and a remedy at law for acquiring it, he is entitled to priority. A mortgage, however, in equity, at the present day, has almost ceased to be regarded as a conveyance of an estate, and is considered rather as merely a lien upon the estate of the mortgagor, the tendency of the modern law being to look upon it simply as a security for the payment of a debt or duty. Such, indeed, is an express statutory provision in Utah, section 260 of the Civil Practice Act of February 17, 1870, enacting that "A mortgage of real property shall not be deemed a conveyance, whatever its term, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." Under this provision all mortgages, without respect to their relative dates, are legal liens, and priority cannot attach to the earlier in date by reason of the superior dignity of the estate conveyed. [441] The rule, therefore, that gives preference to the legal title has no application, and the priority among them must be determined by purely equitable considerations.

The only circumstance on which the appellant can rest the claim of his mortgage to a preference over that of the appellee, is that it is prior in date. But the maxim quoted in support of this claim—*qui prior est tempore potior est jure*—only applies in cases in which the equities are equal. That, we have already decided, is not this case. Here equity cannot be satisfied otherwise than by subjecting the appellant to the loss, which has to be suffered by one of the two solely in consequence of his own fault.

Some question was made in argument as to whether the appellees were holders of the mortgage to Kerr for a valuable consideration. But the findings of the court, which are conclusive as to the facts, leave no room for doubt upon the legal conclusion.

We find no error in the decree, *and it is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 121.

JOHN J. VINTON ET AL., *Appts.*, [485]

v.

HOMER HAMILTON ET AL.

(See S. C., 14 Otto, 485-498.)

Void letters patent.

Letters patent, granted to John J. Vinton for an improvement in the manufacture of iron from furnace slag, are void, because what he claims as his invention is neither patentable nor new.

[No. 171.]

Argued Dec. 6, 7, 1881. Decided Jan. 9, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

Statement of the case by *Mr. Justice* **Woods**:

The bill of complaint alleged that the defendants were infringing certain letters patent, dated October 14, 1878, granted to the complainant, John J. Vinton, for an improvement in the manufacture of iron from furnace slag, and prayed for an injunction to restrain them from further infringement and for damages and an account of profits.

The answer of the defendants denied that Vinton was the original or first inventor or discoverer of the improvement in the manufacture of iron from furnace slag or from the slag of blast or smelting furnaces, set out in his patent, and denied infringement.

Upon final hearing in the circuit court the bill was dismissed, because the process described in complainant's letters patent was known and in common use before the complainant's application for his letters patent, and the same were, therefore, null and void.

The complainants have, therefore, appealed the case to this court.

The specifications of the letters patent declare as follows:

"My invention relates to the production of cast iron from the slag or refuse of the smelting or blast furnace. Heretofore a large percentage of good metallic iron has been thrown away with the slag and become lost to commerce, so far as its use as metallic iron is concerned. This is more particularly the case with rich ores, such as the Missouri and lake ores, which from their nature flux imperfectly in the ordinary smelting furnace. When imperfectly fluxed the slag assumes a thick consistency, and cools with a gen-

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eral greyish color, and though the presence of metal in it cannot be detected by the eye, yet the slag will be found to be of comparatively great specific gravity and, in fact, contains a very large percentage of good metallic iron, often as great as the amount of metal reduced from the ore in the process of smelting.

To reduce this metal from the heavy slag of the smelting furnace, and thereby increase the [486] production of iron from the same amount of ore, is the object of my invention. To accomplish the desired result I employ a cupola furnace, but furnaces specially adapted to the purpose may be constructed and conveniently used in connection with the blast furnaces where the iron is smelted.

The heavy slag is first pulverized or broken up into small pieces, or it may be made granulous or spongy by passing water or air through it when in a molten state, or in any of the well-known ways. A bed of coke or other suitable material is first placed in the cupola and on the top of the coke a small quantity of scrap or other oxidized iron (preferably scale or black oxide of iron) is sprinkled.

The slag to be operated on is then introduced as evenly as possible on the top of the coke and iron oxide, and on the top of the slag I sprinkle a small quantity of limestone broken up into small pieces, then a layer of coke, followed with scrap and scale slag and lime as before alternately until the whole cupola is charged.

The fuel is then ignited, and when the fire is above the *tuyères* the blast is turned on to the full. Owing to the presence of the iron oxides, the heat is very great when brought in contact with the slag, and the latter is speedily reduced, and as the operation goes on fresh charges of the materials are supplied from the top of the cupola, provision being made for the passage of the remaining slag from the furnace at a point below the *tuyères*.

In this way it will be seen that the process is continuous, and the furnace is not permitted to get cool.

The charge is made up in about the following proportions, but may be slightly varied as occasion requires: after the furnace is in operation, first, three bushels of coke; second, fifty pounds iron oxide (scrap or scale); third, eight hundred pounds slag; fourth, one fourth of a bushel of limestone, thrown into the cupola in succession, and from time to time as required.

When there is much sulphur in the iron a small quantity of the black oxide of manganese may be blown in through the *tuyères*, and salt or litharge, or a mixture of any two or all three of these ingredients, may be used in this manner with good effect. The iron thus obtained is run into molds in the usual way.

What I claim as my invention, and desire to secure by letters patent, is the herein described method of reducing iron from the slag or refuse of blast or smelting furnaces, substantially as set forth."

Mr. **Andrew McCallum,** for appellants.

Mr. **Thomas W. Sanderson,** for appellees.

Mr. Justice **Woods** delivered the opinion of [487] the court:

It is matter of general knowledge that pig iron is made from iron ore in a blast or smelting furnace; that to secure this product the furnace is charged, first, with a layer of coke or charcoal, then with a layer of iron ore, mixed with broken limestone, and so on in alternate layers until the proper quantity of these materials is placed in the furnace. The fuel is then ignited and, for the purpose of increasing the heat, streams of air are forced into the furnace by means of blast pipes, the nozzles of which, called *tuyères*, are inserted in openings in the walls of the furnace, usually from four to six feet above its bottom.

The limestone is used merely as a flux. The ore under this process undergoes a chemical change, and iron is formed and sinks in a molten state to the bottom of the hearth, by which is meant not only the bottom of the furnace, but its sides as high up as the foot of the boshes. The refuse left after the melted iron has dropped into the hearth, is also in a molten state, and being lighter than the iron, floats on its top. This is indifferently called cinder and slag. About three or four times in every twenty-four hours the melted iron is drawn from the furnace. This is accomplished in the following manner: the furnace is constructed with two holes, one called the iron and the other the cinder notch. The iron notch is made at the bottom of the hearth. The cinder notch is higher up the side of the furnace, just below the level of the *tuyères;* so high that the cinder can be drawn through it without letting off the molten iron. These holes are kept habitually closed with clay or other similar material. At frequent intervals and always just before drawing off the molten iron, or making a cast, as the iron mongers call it, the cinder notch is opened, and the cinder or slag is allowed to escape, and is carried away from the furnace in a trough made of moistened sand. The cinder notch is then closed and the iron notch is opened, and the molten iron is drawn off through a sand trough, and conducted into molds made in sand beds, called [488] the sow and pigs, where it is allowed to cool. The result is the pig iron of commerce.

In the meantime the furnace is supplied with constant charges of fuel and ore, mixed with limestone, in alternate layers, dumped in from the top, and this process is kept up without cessation for months and sometimes for years.

The sand trough which connects the pig-beds with the iron notch is usually larger and deeper, but more elevated, than the sow or general gutter which conducts the iron into the molds or grooves in the pig-beds. When the metal is first let into the trough it accumulates so as to fill it nearly to the brim. As the flow from the iron notch decreases, the iron, and a small quantity of cinder or slag, which has been chilled by coming in contact with the cold surface of the trough, adhere to its sides and bottom. When the molten iron on the hearth is about exhausted, the blast is increased, and the material left on the hearth is blown out through the iron notch into the sand trough. This also cools in the trough, and thus is formed what are known as trough runners, consisting of iron and slag, which have been forced through the iron notch by letting on the blast, as just mentioned.

A cupola furnace is one used for melting pig iron for the purpose of casting it into useful forms and articles. It constitutes part of the equipment of a foundry. In shape it is gen-

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erally a hollow cylinder. The iron is melted by substantially the same process as the ore in a blast furnace. The cupola furnace has an iron notch but no cinder notch, because there is generally so little cinder or slag in pig iron, as to render such an opening unnecessary.

In order to reach the merits of the controversy it is necessary to obtain a definite idea of what, if anything, the appellants are entitled to under their patent.

The specifications are ambiguous in respect to the particular kind of slag which is to be used in the process therein described; that is to say, whether it is the slag drawn off through the cinder notch, or the runners which are left in the trough through which the molten iron is [489] discharged from the iron notch of a blast furnace. It appears, however, from the evidence that the use of the latter only is contemplated, the former containing such a very inconsiderable quantity of iron as to be valueless.

We observe, in the first place, that the patent cannot be held to cover the discovery that the slag, which is to be used in the process described in the specifications, contains so large a percentage of good metallic iron that it can be profitably extracted by again smelting it.

The evidence shows beyond controversy that for many years before September 18, 1873, the earliest date assigned to the discovery or invention of the complainant, it had been well and generally known that the trough runners contained a large proportion of metallic iron, and they were broken up and re-smelted in blast furnaces. They were thrown into the furnace with scrap iron and iron ore, and smelted in the same manner. It was formerly a notion among old fashioned furnace men, that the use of this material injured the furnace, and deteriorated the quality of the iron produced. But this conceit had been exploded long before the date of appellant's patent, and the runners and other heavy slag were used habitually in many blast furnaces, as above stated.

Second. The appellant cannot claim as any part of his invention the use of a cupola furnace for the purpose of re-smelting trough runners and heavy slag. The evidence in the record shows that as early as the year 1844, at the Jackson furnace, in Venango County, Pennsylvania, which was a blast furnace, a cupola furnace was erected and used for the purpose of smelting heavy slag, from which was manufactured plowpoints and hollow ware, such as skillets, pots and Dutch ovens. Sometimes the product was made into pig iron. This cupola furnace was thus used for three or four years. The fact of such use was public; no effort was made to keep it secret, and it was known, in the language of the witnesses, "all around the furnace."

The testimony of Robert Paisley, Wm. J. Shaner and Thomas W. Kennedy, which is found in the record, shows that the Beaver Falls Co-operative Foundry Association, in April, 1872, made the experiment of using slag and runners in their cupola furnace, and the experiment proving successful, the runners, as early [490] as August, 1872, were procured by the car load, and mixed with pig iron and run into stoveplates. In this way 58 or 60 tons of runners were used prior to October 1, 1873, the date of appellant's patent.

This use of heavy slag and runners was open and public. No one was excluded from the foundry where the work was carried on. Anyone was at liberty to enter and see what was going on, and persons not interested in the furnace, among them the witness, Thomas W. Kennedy, did so. No injunction of secrecy was imposed on them. It is true the operatives at the furnace, who were all stockholders of the association, said nothing about the use they were making of trough runners, because, as they said, if it was a good thing they wanted to keep it to themselves, but they took no steps to keep it a secret, except that they did not talk about it. In fact, it was at the suggestion of Kennedy that the Beaver Falls Co-operative Foundry Association made the experiment of melting runners and heavy slag in their cupola furnace.

After the experiment made by the Beaver Falls Co-operative Foundry Association, in April, 1872, had proved successful, Kennedy, in August, 1873, furnished the defendant, Hamilton, with a quantity of trough runners to be smelted in his cupola furnace, and before October 1, 1873, had sold to foundrymen not less than one hundred tons of the same material to be used for the same purpose.

In fact, the record shows that Kennedy, more than a year before the date of appellant's patent, revived the practice of smelting trough runners and heavy slag in a cupola furnace. As early as the spring of 1872 he declared to the defendant, Hamilton, Thomas Struthers and others, the feasibility of the process, and suggested to Struthers that they ought to take out a patent for it. But Struthers said that unless they could get up some new way of extracting the iron, it would not be patentable, and that was the conclusion they came to after talking the matter over. But Kennedy at once, in the spring of 1872, commenced buying up the trough runners from the blast furnaces, and selling them to foundrymen for use in cupola furnaces.

It is, therefore, abundantly shown in the record that before the date of complainant's patent, or of his invention, the smelting of trough run- [491] ners and other heavy slag in cupola furnaces was practiced and well known.

Thirdly. The method of making slag granulous or spongy by passing water or air through it when in a molten state, is not new nor is it claimed to be new. Besides, there is no evidence that this process is used by the appellees.

Fourth. The method of charging the cupola furnace and of smelting the slag as described in the specification of appellant's patent, is as old as the art of making pig iron, except, perhaps, the sprinkling of scale or black oxide of iron on the top of the coke, and this is not done by the appellees.

Fifth. The appellant does not claim that his invention covers a cupola furnace. A review of the case shows, therefore, that appellant did not first discover the value of furnace runners or heavy slag for re-smelting, that he was not the first to smelt them and use them for running into pigs or castings, either in a blast furnace or a cupola furnace, and that there is nothing new in his process of smelting which is used by the appellees.

All, therefore, that is left for his invention to cover, and which appellant can claim as infringed by the appellees, is the employment of a cinder notch or hole in a cupola furnace to

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draw off the cinder when the furnace is employed in smelting furnace runners or heavy slag. But if the testimony of unimpeached and uncontradicted witnesses is to be believed, as early as June, 1872, at Beaver Falls, Pennsylvania, a cinder notch was used by the Beaver Falls Co-operative Association in a cupola furnace when employed in smelting furnace runners. The notch was put in the cupola at the suggestion of the witness, Thomas W. Kennedy, who was not a member of the association, but who, being the owner of a blast furnace, was selling to it furnace runners to be re-smelted and used for making castings. He testifies to the fact distinctly and clearly, and designates the part of the cupola where the notch was placed, namely: "between the *tuyères* at the back of the cupola to draw off the slag." He is fully corroborated by the witness, W. J. Shaner, who was a member of the association, [492] and whose business was to do the smelting.

This use of the cinder notch in the cupola was public. No effort was made to exclude spectators from the foundry or to conceal the notch. The invention, therefore, of a cinder notch in a cupola furnace, if it was an invention at all, was made by Thomas W. Kennedy, fifteen months before the appellant, according to his own testimony, ever conceived the idea; and Kennedy, during all that time, allowed it to be used by others, without any injunction of secrecy or any restriction or limitation, in a foundry which was open to all who might choose to visit it, and which was visited by many spectators not concerned in its operations.

But even if the application of a cinder notch to a cupola furnace was first made by the appellant, the question remains whether, standing alone, it implies invention and is patentable.

We think this question must be answered in the negative. Neither a cupola furnace nor a cinder notch is new. The use of a cinder notch for drawing off cinders from a blast furnace is as old as blast furnaces themselves. The function which the cinder notch performs in the process covered by the appellant's invention is precisely the same for which it is used in a blast furnace. In smelting slag in a cupola furnace, it was found that the molten cinder accumulated and floated on the top of the molten iron. The application to a cupola furnace, for the purpose of drawing off the cinder, of the cinder notch used in the blast furnace to accomplish the same end, would occur to any practical man. When applied to a cupola furnace the same function was performed in the same way by the same means. In making this application there was no invention. *Pearce* v. *Mulford* [*ante*, 93].

We are of opinion, therefore, that the application of a cinder notch to a cupola furnace for the purpose designated is neither patentable nor new, and that all the other parts of the process and appliances covered by appellant's patent were old and well known long before the date of his alleged invention and the patent therefor. The complainant was not the first inventor, [493] either in fact or in law, of the discovery or invention described in his letters patent. *The patent is, therefore, void, and the decree of the Circuit Court dismissing the bill was right, and must be affirmed.*

Mr. Justice **Matthews** did not sit in this case and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

BANK OF COMMERCE, *Plff. in Err.*, [493]
v.
STATE OF TENNESSEE, COUNTY OF SHELBY, E. L. McGOWAN AND GEORGE B. FLEECE, County Trustees, AND TAXING DISTRICT OF SHELBY COUNTY.

(See S. C., 14 Otto, 493–497.)

Limit of corporate taxation—provision of charter.

1. Where the purposes for which a corporation may hold property are specified in connection with its exemption from taxation, the limitation of taxation designated must be held to apply only to property acquired for such purposes.
2. Where a charter of a corporation provides that it shall pay an annual tax on its corporate stock, which shall be in lieu of all other taxes, the exemption extends only to the property necessary for the business of the company.

[No. 1130.]

Submitted Dec. 8, 1881. Decided Jan. 9, 1882.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is stated by the court.

Messrs. **William Y. C. Humes** and *Humes & Poston*, for plaintiff in error.

Messrs. Taylor & Carroll, C. W. Heiskell and **Benjamin J. Lea**, for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff in this case is a Corporation created in 1856 by the Legislature of Tennessee to engage in the business of discounting notes, buying and selling stock, dealing in exchange and gold and silver bullion, and receiving moneys on deposit. Its charter provides that it "May purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell and exchange the same, and may hold such real or personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same." The charter also declares that the institution "Shall pay to the State an annual tax of one [494] half of one per cent on each share of capital stock, which shall be in lieu of all other taxes."

Previous to 1879 the Bank purchased with a portion of its capital stock a lot of ground in the City of Memphis, with the improvements thereon, as a place of business, and has held the same ever since. The improvements consist of a three-story brick building, but the Bank only uses the first floor for its business and leases out the cellar and the second and third stories to other parties for a money rent.

On the first of January, 1880, the Bank was, and ever since has been, the owner of three other lots in the City of Memphis. It had previously made loans to different parties and taken, as security for their payment, a deed of the lots executed to a trustee. The loans not being paid, the lots were sold under the deed and purchased by the Bank. The purchase was made solely to

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secure a part of the debt; and the Bank now holds the lots for sale, and will sell them when practicable to restore to its legitimate business so much of its capital as is invested in them.

In March, 1875, the Legislature of the State passed an Act defining what property was exempt from taxation by the Constitution, what the Legislature had the power to exempt and did exempt, and what was taxable; and declaring that all other property should be assessed and taxed. In the list of property designated as exempt from taxation, that held by the Bank of Commerce was not mentioned, and the Act repealed all inconsistent laws.

Under this Act, the lot of ground in the City of Memphis, purchased by the plaintiff, with the building upon it and used as a place of business, was assessed and taxed, in the years 1879, 1880 and 1881, for state and county purposes. The three lots were also taxed in like manner for the years 1880 and 1881. The taxes were paid under protest and the Bank commenced the present suit to recover back the money. It appears to have been treated in the state court as a suit in equity, and the Chancellor sustained a demurrer to the bill and dismissed the suit. The Supreme Court of the State reversed the decree in part, holding that the Bank was not liable [495] for the taxes on so much of the lot and building as was used for its business, but was liable for the taxes on the remainder and on the three lots. From this latter decree the case is brought to this court by the Bank, claiming exemption of the entire property from taxation under its charter.

That statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed, is a familiar rule. Against the power nothing is to be taken by inference and presumption. Where a doubt arises as to the existence of the restriction, it is to be decided in favor of the State. The restriction here, consisting in the declaration that a specific tax on each share of the capital stock shall be in lieu of all other taxes, is accompanied with authority to purchase certain real property, "for the use of the institution as a place of business." The Bank had no express authority to invest its capital in real property not required for that use. And it is to be presumed that the exemption from other than the designated tax was in consideration that the capital would be employed for its legitimate purposes. It certainly would not be pretended that the Corporation by turning its whole capital into real property and engaging in real estate business, could then, by force of the charter, escape liability to taxation for it under the general laws. But if the exemption could not be carried to that extent, it is difficult to fix any limit to the amount of real property which it may hold thus exempt, unless we take that prescribed by the charter. In our judgment, the limited exemption cannot be extended to property used beyond the actual wants of the Corporation in carrying out the purposes of its creation. As well observed by the Supreme Court of the State, the contract of exemption, beyond the extent prescribed, ceased when taxable property was held for any other purpose.

It is true that the capital stock of a corporation may, in a general sense, be said to be all the property in which the capital is invested, so that an exemption of the capital stock, without other words of limitation, may operate to exempt all the property of the corporation. *R. R. Co.* v. *Gaines*, 97 U. S., 707 [XXIV., 1098]. But where the purposes for which a corporation may hold property is specified in connection with the exemption, the limitation of taxation [496] designated must be held to apply only to property acquired for such purposes. This we consider to be the general doctrine established by the numerous cases cited by counsel. The case of *State* v. *Mansfield Comrs.* [23 N. J. L. (3 Zab.) 510], decided by the Supreme Court of New Jersey, is a leading one. There it appeared that the charter of the Camden and Amboy Railroad and Transportation Company, after reserving certain imposts, declared that "No other tax or impost shall be levied or assessed upon the said company." The charter conferred upon the company the general power to purchase, receive and hold real and personal estate; and it had acquired certain houses and lots in the Township of Mansfield, which it let to its workmen and *employés*. These houses and lots having been assessed for taxes by the authorities of the town, the corporation sued out a writ of *certiorari* to revise their action, claiming that houses and lots were exempt under the provisions of the charter stated. The court, in deciding the case, said that the general power of purchasing, receiving and holding real and personal estate could only be exercised to effect the purpose for which it was conferred by the government; that the power to construct a railroad and establish transportation lines upon it necessarily included the essential appendages required to complete and maintain such a work and carry on such a business, such as suitable depots, car-houses, water-tanks, houses for switch and bridge tenders, and coal and wood-yards for the fuel used in the locomotives; that these were within a fair construction of the exempting clause because they were necessary and indispensable to the operations of the company, and to the accomplishment of the objects of their charter, but that there must be a limit somewhere to the incidental power of the company to enlarge its operations and extend its property without taxation under the exempting clause, and the court concluded that the limitation must be fixed *where the necessity ends and mere convenience begins;* that the necessary appendages of a railroad and transportation company were one thing, and that those appendages which might be convenient means of increasing the advantages and profits of the company, were another thing; that it might be advantageous for the [497] company to purchase land and erect houses for their *employés*, and establish factories for making their own rails, engines and cars, and even to purchase coal mines and supply itself with fuel, but these are not among the necessary appendages of the company; and that the Legislature, in exempting the company from all other taxes except those mentioned, only intended to include so much property as was necessary and essential to a railroad and a transportation business such as the corporation was created to construct and carry on. The court, therefore, sustained the validity of the taxes on the houses and lots in question. Numerous other cases to the same purport might be cited. *State* v.

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Newark, 25 N. J. L., (1 Dutcher), 315; *R. R. Co.* v. *Burlington*, 28 Vt., 193; *R. R. Co.* v. *Berks Co.*, 6 Pa., 70; *Worcester* v. *R. R. Co.*, 4 Met., 564. The doctrine declared in them, that the exemption, in cases like the one in the charter before us, extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purposes of its creation, could extend its immunity from taxation, and thus escape the common burden of government.

As to the property which was purchased by the Bank upon the sale under the trust-deed, there is less reason to contend for its exemption from taxation. The express authority conferred upon the Corporation to hold real property, except that acquired for the use of the institution as a place of business, was limited to such as might be taken as security for debts; while held for that purpose it was subject to taxation as the property of the debtors. Its liability, in this respect, to bear its proportion of the common burden of government, was not lessened because the Bank, deeming it might be more readily disposed of if freed from the debtor's right of redemption, thought proper to purchase in the title.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 371.

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[501]

DAVID S. DRAPER, *Plff. in Errr.*,

v.

TOWN OF SPRINGPORT.

(See S. C., 14 Otto, 501-504.)

Town bonds valid without seal.

Where a town in New York was authorized to subscribe to stock of a railroad company and issue its bonds therefor; held, that bonds issued without seal were valid.

[No. 159.]

Argued Dec. 1, 2, 1881. Decided Jan. 9, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **James R. Cox,** for plaintiff in error:

The rule as deduced by *Judge* Cooley (Const. Lim., 77, 78), is this:

"Those directions which are not the essence of the thing to be done, but given merely with a view to the proper, orderly and prompt conduct of the business, and by a failure to obey which, the rights of those interested will not be prejudiced, * * * are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient if that which is done accomplishes the substantial purpose of the statute.'

See, *Torrey* v. *Milbury*, 21 Pick., 67; *Rex* v. *Loxdale*, 1 Burr., 447; *People* v. *Gardner*, 24 N. Y., 586; *People* v. *Cook*, 8 N. Y., 89, 90, 92; Potter's Dwar. St., 221-224, 326, *note; Marchant* v. *Langworthy*, 6 Hill., 646; *Striker* v. *Kelly*, 7 Hill, 9; *U. S. Trust Co.* v. *Fire Ins. Co.*, 18 N. Y., 199; *People* v. *Allen*, 6 Wend., 487; *Jackson* v. *Young*, 5 Cow., 269; *Cunningham* v. *Cassidy*, 17 N. Y., 276; *Hatch* v. *Benton*, 6 Barb., 28; *Thompson* v. *Sargent*, 15 Abb. Pr., 452; *Stewart* v. *Slater*, 6 Duer, 84; Smith, Com. Stat., ch. 15, secs. 670, 678; Sedg., Stat., 3 — which doctrine is approved and enforced in this court; *Supervisors* v. *Galbraith*, 99 U. S., 215 (XXV., 411); *Whitney* v. *Cook*, 99 U. S., 607 (XXV., 446); *Orleans* v. *Platt*, 99 U. S., 681 (XXV., 405); *Kelly* v. *McCormick*, 28 N. Y., 321; *People* v. *Mead*, 24 N. Y., 123; *San Antonio* v. *Mahaffy*, 96 U. S., 315 (XXIV., 817); *People* v. *Tompkins*, 64 N. Y., 57; *Moore* v. *Mayor*, 73 N. Y., 250.

We submit that these cases sufficiently show the current of the authority; and that the lack of seals does not affect the validity of these instruments.

The Town of Springport having voluntarily and for value issued these obligations, reciting the seals of the commissioners, and sent them into circulation as sufficient and valid obligations (inadvertently omitting the seals), has thereby authorized the *bona fide* holder at any time to supply the defect.

1 Dan. Neg. Inst., sec., 142, and many cases cited; Chit. Bills, 184, 185; *Brutt* v. *Picard*, Ryan & M., 37; *Doe* v. *Houghton*, 1 Man. & R., 208; *Boyd* v. *Brotherson*, 10 Wend., 93; *Hervey* v. *Hervey*, 15 Me., 357; *Hunt* v. *Adams*, 6 Mass., 519; *Clute* v. *Small*, 17 Wend., 241; *Mitchell* v. *Culver*, 7 Cow., 337; *Parsons* v. *Jackson*, 99 U. S., 435 (XXV., 407).

"Where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up," etc., etc., "such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument. In other words, it is the act of the principal and he is bound by it."

Garrard v. *Hadden*, 67 Pa., 82; *Fleckner* v. *U. S. Bk.*, 8 Wheat., 338; *Redlich* v. *Doll*, 54 N. Y., 237; *Wangh* v. *Bussell*, 1 Marsh., 214, 311; *Hardy* v. *Norton*, 66 Barb., 533, *Waggoner* v. *Millington*, 8 Hun, N. Y., 142; *Bk. of Pittsburgh* v. *Neal*, 22 How., 107 (63 U. S., XVI., 328); *Davidson* v. *Lanier*, 4 Wall., 457 (71 U. S., XVIII., 380).

These seals are not essential to the validity of the instrument; they are good without them, substantially complying with the letter, spirit and purpose of the statute.

Wadsworth v. *Wendell*, 5 Johns. Ch., 228; *Comrs. of U.S. Deposit Fund* v. *Chase*, 6 Barb., 42; Smith, Com., ch. 15, 771, secs. 670, 678.

Mr. **William F. Cogswell,** for defendant in error:

The Town had no power to subscribe for the stock of the railroad company, except by virtue of the statute in question. It is not one of the powers appertaining to it as a municipal corporation.

Wells v. *Supervisors*, 102 U. S., 625, 630 (XXVI., 122, 124); *People* v. *Smith*, 45 N. Y., 773; *People* v. *Hulburt*, 46 N. Y., 110; *People* v. *Spencer*, 55 N. Y., 1; *Springport* v. *Savings Bk.*, 75 N. Y., 397.

As it could only subscribe by virtue of the authority of the statute, its requirements must be strictly complied with.

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The so-called bonds which lie at the foundation of the action have never been executed.

They bear evidence on their face that they are incomplete and imperfect. They recite that they were under the hands and seals of the commissioners, and they are not. There can therefore be no *bona fide* holder in the case, as upon their face they give notice to everyone of their incomplete condition. Suppose, for the sake of the illustration, they had been sealed but not signed. Would anyone claim that they were valid?

The statute requires two things to a valid execution. One is omitted. The instrument is not executed.

The omission of the seal is a substantial one which the court will not disregard. It changes the entire nature of the instrument.

See, *Millett* v. *Baker*, 42 Barb. N. Y. Sup. Ct., 215; *People* v. *Holcomb*, 3 Park. Cr., 656; *Welch* v. *Scott*, 5 Ired., 72; *State* v. *Drake*, 36 Me., 366; *Beekman* v. *Traver*, 20 Wend., 67; *Bellinger* v. *Gray*, 51 N. Y., 610.

The authorities upon which the plaintiff relies, are not in conflict with the foregoing propositions.

The most apposite are those cases which arise upon official bonds, as *U. S.* v. *Linn*, 15 Pet., 315; *Kelly* v. *McCormick*, 28 N. Y., 321; and the cases of *Board of Education* v. *Fonda*, 77 N. Y., 350; but a moment's reflection will show that these cases do not aid the plaintiffs. Bonds were required for certain purposes, as the principal's taking office, or the issuing of an attachment. The defendants, natural persons, gave instruments not under seal. It was held in these cases that the instrument was a good common law agreement, and that the principal's taking office and receiving public money or the issuing and levy of the process, was a sufficient consideration to support it. The defendant, an artificial person, had no power to execute a common law agreement, only a statutory one, and the question is, has it complied with the statute?

Mr. Justice **Bradley** delivered the opinion of the court:

The action below was brought by the plaintiff in error against the defendant to recover the amount of certain interest coupons annexed to certain instruments called bonds of the Town of Springport, issued in payment of stock of the Cayuga Lake Railroad Company. One defense was that the bonds had no seals affixed to the signatures of the town commissioners. For this defect the court below gave judgment for the defendant, a jury having been waived by the parties. Other defenses were set up on the trial, but were overruled by the court. These were: 1. That on a *certiorari* (to which the plaintiff was not a party) the proceedings of the town commissioners, which resulted in the issue of the bonds, were set aside. 2. That there was no sufficient consent of taxpayers of the Town to authorize the commissioners to subscribe for the stock of the railroad company. 3. That many of those taxpayers who did subscribe revoked their consent before the commissioners acted, which reduced the number of those consenting below that required to give the commissioners power to act.

Without expressing any opinion as to the sufficiency of the defenses which were overruled, we are of opinion that the ground on which the court below dismissed the petition was insufficient. It related merely to a matter of form, and not to the substance of the transaction. The statute under which the bonds (so called) were issued was passed April 14, 1869, and was entitled "An Act to Facilitate the Construction of the Cayuga Lake Railroad and to Authorize the Town of Springport, Cayuga County, to Subscribe to the Capital Stock thereof." [502] The 1st section authorized the County Judge to appoint under his hand and seal three freeholders of the Town as commissioners to carry into effect the purposes of the Act. These commissioners were duly appointed and qualified. The 2d section of the Act was as follows:

"Section 2. It shall be lawful for the said commissioners to borrow on faith and credit of the said Town such sum of money as the taxpaying inhabitants shall fix upon by their assent in writing, not exceeding in amount ten per cent of the assessed valuation of the real and personal property of said Town as shown by the assessment roll for the year 1868, for said Town, at a rate of interest not exceeding seven per cent for a term not exceeding thirty years, and to execute bonds therefor under their hands and seal.

The bonds so to be executed may be in such sums and payable at such times and places, not exceeding thirty years, and in such form as the said commissioner or commissioners and their successors may deem expedient; *provided, however*, that the powers and authority conferred by this section shall only be executed upon the condition that the consent shall first be obtained in writing of the majority of the taxpayers of said Town, owning more than one half of the taxable property of said Town assessed and appearing upon the assessment roll of the year 1868, which consent shall be proved or acknowledged in the same manner, as conveyances of real estate are proved or acknowledged, or proved by a subscribing witness, who shall swear, in addition to the ordinary form of affidavits of subscribing witnesses, that the party assenting informed the witness that he knew the contents thereof.

The proof required to show that a majority of the taxable inhabitants representing a majority of the taxable property of the Town have given their consent required by this section, shall be by the affidavit of the assessors or a majority of them of said Town, which affidavit, consent and acknowledgment shall be filed in the town and county clerk's office of the said county, with a copy of the assessment roll of the year 1868, and it shall be the duty of the said assessors; and they are hereby required, to make such affidavit whenever the said consent shall be obtained on or before the 1st day of January, 1870.

(The time of obtaining consents was extended by the Act of April 1, 1870, to April 1, 1871.)

"A certified copy of such affidavit, consent and acknowledgment shall be presumptive evidence of the facts therein contained and shall [503] be admitted in any court of this State or before any judge or justice thereof."

Section 3 authorized the commissioners, in their discretion, to dispose of the bonds to anybody at not less than par, and directed that the money raised by the sale of bonds should be invested in the stock of the Cayuga Lake Railroad

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Company, and that the said money should be used and applied in the construction of said railroad, beginning at the north end as aforesaid, and its buildings and appurtenances, and for no other purpose whatever.

It was further enacted that the commissioners might subscribe for the stock of the R. R. Co. for the amount consented to, and might purchase the stock, receive certificates, and the Town should thereby acquire all the rights and privileges of other stockholders, might participate in meetings of stockholders, and be eligible as directors.

Section 20 authorized the commissioners to exchange the bonds at par and issue them directly to the railroad company, receiving therefor the stock of the company.

On the 23d of March, 1871, the three assessors of the Town made an affidavit in accordance with the Act, stating the facts necessary to enable the commissioners to proceed.

The commissioners thereupon subscribed for 1,000 shares of the capital stock of the railroad company, of $100 each, and issued the bonds in question in payment thereof. The plaintiff purchased the coupons on which the suit was brought in the ordinary course of business, in good faith, and for a valuable consideration.

It is apparent from the law, that the substantial thing authorized to be done on behalf of the Town was, to pledge the credit of the Town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the Town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The Town, indeed, had no seal; and [504] the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the Town; and their seals could have added nothing to the solemnity of the instruments. The fundamental authority contained in the law is found in the first three lines of the 2d section: "It shall be lawful for the said commissioners to borrow on the faith and credit of the said Town such sum of money as the taxpaying inhabitants shall fix upon by their assent in writing." The commissioners executed this authority in the form allowed by the statute, namely: by a direct purchase of the stock with the bonds issued. They might have sold the bonds for money, and paid the money for the stock. Had they done this the Town would have been liable to pay the money borrowed, even if the obligations given for it had been void. Where the transaction has nothing in it of *malum in se*, and the parties are not *particeps criminis* in a violation of law, money had and received by one from the other in good faith, may be recovered even though the security given therefor be void for some technical defect or illegality. This matter was sufficiently discussed in the case of *Thomas* v. *Richmond*, 12 Wall., 354 [79 U. S., XX., 456], and was very ably considered in *Oneida Bk.* v. *Ontario Bk.*, 21 N. Y., 496. The fact that the stock was taken directly in exchange for the bonds, instead of selling the latter for money and investing in stock, can make no material difference in the nature of the transaction. It is equally the case of value lawfully received for an innocent obligation, whether valid or invalid, given therefor. If valid, a recovery may be had on it; if invalid, a recovery may be had upon the original consideration.

We cannot agree with the courts of the State, that the form of a seal was an essential part of the transaction.

Whether the deviation from the directions of the statute, in the form of the obligations, may not have the effect of notice to the holder, sufficient to allow the other defenses to be set up, is a question which it is unnecessary at this time to decide. It may admit of much consideration.

The judgment must be reversed, with directions to award a venire de novo; *and it is reversed accordingly.*

True copy. Test,
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 350, 351; 42 Hun., 11.

Ex Parte:

FREDERICK GORDON, *Petitioner.* [515]

(See S. C., 14 Otto, 515–519.)

Jurisdiction of admiralty court.

1. Where a Court of Admiralty has jurisdiction of the vessel and of the collision which is the subject-matter of an action, it can try the facts and decide whether it will estimate the damages which a person has sustained by the wrongful killing of another by such collision.

2. An appeal lies from its decree to the Circuit Court, and this court will not issue a prohibition to prevent such decree.

[No. 5, Orig.]

Argued Dec. 13, 14, 1881. Decided Jan. 9, 1882.

PETITION for a writ of prohibition.

The case is stated by the court.

Messrs. **Stewart Brown** and **Arthur Geo. Brown,** for petitioner.

Mr. **John H. Thomas,** *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application by the owner of the [516] British steamer Leversons for a writ of prohibition to restrain the District Court of the United States for the District of Maryland, sitting in admiralty, from proceeding further in a cause begun in that court against his vessel to recover damages for the drowning of certain persons in consequence of a collision on the Chesapeake Bay between the steamer and the schooner David E. Wolf, caused by the fault of the steamer.

Section 688 of the Revised Statutes gives this court authority to "issue writs of prohibition to the district courts when proceeding in admiralty." The writ thus provided for is a common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. 6 Bac. Abr., 587, tit. Prohibition, K. Its office is to prevent an unlawful assumption of jurisdiction.

The judicial power of the United States extends to "All cases of admiralty and maritime jurisdiction" (Const., Art. III., sec. 2), and Congress by sec. 563, sub. 8, of the Revised Statutes, committed the exercise of this power in most cases primarily to the district courts. Admiralty jurisdiction extends to maritime contracts and service, and to torts or injuries, of a

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civil nature, committed on navigable waters. *The Belfast*, 7 Wall., 637 [74 U. S., XIX., 269]. The district courts having the power to hear and decide all cases arising under this jurisdiction, when a prohibition is applied for, the question presented is not whether a libelant can recover in the suit he has begun, but whether he can go into a court of admiralty to have his rights determined.

The collision which caused the injury now complained of was certainly a subject of admiralty jurisdiction. It occurred between two vessels while navigating the public waters of the United States, and was a maritime tort. For damages to the vessels, or their cargoes, caused by the collision, a suit could, unquestionably, [517] be maintained in the district court of any district where the vessel should be found. The question in the present suit is, whether the vessel is liable to the libelants for pecuniary damages resulting from a loss of life in the collision, and that, as we think, a court of admiralty may properly decide. The suit is for damages growing out of the collision. Having jurisdiction in respect to the collision, it would seem necessarily to follow that the court had jurisdiction to hear and decide what liability the vessel had incurred thereby. Suppose the courts of common law had never decided that an action could not be maintained at common law for damages caused by the death of a human being, would anyone doubt the power of courts of admiralty to determine whether such an action could be brought in that jurisdiction? It is no doubt true that down to within a comparatively recent period the courts of admiralty, both in England and in this country, have followed the rule of the common law in respect to such actions, and have decided that damages for such wrongs were not recoverable; but since *Lord* Campbell's Act in 1846, 9 and 10 Vict., ch. 93, it has been provided by statute in England, and in most of the States of the Union, that suits may be brought in the courts of common law for the benefit of those having a pecuniary interest in the life of one who has been killed by the wrongful act of another, to recover such damages as they may have sustained in consequence of the wrong that has been done, and we think it is clearly within the power of the courts of admiralty to determine whether this legislation has not wrought a corresponding change in the laws which govern their jurisdiction.

We have not overlooked the fact that in *Smith* v. *Brown*, L. R., 6 Q. B., 729, decided in 1871, the Court of Queen's Bench in England, evidently with some hesitation, restrained the Court of Admiralty from proceeding with such a suit; but in *The Franconia*, L. R., 2 P. D., 163, decided in 1877, Sir Robert Phillimore declined to follow that case, and his action was sustained in the Court of Appeal by a divided court. The English Court of Admiralty has asserted its jurisdiction in *The Gulejaxe*, L. R., 2 Ad. & Eccl., 325; *The Explorer*, L. R., 3 Ad. & Eccl., 289, and *The Franconia*, *supra*, and we think this case is a proper one for the application of the [518] rule followed by the Court of Queen's Bench in *The Charkieh*, L. R., 8 Q. B., 197, where the suggestion on an application for a prohibition was, that in a case of collision between Charkieh and the Batavier, the Court of Admiralty had no jurisdiction because the Charkieh was the property of the Khedive of Egypt, and was a ship of the Egyptian branch of the Turkish navy, carrying the Ottoman naval pennant, but *Lord Chief Justice* Cockburn, who participated in the decision of *Smith* v. *Brown*, said, after stating the claims that were made: "There, therefore, is a further question, whether or not a vessel belonging to a foreign potentate, but not used as a vessel of state, or a vessel of war, is entitled to the immunity which ships of war, and ships used for the purposes of government, enjoy. This is a question peculiarly within the province of the Court of Admiralty to decide. Why are we to find that the Court of Admiralty cannot deal with it? If it entertains the suit, there is an appeal to the Judicial Committee of the Privy Council, a court of the highest authority. I feel disinclined to grant a rule for a prohibition in a case where the facts are in doubt, and the court whose jurisdiction is sought to be impeached is just as competent to determine the question as we are. * * * But both facts and the law are within the jurisdiction of the Court of Admiralty, and that court is perfectly competent to decide them." And Blackburn, *J.*: "It does seem to me that the Court of Admiralty has jurisdiction to determine the facts, and to decide whether international and maritime laws do allow the circumstances stated to be a defense to a claim against the Charkieh; and if that court be wrong, the Privy Council can set it right, and their decision would be final. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the suit as a question of international law; and taking that view of it, I think the court ought not to be prohibited." All the judges concurred in refusing the writ.

So here, the Court of Admiralty has jurisdiction of the vessel, and the subject-matter of the action, to wit: the collision. It is competent to try the facts and, as we think, to determine whether, since the common law courts in England, and to a large extent in the United States, [519] are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another, the courts of admiralty may not do the same thing. If the district court entertains such a suit, an appeal lies from its decree to the circuit court, and from there here, if the value of the matter in dispute is sufficient. Under these circumstances, it seems to us clear that the admiralty courts are competent to determine all the questions involved, and that we ought not to issue the prohibition asked for.

The petition is, consequently, denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 175.

Ex Parte:

DETROIT RIVER FERRY COMPANY, [519]

Petitioner.

(See S. C., 14 Otto, 519, 520.)

Case followed—prohibition.

1. *Ex parte* Gordon, *ante*, followed.
2. It is no ground for relief by prohibition that

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See, *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise.

[No. 4 Orig.]

Argued Dec. 12, 13, 1881. Decided Jan. 9, 1882.

PETITION for a writ of prohibition.

The case is sufficiently stated by the court.

Messrs. **Henry C. Wisner** & *Speed* and *F. H. Canfield*, for petitioner.

Mr. **Alfred Russell**, for respondent.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case is in all its material facts like that of *Ex parte Gordon* [*ante*, 814], just decided. It matters not that the amount demanded in the libel is less than $5,000, and that, consequently, no appeal will lie to this court. An appeal will lie to the circuit court in favor of the libelant if he is defeated, and in favor of the respondent if the recovery exceeds $50. It is no ground for relief by prohibition, that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise. A prohibition cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities. If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is the judgment of the court of last resort, and concludes the parties. It rests with Congress to decide whether a case shall be reviewed or not.

The writ is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 580.

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[520] *Ex Parte:*

IN THE MATTER OF WALTER F. HAGAR, *Petitioner.*

(See S. C., 14 Otto, 520, 521.)

Admiralty jurisdiction—case followed.

1. Claims for pilotage fees are within the jurisdiction of the admiralty.
2. *Ex parte* Gordon, *ante*, followed.

[No. 9, Orig.]

Argued Dec. 14, 15, 1881. Decided Jan. 9, 1882.

PETITION for a writ of prohibition.

The case is sufficiently stated by the court.

Messrs. Henry G. Ward and **Richard C. McMurtrie**, for petitioner.

Messrs. George Gray, **Edward G. Bradford, Jr.**, *Henry Flanders* and **Thomas F. Bayard**, *contra.*

[521] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is an application by the agent of the master, part owner and claimant of the British ship William Law, for a writ of prohibition to restrain the District Court of the District of Delaware, sitting in admiralty, from proceeding further in a suit pending in that court against the vessel to recover the half pilotage, which is claimed to be due under the statutory regulations of Delaware, for refusing to accept the services of a pilot when tendered, outside of Cape Henlopen lighthouse, to conduct the ship to the Delaware breakwater, where she was bound for orders. It has long been settled that claims for pilotage fees are within the jurisdiction of the admiralty. *Ex parte McNiel*, 13 Wall., 236 [80 U. S., XX., 624]; *Hobart* v. *Drogan*, 10 Pet., 108. Such being the case, under the decision just rendered in *Ex parte Gordon* [*ante*, 814], the district court can properly hear and decide the matters in dispute, and the application for the writ is accordingly denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 175.

HENRY W. STOW, *Appt.*, [547]

v.

CITY OF CHICAGO.

(See S. C., 14 Otto, 547-552.)

Claim of patentee—void patent.

1. A patentee, who is the first to make an invention, is entitled to his claim for all the uses and advantages which belong to it.
2. Henry M. Stow's patents for improvements in street pavements are void.

[No. 11.]

Submitted Oct. 11, 1881. Decided Jan. 9, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. **L. Hill**, *J. N. Jewett* and *F. W. Becker*, for appellant.

Messrs. **Lester L. Bond**, *F. Adams* and *J. F. Bonfield*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The appellant, Henry W. Stow, who was complainant in the court below, filed his bill in equity against the appellee, the City of Chicago, charging it with infringement of four certain letters patent for improvements in street pavements, in which he was either the original patentee or of which he was the assignee. The City of Chicago denied infringement, denied the novelty of the inventions covered by the patents, and alleged license and payment of royalties. Upon final hearing the court below dismissed the bill, and the complainant appealed.

In this court the appellant relies exclusively on the first and fourth patents set out in his bill of complaint. They will be separately considered. The first patent relied on is the re-issue, No. 3,274, dated January 19, 1869, of an original patent granted to him, numbered 72,110, [548] and dated December 10, 1867.

The invention covered by the re-issued patent is thus generally described in the specification: "The nature of my invention consists in putting down a pavement of wood or other suitable material upon a foundation bed of sand or loose earth, and packing the sand or earth by means of wedge blocks driven down into the same and forming a part or whole of the pavement."

The pavement described in this re-issued patent consisted essentially of blocks of wood or other material set upon end in rows across the street, with spaces between the rows in which were driven narrow and probably wedge-shaped blocks, which, when driven down, extended a

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considerable distance below the under surface of the blocks first named, into the foundation bed of sand on which they rested. The claims were as follows:

"1. A pavement composed of alternate tiers of square-ended and wedge-shaped blocks, the wedge-shaped ends of the latter being driven into a foundation bed of sand or earth, substantially as and for the purpose described.

2. A pavement composed of blocks with lower ends wedge-formed, and all driven down into a foundation bed of sand or earth, substantially as shown and described.

3. A pavement composed of wood, or in whole or in part of other suitable material, laid on a foundation bed of sand or loose earth, as described, and a portion of the blocks driven down into said foundation bed to pack the same, substantially as and for the purpose specified."

The appellant does not contend that the second claim is infringed.

A cursory reading of the first and third claims will show that they cover the same invention, the third claim simply including with wood other suitable material out of which the pavement may be constructed.

The invention described in these claims does not cover the making of a street pavement of wood. The use of wood for that purpose is as old as the English patent of David Stead, granted August 23, 1839. The Nicholson patent, which bore date August 8, 1854, and which is referred to in the specification of the re-issued patent under consideration, also covers a device for the construction of a pavement by the use [549] of wooden blocks. Nor does the invention consist in laying the pavement upon a foundation bed of sand or earth. This is as old as cobblestone pavements. See, *Stead* v. *Williams*, 7 Man. & G., 818. The appellant does not claim either of these devices as a part of his invention. No particular form of block is described in the claims, except that some of the blocks used have their lower ends made wedge-shaped. All, therefore, that there is left for the invention described in the first and third claims to cover is, the making of the lower ends of a portion of the blocks of which the pavement is composed in wedge shape, and the driving of these wedge-shaped blocks below the general under surface of the pavement into the sand or earth-bed on which it rests, so as to pack it and render it solid and unyielding.

When thus reduced to what it really is, the invention of the appellant is clearly and distinctly anticipated by the English patent issued to David Stead, dated April 23, 1839, which is set out in full in the record.

One of the drawings which accompanies Stead's specifications shows a pavement laid with contiguous rows of octagonal blocks, so placed as to leave rows of square unfilled spaces. In these square spaces were placed square blocks, longer than the octagonal blocks and wedge-shaped at the lower end, and these were driven down into the earth foundation upon which the octagonal blocks rested.

That part of Stead's specification which these figures illustrate, is as follows:

"Figures 18 and 19 is a plan and side view of a portion of a roadway formed by a series of octangular blocks, L L, placed with the fibre vertical, so as to leave a square recess or interval between them, into which may be inserted a corresponding piece, *m*. When this kind of paving is laid upon a road formed upon a newly made embankment or shrinking base, I should recommend a pile to be driven into the earth through the square recess or interval, of about the size and form represented by the dotted lines, Figure 19, in order to support and keep the blocks firm in their position. When the octangular block paving is used for acclivities, I should recommend the before mentioned cavities either to be left unfilled or not filled up to the surface, to afford an assistance to animals ascending the same as before described."

It is true this specification does not in terms [550] say that the purpose of driving the wedge-shaped block or pile through the space left by the octagonal blocks is to pack the earth or sand foundation, but that it does so as effectually as the use of similar blocks in a similar way under the patent of appellant is too clear for argument. A patentee who is the first to make an invention is entitled to his claim for all the uses and advantages which belong to it. *Woodman* v. *Stimpson*, 3 Fish. Pat. Cas., 98.

It is shown that Stead invented this device. Whether he perceived and stated all its advantages is immaterial. *Tucker* v. *Spalding*, 13 Wall., 453 [80 U. S., XX., 515]; *Mr. Justice* Clifford in *Graham* v. *Mason*, 5 Fish. Pat. Cas., 1.

Stead's specifications, it is clear, cover (to use the language of Stow's re-issued patent) "a pavement composed of wood laid on a foundation bed of sand or loose earth," and having "a portion of the blocks of which it is composed driven down into said foundation bed."

Everything, therefore, in the first and third claims of appellant's re-issued patent, which he sets up as new, was anticipated nearly thirty years by Stead's English patent. Appellant's patent, therefore, so far as it covers these claims, is void, and cannot be the foundation of any relief against the appellee.

The other patent which appellant insists that the appellee has infringed, is No. 134,404, dated December 31, 1872, issued to appellant as the original inventor.

The invention covered by this patent is described in the specifications thus: "The nature of my invention relates to that class of wooden pavements in which the blocks are laid directly upon the sand foundation; and it consists in laying the blocks in rows with spaces between the rows, and in filling or partially filling said spaces with sand or gravel and driving or swaging the same into the sand foundation below, in order to pack or compress the sand under the blocks, for the purpose of sustaining the weight of heavy vehicles passing over the pavement."

The claim is as follows: "A pavement composed of blocks laid in rows directly upon the sand foundation, with spaces between the rows filled with sand or gravel, which is swaged or [551] driven into said foundation, substantially as and for the purpose specified."

The use of wood for street pavements, the laying of the blocks directly upon a sand foundation, the placing of the blocks in rows, leaving spaces between the rows, are all old devices. As already shown, they are all to be found substantially in the English patent of Stead, issued April 23, 1839, and they are found in the En-

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glish patent to Lillie, dated October 13, 1860, and the American patent to Richard H. Willett, No. 114,895, and dated May 16, 1871; all of which are put in evidence by the appellee.

Nor is the filling with sand or gravel of the spaces between the blocks, or rows of blocks, of which the pavement is composed, a new device. It was part of the invention of Nicholson, see *Elizabeth* v. *Pavement Co.*, 97 U. S., 126 [XXIV., 1000], and, as appears by the record was mentioned in the specification of the letters patent, No. 112,945, issued to Gordon A. May, March 27, 1871. And in the specifications of the patent granted to W. H. Chappell, No. 42,347, dated April 19, 1864, set out in the appellee's evidence, it is stated that "Wooden pavements have been constructed on the continent of Europe and in the United States by laying wood blocks endwise of the grain in parallel rows with openings or channels between, into which gravel or gas-tar was placed."

All, therefore, that is left for the patent of the appellant, now under consideration, to cover, is the ramming of the gravel between the blocks, of which the pavement is composed, so as to drive the same into the sand foundation below the blocks, in order to pack it so that the pavement may sustain the weight of heavy vehicles without giving way.

And this is all which seems to be claimed by appellant's counsel as the invention covered by this patent. The evidence is distinct and clear that the invention thus defined was anticipated by the pavement laid by J. K. Thompson, City Superintendent, in the year 1864, at the intersection of North State and Kinzie Streets, in the City of Chicago. This piece of pavement was made of wooden blocks, six inches square, set in rows, on an earth foundation, with spaces between the rows, and the spaces were filled with fine gravel, and the gravel rammed. [552] This pavement was put down by Thompson as an experiment. It proved successful. It was in use until the great fire in Chicago in 1871.

The record further shows that in the fall of 1870, at the instance of Thompson, there was laid at the north end of the La Salle Street tunnel, in Chicago, a piece of pavement five hundred yards in length, constructed in the same manner precisely as that laid by him in 1864 at the intersection of North State and Kinzie Streets. It was made with similar wooden blocks, placed in rows on an earth foundation, with spaces between the rows; the spaces were filled with gravel, which was rammed with an iron rammer, made expressly for the purpose. We have here every part of the invention described in the letters patent under consideration, except that it does not appear that the gravel in the spaces between the rows was so compactly rammed as to drive it below the under surface of the pavement into the earth foundation. All, therefore, that is left for the appellant's patent of 1872 to cover is, the giving of a few more strokes with the rammer, whereby the gravel filling may be forced into the earth foundation of the pavement. Can this be called invention?

The testimony shows that the pavements which the appellant charges to be infringements of his patent of 1872, are constructed according to the plan adopted by Thompson in 1864, and it fails to show that in their construction the gravel filling was forced by the ramming into the earth foundation on which the pavements were laid. So that if there is anything new or patentable embraced in the appellant's patent of 1872, that part of his device is not infringed by appellee.

Therefore, without noticing the other defenses, we declare our opinion to be that the appellant is not entitled to any relief against the appellee upon either of the patents on which his demand for relief is now based. His case, as presented here, has no ground to stand on. *The decree of the Circuit Court dismissing his bill must, therefore, be affirmed.*

Mr. Justice **Field** did not sit in this case, and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Citep—104 U. S., 755.

GEORGE A. DAVIS ET AL., *Appts.*, [570]

v.

L. FRIEDLANDER, JULIUS STICH AND L. LITHAUER, Partners as FRIEDLANDER, STICH & CO.

(See S. C., 14 Otto, 570-577.)

Bankruptcy proceedings—effect on attachment—rights of creditors—of assignee.

1. Proceedings in bankruptcy do not operate to dissolve an attachment issued by a state court of equity, and levied upon the property of the bankrupt more than four months prior to their commencement, and a judgment can be entered for the sale of the property, notwithstanding a discharge previously granted is pleaded in bar of the action.
2. The sale, under such decree, devested the assignees of whatever interest or title they had in the property.
3. Creditors cannot thereafter maintain a bill to declare such sale void and to place the attached property in the possession of the assignees, to be by them sold.
4. The assignees cannot question, collaterally, the proceedings in a state court, to which they voluntarily became parties.

[No. 170.]

Submitted Dec. 7, 1881. Decided Jan. 9, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The case is stated by the court.

Messrs. Fillmore Beall and **William M. Randolph**, for appellants.

Messrs. **Lewis Abraham** and **Charles E. Mayer**, for appellees.

Mr. Justice **Harlan** delivered the opinion of [573] the court:

In *Doe* v. *Childress*, 21 Wall., 646 [88 U. S., XXII., 550], we consider the effect of proceedings in bankruptcy upon an attachment issued from a state court and levied upon the property of the bankrupt, more than four months prior to their commencement. That was an action of ejectment, by the assignee of a bankrupt, to recover land claimed by the defendant under a decretal sale in an attachment suit against the bankrupt in a state court. The latter was declared a bankrupt ten months after the institution of the attachment suit, four months before the decree therein, and seven months prior to

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the sale at which the defendant became the purchaser of the land. Upon this state of facts it was ruled that the proceedings in bankruptcy did not operate to dissolve the attachment; that the debtor's title passed to the assignee, subject to the lien created by the attachment, and that a judgment could be entered for the sale of the property, notwithstanding a discharge had been previously granted and was pleaded in bar of the action. It was said by the court that, "Where the power of a state court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. * * * If the assignee had intervened in the suit he would have been entitled to the property or its proceeds, subject to this [the attachment] lien. He did not, however, intervene or take any measures in the case. He allowed the property to be sold under the judgments in the attachment suits, and those under whom the defendant claims purchased it, obtaining a perfect title to the same."

In *Scott, Assignee* v. *Kelly*, 22 Wall., 57 [89 U. S., XXII., 729], it appears that the assignee in bankruptcy became a party to an attachment suit in a state court, commenced shortly before the defendant was declared a bankrupt. The attachment was issued and levied after the adjudication. The assignee claimed the attached [574] property, but the decision in the state court was adverse to him. Upon writ of error to this court, we said that "The assignee in bankruptcy voluntarily submitted himself and his rights to the jurisdiction of the state court. Being summoned, he appeared without objection, and presented his claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the state court to act in the premises and render judgment."

In *Eyster* v. *Gaff*, 91 U. S., 522 [XXIII., 404], the main question considered was whether a state court, in which a foreclosure suit was pending at the time of the bankruptcy of the defendant, had jurisdiction to proceed without bringing the assignee before the court. The question arose in an action of ejectment instituted by the assignee against the purchaser at the decretal sale in the foreclosure suit. Referring to the authority expressly given the assignee by statute, to prosecute or defend all suits in which the bankrupt was a party, the court said: "If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced. It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the Act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. * * * Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void." Again; "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not devested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction, for the benefit of the assignee, on the Circuit and District Courts of the United States, it is concurrent with and does not devest that of the state courts."

These doctrines were further elaborated in [575] *Claflin* v. *Houseman*, 93 U. S., 133 [XXIII., 837], where it was held that the assignee in bankruptcy, under the Act of 1867, had authority to bring a suit in the state courts, wherever those courts were invested with appropriate jurisdiction suited to the nature of the case. See, also, *Jerome* v. *McCarter*, 94 U. S., 737 [XXIV., 137], and *McHenry* v. *La Société Francaise, etc.*, 95 U. S., 58 [XXIV., 370].

The principles announced in the foregoing cases would seem to be decisive of the main questions arising on this appeal. What are the controlling facts disclosed by the record?

Appellees, Friedlander, Stich & Co., sued Kaufman, their debtor, in the Law Court of Memphis, taking out an attachment, which was levied, November 30, 1866, upon certain real estate, in that city, belonging to him. Subsequently, on different days in December, 1866, and January, 1867, other creditors of Kaufman —the present appellants—brought suits against him in the chancery court of the same city, each creditor taking out an attachment, which was promptly levied on the same real estate as that covered by the attachment in favor of the present appellants. On the 14th day of July, 1868, Kaufman was adjudged a bankrupt upon his voluntary petition, filed the 30th of May, previous; more than a year after the levy of the last of the attachments in the state courts. His assignees were Cirode and Coronna, to whom was made an assignment of the rights, property and effects of the bankrupt. On the 21st of November, 1868, the assignees having received written notice of the pendency of the suits in the chancery court—then consolidated and about to be heard—appeared therein and, with their consent, an order was entered making them, in their capacity as assignees in bankruptcy of Kaufman, parties defendant, with the benefit of any defense they might at any time have had, they assenting that the hearing of the cases proceed. Subsequently, on the 21st day of December, 1868, a final decree was entered in the chancery court ascertaining the amount of Kaufman's indebtedness to the respective complainants, and adjudging that the attached property be sold, free from any right or equity of redemption in Kaufman, or in any of the other defendants, the proceeds to be applied in satisfaction of the debts due the attaching creditors; the surplus, if any, to be paid to Cirode and Coronna, as the assignees in bankruptcy of Kaufman.

Friedlander, Stich & Co., on the 1st of March, 1869, the day fixed by the master's advertisement of the sale of the attached property, presented to the Chancellor of the chancery court (at his chambers, we suppose) a petition in which—after asserting, in virtue of their prior attachment in the law court, a lien superior to that acquired by the present appellees under

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their respective attachments in the chancery court—they prayed that the sale, so far as it related to the property covered by their attachment, be postponed; that they be made parties to the consolidated equity suits; and that their priority of lien be established. The Chancellor declined to order the postponement asked, but indorsed upon the petition that "The sale will proceed, and the complainants to this bill may file this, or a petition, in the consolidated causes to establish their priority, if such exists, to the fund." It does not appear that Friedlander, Stich & Co. availed themselves of the right thus accorded, or that they gave any further attention to or had any further connection with the suits in the chancery court. The sale took place as advertised, Hill becoming the purchaser of a part of the property at the price of $2,500, while the remainder was struck off to Carter, Kirtland & Co., attaching creditors of Kaufman, at the price of $12,520. The bids were less, by nearly one half, than the aggregate debts of the attaching creditors in the equity suits. No exceptions were filed to the report of sale. Hill having complied with the terms of sale, his purchase was confirmed. A decree was entered declaring all the right, title and interest of the parties, in and to the property purchased by Hill, devested out of them and vested in him. It does not appear, from the transcript before us, that Carter, Kirtland & Co. complied with the terms of sale, or that any final action was taken by the court as to their purchase. In July, 1869, Friedlander, Stich & Co. obtained judgment in the law court against Kaufman for the sum of $19,311.81, the amount of their claim against him; and, also, an order for a sale of the attached property, the same previously sold under the decree of the chancery court. But that order was suspended to await the consent of the court in bankruptcy to its execution, or until the further order of the law court.

The present suit was commenced on the 20th of August, 1870, by petition of Friedlander, Stich & Co. filed in the district court, sitting in bankruptcy, and to which the attaching creditors in the suit in the chancery court, the purchasers at the decretal sale of March 1, 1869, and the assignees in bankruptcy of Kaufman were made defendants. The manifest object of the suit is, to secure an adjudication, establishing the prior lien of Friedlander, Stich & Co., as against the other attaching creditors, upon the real estate attached, alike, in the suits in the Law and Chancery Courts of Memphis. To that end, a decree is asked declaring the sales under the order of the latter court to be void, and placing the attached property in the possession of Kaufman's assignees, to be by them sold, under the order of the bankruptcy court; the proceeds of sale to be applied first to the satisfaction of the judgment of Friedlander, Stich & Co. in the law court. The district court disregarding the sale made under the decree of the state court, gave those parties all the relief asked, and its decree was affirmed by the circuit court.

There are many other facts disclosed by the record, but, in the view we take of the case, it is unnecessary to make a more detailed statement than we have done.

We are of opinion that the decree below is radically wrong. It cannot be sustained consistently with the settled doctrines of this court. It rests, necessarily, upon the ground, that immediately upon the assignment of the bankrupt's property to his assignees, the state court of chancery, although the attachments therein were sued out more than four months preceding the bankruptcy, had no jurisdiction to determine the relative rights of the attaching creditors and the assignees in bankruptcy, or to order a sale of the attached property, and apply the proceeds to the satisfaction of the debts of those creditors. But no such position can be maintained. It was competent for the assignees, upon their appointment and qualification, by appropriate proceedings, directed against individual creditors, suing in other courts, to have brought all the property in which the bankrupt had an interest, including that attached in the suits in the state courts, under the direct control of the bankruptcy court, to be disposed of under its orders, with due regard, however, to the previously acquired rights and equities, in whatever way arising, of all the creditors of Kaufman. But they were not bound to pursue that course. Consistently with the bankrupt law, as interpreted by this court, they were at liberty to appear in the state court, and assert there whatever rights they, as assignees, had in the attached property. Electing to pursue the latter course, they voluntarily submitted to the jurisdiction of the state court, which had ample authority to adjudicate, between the attaching creditors and the assignees in bankruptcy, upon all matters arising in the suits before it. Without questioning (as they do not now) the debts of the attaching creditors or the validity of their attachments, the assignees became parties defendant in the equity suits. They neither filed nor offered to file any formal pleading. Nor did they advise the chancery court of the attachment of Friedlander, Stich & Co. in the law court. They left that court to adjudge what were their rights in the property attached. Its final decree secured to them whatever surplus might remain after applying the proceeds of sale to the demands of the attaching creditors. If the bankrupt owed the attaching creditors the sums by them respectively claimed, and if the attachments were so issued and levied as, under the laws of the State, to create a valid lien upon the property, it is clear that the state court gave the assignees all that could have been awarded *them*. [576]

It results from what has been said, that the sale, under that decree—whoever became the purchasers of the attached property, whether third persons, or parties to the suits—devested the *assignees* of whatever interest or title *they* had in the property. That decree, having been passed by a court of competent jurisdiction as to parties and subject-matter, and never having been modified by the court which rendered it, or by any court having authority to review its action, the assignees are precluded from asserting in any other court any interest or title whatever in the property thus sold. Had the present suit been instituted directly by the assignees, for the purpose of setting aside the sale made under the order of the state court, and of procuring another sale of the attached property, under the orders of the court in bankruptcy, the proceedings in the state court would

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have been a conclusive answer to such an action.

Plainly, therefore, the present suit by Friedlander, Stich & Co. is an attempt to invoke the jurisdiction of the district court, sitting in bankruptcy, to the end that they may establish, as against other creditors of Kaufman, their priority of lien upon property, in which, as we have seen, the assignees can now assert no right or interest for the benefit of general or unsecured creditors. Whether appellees have such priority of lien in virtue of their attachment in the law court: whether the proceedings in that court were such as, under the laws of Tennessee, gave them a lien superior to that acquired [577] by the respective attaching creditors in the suits in the state chancery court; whether, by reason of their petition addressed to the Chancellor of the latter court, and his action thereon, they became, in any proper sense, parties to the suits in the chancery court, or bound by the decree therein rendered; or, whether their rights were altogether unaffected by that decree; are all questions in which the assignees have now no interest. They are questions which concern only the respective attaching creditors in the law and chancery courts. For the determination of those questions the present appellees may not invoke the jurisdiction or aid of the bankruptcy court. The decree of the chancery court and the sale thereunder, withdrew the attached property from the assets of the bankrupt. The property brought less than the claims of the attaching creditors; and since the assignees cannot question, collaterally, the proceedings in the state court, to which they voluntarily became parties, they have no possible interest in this litigation. It is, we repeat, a contest exclusively between attaching creditors as to priority of liens upon property in the disposition of which, so far as we can ascertain from the present record, the assignees have not the slightest pecuniary interest.

The decree of the circuit court is, therefore, reversed, with directions that the petition of Friedlander, Stich & Co. filed in the district court, sitting in bankruptcy, be dismissed with costs to the present appellants, but without prejudice to any claim they may assert, by any proper proceedings in a court of competent jurisdiction, to a prior lien as against appellants, or others, upon the property levied upon by the attachment in the Law Court of Memphis.

Decree reversed.

True copy. Test:
James H McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 469.

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[340] CHRISTIAN WORLEY ET AL., *Appts.*

v.

LOKER TOBACCO COMPANY ET AL.

(See S. C., 14 Otto, 340-344.)

Void letters patent—public use—effect of.

1. Letters patent to Christian Worley and Henry McCabe for an improvement in manufacturing plug tobacco, are invalid by reason of a public use before they were granted.

2. A single instance of the public use of his invention by a patentee, for more than two years before the date of his application, will be fatal to the validity of the letters when issued.

3. The inventor cannot relieve himself of the consequences of the prior public use of his patented invention, by assigning an interest in his invention or patent, to the person by whom the invention was thus used.

[No. 196.]

Argued Jan. 5, 1882. Decided Jan. 16, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Mr. **Robert H. Parkinson,** for appellants.

Mr. S. S. Boyd, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The bill of complaint averred that on August 22, 1876, letters patent of that date were issued to Christian Worley and Henry McCabe, the complainants, for an improvement in the mode of finishing plug tobacco, of which Worley was the inventor, and McCabe was his assignee of an undivided half, and that the defendants were infringing said patent, and prayed for an injunction to restrain further infringement, and for damages and an account of profits. The answer asserted the invalidity of the patent and denied infringement. Upon final hearing the circuit court dismissed the bill, and the complainants have appealed to this court.

The specifications on which these letters patent were issued declare as follows:

"The common way to proceed in finishing plug tobacco is to press the bunches into plugs having the form seen in the retail stores. The plugs are next removed from the molds in which they are pressed, and packed in boxes, and the boxes placed in a room, where the tobacco is sweated and cured. The plugs are afterward taken from the boxes, and subjected to a second pressing before they are packed in the boxes for sale.

My improved mode consists in finishing tobacco by placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry [341] heat for several hours, while they are tightly compressed between the plates, which are in contact with the broad sides of the plugs; and finally removing the box, and leaving the contents therein until cold, the whole process being adapted to give a fine and smooth finish to the wrapper and, by putting the plug in proper condition, doing away with its tendency to bulge out at the sides, as plugs are apt to do when they have not been thus treated."

The claim was thus set forth:

"I am aware that there is not any novelty in: first, the simple finishing of tobacco by placing it in a heated room; and, secondly, the simple pressing of tobacco between metallic plates and, therefore, I do not claim this distinct heating and pressing of tobacco broadly; but what I do claim as new and of my invention and desire to secure by letters patent, is:

The mode of finishing tobacco substantially as described, consisting of placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry heat of about 140° Fahrenheit for several hours while they are tightly compressed between the plates, which are in

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contact with the broad sides of the plugs, and finally removing the box and leaving the contents therein until cold."

It will be seen that the patent disclaims the simple pressing of tobacco between plates, and the finishing of it by simply placing it in a heated room.

What appellants insist is new is this, namely: that while the plugs of tobacco are still confined in the finisher (which is the name given to the box in which they are placed before being subjected to extreme pressure), and while still tightly compressed between the metallic plates, they are placed in a sweat room, and allowed to remain several hours, and before being removed from the finisher are taken from the sweat room and allowed to cool.

This process, it is contended, brings the oil of the tobacco to the surface of the plug, and gives it a glossy coating which improves its appearance and keeps the tobacco from moulding or swelling.

The patent is, therefore, for the process described and nothing more. None of the appli-
[342] ances by which it is carried on are claimed as new, and the evidence abundantly shows that they are all old devices.

The appellees insist that the patent is void, because the improvement described therein was in public use at the factory where Worley, the patentee, was employed for more than two years prior to his application therefor.

The law applicable to the case is section 24 of the Act of July 8, 1870 [16 Stat. at L., 201], now embodied in the Revised Statutes as section 4886, which declares, "Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country; and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

Neither the bill of complaint nor the evidence shows the date of Worley's application for his patent, nor of the assignment of an undivided half of his invention to McCabe. The patent itself bears date August 22, 1876, and this must, consequently, be taken as the date of the application and of the assignment. The question is, therefore, whether the improvement patented to Worley was in public use for more than two years prior to that date; that is to say, whether a public use prior to August 22, 1874, is proven.

We think that the testimony of the appellants themselves shows that this question must be answered in the affirmative.

From their depositions the following state of facts appears:

McCabe was the proprietor of a tobacco manufactory in the City of St. Louis, and Worley was in his employment as a workman in the factory. In the summer of 1869, McCabe moved his factory from Second Street to Cass Avenue, and lost about two months of good working weather in so doing. The work of the factory was, consequently, carried on pretty late in the fall, and McCabe told Worley that they should have to go to work early in the spring. It was to prevent the sweating of tobacco which was [343] manufactured in the spring of the year that Worley, in the fall of 1869, conceived the process for which he afterwards obtained his patent. It was at the suggestion of McCabe that he turned his attention to the subject, and the process was contrived for McCabe's benefit. It is not pretended that Worley and McCabe were joint inventors. The invention was made by Worley alone. He at once began using his invention in McCabe's factory. He testifies that it was complete, and he became satisfied with its results, in 1871. It is true that after that date he made experiments to decide upon the best mode of constructing his finishers so as to secure the requisite strength, but the finisher constituted no part of his patented invention. In 1871 his invention was complete, and in his opinion successful, and was adhered to from that date, without change.

The process was used in the factory of McCabe under the direction of Worley until the application was filed for the patent in 1876, and according to the testimony of McCabe, Worley continued the process for McCabe's benefit, who paid him a salary larger than was usual for his knowledge as a tobacco manufacturer. During all the time from 1870 to 1876 thousands of pounds of tobacco finished by means of this process in the factory of McCabe were sold in the market every year. No injunction of secrecy was laid on McCabe by Worley, no one was excluded from the factory where his process was carried on and, at least, one manufacturer learned the process from observing it in McCabe's factory, and adopted it and used it in his own. Worley, it is true, testifies that he told several of the hands employed in the factory not to say anything about what they were doing, and McCabe says that before the patent was obtained there was "an outside understanding" that they were "to keep it away from the public eye as much as possible." The testimony of the appellants on this point is most vague and unsatisfactory, and it is evident that no means were taken by them to keep the process invented by Worley a secret, and it was not kept a secret. Worley, according to his own testimony, communicated his process not only to McCabe but to others, and used it openly in McCabe's factory, for a period of six years before applying for his patent.

It has been repeatedly held by this court, that a single instance of public use of his invention by a patentee, for more than two years before [344] the date of his application for his patent, will be fatal to the validity of the patent when issued. *McClurg* v. *Kingsland*, 1 How., 202; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S., 92 [XXIV., 68]; and *Egbert* v. *Lippman* [*ante*, 755]; decided at the present Term.

We think the testimony of the appellants themselves, shows such a public use of the process covered by Worley's patent, as to render it invalid. This evidence brings the case clearly within the terms of the decision of *McClurg* v. *Kingsland*, *ubi supra*, where it was declared that if a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of the employer has his wages increased in consequence of the useful result of the experi-

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ments, makes the article invented, and permits his employer to use it, no compensation for its use being paid or demanded, and then obtains a patent for it, the patent is invalid and void.

Suppose Worley had not assigned an interest in his invention to McCabe and, after obtaining his patent, had brought suit against the latter for infringement; it is perfectly clear that McCabe could have defended the suit successfully on the ground of his own public use of the invention for two years before the date of the patent. If such defense could be made by McCabe, it could be made by any one else, for the facts relied on would render the patent void.

The fact that McCabe, just before the patent was applied for, became the assignee of an interest in it, does not make this defense any the less effectual; for the assignee of a patent-right takes it subject to the legal consequences of the previous acts of the patentee. *McClurg* v. *Kingsland, ubi supra.*

The inventor cannot relieve himself of the consequences of the prior public use of his patented invention, by assigning an interest in his invention or patent to the person by whom the invention was thus used.

We think the evidence of the appellants themselves establishes clearly the defense under consideration. *The decree of the Circuit Court must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Cited—108 U. S., 466.

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[407] SAMUEL Y. HYDE ET AL., *Plffs. in Err.*,
v.
JOHN RUBLE ET AL.

(See S. C., 14 Otto, 407-410.)

Removal of cause—citizenship of parties—two causes united—repeal of Act.

1. A case is not removable, under the 1st clause of the 2d section of the Act of 1875, where all the parties on one side of the controversy are not citizens of different States from those on the other.
2. To entitle a party to a removal under the 2d clause of the same section, there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other.
3. When two causes of action are found united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants interested in the controversy, which, if it had been sued on alone, would be removable.
4. The 2d clause of section 639, of the Revised Statutes, was repealed by the Act of 1875.

[No. 1010.]

Submitted Dec. 1, 1881. Decided Jan. 16, 1882.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The case is stated by the court.

Mr. **Angus Cameron,** for plaintiffs in error.

Mr. **Gordon E. Cole,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit begun by Ruble and Green, on the 6th of March, 1880, in a State Court of Minnesota against all the plaintiffs in error, who were the defendants below, upon an alleged contract of bailment made by all the defendants as partners. The amount involved was a little more than $500. The plaintiffs were both citizens of Minnesota. One of the defendants, Rowell, was a citizen of Minnesota, but the others were citizens of Wisconsin and Iowa. The business of the alleged partnership was carried on in Minnesota. Rowell filed a separate answer to the complaint, in which he denied the existence of any partnership between himself and the other defendants, and set up a full performance of the contract on his part. The other defendants joined in a separate answer for themselves, in which they denied any partnership [408] with Rowell and any contract between themselves and the plaintiffs. They also denied generally all the allegations of the complaint.

On the 12th of April, 1880, after these answers were in, all the defendants, including Rowell, filed in the state court a petition for the removal of the suit to the Circuit Court of the United States for the District of Minnesota, on the ground of the citizenship of the parties. At the next Term of the circuit court the cause was remanded to the state court. This order was entered in the circuit court on the 31st of July, 1880, and a copy thereof filed in the state court on the 11th of August. On the 12th of January, 1881, at a Term of the state court which began on the 10th of that month, another petition was filed, by all the defendants who were not citizens of Minnesota, for a removal of the suit, as to themselves, on the ground that there could be a final determination of the controversy, so far as it concerned them, without the presence of Rowell as a party. It is not contended that this petition was filed in time to effect a removal under the second clause of the 2d section of the Act of March 3, 1875, Sup. Rev. St., 174, ch. 137, but the state court, under the second clause of section 639 of the Revised Statutes, ordered a removal, so far as concerned the petitioning defendants, leaving the suit to proceed in that court as to Rowell. When the case was docketed in the circuit court under this second removal it was again remanded. To reverse these several orders of the circuit court this writ of error has been brought.

This action is clearly one sounding in contract and not in tort. According to the allegations of the complaint, the plaintiffs stored their wheat with the defendants at an agreed rate for storage, the defendants undertaking to buy the wheat and pay for it at the market price, whenever the plaintiffs wanted to sell. The action is brought to recover what is alleged to be due on the price according to the terms of this contract. All the allegations of wrongful conversion are immaterial, and in no way change the character of the suit.

The suit, then, as it stands on the complaint, is in respect to a controversy between the parties as to the liability of the defendants on a single contract. One ground of defense is, that [409] there was no partnership between the defendants, and that Rowell alone was bound by the contract that was made; and another, that the

NOTE.—*Removal of causes under Act of* 1875; *citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 593.

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contract, by whomsoever made, had been fully performed. Clearly, then, under our rulings in the *Removal Cases*, 100 U. S., 457 [XXV., 593], and *Blake* v. *McKim* [*ante*, 563], the case was not removable under the first clause of the 2d section of the Act of 1875, because all the parties on one side of the controversy were not citizens of different States from those on the other.

Neither do we think it was removable under the second clause of the same section, on the ground that there was in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under this clause, there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other. Thus, in *Barney* v. *Latham* [*ante*, 514], two separate and distinct controversies were directly involved; one as to the lands held by the Winona & St. Peter Land Company, in respect to which the land company was the only necessary party on one side and the plaintiff on the other; and the second as to the moneys collected from the sales of lands before the land company was formed, and as to which only the natural persons named as defendants were the necessary parties on one side and the plaintiffs on the other. One was a controversy about the land and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action and complete relief afforded in each suit as to the particular controversy involved. In that about the land, the land company would have been the only necessary defendant; and in that about the money, the natural persons need only have been brought in. In that about the land, there could not have been a removal, because the parties on both sides would have been citizens of the same State; while in that about the money there could have been, as the plaintiffs would all be citizens of one State, while the defendants would all be citizens of another. When two such causes of action are found united in one suit, we held in the case last cited, there could be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants interested in the controversy, which, if it had been sued on alone, would be removable. [410] But that, we think, does not meet the requirements of this case. This suit presents but a single cause of action, that is to say, a single controversy. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy.

The suit is, therefore, governed by the principles applied in the *Removal Cases* and *Blake* v. *McKim*, rather than those in *Barney* v. *Latham*, and was properly remanded.

The second clause of section 639 of the Revised Statutes was, as we think, repealed by the Act of 1875, and as the second petition for removal was not filed in time under the Act of 1875, it was of no avail. The whole case depends on the first petition.

The order to remand is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 578; 106 U. S., 194, 196; 108 U. S., 132; 110 U. S., 60; 112 U. S., 193; 3 McCrary, 593; 18 N. W. Rep., 644; 20 N. W. Rep., 785.

P. W. H. CUMMINGS, Admr. of the Succession of J. M. GILMER, ROBERT L. GILMER and M. BAER, *Plffs. in Err.*, [419]

v.

H. H. JONES ET AL.

(See S. C., 14 Otto, 419.)

Limitation of writs of error.

The limitation of two years, prescribed by section 1008 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to writs of errors to State Courts.

[No. 938.]

Submitted Dec. 19, 1881. Decided Jan. 16, 1882.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to dismiss.

The case is sufficiently stated by the court.

Messrs. Durant & **Charles W. Hornor,** for defendants in error, for motion.

Mr. Samuel F. Phillips, contra.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is, whether the limitation of two years prescribed by section 1008 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to writs of error to State Courts. We have no hesitation in saying it does. Section 1003 provides that "Writs of error from the Supreme Court to a State Court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States." This is almost the exact language of a similar provision in the 25th section of the Judiciary Act of 1789, and we are not aware it was ever supposed that writs issued to the State Court under that section were not subject to the limitation prescribed for writs to the Circuit Courts by the 22d section. In *Brooks* v. *Norris*, 11 How., 204, this seems to have been assumed, and a writ to a State Court was dismissed "On the ground that it is barred by the limitation of time prescribed by the Act of Congress." There was at that time no other limitation than the one contained in the 22d section.

The motion to dismiss is granted, for the reason that the writ was not brought within two years after the judgment complained of was rendered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 568.

ROBERT L. BRADLEY'S Admr., *Appt.*, [442]

v.

UNITED STATES.

(See S. C., 14 Otto, 442, 443.)

Witness, admissibility of.

Sections 1079 and 1080, of the Revised Statutes do not prevent the United States from using, as a wit-

NOTE.—*Competency of witnesses in U. S. Courts in civil cases; how far governed by state laws.* See, *note* to Vance v. Campbell, 66 U. S., XVII., 168.

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ness to defeat a claim, one whose interest is adverse to the claimant; and that, too, when a judgment in favor of the United States may have the effect of establishing the right of the witness to the same claim.

[No. 188.]

Argued Dec. 22, 1881. Decided Jan. 16, 1882.

APPEAL from the Court of Claims.

The only point discussed by this court is sufficiently explained in the opinion. For report of the case in the court below, see 12 Court of Claims, 578.

Messrs. **Charles E. Hovey** and *Alexander Porter Morse*, for appellant.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for appellee.

[443] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

Section 1079 of the Revised Statutes provides that no claimant suing the United States in the Court of Claims, nor any person from or through whom such claimant derives his alleged title, claim or right, nor any person interested in any such title, claim or right, shall be a competent witness in supporting the same, but under section 1080 the United States may make a claimant a witness.

We agree with the court below that this does not prevent the United States from using, as a witness to defeat the claim, one whose interest is adverse to the claimant; and that, too, when a judgment in favor of the United States may have the effect of establishing the right of the witness to the same claim.

The objections urged against the competency of the witness under the provisions of section 858 of the Revised Statutes are disposed of by *National Bank* v. *Potter* [*ante*, 111].

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[444] DANIEL H. WELLS ET AL., *Plffs. in Errr.*,

v.

JOHN NICKLES.

(See S. C., 14 Otto, 444-449.)

Timber agents—selling timber—compromise.

*1. While there is no Act of Congress expressly authorizing the appointment of timber agents by the Commissioner of the Land-Office, or by the registers and receivers of the local land-offices, the appropriation of money in several Acts of Congress to pay them, is a recognition of the validity of their appointment.

2. The instructions of the Commissioners of the General Land-Office delivered occasionally from 1855 to 1877, directing them to seize and sell timber cut from the public land, also authorized them to compromise with the trespassers on payment of a reasonable compensation for the timber cut and taken away.

3. A compromise so made by which a trespasser agrees to pay all the costs and expenses of a seizure by one of these agents, and gives bond to pay the value of the timber when ascertained in a manner pointed out in the agreement, and does pay the actual expenses, is a valid adjustment of the matter, and binds the United States.

4. On a subsequent seizure of the same property, by government officers, in disregard of this settlement and sale of it to another person, this compromise is evidence of the title of the party who took possession under it and had held it ever since, in an action between him and the second purchaser.

*Head notes by *Mr. Justice* MILLER.

[No. 99.]

Submitted Nov. 18, 1881. Decided Jan. 16, 1882.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. **J. G. Sutherland** and **John R. McBride**, for plaintiffs in error.

Messrs. **Shellabarger & Wilson**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

Nickles brought his action of replevin in the District Court of the Third Judicial District to recover possession of a large amount of sawed lumber, laths and logs, of which he claimed to be the owner. The defendants, Wells and others, denied this, and set up ownership in themselves. The case was tried by a jury, to whom the court gave the following instruction at the request of plaintiff:

"To make a case entitling plaintiff to recover, it is only necessary for the plaintiff to show, by a preponderance of testimony, that the logs in question, and the logs from which the lumber in question was made, were cut on government lands, seized by the timber agents and sold to the plaintiff, and that the defendants detained the logs and timber from the plaintiff."

As there was no doubt but that all the logs had been cut from government lands, and that plaintiff bought it of a timber agent, the jury found a verdict for plaintiff, and judgment was rendered accordingly. This was affirmed in the Supreme Court of the Territory, where the soundness of this instruction was the main question to be decided, as it is here.

One of the defenses set up by Wells and his co-defendants, was that this same lumber had been seized and taken out of his possession by timber agents, under order of Oliver A. Patton [445] and V. M. C. Silva, Register and Receiver of the Land-Office, within whose territory the timber was cut.

That Wells brought a suit against them for that seizure, in the progress of which a compromise was effected. This compromise was reduced to writing and signed by the attorneys of the parties, and according to its terms the lumber was delivered to Wells.

It is as follows:

"In the District Court for the Third Judicial District of the Territory of Utah.

DANIEL H. WELLS

v.

OLIVER A. PATTON, V. M. C. SILVA, J. J. HEFFERMAN and WILLIAM MCKAY, Timber Agents of the United States for the Territory of Utah.

It is hereby stipulated by said parties as follows: in consideration of the bond to be executed by said plaintiff as below stated and his stipulation herein, said defendants hereby release the property from seizure mentioned in the complaint filed in this action, and will discontinue the publication of the notice of sale thereof, and will not hereafter meddle with said property or interfere with plaintiff's use thereof for his own benefit; said plaintiff, in considera-

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tion of the above, hereby agrees that he will not discontinue this suit without the defendants' consent, but will prosecute the same with diligence to final judgment, and will now give bond, with sufficient surety, to pay such sum as he shall be adjudged to pay by final judgment on the merits of this action. The plaintiff also agrees to advance the money to pay the costs of the seizure mentioned in the complaint, and all the costs connected therewith, including advertising, and if the plaintiff shall not be found liable to pay such costs and charges, so paid by such advance, the money so paid shall be deducted from the amount otherwise awarded, if anything, against him by such final judgment.

SUTHERLAND & BATES,
MARSHALL & ROYLE & HEMINGRAY.
Attys' for Defts'.

[446] Rec'd of Daniel H. Wells three hundred and twelve dollars for the expenses of seizure mentioned in the last paragraph of the foregoing stipulation.

Salt Lake City, July 10, 1875.

MARSHALL & ROYLE & HEMINGRAY,
Att'ys for Def'ts."

The Oliver A. Patton here sued, and who made this agreement in that suit, is the same man who, as register of the land-office, directed the subsequent seizure of the property, and who sold it himself to Nickles. It is under that sale alone that Nickles asserts a title to the property.

It appears that, in addition to paying the expenses of the seizure and costs of that suit, Wells gave the bond required by the stipulation.

After this the defendants in that action demurred to Wells' complaint, and their demurrer was sustained and the suit was dismissed. It does not appear that any attempt was made in that action to assess the damages of the defendants or the value of the timber delivered by them to Wells, nor that any suit was brought on Wells' bond, or that it was delivered up to him or canceled.

It would seem to be undeniable that if all the rights contested in these two suits about the same property were those of private persons, the transaction above detailed would be a bar to the present suit. Apparently conceding this to be so, as far as we can gather from the opinion of the Supreme Court of the Territory, that court and the district court denied the sufficiency of these facts as a bar, on the ground that the property was the property of the United States, and the parties to the former suit had no authority to make the compromise which is relied on.

That the lumber was the property of the United States when first seized by the timber agents, is not denied; and it was, therefore, held by them as agents of the government at the time Wells' suit was commenced. That suit was not an action of replevin, but its object was to obtain an injunction to prevent the officers from selling the property, and for a determination of his right to it. It was an eminently proper suit to be brought, if, as he maintained, those officers were seizing and attempting to sell and deliver as property of the United States that which was lawfully his. We know of no principle of law which would forbid him in a proper suit to bring the men thus seizing his property before a legal tribunal. When there, their authority to act for the government, and the question of the ownership of the property which they asserted a right to seize, were questions eminently proper to be decided by a court, especially a court of the United States. If it were [447] otherwise, all the property held by the citizens of this vast country is held at the pleasure of anyone bold enough to assert that it is government property and that he is a government agent.

The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.

The Department of the Interior, under the idea of protecting the lands of the government from depredations on its timber, has gradually come to assert the right to seize what is cut and taken away from the public lands wherever it can be traced. In aid of this the registers and receivers of the land-offices have been, by instructions from the Secretary of the Interior, constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents.

But neither in these Acts of Congress, nor in the instructions from the department, are the powers of these special agents well defined. Fortunately, that point is not material to the decision of the question before us, for the sale under which plaintiff below succeeded in obtaining his verdict, was made by the same register of the land-office with whom Wells made the compromise whose validity is disputed. The action of the other agents may, therefore, be disregarded in the consideration of these questions. It would seem, in the absence of any express limitation of his authority, that the general power to deal with lumber or timber of this character by suit at law, or by such seizure as would subject him to an action, must also authorize the agent to do whatever could be properly done in the conduct of such a suit.

But these officers were not left without instruction and authority on this point. In a letter from the Commissioner of the Land Office, dated November 4, 1870, to the register and receiver of public lands at Salt Lake City, an office held by Mr. Patton, the following language is used: "You will discharge with energy the duty devolved upon you by the inclosed circular, having due regard, however, to the right of homestead and preemption settlers, and to the [448] circumstances of the community requiring a supply of timber, for mining, manufacturing and other business pursuits. In cases where timber may be cut from the public lands and extenuating circumstances exist, you are authorized to compromise with the parties committing the trespass, on their paying all expenses incurred, and a reasonable stumpage to be fixed by you according to the condition of the markets, and not to fall below the *minimum* rate of $2.50 per M. feet. When objection is made to the rate fixed under this rule, the matter may be submitted to the Judges of the Supreme Court of the Territory, in which case you will be governed by their decision as to the stumpage to be exacted." The circular so inclosed was a general one, to all registers and receivers, of December 24, 1855, by Thomas A. Hendricks, Commissioner of the Land-Office, directing

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them to be vigilant in preventing persons cutting timber on public lands, and to seize such timber when cut, and sell it to the highest bidder. These instructions are repeated without the limitation to $2.50 per thousand feet, in orders from the commissioner of the dates of July 8, 1874, September 8, 1874, and June 21, 1875, the latter of which, after referring to the circular of 1855, and the other letters just mentioned, adds: "When circumstances justify so doing, you may settle with the parties on their paying any expenses incurred, and a reasonable stumpage for the timber. But you are to regard this as a compromise justified by existing circumstances, and not as the granting of permission to cut the timber, which is forbidden by law."

These instructions contain ample authority for the compromise made with Wells. It was made July 10, 1875, and the latest of the letters of the commissioner, from which we have cited, is dated June 21, 1875.

The compromise appears to have been framed in conformity with the language of the letter of November 4, 1870, for Wells agreed to pay and did pay the expenses of seizure and costs of suit, and nothing remained but for the judge who decided the demurrer to fix the amount of the stumpage and give judgment for it against Wells. He had given bond to pay what was so ascertained. The case was settled in precise accordance with the instructions of the commissioner, and we think the settlement bound the United States, whose agent made the compromise. [449]

The authority to make this settlement is quite as clear as the authority of the same officer to sell to Nickles; so that his right to sue depends upon the same authority on which Wells had the property delivered to him; on payment of all costs and expenses and giving a bond, with surety, for the damages.

The instruction of the district court held this settlement to be of no validity. The Supreme Court held the same view; and the register who made the sale to Nickles evidently disregarded his own compromise and sold the property to Nickles under the same idea. All this, we think, was erroneous.

We have been shown a letter of April 5, 1877, from the Secretary of the Interior to the Commissioner of the Land-Office, in which he says "No agent employed by you will be permitted to make any compromise for depredation on the public lands." But whether this order is limited to the agents specially employed to look after such depredations, or be held to include the registers and receivers also, is immaterial in the present case, for this recall of the power to compromise was nearly two years after the one under consideration was made and a considerable sum of money paid under it.

All the letters from the department to its officers above referred to, except the one last mentioned, are in this record and are made part of the case on which the Supreme Court of the Territory decided.

We are of opinion that the instruction to the jury, which we have given in full, and the whole theory on which the effect of the stipulation of compromise was decided, is erroneous, *and the judgment of both the Supreme and District Courts is reversed, with directions to set aside the verdict and grant a new trial; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LORING P. HAWES, *Appt.*, *v.* CONTRA COSTA WATER COMPANY, CITY OF OAKLAND ET AL. [450

(See S. C., "*Hawes* v. *Oakland*," 14 Otto, 450-462.)

Action by shareholder against corporation—collusive parties.

*The appellant, a shareholder in the Contra Costa Water Works Company, brought his bill in equity against that Company and the City of Oakland, in the Circuit Court of the United States for California, on the ground that he was a citizen of New York and the defendants citizens of California, alleging that the Waterworks Corporation was furnishing the City of Oakland water free of charge beyond what the law required it to do, and that, though he had requested them to desist, the directors continued to do this to the great injury of himself and other shareholders and the Company.

The court examines the right of the shareholder to sustain such a suit in the light of the authorities English and American, including Dodge v. Woolsey, 18 How., 331 [XV., 401], and holds that in such cases there must exist as the foundation of the suit:

1. Some action or threatened action of the managing Board of Directors or Trustees of the corporation which is beyond the authority conferred by their charter or other source of organization; or,
2. Such a fraudulent transaction, completed or threatened, by the acting managers in connection with some other party or among themselves or with the other shareholders as will result in serious injury to the corporation or to the interests of the other shareholders; or,
3. Where the Board of Directors or a majority of them are acting for their own interests in a manner destructive of the corporation itself or of the rights of the other shareholders; or,
4. Where the majority of shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders and which can be only be restrained by the aid of a court of equity.
5. It must also be made to appear: that plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation.
6. That he was the owner of the stock on which he claims the right to sue at the time of the transactions of which he complains or that it has since devolved on him by operation of law.
7. That the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance.

[No. 148.]

Submitted Dec. 12, 1881. Decided Jan. 16, 1882.

APPEAL from the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. **Charles N. Fox** and *S. M. Wilson*, for appellant.

Mr. **Henry Vrooman**, for appellees:

1. The complainant has not legal capacity to bring this suit.

It appears by the bill of complaint herein, that if any cause of action exists, by reason of the matters therein stated, such cause of action is in favor of the defendant, the Contra Costa Water Company, only.

2. A stockholder of a corporation is not entitled to institute and maintain a suit in equity, in his own name, against the directors of a cor-

*Head notes by *Mr. Justice* MILLER.

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poration and the corporation itself concerning the management of the affairs of the corporation, unless the directors have been guilty of fraud.

Dodge v. *Woolsey*, 18 How., 343-344 (59 U. S., XV., 405, 406).

3. There is no averment in the bill filed herein that the complainant made a demand before the commencement of this suit, upon the directors or trustees of the said Water Company, that they should commence this or any suit, or for the use of the corporate name; or that the directors or trustees of the said Company refused to institute this suit; or that they are fraudulently, collusively or unlawfully allowing the said City to take and use the water of said Water Company without compensation.

Now we submit:

(*a*) That the demand referred to in the bill, was not such a demand as is required by the rule laid down in the case hereinbefore cited; and,

(*b*) That the request made by the complainant to the Board of Directors, "to desist from their illegal and improper practices aforesaid," was not sufficiently definite to notify them as to what he desired to have done. The general rule is, that the management of the corporate affairs is vested in its Board of Directors, acting under the corporate name, for which management they are clothed with full power. If ignoring the function of the Board of Directors, one of the stockholders may, without the directors' consent and without demand upon them, bring a suit in his individual discretion, so may another stockholder and another; this would lead to:

1. A multiplicity of suits.

2. A conflict of authority in managing the corporate business.

3. The subrogation of the authority of the directors, who represent all the stockholders, to the mere option of a single stockholder.

Whereas, the very idea of a Board of Directors for a corporation is to prevent all these things.

The authorities are uniform upon this point. *Smith* v. *Hurd*, 12 Met., 383; *Gardiner* v. *Pollard*, 10 Bosw., 675; *Greaves* v. *Gouge*, 16 Abb. Pr. (N. S.), 379; *Hersey* v. *Veazie*, 24 Me., 9; *Memphis* v. *Dean*, 8 Wall., 73 (75 U. S., XIX., 328).

As to the isolated or exceptional cases in which a stockholder may maintain the suit:

1. Clearly, if a stockholder considers himself injured or about to be injured, by the fraudulent management of the directors, and if, thereupon, he make application to the directors for the use of the corporate name whereunder to enforce his rights, and they refuse him, then he is entitled to proceed in his own name. But, as we have before stated, no such demand or refusal is averred in complainant's bill, and therefore he is not clothed with the legal capacity of one under and entitled to the benefit of this exceptional case of a stockholder.

2. It may be said that where the directors of the corporation are themselves the parties complained of, there is no need of making a demand upon them for the use of the corporate name. But even conceding that such a case might exist, it could only exist in one of two cases, to wit:

(*a*) Where the directors themselves are charged with fraud or collusion.

(*b*) Where the directors are charged with acts *ultra vires*.

Now there is no averment in complainant's bill of any fraud or collusion, nor of anything that even points in that direction. Nor is there any averment that the acts of the Board of Directors were *ultra vires*.

In the case of *Dodge* v. *Woolsey*, 18 How., 339 (59 U. S., XV., 403), the directors were about to pay a tax, which complainant there averred was unconstitutional, both under the Constitution of the State of Ohio, and under the Constitution of the United States, and, therefore, an act *ultra vires*, if payment was made, and in this case the Supreme Court of the United States held that demand and refusal were necessary averments. That was a much stronger case for the complainant there than is this case for the present complainant, in this, that in that case double unconstitutionality was averred and, therefore, an act twofold *ultra vires;* whereas, in the case at bar, no questions of constitutionality, even under either State or Federal Constitution is raised; and, therefore, no act *ultra vires* is pleaded by any averment in the bill. And even if in this case complainant desires to raise the question of *ultra vires* against the Board of Directors, he never can raise it except by pleading it. So the complainant is not within any of the possible exceptional cases wherein he could claim that he is excused from showing the demand for and refusal of the corporate name. Therefore, under both the general rules and under all the possible exceptional cases, this complainant is forestalled from prosecuting this suit upon the pleadings as they now stand.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court for the District of California from a decree in chancery dismissing the appellant's bill.

The plaintiff, who is a citizen of New York, alleges himself to be a stockholder in the Contra Costa Waterworks Company, a California corporation, and he files his bill of complaint on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the action.

The defendants are the City of Oakland, the Contra Costa Water Works Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook and John W. Coleman, trustees and Directors of said Company. [451]

The foundation of the complaint is, that the City of Oakland claims at the hands of the Waterworks Company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the Waterworks Company comply with this demand, to the great loss and injury of the Company and to the diminution of the dividends which should come to him and other stockholders, and the decreased value of their stock. The allegation of his attempt to get the directors of the Company to correct this evil will be given in the language of the bill.

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He says that "On the 10th day of July, 1878, he applied to the President and Board of Directors or Trustees of said Water Company and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said City, to cases of fire or other great necessity, and that said Board should take immediate proceedings to prevent said City from taking water from the works of said Company for any other purpose without compensation; but said Board of Directors and Trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said Company's means to said City of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said Water Company and your orator and the other stockholders thereof have suffered and will, by a continuance of said acts, hereafter suffer great loss and damage."

To this bill the Waterworks Company and the directors failed to make answer, and the City of Oakland filed a demurrer, which was sustained by the court and the bill dismissed.

Two grounds of demurrer were set out and relied on in the court below and are urged upon us on this appeal. They are:

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the Corporation, and the right to sue belonging solely to that body. [452]

2. That the City of Oakland is entitled to receive, free of compensation, all the water which it is charged to be so using in this bill, by a sound construction of the law under which the Company is organized.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in the case of *Dodge* v. *Woolsey*, 18 How., 331 [59 U. S. XV., 401], the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal Courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporations whose rights are to be enforced have no right to sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of the state courts, which are their natural, their lawful and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal Court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuses to enforce or to protect. He instantly demands of them to do their duty in this regard, which, of course, they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery, namely: one against his own company, of which he is a corporator, for refusing [453] to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal Court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted, and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic and corporate that it may in its corporate name transact all the business which its charter or other organic Act authorizes it to do.

Such corporations may be common carriers, [454] bankers, insurers, merchants; and may make contracts, commit torts and incur liabilities; and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of *Dodge* v. *Woolsey* [*supra*], permits the stockholder in

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one of these corporations to step in between that corporation and the party with whom it has been dealing, and institute and control a suit in which the rights involved are the rights of the corporation, and the controversy one really between that corporation, entirely capable of asserting its own rights, and the other party, who is equally so.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.

The earliest English case in which this subject received any very careful consideration is that of *Foss* v. *Harbottle*, before *Vice-Chancellor* Wigram, whose very full and able opinion is reported in 2 Hare, 461. The case was decided in 1843 on a demurrer to the bill, which was brought by Foss and Turton, two shareholders in an incorporation called the Victoria Park Company, on behalf of themselves and all other [455] stockholders, except those who were made defendants, against the directors and one shareholder not a director, and against the solicitor and architect of the company. The bill charged the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened and wasted. It alleged that there had ceased to be a sufficient number of qualified directors to constitute a Board; that the company had no clerk or office; and it prayed for the appointment of a receiver and a decree against the defendants to make good the loss. After showing that the case was one in which the right of action was in the company, the *Vice-Chancellor* says: "In law, the corporation and the aggregate members of the corporation are not the same thing for purposes like this, and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative." Again, after pointing out that cases may arise where the claims of justice would be found superior to the technical rules respecting the mode in which corporations are required to sue, he adds:

"But, on the other hand, it must not be without reasons of a very urgent character that the established rules of law and practice are to be departed from, rules which, though in a sense technical, are founded on the general principles of justice and convenience; and the question is, whether a case is stated in this bill entitling plaintiffs to sue in their private character." He then, in an elaborate argument, holds that the bill is fatally defective because it does not aver that there is no acting or *de facto* Board of Directors who might have ordered the bringing of this suit; and, secondly, that it was the duty of the plaintiffs—the two shareholders who complain of what had been done—to have called a meeting of the shareholders or attended at some regular annual meeting and obtained the action of a majority on the matters in issue. The majority, he says, may have been content with what was done and may have ratified the action of the Board, in which case the whole body would have been bound by it.

The demurrer was sustained and the bill dismissed.

In the subsequent case of *Mozley* v. *Alston*, [456] 1 Phil., 790, decided in 1847, *Lord Chancellor* Lyndhurst says that "The observations of the Vice-Chancellor in *Foss* v. *Harbottle* correctly represent what is the principle and practice of the court in reference to suits of this description."

These cases have been referred to again and again in the English courts as leading cases on the subject to which they relate, and always with approval.

In the case of *Gray* v. *Lewis* [L. R., 8 Eq., 526], decided in the Chancery Appeals, in 1873, Sir W. M. James, L. J., said: "I am of opinion that the only person, if you may call it a person, having a right to complain was the incorporated society called *Charles Lafitte & Co.* In its corporate character it was liable to be sued and was entitled to sue, and if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate character—a defense which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in *Mozley* v. *Alston*, and *Foss* v. *Harbottle*, to which, as I understand, the only exception is where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overpowered by them, as in *Atwool* v. *Merryweather* [L. R., 5 Eq., 464, *note*], where *Vice-Chancellor* Wood sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain proper authority from the corporate body itself in a public meeting assembled." Law Reports, 8 Ch. App., 1035.

But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the same learned Justice in the case of *McDougall* v. *Gardner*, in 1875, L. R., 1 Ch. D., 21. "I am of opinion", he says, "that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in this court as the rule in *Mozley* v. *Alston*, and *Lord* v. *Copper Min. Co.* [2 Phil., 740], and *Foss* v. *Harbottle*, should always be adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made [457] the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent; unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they

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are not fit persons to determine it, but that every litigation must be in the name of the company if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things of which a company may well be entitled to complain but which, as a matter of good sense, they do not think it right to make the subject of litigation, and it is the company as a company which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation or whether it will take steps to prevent the wrong from being done."

The cases in the English courts are numerous, but the foregoing citations give the spirit of them correctly.

In this country the cases outside of the Federal Courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud, or a breach of trust, or are proceeding *ultra vires*. See, *March* v. *R. R. Co.*, 40 N. H., 548; *Peabody* v. *Flint*, 6 Allen, 52; *Brewer* v. *Boston Theater*, 104 Mass., 378, where the general doctrine and its limitations are very well stated. See, also, *Hersey* v. *Veazie*, 24 Me., 9; and *Samuel* v. *Holladay*, 1 Woolw., 400.

The case of *Dodge* v. *Woolsey*, decided in this court in 1855, is, however, the leading case on the subject in this country.

And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit—a bill in chancery—was brought in the Circuit Court for the District of Ohio by Woolsey, a stockholder of the Commercial [458] Bank of Cleveland, and a citizen of Connecticut, against that bank, its managing directors, and Dodge, tax collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which, by the Constitution of the State of Ohio, the bank was bound to pay; that, in that respect, the Constitution, then recently adopted, impaired the obligation of the contract of the State with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the Board of Directors, requested them to institute proceedings to prevent the collection of this tax, but the Board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal. In the opinion of the court, reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract with the State concerning taxation, and that the *tax is so onerous upon the bank that it will compel a suspension and final cessation of its business.* The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its Constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the Act of incorporation the will of the majority cannot make the Act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension of simple negligence on the part of the directors." And the court adds: "It is obvious from this rule that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that [45 opinion, of the fact that the only question on the merits of the case was one which peculiarly belonged to the federal judiciary, and especially to this court to decide, namely: whether the Constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank.

As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a state court from the Supreme Court of the United States.

That difficulty no longer exists, for, by the Act of March 3, 1875 [18 Stat. at L., 470], all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank in the case of *Dodge* v. *Woolsey*, could, undoubtedly, have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.

And this same statute, while enlarging the jurisdiction of the circuit courts in cases fairly within the constitutional grant of power to the federal judiciary, strikes a blow by its 5th section at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a circuit court, or removed there from a state court, it shall appear to said court "That such suit does not really involve a dispute or controversy properly within the jurisdiction of said court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said circuit court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed."

It is believed that a rigid enforcement of this statute by the circuit courts would relieve them

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of many cases which have no proper place on
30] their dockets.

This examination of the case of *Dodge* v. *Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to, leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit:

Some action or threatened action of the managing Board of Directors or Trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization;

Or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

Or where the Board of Directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the
31] court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the City, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, nor of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the Company's charter to be correct, there is nothing which *forbids* the Corporation from dealing with the City in the manner it has done. That City conferred on the Company valuable rights by special ordinance, namely: The use of the [462]
streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom, to let the City use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California, may take this view of it and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the City to be conducted by one stockholder for the Corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant, by that bill, shows no standing in a court of equity —no right in himself to prosecute this suit.

The decree of the Circuit Court is, therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 16; 106 U. S., 542; 110 U. S., 211; 96 N. Y., 450; 67 How. Pr., 393; 30 Hun, 73.

M. A. ROSENBLATT, Collector OF CITY OF [462]
ST. LOUIS, *Appt.*,

v.

WALTER S. JOHNSTON, Receiver of NATIONAL BANK OF THE STATE OF MISSOURI.

(See S. C., 14 Otto, 462, 463.)

Taxation of insolvent national bank.

The personal assets and personal property of an insolvent national bank in the hands of a receiver

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appointed by the Comptroller of the Currency, in accordance with the provision of section 5234 of the Revised Statutes, are exempt from taxation under state laws.

[No. 667.]

Submitted Jan. 4, 1882. Decided Jan. 16, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

This was a proceeding to obtain from the court below an order upon the Receiver of the National Bank of the State of Missouri, to pay to the City of St. Louis, taxes assessed for the years 1877 and 1878, against assets of the bank in the hands of the Receiver. The amended bill set forth the authority to sue, and the official relation of the complainant. It alleged that the bank carried on business under the national banking laws until June 19, 1877, when, upon its suspension and insolvency, the respondent was appointed Receiver by the Comptroller of the Currency. It alleged that "Upon the happening of the insolvency of the National Bank of the State of Missouri as aforesaid, the shares of stock in said banking association became, and ever since have been, and are now, absolutely worthless and of no value whatsoever."

The further allegation was made that the assets and personal property of the banking association passed into the hands of the respondent as Receiver, and had been held by him since June, 1877, and disposed of in the settlement of the affairs of the bank. The assessment of taxes for the years 1877 and 1878 was averred, and the property in the hands of the Receiver was alleged to be sufficient to pay such taxes. The bill prayed an order on the respondent to pay the taxes out of the funds in his hands, and for general relief. To this bill the respondent demurred.

The Circuit Court sustained the demurrer and dismissed the bill. The Collector appealed to this court.

Mr. **Leverett Bell,** for appellant.

Messrs. **J. M. Krum & C. H. Krum,** for appellee.

[463]

Mr. Chief Justice **Waite** delivered the opinion of the court:

The single question in this case is, whether the personal assets and personal property of an insolvent national bank in the hands of a Receiver appointed by the Comptroller of the Currency, in accordance with the provision of section 5234 of the Revised Statutes, are exempt from taxation under state laws; and we have no hesitation in saying that in our opinion they are. Such property and assets, in legal contemplation, still belong to the Bank, though in the hands of a receiver, to be administered under the law. The Bank did not cease to exist on the appointment of the Receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed. *Bk. of Bethel* v. *Pahquioque Bk.*, 14 Wall., 398 [81 U. S., XX., 844]; *Kennedy* v. *Gibson*, 8 Wall., 506 [75 U. S., XIX., 479]; *Bk.* v. *Kennedy*, 17 Wall., 21 [84 U. S., XXI., 555]. If the shares have any value they are taxable in the hands of the holders or owners under section 5219 of the Revised Statutes, but the property held by the Receiver is exempt to the same extent it was before his appointment.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES MURPHY, *Appt.*,

v. [464

UNITED STATES.

(See S. C., 14 Otto, 464, 465.)

Effect of settlement of an account.

The acceptance by a claimant, without objection, of the amount allowed by the Secretary of the Navy, in his adjustment, of an account presented to him, is equivalent to a final settlement and compromise of all the items included in that account.

[No. 745.]

Submitted Dec. 22, 1881. Decided Jan. 16, 1882.

APPEAL from the Court of Claims.

Messrs. **James W. Denver** and **Luther H. Pike,** for appellant.

Messrs. **Samuel F. Phillips** and **John S. Blair,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed. We are clearly of the opinion that the acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy in his adjustment of the account presented to him was equivalent to a final settlement and compromise of all the items of the present claim included in that account. There is nothing in the findings of the court below to warrant a judgment in favor of the claimant upon the only item included in the petition in this case which was not mentioned specifically in the account presented to the Secretary of the Navy and passed on by him in the adjustment he made. [465]

Affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

COLLIS P. HUNTINGTON, *Appt.*, [482]

v.

CHARLES E. PALMER, Tax Collector of the COUNTY OF ALAMEDA, AND CENTRAL PACIFIC RAILROAD COMPANY.

(See S. C., 14 Otto, 482–484.)

Case followed—illegal taxation of corporation.

1. Hawes v. Oakland, *ante*, followed.
2. A suit to set aside illegal taxation of a corporation must be brought in its name, and not in that of one of its stockholders, unless there has been an ineffective effort by the complainant to induce the corporation to take the necessary steps to obtain relief.

[No. 1127.]

Submitted Jan. 4, 1882. Decided Jan. 16, 1882.

APPEAL from the Circuit Court of the United States for the District of California.

The case is sufficiently stated by the court.

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Messrs. **Hall McAllister** and **Harvey S. Brown,** for appellant.

Mr. **Alfred Barstow,** for appellee.

Mr Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the District of California, dismissing on demurrer the appellant's bill in equity.

[483] The bill sets out that the Railroad Company is unjustly and illegally taxed in many particulars, the laws under which the tax is levied being void for conflict with the Constitution of the State, and in an amended bill they were asserted to be in conflict with the Constitution of the United States.

It is unnecessary to examine into the sufficiency of the allegations of the bill on these points, because we think it comes clearly within the principles just announced in the case of *Hawes* v. *Contra Costa Water Co.* [*ante*, 827].

Although the Central Pacific Railroad Company is the party injured by the taxation complained of, which must be paid out of its treasury, if paid at all, the suit is not brought in its name, but in the name of one of its stockholders. Of course, as we have attempted to show in the case just mentioned, this cannot be done without there has been an honest and earnest effort by the plaintiff to induce the corporation to take the necessary steps to obtain relief.

The allegation on this subject found in the bill is, that plaintiff, on or about the 15th day of December, 1880, did inform and cause to be informed the Board of Directors of the Railroad Company of the invalidity of the pretended assessment and the tax founded thereon, and did then and there request said Board to take such action or legal proceedings as might be proper in the premises to test and determine their validity, which they then and there absolutely and willfully refused to do. He then [484] alleges that said Board will pay these illegal taxes out of funds of the Company to the detriment of himself and other stockholders.

There is not, as in the case of *Dodge* v. *Woolsey* [59 U. S., 331, XV., 401], any averment that this tax is so burdensome as to be destructive of the Corporation itself; nor of any fraud on the part of the Board of Directors, nor anything to show that their decision not to resist the tax is unwise, or opposed to the best judgment they could exercise in the matter.

There is no averment of any effort to invoke the control of the body of the stockholders, or any reason why it was not done. Nor is it made to appear that a single other stockholder, besides the plaintiff, was consulted by him, or has any wish to contest the payment of these taxes with the state authorities.

It is the bald claim of one stockholder, owning $100,000 of the stock out of $10,000,000, or thereabouts, without any serious effort to bring the others to his views, or even the Board of Directors, to assert a right of action for the whole body in the very common matter of paying more taxes than he thinks to be just.

There is here no formal written appeal to the board, nor any formal resolution of that body, as in the case of *Dodge* v. *Woolsey*, and there is nothing to repel the reasonable presumption of parties improperly and collusively made in order to invoke the jurisdiction of the Federal Court.

We are of opinion, therefore, that the demurrer was properly sustained, and the decree dismissing the bill is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BENJAMIN H. MICOU ET AL., Heirs-at-law of CLARA E. BOYKIN, Deceased, By Their Guardian, FRANCIS S. BOYKIN, ET AL., *Appts.*, [530]

v.

FIRST NATIONAL BANK OF MONTGOMERY.

(See S. C., 14 Otto, 530-547.)

Preference among creditors—valid sale—justifiable decrees.

1. Where, by the law of a State, an insolvent debtor has the right to prefer one creditor over another, one who is at the same time father and guardian is not required, in paying his debts, to discriminate against his own flesh and blood, to whom he is indebted as their trustee.

2. Where real estate of an insolvent debtor was sold on a decree in favor of a creditor, the circumstance that the debtor, after the sale, was not turned promptly out of possession, is not any ground of complaint on the part of other creditors who show no right to disturb the sale itself.

3. On the facts held, that the decrees considered herein in favor of wards against their guardian and father were not fraudulent as to creditors.

[No. 66.]

Argued Dec. 20, 21, 1881. Decided Jan. 16, 1882.

APPEAL from the Circuit Court of the United States for the Middle District of Alabama.

The case is stated by the court.

Messrs. **William A. Gunter, Philip Phillips,** *D. S. Troy* and *W. Hallett Phillips,* for appellants.

Messrs. **David Clopton,** *Samuel F. Rice* and **Hilary A. Herbert,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed by the appellee, the First National Bank of Montgomery, to subject lands alleged to belong to Benjamin H. Micou, to the payment of a judgment recovered by it against him, and Thomas M. Barnett and Nicholas D. Barnett, partners, as Barnett, Micou & Co., the legal title to which had been transferred to Henry C. Semple, in trust for Clara E. Boykin, wife of Frank S. Boykin, and Lucy B. Micou, all of whom, together with Benjamin H. Micou, were defendants below; the conveyance being, as charged, in fraud of the complainant's rights as a creditor.

The indebtedness on which the judgment in [531] favor of the Bank is founded, was existing at the time of the occurrence of the transactions which form the subject of the controversy.

The fraud charged in the bill is, that Benjamin H. Micou, being at the time guardian in the Probate Court of Tallapoosa County, Alabama, of his daughters, Clara E. Boykin and Lucy B. Micou, confederated and colluded with them, and with Frank S. Boykin, husband of Clara, to procure judgments and decrees to be

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entered up against himself by said probate court in the matter of said guardianships, and to have all of his property liable to sale under legal process, except such personal property as they might aid him to fraudently convert to his own use, and excepting some property bought by another creditor, sold and transferred to his said daughters, with the intent on the part of all of said parties thereby to hinder, delay and defraud the creditors of the said Benjamin H. Micou, he being at the time insolvent.

By virtue of this conspiracy, it is alleged that settlements and decrees were caused to be made in said probate court, whereby it was falsely and fraudulently made to appear that on February 10, 1874, the said Benjamin H. Micou was indebted to Clara E. in the sum of $88,300, for which sum a decree was rendered in said court in favor of Clara and her husband against him, and that on February 24, 1874, said Micou was indebted to Lucy B. in the sum of $88,031.77, for which sum a decree was rendered in said court in her favor. Copies of the proceedings in the probate courtare exhibited. At the time of the settlement with her, Lucy was a minor over the age of nineteen years.

It is charged in the bill that in making said settlements Micou "Did not contend for or desire fair and proper settlements, and that there was no real effort on his part to introduce, as he had it in his power to do or inform his attorney of evidence to show that he was not, as your orator avers he was not, chargeable with the amounts and sums he permitted to be found against him by collusion," with his daughter and son-in-law.

The bill further states as follows: "Orator is without any means of showing in this his bill, the particular items and amounts improperly and [532] collusively charged against said Benjamin H. Micou, and items for which he should have received credit in said settlements, further than is herein shown, the facts upon which said settlements ought to have been made being peculiarly within the knowledge of said B. H. Micou and the other defendants hereto and not of your orator; but orator charges that the item of $91,648.95 with which the said Benjamin H. allowed his account to be surcharged on said settlement was not, and was known to the said Benjamin H. and to the said Clara E., Frank S. and Lucy B., not to be legally and justly due from him; that each item of negro hire, of which said sum is partly made up, was, if said Benjamin H. was rightly chargeable with any part thereof, charged at too high a rate, and that said sum of $94,799.95 was too much by a large sum, of, to wit: $50,000, and that this could have been shown to the court by testimony, if he, the said Benjamin H., had desired to make a fair and valid settlement.

Orator further charges that said Benjamin H. was not, and he and his said daughters then well knew that he was not, chargeable with the large sums, or any part thereof, shown in Exhibit A and B to have been charged against him for negro hire and land rent, for that, as orator charges, the said B. H. Micou was, by orders of said probate court, made as shown by the full and true copies thereof hereto attached, and marked Exhibit D, and prayed to be taken as part of this bill of complaint, authorized to keep his said daughters' property together, and he was only liable to account for the profits arising from the same, which were small."

The decrees referred to were rendered in February, 1874, and by the law of Alabama (Code of Ala., sec. 2794) it is provided that "All final decrees against guardians have the force and effect of judgments at law, upon which execution may issue against them and the securities on their bonds."

The two brothers Barnett, who were partners of Micou, were also his brothers-in-law, uncles of Clara E. and Lucy, his daughters and wards, and were sureties on his bond as their guardian. [533] The decree in favor of Lucy, who at the time of its rendition was still under age, was rendered in the name of H. A. Garrett, who had been appointed her guardian *ad litem* for that purpose.

Executions were issued upon both decrees to the sheriff of Montgomery County, who also at the same time held some other executions against the same defendants, under which all the real estate belonging to the Barnetts and Micou were sold and conveyed by the sheriff to Henry C. Semple, who was the attorney for Lucy B. and Clara E. and her husband, except one parcel bought in by one Pittman, plaintiff in one of the other executions, under an arrangement made with him by Semple on behalf of his clients. Each of the executions in favor of Mrs. Boykin and Lucy B. Micou was credited with $49,540.36 as the proceeds of these sales.

Executions were also issued upon the decrees to the sheriff of Macon County, where Benjamin H. Micou owned a plantation, which he cultivated, and on which, it is alleged, there was a large amount of personal property belonging to him, consisting of a crop of corn, cotton and grain and plantation tools. The executions first issued to this county, it is charged, were returned without levy upon the personal property, under instructions from the plaintiffs to that effect, in order to enable Micou to dispose of it otherwise, which it is averred he did, and thereafter a levy was made on the real estate, which was sold and conveyed to Micou himself as trustee. These lands, it is charged, were worth $6,000, but were sold for $1,250.

Executions on the decree were likewise issued to Elmore County, under which real estate belonging to Micou, and also to the Barnetts, was sold to Semple. It is charged that there was a large amount of personal property belonging to the defendants on these lands, which was not levied on, in order that the defendants might convert them to their own use by some other disposition. And it is charged in the bill "That since the rendition of said decrees there has been a complete understanding and agreement between the parties to said executions that the plaintiffs therein should so use said decrees, and process to be issued thereunder, as to enable the defendants therein to hinder, defraud and delay their several creditors, in that they were to be permitted and aided in converting property to their own use," as therein shown; and that, in [534] further pursuance thereof, notwithstanding the sales of the real estate, the defendants in the executions have been permitted to remain in possession thereof for their own use.

The Barnetts were not made parties to the bill, and no relief is prayed against them.

It is also charged in the bill that Semple holds

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the legal title to the property conveyed to him under the sales on execution upon some secret trust, in which the Barnetts and Micou have, by agreement, some beneficial interest.

It is also alleged that at the time of the settlement of the accounts in the probate court, Lucy B. was a minor over the age of nineteen years, but that her disability of non-age had been removed by a special proceeding for that purpose under a statute of Alabama; but these proceedings, a transcript of which is exhibited with the bill, show that the decree of the chancery court removing her disability was not made until June, 1874, although the petition therefor was filed in May, 1873; and in point of fact, the settlement by Micou of his account as her guardian was made, as appears by the proceedings in the probate court, on his resignation of his guardianship, accepted of record on January 26, 1874, and was effected by the appointment of Garrett as her guardian *ad litem*, in the matter of the settlement.

In his petition to the chancery court, praying for the removal of the disability of non-age in respect to Lucy, her father states, as reasons for the relief, as follows: "Said minor is possessed in her own right of a considerable estate, real and personal, and a large part of said personal estate consists of demands against petitioner, which he is now ready and willing to settle and account for; said minor is a young lady of at least average intelligence and more than ordinary education and acquirements, and is, perhaps, as competent now to manage her own affairs as she ever will be. Your petitioner is, at this time, able and willing to settle all her demands against him. But inasmuch as he is engaged in commercial and manufacturing pursuits, and as the result of such pursuits is proverbially uncertain, petitioner may, by adverse fortune, be deprived of the means of making such full settlement after said minor arrives at the age of twenty-one years; and petitioner further states that Thomas M. Barnett and Nicholas D. Barnett, the sureties of petitioner on his bond as guardian, are engaged in the same pursuits as himself, and liable to the same disaster," etc. [535]

In point of fact, at and previous to that time, Benj. H. Micou was and had been president and managing agent of the Tallassee Manufacturing Company, No. 1, doing a large business, with its office in Montgomery, Ala., and in which he and the Barnetts were largely interested as the principal stockholders. The firm of Barnett, Micou & Co. had, in the fall of 1873, lent its credit to said manufacturing company, to the extent, it is alleged, of $300,000, at which time, it is also alleged, that company had become embarrassed, and in December, 1873, suspended payment.

It is also charged that the firm of Barnett, Micou & Co., and its individual members, were largely indebted on other accounts, in excess of the value of their property, subject to levy and sale under process, which it is alleged was not greater than $175,000.

Clara E. Micou intermarried with Frank S. Boykin, July 10, 1873, shortly after which, it is alleged, and before the settlement with her as guardian in the probate court, her father transferred to her in payment of that sum, on account of what was due to her from him, $30,000 in the capital stock of the Tallassee Company, but omitted the same from his account in the settlement, in pursuance of the fraudulent purpose already charged.

Answers under oath are required from the defendants, and numerous special interrogatories, covering the whole scope of the bill, are addressed to them.

The account of Benj. H. Micou, as guardian of his daughters, as filed by him in the probate court for settlement January 13, 1874, is exhibited with the bill. This account begins with a balance to the debit of the guardian, as ascertained on a former settlement by the probate court in 1859, which, with interest, amounts to over $20,000, and includes cash items, being amounts received for them, as distributees of the estates of T. M. Barnett, Sr., their mother's father, and of the estate of their mother, which, with interest, amount to about $70,000; the other items consisting of sums received on account of the income arising from their property; but no income is allowed them for the years 1862, 1863, 1864 and 1865, on the ground that none was received; and the guardian charges himself with rent for their real estate from 1866 to 1873, rented by himself, at the rate of $1,000 per annum. The balance admitted by the guardian to be due to the two wards, is $107,430.52. [536]

That this account was rendered in good faith, and that there was due at the time from Benj. H. Micou to his wards, at least, as much as the balance shown by it, are facts not questioned by the bill, but admitted, if not expressly, by necessary implication, to be true. Indeed, the very fraud charged and relied on, as constituting the ground of the relief prayed for, is that the parties did not abide by this account.

It appears, however, by the transcript of the proceedings in the probate court, that Mrs. Clara E. Boykin, by her attorney, Elmore J. Fitzpatrick, objected to the allowance of certain items in the account as filed, and it is recited that "The court having listened to the argument of counsel, and heard the testimony offered in support of the said objections, decided and ordered," that the guardian be charged with certain enumerated items. They consisted of amounts charged against him as hire of slaves for the years 1859 to 1865, both inclusive, and also rents for land during the same period, and surcharging the account for rents from 1866 to 1873, and readjusting the account in some other particulars, striking out the items of debit for proceeds of cotton, and disallowing certain items of credit. The final result was to credit the guardian with sums in the aggregate amounting to $22,261.98, and charging him with sums amounting to $92,553.95, increasing the balance against him in the sum of $76,291.08, and allowing for an error of addition, making the final balance against him the sum of $185,967.60, of which, after deducting costs and commissions, Mrs. Boykin was entitled to one half, being $88,300. For that amount judgment was rendered in her favor February 10, 1874, with an order for an execution thereon against the guardian and his sureties: [537]

The account of the guardian with his daughters was kept jointly, as their interests in the property had never been separated; and similar proceedings in the settlement with his daughter Lucy, resulted, on February 24, 1874, in a judg-

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ment in favor of Henry A. Garrett for her use, he having been appointed her guardian *ad litem*, to represent her in the settlement, for the sum of $88,031.77.

The accounts, as originally filed by the guardian, are based upon the principle of crediting the wards with the net proceeds of the operation of their plantations, carried on for them by their father, while the accounts, as settled by the probate court, charge him with the risks and losses of the business as carried on, requiring him to account as if he had rented the plantations and hired the slaves for his own use, at such sums as he might have obtained from others.

It seems not to be denied, that the latter, under the laws of Alabama, was a proper mode and basis of settlement, unless the guardian could show some previous special authority for carrying on the operations of the plantation, in the name and at the risk of his wards.

In the settlement of Micou's accounts it was claimed on his behalf and as a justification of his account as filed by himself, that such special authority existed; and to prove this, there was produced an order of the Probate Court of Tallapoosa County, dated July 18, 1859, which, it was claimed, contained such authority. It appears from a copy of that order, exhibited with the bill, that on November 22, 1858, Benjamin H. Micou, as guardian of his daughters, filed a petition, setting forth that it was to the interest of said minors that the slaves belonging to them be kept together and worked on a plantation, instead of hired out, and that for said purposes it was necessary to purchase a plantation on which to work said slaves, and to the interest of said minors so to do; suggesting that he had contracted for the purchase of a described tract for the purpose aforesaid, and praying for an order authorizing him to purchase and pay for the same. The Probate Judge accordingly appointed commissioners to report as to the value of the lands and the necessity of the purchase. On December 20, 1858, another order was entered, reciting the report of the commissioners, in favor of the purchase for the purpose and at the price named, and "It appearing to the court, from the report of said [538] commissioners and from legal and proper evidence, that it is to the interest of said minors that said slaves should be kept together and worked on a plantation, and that the purchase of the above described plantation is a necessary one," etc., it was therefore "ordered, adjudged and decreed by the court that the said Benjamin H. Micou do forthwith proceed and purchase said lands or plantation above described at the price or sum aforesaid for the use and benefit of the said minors," etc., and "it is further ordered that when said guardian shall have perfected said purchase and received titles for said land, he report the same to this court."

On June 23, 1859, the guardian made report of the authorized purchase, and of the payment of the price, and that a title had been made to the lands. This report was approved and confirmed by an order of the court, made July 18, 1859. But it does not appear that any further order was made by the court, directing or authorizing the guardian to keep the slaves of his wards together and work them on their plantation, at their risk and expense, instead of hiring them out and renting the lands. And the probate court decided, in the matter of the final settlement of his accounts, that the order to purchase the additional land, of December 20, 1858, relied on as authority for so doing, did not have such effect; and the judge accordingly adjusted the account and found the balance due on the principle stated.

This judgment is attacked by the complainant below as collusive and fraudulent, and the right to the relief sought rests upon that charge.

The prayer of the bill is, that the decrees of the probate court establishing these balances as due from Benjamin H. Micou, as guardian, to his daughters, respectively, together with all proceedings, executions and sales under them of the property of Benjamin H. Micou, be declared to be null and void, and that the lands of Micou sold under them be subjected to the payment of the debt due to the complainant, and for general relief.

As required, the defendants answered severally, under oath, and specifically deny every allegation of the bill charging fraud and conspiracy. [539] These answers are supported by the testimony of the parties, taken on their own behalf in the cause.

The principal defendant, Benjamin H. Micou, in his answer, states that soon after his daughter Clara, afterwards Mrs. Boykin, became of age, "He commenced to make preparation for settling the whole of his account with his two daughters, of his guardianship of their property, and in the spring of 1873 he collected up his accounts and vouchers in regard to his management of their estate and placed them in the hands of his attorney, David I. Blakey, and directed him to make out a full and correct account for settlement of said guardianship; and as he desired to be relieved of the responsibility of said trust entirely, and his other daughter, Lucy, was nearly of age, he, at the same time, instructed his said attorney to prepare a petition to the Chancery Court of Elmore County, praying to have said Lucy relieved from the disabilities of minority, so that he might settle at the same time with both of his said wards; that he failed to procure a decree at the June Term of said Chancery Court of Elmore County, and on account of bad health and absence from the City of Montgomery and State of Alabama during most of the summer of 1873, was unable to furnish his attorney with the information necessary from time to time to enable said attorney to properly prepare said account; the said settlement was further delayed by the breaking out of yellow fever in Montgomery in the fall of 1873 and by the financial panic, which occupied the whole of respondent's attention and compelled him to give the whole of his time to the management of the affairs of the Tallassee Manufacturing Company, to the exclusion of his private business, so that he was unable to take up the matter of the settlement of his guardianship until after his connection with the Tallassee Manufacturing Company ceased, in January, 1874; and that in making such settlements he did not consult or confer with said Clara or Frank Boykin or Lucy Micou, and did not give to his attorney any instructions to make out any different account from the one ordered to be made in the spring of 1873, when respondent believed himself to be a rich man

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[540] and amply able to pay all his debts; and respondent is informed by his said attorney and believes and so states, that the account filed by him for settlement of his guardianship in the Probate Court of Tallapoosa County is substantially the same that was prepared by his said attorney in the summer of 1873."

This statement is inconsistent with the supposition that the settlement of his accounts as guardian was prompted by any belief in the imminency of his insolvency. And that it was not so is corroborated by the circumstances of a transaction charged in the bill as one of the evidences of the fraud alleged against him. It appears that about the time of the marriage of his daughter Clara, which occurred in July, 1873, he gave her certificates of shares of the capital stock of the Tallassee Manufacturing Company to the amount of $30,000, in payment of that amount of his indebtedness to her as her guardian. She gave a receipt for it at the time; but soon after, upon its being made known to her husband, and on the advice of counsel, the transaction was canceled, as one that he could not insist upon. The omission to charge this as a payment in his account is alleged against him as proof of fraud. But if at this time he was aware of his own insolvency and that of the manufacturing company, the fraud attempted was against and not in favor of his daughter. No such uncharitable view of his conduct has been entertained in any quarter. The more reasonable and probable supposition is, that at the time he hoped to support his credit, preserve his business, save his property and pay his debts, and thus maintain the value of the property transferred to his daughter. The circumstances which induced the cancellation of the transaction altogether preclude the supposition of an intention to perpetrate a fraud upon the complainant.

Mr. Micou states further in his answer, "That at the time he filed his account for settlement in said probate court, he did not think he was liable for the rents and negro hires afterwards charged against him, because he believed that an order had been made by the Probate Court of Tallapoosa, directing said estate to be kept together, and so informed his attorney; and, therefore, his account was made out on the basis of charging himself only with the real profits derived from the cultivation of the plantation purchased for said wards, after deducting the plantation expenses and the expense of stocking said plantation with mules, utensils and other stock; and respondent had no knowledge that any effort would be made to charge him with the said hires and rents until the question came up in the Probate Court of Tallapoosa County on the said settlement, when Elmore J. Fitzpatrick, representing the interest of said wards, contended that the order which defendant had always understood to be an order to keep the said wards' estate together, was, in fact, an order only to buy a plantation, and insisted on his right to charge defendant with rents and hires. Respondent's attorney, acting under his instructions, resisted said claim and argued the question of the proper interpretation of said order to the said probate court, but the court decided that respondent should be charged with rents and hires."

[541]

That this litigation was adverse and *bona fide* is testified to, also, by Blakey, the attorney for the guardian, and by Fitzpatrick, the attorney for the wards, and by Semple, the regular attorney of the latter, and for whom Fitzpatrick acted as a substitute on the occasion. They severally deny that there was any collusion or understanding, or concert of any kind between them or with their clients in reference to the matter. If in point of fact there was any such collusive agreement, and a feigned contest in pursuance of it, these witnesses must have known it, for they were the instruments through whom alone, together with the Judge, it was effectuated; and there is nothing in the case that warrants the alternative of rejecting their testimony as untrustworthy.

Some expressions in the deposition of Sturdevant, the Probate Judge, are referred to in argument as indicating that the contest before him was not earnest; such as that Blakey, the attorney for Micou, after a short argument in opposition to the contention of Fitzpatrick, "yielded the point;" but he distinctly and clearly states the issue between them and the grounds of it. He says that "The whole question turned upon the fact that there was no authority given to Micou to keep the estate together and to run the farm;" that he decided that there was no such authority, and that the account was settled upon that basis. There is no intimation that this Judge was privy or party to the fraud charged against Micou, nor is it claimed that any fraud in procuring the judgment was practiced by the parties or their attorneys upon him. A legitimate question was, in fact, submitted to him for decision, and the responsibility of rendering the appropriate judgment was distinctly imposed upon him by the law and the act of the parties. He rendered his decrees and, we have no doubt, in perfect good faith; whether correctly or otherwise, is not a question that can be made in this case. There is certainly nothing in their nature, nor in the estimate of values contained in them, to justify the inference that the Judge was moved by any illegal or improper influences. Indeed, we are not referred by counsel to any principle or authority in the law of Alabama to show that, under the circumstances in proof before the probate court, the Judge ought to have come to any different decision. But it is enough for the purposes of this case to find, as we do, that there was no fraud in the settlement and decrees on the part of either guardian or wards.

[542]

There being a failure of proof of the principal fact alleged—the *corpus delicti*—all the circumstances of suspicion that are arrayed as evidential, lose their significance. That Micou was insolvent, and chose to prefer his daughters, to the extent to which they were his creditors, as his wards, and furnished them an opportunity, by means of a settlement made in good faith, and established by the decree of a competent court, to subject his individual property to their payment in preference to the complainant and other creditors of the partnership of which he was a member, may well be admitted to be sufficiently proven. But it is all that remains; and must be admitted at the same time, to be fully sanctioned by the law of Alabama. The Statute of that State, which is invoked as the ground of the relief prayed for in the bill, prescribes that "All conveyances or assignments,

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in writing or otherwise, of any estate or interest, in real or personal property, and every charge upon the same made with intent to hinder, delay, or defraud creditors, purchasers or other persons of their lawful suits, damages, forfeitures, debts or demands; and every bond or other evidence of debt given, suit commenced, decree [543] or judgment suffered with a like intent, against the persons who are or may be so hindered, delayed or defrauded, their heirs, personal representatives, and assigns, are void." Nevertheless, it is equally true, as it is expressly admitted in argument, that, by the law of that State, a debtor has the right to prefer one creditor over another, although such preference may leave the debtor without the means of paying his other debts. And thus conferring upon an insolvent debtor the right of absolute choice among his creditors, the law does not require one who is at the same time father and guardian to discriminate against his own flesh and blood, to whom he is indebted as their trustee.

Even the bankrupt law, which was then in force and might have been invoked, for aught that appears in this record, by the complainant, to prevent the preference of which it complains, as a fraud upon it, assigns to the debt due from Micou to his daughters, as their guardian, a superior quality to that belonging to the claims of ordinary creditors; for his discharge in bankruptcy would not have released him from his legal obligation to his wards. And even had the distribution of his property, both that belonging to him individually and that of the partnership of Barnett, Micou & Co., been made under proceedings in bankruptcy, the very preference secured to his daughters by the decrees of the probate court, would, under the circumstances of the case, have still resulted. For in that case the individual property of the partners would have been first applied to pay in full all their individual debts; leaving to the partnership creditors, such as the present complainant, the partnership assets, and only the surplus of the individual property of the partners. This was precisely what took place under the proceedings in question.

It is alleged in the bill, and urged in argument, that after the decrees were obtained, the executions issued, which eventuated in the sales of real estate to Semple, were handled so as to hinder and obstruct other creditors in the collection of their debts, by covering crops and other personal property from levy and sale; but we have been unable to discover from the record any evidence in support of the charge; and the circumstance that the debtors, after the sales, were not turned promptly out of possession, is not, in our opinion, any ground of complaint [544] on the part of other creditors, who show no right to disturb the sale itself. The same remark equally applies to the trust under which, by agreement with his clients, Semple holds the title acquired by the purchases under the executions. It appears from the answer of Mr. Semple, that, on April 4, 1874, after the decrees had been rendered against Micou, as guardian, and the Barnetts as his sureties, Clara and Francis Boykin and Lucy Micou assigned the same to Semple, with the right to control, manage and collect them, upon trust nevertheless, to proceed so as to secure to Clara and Lucy the title to certain described portions of the real and personal estate, to be sold under execution and purchased in by him to that end, and upon the further trust to purchase as much of the remainder of the property held and owned by the defendants in the decrees, respectively, as could be sold under said executions and purchased therewith, and to settle that part of it owned by Benjamin H. Micou, and sold as his, on his present wife and her children, and to settle that part of it so purchased, which may be sold as the property of Thomas H. Barnett, on his wife and children, and that sold as the property of N. D. Barnett, on his wife and children, but in the two last cases subject to certain charges specified for the payment of money to Clara and Lucy.

There is no proof whatever that it was, in view of this or any similar arrangement, that the settlements and decrees in the probate court were had; or that any such arrangement was then contemplated by anyone of the parties. The contrary is proven by the oath of Mr. Semple, who testifies that it was purely voluntary on the part of Boykin and his wife and Lucy Micou, without any consideration from Benjamin H. Micou or the Barnetts, and suggested for the first time and by himself, to them, after the decrees had been rendered, as a suitable thing to be done. The grounds on which he proceeded in his persuasions to his clients can best be told in his own words. He says:

"After the rendition of the decrees I saw Francis Boykin and talked with him as a friend as well as his attorney; his father and mother were old friends of my youth, and I had known him since he was a child. I told him that the whole property of the guardian, Micou, and his sureties, Tom and Nich. Barnett would not pay [545] the debt; that they and their families would be left penniless; that it would be a hard course to pursue for him and his wife and Lucy to take everything they had, as by law they could do, and that common justice and common decency demanded that they should, out of the abundance which they would have, make some provision for the wives and families of their father and uncles. Boykin very readily agreed to this, but when it came to putting it in writing he seemed to place an exaggerated estimate on the value of the property and place many difficulties in the way. I told him that it was apparent that the ruin of the Barnetts as copartners in Barnett, Micou & Co. had been caused by the faith, trust and reliance they had placed in Micou, his wife's father; that neither he nor his wife or her sister could ever enjoy the respect or confidence of the community if they did not make some proper provision for the families of Thomas M. and Nicholas Barnett, and as to their father's family, of course, I knew that nature itself would dictate a provision for them. I suggested to him that the whole property which we could reach by execution, in fact came directly or indirectly from old Mr. Barnett, the grandfather of his wife and her sister, and how highly he had been esteemed for his sense of justice and honesty; that in my honest judgment, he and his wife and her sister ought to consider what Mr. Barnett would do if he were alive and the owner of the property, and to do it. The young ladies were entirely willing to do whatever I recommended, and Mr. Boykin at last consented to make the provision

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I incorporated in the assignment, which is copied into my answer The assignment was made to me as I refused to manage the matter in any other way. Miss Lucy was a minor, but I expected her disabilities of minority to be removed, and she engaged to ratify it when she became of age, which she afterwards did. Mr. Micou, so far as I know or believe, had no part in it and was not informed of it. He was not in town from the time I suggested it till it was executed. I never consulted him directly or indirectly about it, and have no reason to believe he was consulted by anyone else on the subject. I never spoke to the Barnetts on the [546] subject, or anyone else, or suggested the arrangement, or any arrangement, for the assignment of the decrees, or for any provision to be made for the families of the Barnetts or of Micou, until after the decrees were rendered. In saying this I mean to state that I never even spoke to Boykin on the subject of any provision for the families of his wife's father or uncles until after the rendition of the decrees."

These motives were as honorable to him who urged them as to them who accepted and acted upon them; but independent of their character, the important fact is that the arrangement was subsequent to the time when Mrs. Boykin and her sister had become absolutely entitled to subject all the property in question to the payment of their decrees, and entirely independent of the proceedings by which they obtained them; so that it clearly and satisfactorily appears that the decrees were not in fact, rendered by consent and upon the agreement that such a benefit to the families of the debtors should result. This being so, the daughters of Benjamin H. Micou had a right to dispose of their own, free from question, so long as they infringed not the rights of others; and if they chose, in their turn, to pay a debt of gratitude to the brothers of their mother, and to ease the decline of an impoverished father, we know of no provision in the Code of Alabama which forbids it.

The court below proceeded upon a different view of the evidence and rendered a decree granting the prayer of the bill. Its operation is to annul the settlement and decrees of the Probate Court of Tallapoosa County in favor of Mrs. Boykin and her sister, and all proceedings under them, and give priority to the complainant's judgment, without provision for securing them in the amounts admitted to be due them. It has been forcibly urged upon us in argument that, even upon the facts as charged in the bill, the decree would be erroneous in this respect, on the ground that the disability of coverture as to Mrs. Boykin, and of infancy as to Lucy Micou, and the circumstances of the fiduciary character of their relation to their father, rendered them, in law, incapable of active and responsible participation in an express fraud, so far at least as to exempt them from all liability, except to restore the actual fruits realized by them from it.

[547] But we have not found it necessary to consider or decide that question, and it is mentioned merely to exclude all inferences that might otherwise arise.

In our opinion the evidence required that the decree below should have been in favor of the defendants, and for that error it is reversed and the cause remanded, with instructions to dismiss the bill; and it is so ordered.

Mr. Justice **Woods** did not sit in this case and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—36 N. J. L., 198.

MARY JANE GRIGGS ET AL., *Plffs. in Err.*,
v.
R. G. HOUSTON & CO., A Firm Composed of R. G. HOUSTON, JOHN B. NEELY and THOMAS O'CONNER. [553]

(See S. C., 14 Otto, 553, 554.)

Statutes as to railroads—verdict, when may be directed.

1. Statutes in relation to railroads do not apply to a contractor engaged in building a road.
2. Where, upon the evidence, if the jury had brought in a verdict against the defendants it would have been the duty of the court to set it aside and grant a new trial, the court may direct a verdict for the defendants.

[No. 897.]

Submitted Dec. 12, 1881. Decided Jan. 16, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

This action was brought in the court below, by the plaintiff in error, for herself and minor children, to recover damages for the death of her husband occasioned by injuries, which occurred under the following circumstances:

The Cincinnati Southern Railway was in course of construction, and the defendants were contractors for the completion of the southern division of the road, and had hired from the Western & Atlantic R. R. Co., an engine and tender, the latter company furnishing the engineer. This engine, with tender and two loaded flat cars attached in the rear, left a station four miles northeast of Chattanooga on the morning of June 2, 1879 headed northward. Several persons besides the enginner were in the cab, among them J. B Neely, one of the defendants. There were also several persons including Griggs, upon the pilot of the engine. Whether their presence was known to Neely or the engineer is not certain. In rounding a curve about twelve miles from Chattanooga, a car standing on the main line loaded with ballast appeared in sight. Notwithstanding precautions of the engineer, concerning which there is some dispute, the engine struck this car with sufficient force so that the husband of the plaintiff, and two others, riding upon the pilot, were caught between the engine and the car, and plaintiff's husband received the injury from which he died.

Plaintiff's husband was one of the *employés* of defendants, but was not engaged in running the train, and paid nothing for his ride.

Plaintiff based her claim for recovery upon section 1166, subsection 5 and section 1167 of the Code of Tennessee, which is as follows:

NOTE.—*When a verdict may be directed by the court.* See, *note* to Grand Chute v. Winegar, 82 U. S., XXI., 174.

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"Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always on the lookout ahead, and whenever any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident. Every railroad company that fails to observe these precautions or cause them to be observed by its agents or servants, shall be responsible for all damages to person or property occasioned by or resulting from any accident or collision that may occur."

The court below charged the jury as follows: "In my opinion following the last decision of the Supreme Court of Tennessee, which is authority in this case and in consonance with my own opinion, I charge you that the Statutes of the State relating to railroads do not apply to this case, and, therefore, they must not be looked to by you as controlling the decision of this case. That will leave the case under common law. Following the decision, as I think of the Supreme Court in 95 U. S., which has been read to you, I am of the opinion that, under the facts established by the evidence in this case, the plaintiff is not entitled to recover anything; and I, therefore, instruct you to return a verdict for defendant."

Judgment having been rendered for the defendant, the plaintiff sued out this writ of error.

Messrs. **J. M. Thornburgh** and *W. M. Baxter*, for plaintiff in error.

Mr. **Xenophon Wheeler**, for defendants in error. Cited, 3 Heisk., 276; *Louisville and N. R. R. Co.* v. *McKenna*, South. L. J., May, 1881.

[554]

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed. We agree entirely with the court below in the opinion that the statutes in relation to railroads relied upon by the plaintiffs in error are not applicable to the facts of this case. If upon the evidence the jury had brought in a verdict against the defendants it would have been the duty of the court to set it aside and grant a new trial. The case comes clearly within that of *R. R. Co.* v. *Jones*, 95 U. S., 439 [XXIV., 506], which was followed below. It was right, therefore, to direct a verdict for the defendants. There was no such conflict of evidence as to make it necessary for the jury to pass on the facts.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.
Cited—109 U. S., 482.

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[554] PETER JONES ET AL., *Plffs. in Err.*,

v.

JOHN BUCKELL ET AL.

(See S. C., 14 Otto, 554–556.)

Motion for new trial—bill of exceptions.

1. The ruling of the court below, on a motion for a new trial, is not reviewable here.
2. Where no part of the evidence is set out in the bill of exceptions, showing the materiality of the charge complained of, the case presents only an abstract proposition of law, which this court is not required to consider.

[No. 186.]

Argued Dec. 22, 1881. Decided Jan. 16, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida.

This was an action in ejectment, originally brought by the defendants in error, in the Circuit Court for Duval County, Fourth Judicial Circuit for Florida, to recover certain lots in the City of Jacksonville. The case was transferred to the United States Circuit Court and, upon trial in that court, the jury found under the instructions of the court for the plaintiffs. Judgment having been entered accordingly and a motion for a new trial made and overruled, the defendants sued out this writ of error. The land in question had been owned by one Charles Willey in his lifetime. The plaintiffs below claimed as his heirs, while the defendants, now plaintiffs in error, claimed under certain confiscation proceedings in the United States District Court.

The case further appears in the opinion.

Mr. **William A. Beach**, for plaintiffs in error.

Mr. **Charles W. Jones**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The question argued in this case is, whether [555] a condemnation under the "Act to Confiscate Property Used for Insurrectionary Purposes," passed August 6, 1861, 12 Stat. at L., 319, ch. 60, carried the fee of lands confiscated, or only the life estate of the owner; but we cannot discover that such a question is fairly presented by the record for our consideration. The ruling of the court below on the motion for a new trial is not reviewable here. This is well settled. *Henderson* v. *Moore*, 5 Cranch, 11; *Ry. Co.* v. *Heck* [*ante*, 58].

The only questions, therefore, arising on the bill of exceptions, are those presented by the exception to the following opinion and charge of the court to the jury.

"The Acts of 1861 and 1862, though differing in some respects, are *in pari materia;* while the one treats of property, the other of the person, both are on account of the acts of the person offending. The *Armstrong foundry case*, shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that pardon of the offender absolved the property as well as the person. Upon review of the whole case, the court charges you that the condemnation and sale of the lot in question, purporting to convey a fee simple, only conveys an estate for the life of Charles Willey, and that the heirs of the said Charles Willey are entitled to recover the same." [556]

The pleadings nowhere show that the rights of the parties depend on the construction or effect of the Act of 1861, and no part of the evidence is set out in the bill of exceptions. Copies of deeds and a stipulation in respect to evidence are found in the transcript, but they are nowhere referred to in the bill of exceptions, and it is not even stated in the record that they were used at the trial. As long ago as *Dunlop*

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v. *Munroe*, 7 Cranch, 270, it was said by this court that "Each bill of exceptions must be considered as presenting a distinct and substantive case, and it is on the evidence stated in itself alone that the court is to decide." Of course, evidence may be included in a bill of exceptions by appropriate reference to other parts of the record, and if that had been done here it might have been enough. But with no issue made directly by the pleadings, and no evidence set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, the case presents to us only an abstract proposition of law which may or may not have been stated by the court in a way to be injurious to the plaintiffs in error. Such a proposition we are not required to consider. *Reed* v. *Gardner*, 17 Wall., 409 [84 U. S., XXI., 665].

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[556] VINCENT MICAS, *Plff. in Err.*,
v.
OTHO H. WILLIAMS, Exr. of JOHN B. HOWELL, Deceased.

(See S. C., 14 Otto, 556, 557.)

Jurisdictional amount—motion to affirm.

1. Where affidavits, filed by the plaintiff in error in opposition to a motion to dismiss for want of jurisdictional amount, are sufficient to establish that the value of the matter in dispute exceeds $5,000, the motion to dismiss will be denied.
2. Where a writ of error was taken for delay only, a motion to affirm will be granted.

[No. 1060.]

Submitted Dec. 19, 1881. Decided Jan. 16, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

On motion to dismiss, with which is united a motion to affirm under Rule 6, par. 5.

Messrs. J. O. Nixon, Jr., **Joseph P. Hornor** and *Francis W. Baker*, for defendant in error.

Messrs. **Thomas J. Durant** and *C. W. Hornor*, for plaintiff in error.

[557] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The affidavits which have been filed by the plaintiff in error in opposition to these motions are, probably, sufficient to establish the fact that the value of the matter in dispute exceeds $5,000. The motion to dismiss is, therefore, denied; but, on looking into the record, we are entirely satisfied the writ was taken for delay only. No assignment of errors has been annexed to or returned with the writ as required by section 997 of the Revised Statutes, and every question presented by the bill of exceptions or suggested upon the argument, appears to us so frivolous as to make it improper to keep the case here for any further consideration. There was on the record, as it stood when these motions were made, at least sufficient color of right to a dismissal to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule 6, par. 5.

The motion to affirm is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DANIEL H. ELWOOD, *Plff. in Err.* [562]
v.
PATRICK M. FLANNIGAN, Impleaded with EDWARD SORIN.

(See S. C., 14 Otto, 562–570.)

Patent for lands—laws of States—acknowledgment of deeds—sufficient certificate—Michigan law.

1. When a patent for lands is issued, the title to the lands vests in those holding under any deed the patentee may have previously made.
2. The courts of the United States take judicial notice of all the public laws of the several States.
3. Where the statute makes it the official duty of one holding an office to take the acknowledgment of deeds, the statement of his official character in his certificate of acknowledgment necessarily includes a statement of his official authority.
4. The statement in the certificate that the grantor came before the officer and made the necessary acknowledgment, implies that the grantor was known to the officer, and the acknowledgment is enough until impeached.
5. Under the laws of Michigan, the certificate of the officer that he was, in fact, a justice of the peace at the time, is sufficient evidence of that fact to entitle a deed to record.

[No. 157.]

Argued Nov. 30, 1881. Decided Jan. 16, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **Walter B. Scates**, for plaintiff in error.

Mr. **Thomas Hoyne**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was an action of ejectment to recover [563] the possession of fractional section 7, T. 37 N., R. 15 E., in Cook County, Illinois. By a Treaty with the Pottawatomies of the State of Indiana and Michigan Territory, made on the 27th of October, 1832, 7 Stat. at L., 399, the United States agreed (art. 111) to grant and to convey by patent to Ash-kum, one of the chiefs, and a reservee under the Treaty, two sections of land to "be selected, under the direction of the President of the United States, after the lands shall have been surveyed." Under this provision of the Treaty the lands now in dispute were selected, and the selection approved by the President on the 29th of March, 1837. Ash-kum died intestate in 1846. On the 3d of November, 1864, after his death, a patent was issued, conveying the lands "unto * * * Ash-kum, and to his heirs and assigns forever." Both parties claim under this patent; the plaintiff in error, who was also plaintiff below, by deed from the heirs of Ash-kum, and the defendants, by deed with covenants of warranty from Ash-kum himself, while in life, "to Louis DeSalle, of the Township of Niles, in Berrien County, Michigan Territory," bearing date October 24, 1835.

All the objections to the title of the defendants which were insisted on in the argument, except those relating to the proof of the deed of Ash-kum, and the refusal of the court to charge as requested by the plaintiff upon the assumption of fraud in its procurement, are, as we think, disposed of by *Doe* v. *Wilson*, 23 How., 457 [64 U. S., XVI., 584], and *Crews* v. *Burcham*, 1 Black, 352 [66 U. S., XVII., 91], in

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which similar reservations and grants under the same Treaty were involved. By these cases it has been settled that when the patent issued to Ash-kum and his heirs, the title to the land vested in those holding under any deed he might have made before.

The principal controversy is as to the evidence admitted to prove the deed of Ash-kum. After proof of the loss of the original deed, a certified copy from the records of Cook County was offered in evidence. The record was made on the 31st of May, 1836, and the copy showed a deed, purporting to convey the land, signed by Ash-kum with his mark, sealed, and attested by two witnesses. The certificate of acknowledgment was as follows:

[564] "TERRITORY OF MICHIGAN, } ss.
BERRIEN COUNTY. }

Be it remembered that on the twenty-fourth day of October, *anno Domini* 1835, before me, Titus B. Willard, Esquire, one of the justices of the peace for said County of Berrien, came the above named Ash-kum, an Indian Chief, and acknowledged the above written indenture by him subscribed to be his free act and deed, and desired that the same might be recorded as such according to law.

In testimony whereof I have hereunto set my hand and seal the day and year above written.

TITUS B. WILLARD, [L. S.]
Justice of the Peace.'

No certificate of any kind as to the official character of Willard was added to the deed before it was recorded. Neither was there before the record any certificate of any clerk of a court of record of Michigan, under the seal of his court, to the effect that the deed had been executed and acknowledged in conformity with the laws of that State. There was, however, annexed to the copy of the deed from the record, the following certificate.

"OFFICE OF COUNTY CLERK, BERRIEN CO., MICH., BERRIEN SPRINGS, 1870.
EDWIN D. COOKE, *Clerk.*
STATE OF MICHIGAN, } ss.
BERRIEN COUNTY. }

I, Edwin D. Cooke, clerk of said county, and of the circuit court therein, the same being a court of record and having a seal, do hereby certify that the certificate of acknowledgment by Ash-kum, an Indian Chief, taken before Titus B. Willard, a justice of the peace in and for said County of Berrien, on the 24th day of October, A. D. 1835, as appears on the certified copy of the deed hereto annexed, was executed according to and in conformity with the laws of the Territory of Michigan, as they existed at the time of taking such acknowledgment; and I further certify that, as appears by the records of and in the office of the register of deeds of said County of Berrien, that the said Titus B. Willard was, at the time of taking such [565] acknowledgment, an acting justice of the peace in and for said County of Berrien.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Berrien Springs, this 2d day of January, A. D. 1878. EDWIN D. COOKE, *Clerk.*

{ SEAL OF THE CIRCUIT COURT OF } „
{ BERRIEN COUNTY, MICH. }

In this connection, the defendants proved by parol that Willard was an acting justice of the peace of Berrien County at the date of the certificate of acknowledgment; and they also put in evidence a certificate of the Secretary of State of Michigan, of which the following is a copy:

"STATE OF MICHIGAN,
OFFICE OF THE SECRETARY OF STATE, ss.

I, E. G. D. Holden, Secretary of State of the State of Michigan, do hereby certify that Titus B. Willard was, on the seventh day of March, one thousand eight hundred and thirty-four, duly appointed justice of the peace for the County of Berrien, as appears from the records in this office; and that the term of office fixed by law at the time of his appointment was three years.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy seven.

{ THE GREAT SEAL OF THE }
{ STATE OF MICHIGAN. }

E. G. D. HOLDEN,
Secretary of State.
By WM. CROSBY, *Deputy.*"

The defendants also put in evidence a Statute of Michigan "concerning deeds and conveyances," in force at the date of the deed, Laws of Mich. 1833, p. 279, which provided (sec. 1) that deeds of lands in that Territory, signed and sealed by the parties granting the same, and signed by two or more witnesses, and acknowledged by the parties, should be good and valid to pass title. The acknowledgment required might be made (sec. 2) before, among other officers. a justice of the peace in any county in the Territory, and a certificate of the acknowledgment being indorsed on the deed, "and signed by the person before whom the same was taken," the deed was entitled to be recorded.

To the admission of this evidence the plaintiff [566] in due time objected, and his objections having been overruled, exceptions were taken and made part of the record. The assignments of error relate principally to these exceptions.

By the Statutes of Illinois in force when the deed in question was executed, a deed signed and sealed by the party making the same, was sufficient for the conveyance of any lands in that State. R. L., 1833, p. 129, sec. 1. To entitle such a deed to record, however, an acknowledgment was required before one of certain designated officers, among which were justices of the peace, and if the justice resided out of the State it was required that there be added to the deed a certificate of the proper clerk, "Setting forth that the person before whom such * * * acknowledgment was made was a justice of the peace at the time of making the same." R. L., p. 138, sec. 1. By further statutes it is provided that whenever a a deed which is entitled to be recorded is lost, a certified copy from the record may be used in evidence with the same effect as the original. R. S., 1845, p. 103, sec. 25; R. L., 1874, p. 279, sec. 36.

By the Revised Statutes of Illinois adopted in 1845, R. S., 1845, p. 105, ch. 24, sec. 16, it was enacted that a deed made out of the State and within the United States should be entitled to record when executed and acknowledged or proved in conformity with the laws of the State, Territory or district where made, "*Provided*, That any clerk of a court of record, within

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such State, territory or district, shall, under his hand and the seal of such court, certify that such deed or instrument is executed and acknowledged or proved in conformity with the laws of such State, territory or district." Then, in 1851, it was further enacted, Scate's Stat., 972, sec. 5; Sess. L., February 15, 1871, p. 122, "That a certified copy of any deed, * * * affecting any real estate situate within this State which has been acknowledged without this State, in conformity with the laws of the State where such deed * * * * was acknowledged, and which has been recorded in the proper county in this State, shall be evidence in all courts and places; *Provided*, The party offering such certified copy in evidence will exhibit with the same a certificate of conformity, as provided for in the 16th sec. of ch. 24 of the Revised Statutes, notwithstanding said certificate of conformity has never been recorded." [567] And again; in 1874, R. S., 1874, p. 276, ch. 30, sec. 20, "An acknowledgment or proof may be made in conformity with the laws of the State, territory, or district where it is made; *Provided*, That if any clerk of a court of record, within such State, Territory or district, shall, under his hand and the seal of such court, certify that such deed or instrument is executed and acknowledged or proved in conformity with the law of such State, Territory or district, or it shall so appear by the laws of such State, territory or district, duly proved and certified copies of the record of such deed, mortgage or other instrument relating to real estate, heretofore or hereafter made and recorded in the proper county, may be read in evidence, as in other cases of certified copies, upon such a certificate of conformity to the laws of the State, territory or district where such deeds, mortgages or other instruments were made and acknowledged, being exhibited therewith or annexed thereto."

Such being the laws of the two States applicable to the facts of this case, we proceed to the consideration of the specific objections to the evidence. These may be stated, generally, as follows: 1. That the deed was not entitled to record in Illinois because it was not accompanied by a certificate of the proper clerk that the person before whom the acknowledgment was made was a justice of the peace; and, 2. That the deed was not executed in conformity with the laws of Michigan.

It is conceded that the deed was not acknowledged in conformity with the laws of Illinois, and it is no doubt true that when recorded there was no law of that State which allowed a certified copy to be used in evidence. It was, however, recorded in fact. Consequently, under the later statutes, if actually executed in conformity with the laws of Michigan, and that fact was properly certified, the copy was admissible. There is no question but that the deed, if executed, was in form sufficient to convey the land. It was signed and sealed by the grantor, and was otherwise sufficient as a conveyance between the parties under the laws of Illinois. The whole controversy here is, as to the proof of its execution in conformity with the laws of Michigan, so as to make the copy from the record [568] competent evidence in place of the original. The laws of Illinois, therefore, requiring the certificate of a clerk in certain cases as to the official character of a justice of the peace, are unimportant. If in Michigan such a certificate was not necessary to complete the execution of the deed, none was required in Illinois. Certainly, a deed may be said to be fully executed when all has been done that is necessary to entitle it to record, and for that purpose, in Michigan, the evidence of an acknowledgment was complete when the officer before whom it was taken signed a certificate to that effect indorsed on the deed. No provision was made for any authentication of the official character of the officer. His certificate, made, as it must necessarily be, under the obligations of his official oath, was deemed sufficient.

Was, then, the deed executed in conformity with the laws of Michigan? Under the laws of Illinois, that fact may be proven by the laws of Michigan themselves, or by the certificate of the proper clerk. As the courts of the United States take judicial notice of all the public laws of the several States, *Owings* v. *Hull*, 9 Pet., 625; *Covington Br. Co.* v. *Shepherd*, 20 How., 232 [61 U. S., XV., 898], there was probably no necessity for the proof of the laws of Michigan which was made.

The deed was signed and sealed by the grantor, and it was attested by two witnesses. Of that there can be no dispute. It had indorsed upon it a certificate of acknowledgment signed by Titus B. Willard, which set forth that he was one of the justices of the peace of Berrein County, and that Ash-kum, who was named in the deed as grantor, came before him and acknowledged its execution. It is true the certificate does not state that the officer was one who by law could take the acknowledgment of deeds, but it does state what the office was, and as the statute makes it the official duty of one holding such an office to take the acknowledgment of deeds, the statement of his official character necessarily included a statement of his official authority.

It is next objected that the certificate does not state that Ash-kum was personally known to the officer. There is nothing in the Michigan Statute which requires any such statement, though there is in Illinois. It is enough in Michigan if the officer certifies to the fact of an [569] acknowledgment by the proper party. That has been done in this case. The statement is that Ash-kum, an Indian Chief, came before the officer and made the necessary acknowledgment. This implies that the grantor was in some way known to the officer, and that the acknowledgment was, in fact, made. The making of the certificate was an official act done under the sanction of an official oath, and is presumptively true. The laws of Michigan did not require the officer to state in his certificate the evidence by which the identity of the person was established in his mind. It was enough that he certified to the fact.

The fact that the grantor was in this case an Indian is unimportant. The duty of the officer was precisely the same in respect to him as it was to other men. The officer must, in his case as in others, be satisfied of the identity of the person, as well as of the fact of an acknowledgment. That being done it was his duty to make the certificate. There is nothing in *Dewey* v. *Campau*, 4 Mich., 565, to the contrary of this. There the deed was rejected because the officer

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in effect only certified that he was told by an interpreter, that an Indian woman made the acknowledgment, no power having been given him to swear an interpreter for such a purpose. Here the certificate is that an acknowledgment was, in fact, made. That is enough until impeached.

It is next objected that there was no proof that Willard was at the time, in fact, a justice of the peace. The laws of Michigan required no other evidence of that fact, to entitle a deed to record, than the certificate of the officer himself. That was given in this case, and in addition it was shown that he was acting as a justice of the peace at the time. This makes it unnecessary to consider whether the certificate of the Secretary of State, of the fact of his appointment, was competent evidence. The law did not require a copy of his commission or proof of his having taken the official oath. It was sufficient that he was acting under color of right. That fact was clearly shown. This disposes of the case, so far as the proof of the deed was concerned. Having been executed in conformity with the laws of Michigan, and recorded, a certified copy with the requisite certificate of conformity annexed was admissible in evidence, according to the laws of Illinois, after proof of the loss of the original.

[570]

In respect to the request which was made of the court to charge the jury as to the effect of fraud in the procurement of the deed, it is sufficient to say there is not a particle of evidence in the record to sustain such a claim. If the jury had found for the plaintiff on any such theory, it would have been the duty of the court to set the verdict aside and grant a new trial. Consequently, there was no error in refusing the charge requested.

The judgment is affirmed.

True copy. Test;
James H. McKenney, Clerk, Sup. Court U. S.

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[592] CHARLES J. BONAPARTE, EXR. of ELIZABETH PATTERSON, Deceased, *Plff. in Err.*,

v.

APPEAL TAX COURT OF BALTIMORE CITY.

(See S. C., 14 Otto, 592-595.)

Taxation of public debt of State—constitutional provision.

1. The registered public debt of one State, exempt from taxation by the debtor State or actually taxed there, is taxable by another State when owned by a resident of the latter State, and by such taxation no obligation of the contract of the debtor State is impaired.

2. Immunity from such taxation does not arise from article 4, section 1, of the Constitution, which provides that full faith and credit shall be given in each State to the public Acts of every other State.

[No. 172.]

Submitted Dec. 8, 1881. Decided Jan. 16, 1882.

IN ERROR to the Court of Appeals of the State of Maryland.

This action was commenced by petition filed in the Baltimore City Court by Elizabeth Patterson, stating that by the return of the Board of Control and Review, No. 3, of the City, made to the Appeal Tax Court within thirty days before the filing of the petition, in accordance with the provisions of chapter 260 of the Acts of Assembly of 1876, there appeared to have been valued to the petitioner, for the purposes of state and municipal taxation, the following property:

Private securities.....	$ 10,000
City of New York stock, 6 per cent,..	105,100
City of New York stock, 7 per cent,..	15,000
County of New York stock, 7 per cent,	10,000
County of New York stock, 6 per cent,	50,000
State of New York stock, 6 per cent,.	30,000
State of Pennsylvania stock, 6 per cent,	50,000
State of Ohio stock, 6 per cent,.....	86,000
City of Philadelphia stock, 6 per cent,	116,000

The petitioner claimed that all of the above mentioned property, so valued to her by the Board, was either not owned by her or exempted from such valuation, and that the same should be stricken from the list of property valued to her by the said Appeal Tax Court. By an amendment to the petition, the petitioner alleged that the above stocks were registered stocks, transferable only on the books of public officers of the State, and that the interest was only payable at the respective seats of government, excepting the Ohio stock, of which the interest was payable in New York, and that no profit could be derived from the stocks except through the doing of acts necessarily to be done outside of Maryland.

By agreement, the Baltimore City Court rendered a decree *pro forma* in favor of the petitioner. The Appeal Tax Court appealed to the Court of Appeals of the State, where the judgment of the lower court was reversed. The petitioner appealed to this court.

The propriety of the valuation of the private securities, so called in the above list, is not in question here. Of the remainder it appeared that certain portions were exempt from taxation in the States where they were issued, while other portions do not appear to have been so exempt.

Messrs. **I. Nevett Steele** and **Charles J. Bonaparte,** for plaintiff in error.

Mr. **Charles J. M. Gwinn,** *Atty-Gen.* of Maryland, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The question we are asked to decide in this case is, whether the registered public debt of one State, exempt from taxation by the debtor State, or actually taxed there, is taxable by another State when owned by a resident of the latter State. We know of no provision of the Constitution of the United States which prohibits such taxation. It is conceded that no obligation of the contract of the debtor State is impaired. The only agreement as to taxation was that the debt should not be taxed by the State which created it. [594]

It is insisted, however, that the immunity asked for arises from article IV., section 1 of the Constitution, which provides that full faith and credit shall be given in each State to the public Acts of every other State. We are unable to give such an effect to this provision. No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this partic-

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ular. We are referred to no statute of the debtor State which attempts to separate the *situs* of the debt from the person of the owner, even if that is within the scope of the legislative power of the State. The debt was registered, but that did not prevent it from following the person of its owner. The debt still remained a chose in action, with all the incidents which pertain to that species of property. It was "movable," like other debts, and had none of the attributes of "immovability." The owner may be compelled to go to the debtor State to get what is owing to him, but that does not affect his citizenship or his domicil. The debtor State [595] is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belong to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the State in which he dwells, still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself.

It is true, if a State could protect its securities from taxation everywhere it might succeed in borrowing money at reduced interest; but inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the States are left free to extend the comity which is sought or not, as they please.

Taxation of the debt within the debtor State does not change the legal *situs* of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation.

As the only federal question involved was decided right in the court below, we cannot look into the other errors which have been assigned. *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429].

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HOBART C. DUGGER AND ALICE V. SPRAGUE, By Her Husband, MYRON T. SPRAGUE, *Plffs. in Err.*, [596]
v.
WILLIS P. BOCOCK ET AL.

(See S. C., 14 Otto, 596-604.)

Federal question—confederate bonds.

1. A federal question is not necessarily involved in a case because the consideration of a contract to be enforced was Confederate money, or because payment of a debt was made in such money.
2. The effect on a contract of the coercion employed to get Confederate bonds taken in its payment, is not a federal question.

[No. 165.]

Argued Dec. 5, 6, 1881. Decided Jan. 16, 1882.

IN ERROR to the Supreme Court of the State of Alabama.

The case is stated by the court.

Messrs. J. T. Jones and **Michael L. Woods**, for defendants in error.

Mr. **Samuel F. Phillips**, for plaintiffs in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity begun by the appellants, two of the children and heirs of Henry Dugger, deceased. The case, which was decided on demurrer to the bill, may be stated generally as follows:

Henry Dugger, a citizen of Alabama, died in 1852, leaving Alice G. Dugger, his widow, and eight children, of whom the present appellants were the youngest. The widow was appointed by the Probate Court of Marengo County administratrix of the estate, which consisted of lands and personal property. The estate being free from debt, the administratrix, on the 3d of September, 1860, filed her petition in the probate court for leave to sell the lands for the purposes of distribution. The proper order was made, and on the 19th of November the lands were sold to Willis P. Bocock, one of the appellees, at $42.01 an acre, amounting in the aggregate to $28,806.40. For the purchase money Bocock gave his three notes with sureties to the administratrix, one for $10,370.30, payable November 19, 1861, another for $11,138.47, payable November 19, 1862, and the other for $11,906.64, payable November 19, 1863. This sale was reported to and confirmed by the court, but under the law of Alabama the legal title to the lands did not pass from the heirs to the purchaser until the purchase money was paid, and a conveyance actually made under an order of the court for that purpose. Until such a conveyance the heirs might maintain eject- [597] ment for the recovery of possession if the conditions of the sale were not complied with. *Doe* v. *Hardy*, 52 Ala., 297.

It is averred in the bill "That although said Willis P. Bocock was the ostensible purchaser of the whole of said land, yet, by some arrangement between him and said Henry A. Tayloe, made before or at the time of said purchase, said Tayloe obtained by the understanding with Bocock the one hundred and ninety-six acres of land before mentioned, and undertook with said Bocock, to pay the purchase money for the same at the rate aforesaid, and said Tayloe went into and has since had possession thereof." The present suit is brought with reference to this one hundred and ninety-six acres only, the whole property sold consisting of something more than six hundred and forty acres.

The bill then proceeds to state as follows:

"VI. Your orator and oratrix further show to Your Honor that neither said Bocock nor anyone else has ever paid the purchase money evidenced by said notes, or any part thereof, according to terms of his purchase, or in any manner, except as hereinafter stated, and the purchase money for said one hundred and ninety-six acres, with interest thereon, remains wholly unpaid.

VII. That said Bocock took up the said two notes first falling due with Confederate States

NOTE.—*Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.* See, *note* to Matthews v. Zane, 8 U. S. (4 Cranch), 382; *note* to Martin v. Hunter, 14 U. S. (1 Wheat.), 304; and *note* to Williams v. Norris, 25 U. S. (12 Wheat.), 117.

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treasury notes, and the said note last falling due he took up by handing over to Mrs. Alice G. Dugger bonds of the Confederate States. Your orator and oratrix, who were then infants, state, upon information and belief, that Bocock and the defendant, Henry A. Tayloe, together urged said Alice G. Dugger to accept said Confederate notes and bonds in payment of said Bocock's notes, at a time when all of her children who were of age were absent from home, and the said Alice G. Dugger received such Confederate notes for the note first falling due, without remonstrance; she reluctantly yielded and received the Confederate notes for the note secondly falling due, but when they urged her to accept the said treasury notes or Confederate bonds for the last note, she peremptorily refused to accept said Confederate notes and bonds, which were then really almost worthless, in payment of said note, and for a long [598] time she continued to refuse, and sent the said Bocock and Tayloe away without taking the offer; but she had great confidence in and esteem for said Bocock and Tayloe, who were her neighbors, and were men of high character, and they brought great pressure to bear on her to induce her to take the Confederate notes or bonds. They represented to her that she would be ruinously taxed by the Confederate Government if she refused to take Confederate money in payment of said note, and that she would be made to pay the tax in gold, and they or one of them reported her refusal to the Confederate tax collector, who called upon her and told her he was informed of her refusal, and finally, under great pressure, under protest and unwillingly, the said Alice G. Dugger very reluctantly yielded and took said Confederate bonds, and gave up to said Bocock said last note. The sons of Alice G. Dugger, then of age, were absent in the army."

Payment of the purchase money was never reported in form to the court by Mrs. Dugger, and no order was ever made for her to convey the property. Neither did she ever execute any conveyance, but at the April Term, 1864, of the court she filed her final account as administratrix, in which she charged herself with the purchase money, making no mention of the fact that it had been paid in the notes and bonds of the Confederate States. This account was audited and settled by the court, and a distribution ordered. The balance found due from the administratrix was $40,170.41, of which the share of each distributee was $5,021.30. These appellants were then infants, and the record shows that they were represented in the proceedings for settlement and distribution by H. A. Woolf. Mrs. Dugger was at the time their guardian, and she charged herself in her accounts as guardian, which were then pending before the court for partial settlement, with the distributive shares of her wards.

In 1866, after the close of the war, no conveyance having been made to Bocock, Mrs. Dugger and her surviving children, including the present appellants, who were still infants, commenced a suit in one of the state courts of Alabama, in the nature of an action of ejectment, against Bocock and Tayloe to recover the lands. Fearing that an attempt would be made by the defendants to get a deed, the widow and [599] heirs on the 12th of May, 1866, filed in the probate court their protest against any order to that effect, but the bill avers that Bocock did, "For the express purpose of defeating said action at law, on the twenty-first day of March, 1868, file his petition in said probate court, * * * wherein he represented and stated that he had paid the whole purchase money for said lands, when in fact he had never paid it, or any part thereof, otherwise than in Confederate States treasury notes and bonds, as already herein set forth in detail; and further setting forth in his petition that the said Alice G. Dugger had not reported such payment, though more than a reasonable time had elapsed for her to have done so, and praying that an order for a conveyance of said lands to him might be made; and said probate court, notwithstanding said *caveat* and protest filed by the heirs-at-law of said Henry Dugger, deceased, long before that time, and which was then on file, and without notice to the administratrix or to any of the said heirs, and without the knowledge by them of said application, and upon *ex parte* proof made by said Bocock, did appoint Henry A. Woolf, a brother of the Judge of said court, and an entire stranger to the estate, having no interest therein or knowledge of the affairs thereof, to execute titles to said Bocock; and said Woolf, in compliance with said order and decree of said court, made conveyances of said lands to said Bocock, without notice to or knowledge by the administratrix. * * * And the said action in the nature of ejectment brought by said heirs was defeated by the production of said conveyance, on the ground that the remedy was by direct proceedings in chancery to impeach said order or decree."

On the 11th of June, 1868, after Bocock got his deed, the widow and children, the appellants being represented by their guardian, entered into an agreement of compromise with Bocock, by which, "In full and final compromise and settlement of the claims between the parties, * * * touching and concerning their claims and rights in and to the lands hereinafter mentioned, and of the suits between them in respect thereto, and of the damages, rents and *mesne* profits," the widow and children agreed to convey to Bocock a certain portion of the lands, and he to convey to them the rest, except the one hundred and ninety-six acres now in dispute. By an express stipulation, nothing in that compromise was "To impair or affect any right, title or claim of any or [600] either of the parties of the second part [the widow and children] to any lands in possession of said Henry A. Tayloe, or to rents and damages for the use thereof by said Tayloe, or to any action pending against Tayloe."

This agreement was, in all respects, ratified by the appellants after they came of age, but on the 31st of October, 1873, they began this suit to reach the one hundred and ninety-six acres held by Tayloe, and as to him they made the following averments:

"Your orator and oratrix have but imperfect knowledge or information of the exact arrangement by which said Tayloe obtained the same, or whether he has the same in his own name or in the name of some other person, and pray that said Bocock and Tayloe and Maupin may answer and set forth how and in what manner the same was acquired and is held by them, or

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either of them, and also what said Tayloe and Maupin, and each of them, paid for it, and in what sort of money or currency; and your orator and oratrix state upon information and belief that the Confederate currency and bonds with which said Bocock took up his notes was furnished by said Tayloe to the amount of the purchase money for said one hundred and ninety-six acres, and that said payment, though made in Bocock's name, was in full to the extent of the amount due for said one hundred and ninety-six acres made in part by said Tayloe.

XVI. Your orator and oratrix charge that said Tayloe paid nothing for said land except Confederate money and bonds, which were not a valuable consideration as against your orator and oratrix, who were then minors, and they further say that said Tayloe well knew that said Bocock had paid only Confederate notes and bonds for said lands and, on information and belief, they charge that he participated with said Bocock in said wrong and injury to your orator and oratrix. And your orator and oratrix show that said Maupin is the son-in-law of said Tayloe, and lives with him; that he married the daughter of said Tayloe in 1864 or 1865, and that he has no title to said land and is not a purchaser for value; and that he acquired whatsoever rights he may have with full knowledge or notice that nothing but Confed- [601] erate notes and bonds had been paid for said land."

The prayer of the bill is as follows:

"To the end, therefore, that an account may be taken of the amount due to your orator and oratrix, respectively, as their several portions of money arising from the sale of said one hundred and ninety-six acres of land, as heirs at law of said Henry Dugger, deceased, and as heirs at law of said John W. Dugger, deceased, and that payment of the same may be enforced against said one hundred and ninety-six acres of land, and against the rents thereof, to accrue from the filing of this bill; and that said lands may be sold therefor, and that the decree for titles to said Bocock and the deed made thereto may be held void, or, if not, that it may be set aside, or held to be subordinate to your orator's and oratrix's lien, and that your orator and oratrix may have such other and further relief as to Your Honor may seem proper and as justice may require."

The Supreme Court of the State having affirmed the decree of the court below dismissing the bill, the case has been brought here upon a writ of error allowed by the *Chief Justice* of that court. A motion to dismiss for want of jurisdiction has been made, which now stands for hearing with the case on its merits.

The only averments in the bill that can by any possibility raise a federal question, are those which relate to the payments in the notes and bonds of the Confederate States. In *Delmas* v. *Ins. Co.*, 14 Wall., 666 [81 U. S., XX., 759], we said distinctly that a federal question was not necessarily involved in a case because the consideration of a contract to be enforced was Confederate money, and *Mr. Justice* Miller, speaking for the court, said: "When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. Like in many other questions of the same character, the federal courts and the state courts, each within their own spheres, deciding on their own judgment, are not amenable to each other." This case was followed in *Tarver* v. *Keach*, 15 Wall., 68 [82 U. S., XXI., 82]; *Rockhold* v. *Rockhold*, 92 U. S., 129 [XXIII., 507]; *Ins. Co.* v. *Hendren*, 92 U. S., 286 [XXIII., 709]; *Bk.* v. *McVeigh*, 98 U. S., 332 [XXV., 110]. [602]

In *Thorington* v. *Smith*, 8 Wall., 1 [75 U. S., XIX., 361], a case which came up from one of the district courts of the United States for Alabama, the question arose whether contracts for the payment of Confederate notes made during the late rebellion, between parties residing within the Confederate States, could be enforced in the courts of the United States, and we held that they could, if made in the usual course of business and not for the purpose of giving currency to the notes, or otherwise aiding the rebellion. The *Chief Justice*, in delivering the opinion of the court said, in speaking of these notes: "As contracts in themselves, except in the contingency of successful revolution, these notes were nullities, for, except in that event, there could be no payer. They have, indeed, that character on their face, for they were payable only 'after a ratification of a Treaty of Peace between the Confederate States and the United States of America.' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force." And further on, in reference to contracts stipulating for payment in this kind of currency: "They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection." Such is now the settled rule of decision in this court. *Delmas* v. *Ins. Co., supra; Confederate Note Case*, 19 Wall., 556 [86 U. S., XXII., 199]; *R. R. Co.* v. *King*, 91 U. S., 3 [XXIII., 186]; *Stewart* v. *Salamon*, 94 U. S., 435 [XXIV., 275].

In *Hanauer* v. *Woodruff*, 15 Wall., 447 [82 U. S., XXI., 227], it was held that "The war bonds issued by the Secession Ordinance of Arkansas, though used as a circulating medium in that State and about Memphis, did not constitute any forced currency which the people in the State and city were obliged to use," and "that they were only a circulating medium in the sense that any negotiable money instruments, in the payment of which the community has confidence, constitute a circulating medium." For this reason we decided in that case, which came up from the Circuit Court of the United [603] States for the Eastern District of Arkansas, that a note given in the purchase of such bonds could not be enforced in the courts of the United States. *Mr. Justice* Field, in delivering the opinion of the court, stated the difference between that case and *Thorington* v. *Smith* to be "The difference between submitting to a force which

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could not be controlled, and voluntarily aiding to create that force."

In the light of these cases it is easy to see that this bill does not necessarily involve the decision of any federal question. There is no pretense that the parties intended, in the payments that were made, to aid the rebellion. Neither is it alleged that the first and second notes were paid in any other than the usual course of business. As to the third, the utmost that can be claimed from the allegations is, that Mrs. Dugger was forced against her will to accept the Confederate bonds and give up the note. There can be no doubt that under our decisions the payment of the first and second notes was good, if Mrs. Dugger was authorized by law to accept anything else than lawful money. About the third, the question presented was, apparently, not as to the validity of the Confederate bonds, but as to the effect of the coercion employed to get them taken. None of these are federal questions. Neither is the further one, whether a payment good as to Mrs. Dugger would be good as to these appellants. All these questions are of a class as to which the judgment of the state court is final and not reviewable here.

The rule in relation to our jurisdiction is, that it must either appear from the record in express terms that there has been a decision against the right claimed under the Constitution, laws or treaties of the United States, or that the judgment or decree complained of could not have been given without so deciding. *Murray* v. *Charleston*, 96 U. S., 442 [XXIV., 761]. Here there are no averments in the bill which directly present the validity under the laws of the United States of a payment in Confederate securities, and it may fairly be inferred that the appellants relied upon an entirely different ground for the relief they asked. Such being the case, no federal question was necessarily involved in the decision that has been made. As [604] the burden is on the appellants to show our jurisdiction, and we cannot entertain the case unless they have done so, *the motion to dismiss is granted.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 484; 111 U. S., 769.

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[618] ANDREW J. DAVIS ET AL., *Appts.*,

v.

SARAH J. FREDERICKS.

(See S. C., 14 Otto, 618-620.)

Property of married woman.

Where a wife paid for property in cash from her own separate funds, it is not liable for her husband's debts on the ground that the deed to her was made in fraud of his creditors.

[No. 177.]

Argued Dec. 19, 1881. Decided Jan. 16, 1882.

APPEAL from the Supreme Court of the Territory of Montana.

The case is sufficiently stated in the opinion.

Messrs. **Richard T. Merrick** and *Martin F. Morris*, for appellants.

Messrs. **Samuel Shellabarger** and *Jeremiah N. Wilson*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 2 of "An Act Concerning the Practice in Territorial Courts and Appeals therefrom," passed April 7, 1874, 18 Stat. at L., 27, ch. 86, Sup. R. S., 18, is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter pre- [619] scribe; *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal." * * *

As such appeals lie to this court only from the Supreme Court of a Territory, R. S., sec. 702, it follows that the statement both as to facts and rulings on which we are to act, must be made directly or indirectly by that court. In *Stringfellow* v. *Cain*, 99 U. S., 614 [XXV., 422], we said that where, under the practice in a Territory, a case went from the district court to the Supreme Court on a statement of facts, and there was a general judgment of affirmance, the statement of facts made by the district court, thus approved and enforced by the Supreme Court, would be accepted here as a "statement of facts" made by the Supreme Court under the requirements of this Act. And so, too, if there was a reversal of the decree of the district court and a different decree entered in the Supreme Court upon the facts as stated. In the present case there was no statement of facts made by the district court. The only questions presented to the Supreme Court were those which arose on the rulings of the district court in the admission or rejection of evidence, and in its charge to a jury impaneled to try certain questions prepared and submitted to them. The judgment having been affirmed, Davis, the appellant, asked that a statement of facts be made by the Supreme Court and certified up with the transcript of the proceedings on an appeal. This request was complied with, and from the statement made it appears that prior to July 1, 1871, Davis, the appellant, held the title to a certain saw-mill, which on that day he conveyed by deed, with covenants of warranty, to the appellee, Sarah J. Fredericks and W. H. Drew. Afterwards, in 1872, Davis and Drew built a flouring-mill on another piece of land, which they continued to own in common until March 30, 1874, when Drew sold his half to Mrs. Fredericks for $2,000, which she paid him in cash from her own separate funds. On the same day Mrs. Fredericks sold and conveyed to Drew [620] her half of the saw-mill, receiving in payment certain notes and securities. Afterwards, Mrs. Fredericks began this suit against Davis to obtain a partition of the flouring-mill property.

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As the property was indivisible, a sale was necessary to effect the partition.

In March, 1875, Davis sued the husband of Mrs. Fredericks to recover a debt which he claimed was due him, and attached the half of the flouring-mill standing in the name of Mrs. Fredericks, as the property of her husband. In the partition suit he insisted that Mrs. Fredericks held the property in fraud of his rights as an attaching creditor of her husband, and attempted to make proof of that fact, so that he might reach by his attachment the part of the proceeds of the sale that would otherwise be set off to her. For this purpose he offered to prove that his own conveyance to her of the one half of the saw-mill was in fraud of his own rights as a creditor of her husband. This, as appears from the statement, the Supreme Court ruled he was estopped by his deed to her, from doing.

The assignments of error relate principally to the questions arising on this ruling, but we deem it unnecessary to consider them, as we agree with the court below that, in view of the other facts which have been directly found, it is wholly immaterial whether there was fraud in the saw-mill transaction or not. It is expressly stated to have been a fact that Mrs. Fredericks paid for the flouring-mill in cash from her own separate funds, and with this found there is nothing whatever in the case to impeach or in any manner invalidate the conveyance from Drew to her. *The decree is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[480] UNITED STATES, *Appt.*,

v.

PACIFIC MAIL STEAMSHIP COMPANY.

(See S. C., 14 Otto, 480-482.)

Mail contract—stipulation.

1. In this case, at the last Term, *ante*, the principal question whether the mails had been carried by the Pacific Mail Steamship Company between San Francisco and Hong-Kong in such vessels as the contract required, was adjudicated, and is no longer open to inquiry.

2. By the stipulation mentioned in the opinion, it was not intended to consent to a re-opening of the question touching the character of any vessel in which the mails had been carried under that contract.

[No. 1070.]

Submitted Jan. 6, 1882. Decided Jan. 23, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. **Samuel F. Phillips,** *Solicitor-Gen.*, and *John S. Blair*, for appellant.

Messrs. **John F. Farnsworth** and **William E. Chandler,** for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This case was before us at the last Term, on the appeal of the Steamship Company, and the judgment of the Court of Claims was reversed and the case remanded, with directions to render a judgment in conformity to the opinion of this court [*ante*, 419].

The principal, in fact the only question then considered, was, whether the mails had been carried by the Company between San Francisco and Hong-Kong in vessels of the character required by the contract.

The finding of facts on that subject by the Court of Claims enabled us to decide, that apart from the City of Pekin's, which was governed by considerations peculiar to itself, of the other twelve voyages for which the claimants asserted a right to recover, six had been performed in vessels of the character required by the contract, and six had not. All these vessels, their names and class, were specifically set out in the finding of facts, and the voyage of the Japan, commencing August 29, 1874, at San Francisco, is one of those held by this court in its opinion to have been performed in a proper vessel, for which the claimants were entitled to recover.

The whole matter would seem to have been thus closed, but for the following sentence in the opinion: "There may be deductions for non-performance of duty, or other matters provided for in the contract in regard to which no [481] finding is made by the Court of Claims, but which will be open to inquiry on the return of the case to that court."

When the case came before that court again on the mandate and opinion of this court, it was conceded, by stipulation, as a fact, that on this voyage of the Japan she stopped at Yokohama and sent the mails by other vessels to Hong-Kong, and that the return mail from Hong-Kong to Yokohama was carried in the same manner, the Japan returning in due time with a mail to San Francisco.

It is argued by counsel for the United States that this fact invalidates the entire claim under that voyage, because the whole of it was not performed in vessels of the character required by the contract.

The Court of Claims was of opinion that this matter was not open to inquiry under the ruling made by this court, and in this we concur.

The questions of the character of the vessels in which the mail had been carried by the claimants, and their conformity to the contract with the Government, were the very questions, and the only questions, in issue before the Court of Claims and before this court. The former made, as the rule requires, such findings of fact, pertinent to these questions, as enabled this court to say that for six of these voyages the Government was bound to pay, and the case was sent back to the Court of Claims to render judgment accordingly.

The character of the vessels and the performance of the voyages were then adjudicated and fixed, and were no longer open to inquiry.

The contract contained a provision that suitable fines and penalties should be imposed by the Postmaster-General, for delays and irregularities in the performance of the service, and for failure to take or deliver any part of the mail, for suffering it to be wet, injured or lost, and many things of that kind, which had not been passed on because the United States denied the liability *in toto*, on the ground that none of the vessels was of the character required by the contract.

It was to matters of that class the opinion had reference in the clause we have cited, and not to the very matter of the character of these vessels which was settled by the first finding of [4 facts and the decision thereon.

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It is suggested by counsel for the United States, that, by the terms of the stipulation as to these new matters filed in the Court of Claims, the case was opened by agreement. The language relied on is this:

"It is agreed that the case be submitted, under the mandate and opinion of the Supreme Court herein, on the following facts, which, as far as they may affect or modify any facts heretofore found by the court, are agreed to be in addition or substitution therefor."

We understand this to mean that the matters stated are true and, so far as they are proper evidence, as the case stands they are conceded; but that it was not intended to *consent* to a reopening of the character of any vessel in which the mails had been carried under that contract, and such was the view of this clause of the stipulation taken by the Court of Claims in its opinion.

After the case was remanded to the Court of Claims, the Postmaster-General, in a letter to the Judges of that court, informed them that he had made an order that, in the event that they should hold the voyage of the Japan to be accepted, he imposed a fine of $13,000 for the delay of that vessel in starting on the voyage at San Francisco. As such an order could be of no avail after the court had decided the case, in which event alone the fine was to be imposed, that court very properly disregarded it.

The judgment of the Court of Claims is affirmed

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[521] MATTHEW GOTTFRIED, *Appt.*,

v.

FREDERICK MILLER.

(See S. C., 14 Otto, 521-530.)

Assignments of patents—contract of corporation—signature of president—attachment—estoppel.

1. Assignments of patents are not required to be under seal.
2. A corporation may bind itself by a contract not under its corporate seal, when the law does not require the contract to be evidenced by a sealed instrument.
3. An assignment, which purports on its face to be the contract of a company, and is signed by its president as the act of the company, is the contract of the company.
4. An attachment of the stock of a shareholder does not incumber the property of the company, nor prevent its assignment of letters patent belonging to it.
5. Where one sold a patented machine, and afterwards acquired an interest in the patent, he is estopped from prosecuting the purchaser for an infringement of the patent by the use of the machine.

[No. 882.]

Submitted Jan. 4, 1882. Decided Jan. 23, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

Statement of the case by *Mr. Justice* **Woods:**

The bill of complaint alleged that on May 3, 1864, letters patent of that date were granted to the complainants, Matthew Gottfried and John F. T. Holbeck, for an improvement in a machine for pitching beer barrels. It charged that the defendant was infringing said letters patent, and prayed for the writ of injunction [522] against him to restrain further infringement, and for damages and an account of profits.

The only defense relied on was, that on November 25, 1872, one John H. Stromberg was the owner of an undivided one third of the entire interest in the letters patent sued on, and being such owner, had sold and delivered to the defendant, for his use forever, a machine for pitching barrels, containing some of the improvements purporting to be secured by said letters patent; that the defendant had paid for said machine, and had, since said November 25, 1872, hitherto continued to use, and was still using, the same, and that the defendant, except as aforesaid, had never in any manner used or employed the method or improvements, or the process or machine, set forth in said letters patent."

The cause was heard in the circuit court upon bill, answer, replication and evidence, and that court being of opinion that the defense had been made out, dismissed the bill. The appeal of the complainant brings the case to this court for review.

The controversy relates to the right of the defendant to use the machine purchased by him from Stromberg. The evidence establishes the following state of facts, about which there seems to be no dispute:

Letters patent dated May 3, 1864, were granted to Gottfried and Holbeck, the complainants, for an improvement in the mode of pitching barrels.

On November 25, 1872, one Stromberg sold to the defendant, Miller, a pitching machine containing, as complainants asserted, the improvements covered by their patent. Miller claimed the right to use this machine, and has used it from the time of his purchase up to the filing of the bill. This is the infringement of which complaint is made. The controversy depends on several transfers and other transactions between the parties who at different times had or claimed to have an interest in the patent. They were as follows:

On December 19, 1870, Gottfried, one of the patentees, by written assignment, in consideration of $5 paid and a royalty to be paid of $10 on every machine to be manufactured by Holbeck, sold and transferred to Holbeck all his interest in the patent and the invention, reserving to himself, however, in the same instrument the right to revoke the assignment if the royalty reserved should not be paid; and on January 8, 1871, Holbeck, being then the sole owner of the patent, sold and assigned to Charles F. Smith and Henry C. Comegys an undivided two thirds of all his title and interest therein. On January 25, 1871, the title to the patent being at that time in Holbeck, Smith and Comegys, they, by written assignment, transferred all their right, title and interest in and to various patents, including the Gottfried and Holbeck patent, to the "Barrel Pitching Machine Company" of Baltimore. The assignment con- [523] tained this provision: "The same to be held and enjoyed by the said company as fully and entirely as they would have been held by us if this assignment and sale had not been made,

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with the exception that the said company shall not assign to anyone but ourselves any or all the interest in and to the above named patents in the proportion as they are now held by us, this assignment to hold good until the dissolution or liquidation of the said company, when the said company shall re-assign to us in the same proportions as now assigned by us." Afterwards, on June 1, 1871, Holbeck, Smith and Comegys made a further assignment to the company of their interest in the patents mentioned in the first assignment, which contained the following clause: "And provided also, that this assignment shall continue in full force until the dissolution of said company, in which event, or in the event of the liquidation of the affairs of said company, the several interests of each grantor in said patents shall, subject to the lawful rights of the creditors of said corporation, be re-assigned to each grantor."

On December 9, 1875, the directors of the Barrel Pitching Machine Company resolved that all the right, title and interest of the company in and to this patent acquired by the assignment from Smith, Comegys and Holbeck should be assigned and conveyed back to those parties for the sum of $500. And it was further resolved that Charles F. Smith, who was the president of the Barrel Pitching Machine Company, be directed to execute and deliver to Smith, Comegys and Holbeck an assignment on behalf of the Pitching Machine Company.

On the 11th day of December, 1875, in pursuance of the resolution just mentioned, an instrument was executed which purported to be an assignment, for the consideration of $500, by the Barrel Pitching Machine Company to Smith, Comegys and Holbeck, of all the right, title and interest of the company in and to the patent. The attestation clause and signature were as follows:

"In testimony whereof, and in pursuance of a resolution passed by said company on the 9th day of December, 1875, a copy of which is appended hereto, the said Charles F. Smith hath hereto set his hand, as the act of the said company, this 11th day of December, 1875.

(Signed) CHARLES F. SMITH,
President Barrel Pitching Machine Company."

[524] On the same day, December 11, 1875, Smith, for the alleged consideration of $500, granted and assigned to Holbeck and Gottfried all his right and title to the patent; and afterwards, on June 7, 1876, Comegys transferred to Stromberg all his interest in the patent.

It next appears that on October 9, 1876, Gottfried, Holbeck and Stromberg, who are named as jointly interested in the patent, by a certain instrument in writing, appointed J. H. B. Latrobe, of Baltimore, their attorney, with authority to prosecute suits against infringers of the patent, and to compromise or adjust the same. This instrument contained the following clause:

"And it is understood that all expenses, costs and charges, including counsel fees, attending the litigation, if any, shall be deducted from the collections aforesaid, and the balance paid over to the parties hereto in the proportion of their interest in the said patents, and particularly it is understood that the said John H. Stromberg shall be paid out of said collections as fast as made, all moneys that he may have advanced in the prosecution of claims under said letters patent."

This instrument bears the signatures and seals of Holbeck, Gottfried and Stromberg. During the years 1877 and 1878, bills in equity were filed by them against various defendants, in which they averred themselves to be joint owners of the letters patent:

On December 15, 1879, Stromberg, in consideration of the sum of $5,000, assigned to Gottfried all his interest in the patent, and in all claims of every kind or nature for past infringements, and all rights of action arising out of or connected with infringements. This instrument of assignment recited the fact that Stromberg had theretofore disposed of rights and licenses under the patent as a part owner under *mesne* assignments of the same, and had caused suits to be instituted against infringers; and that it was a part of the consideration of the assignment from him that he should be released from all claim which Gottfried or Holbeck, or their assignees, might or could have against him for or by reason of any collections theretofore made by him, or his attorneys, or against any person or persons to whom he had granted licenses to use the patented improvements; and it was then [525] declared as follows:

"Now, therefore, the said Matthew Gottfried and the said John F. T. Holbeck (the said Holbeck uniting herein for the purpose of carrying out the agreement aforesaid), for and in consideration of the premises, have released, and by these presents do hereby release, the said John H. Stromberg from all claim that they or either of them might or could have against the said Stromberg for or by reason of any collection he may have made from parties to whom he or his attorneys * * * may have granted licenses to use the said patented improvement, hereby ratifying and confirming all such licenses, and all the acts of the said Stromberg and his attorneys in the premises. And the said Matthew Gottfried doth hereby covenant and agree that he will save harmless the said Stromberg and his attorneys from all claims that may be made against them or either of them for or by reason of any interest which the said Gottfried and Holbeck or either of them may have given to any other party in the said letters patent."

It appears, also, that in September, 1873, Charles F. Smith brought a suit against Henry C. Comegys in the Superior Court of Baltimore City upon an indebtedness from Comegys to him, in which an attachment was issued and a seizure made of the shares of capital stock held by Comegys in the Barrel Pitching Machine Company, which proceedings, on October 27, resulted in a judgment condemning the stock, according to the laws of the State of Maryland, for the satisfaction of Smith's claim.

On the day upon which Stromberg sold the machine to the defendant, Miller, he had no interest in the patent and no license under it, and it is admitted that in making and selling the machine to Miller, Stromberg was an infringer.

At the January Term, 1881, on motion of both complainants, the court below dismissed the bill as to Holbeck, and upon final hearing, in June following, a decree was made dismissing the bill as to Gottfried, the other complainant. From this decree Gottfried appealed.

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Messrs. **Thomas A. Banning** and **Ephraim Banning,** for appellant.
Mr. **E. H. Abbott,** for appellee.

[526] *Mr. Justice* **Woods** delivered the opinion of the court:

The appellant rests his right to a decree in this case upon these grounds: first, that Stromberg never owned any part of the patent sued on; and, second, that if he did, his ownership could not inure to the protection of the defendant, Miller. We shall consider these contentions in the order stated.

Upon the first point we remark that it is entirely clear that the assignment of his interest in the patent by Comegys to Stromberg, dated June 7, 1876, transferred to the latter an interest therein, provided the retransfer of the patent by the Barrel Pitching Machine Company to Holbeck, Smith and Comegys vested the title to the patent in them. Briefly stated, the following is the chain of title: Gottfried and Holbeck are the joint patentees; Gottfried conveys all his interest in the patent to Holbeck, who becoming thus the owner of the entire patent, conveys one undivided third to Smith and another to Comegys. Holbeck, Smith and Comegys convey the entire interest in the patent to the Barrel Pitching Machine Company. The company reconveys its interest in the patent to its assignors, Holbeck, Smith and Comegys; Smith conveys his interest to Gottfried and Holbeck, and Comegys conveys his to Stromberg.

The contention of the appellant is, that the assignment of December 11, 1875, by the Barrel Pitching Machine Company to Holbeck, Smith and Comegys was not properly executed, and was, therefore, ineffectual to pass any title.

The assignment declares that in pursuance of a resolution passed by the Barrel Pitching Machine Company, and in consideration of $500 received by it from Smith, Holbeck and Comegys, the said company has granted to them all its title and interest in said letters patent. It is officially signed by Smith as president of the company, who declares the setting of his hand thereto to be the act of the company.

The resolution referred to in this assignment is in the record, from which it appears that the company decided to make the assignment, and directed Smith to execute and deliver the same to Smith, Comegys and Holbeck on behalf of the company, on receiving from them the sum of $500.

[527] On account of the want of the corporate seal and of the manner of its execution it is insisted by appellant that this assignment was not the transfer of the Barrel Pitching Machine Company, but the personal deed of Smith.

There is no ground whatever for this contention to stand on. Assignments of patents are not required to be under seal. The statute regulating their transfer simply provides that "Every patent, or any interest therein, shall be assignable in law by an instrument in writing." 16 Stat. at L., p. 203, sec. 36; R. S., sec. 4898.

A corporation may bind itself by a contract not under its corporate seal when the law does not require the contract to be evidenced by a sealed instrument. *Bank* v. *Patterson*, 7 Cranch, 299; *Fleckner* v. *Bank*, 8 Wheat., 338; *Turnpike Corp.* v. *Hay*, 7 Mass., 102; *Dunn* v. *Rector, etc., of St. Andrew's Ch.*, 14 Johns., 118; *Kennedy* v. *Ins. Co.*, 3 Har. & J., 367; *Stanley* v. *Hotel Corp.*, 13 Me., 51. Even the parol contracts of a corporation made by its duly authorized agent are binding. *Fanning* v. *Gregoire*, 16 How., 524; *Fleckner* v. *Bank* [*supra*]. The absence, therefore, of the corporate seal from the contract of assignment does not render it invalid or void.

The assignment is executed in the manner required by law of an agent when making a simple contract in writing for the corporation and by its authority. The rule as laid down by the authorities is, that the agent should, in the body of the contract, name the corporation as the contracting party and sign as its agent or officer. This is the mode in which bank-bills, policies of insurance, and many other contracts of corporations are ordinarily executed. *Mott* v. *Hicks*, 1 Cow., 513; *Bowen* v. *Morris*, 2 Taunt., 374; *Shelton* v. *Darling*, 2 Conn., 435; *Brockway* v. *Allen*, 17 Wend., 40.

The assignment under consideration purports, on its face, to be the contract of the Barrel Pitching Machine Company. It declares that the consideration has been received by the company; that it is executed in pursuance of a resolution passed by the company, and it purports to be signed by Smith, president of the company, who declares that he signs it as the act of the company.

It would be an absurdity to hold that this instrument is the individual contract of Smith and not of the Barrel Pitching Machine Company. [528]

It is not the company which asserts that this instrument was ineffectual to devest it of title to the patent, and the record shows that the assignees therein named acted upon the assumption that the assignment vested them jointly with the title.

We are of opinion, therefore, that the assignment was well executed by the Barrel Pitching Machine Company, and transferred the letters patent to Holbeck, Smith and Comegys, and that Stromberg, on June 7, 1876, by virtue of the assignment made to him on that day by Comegys, became vested with an undivided interest in the patent.

It is contended by counsel for appellant that the attachment of the stock of Comegys in the Barrel Pitching Machine Company, at the suit of Smith, in the Superior Court of Baltimore City, prevented Comegys from acquiring any interest in the patent by the assignment thereof to Smith, Holbeck and Comegys by the Barrel Pitching Machine Company and, therefore, Comegys could convey no interest in the patent to Stromberg. This position seems to be founded on the clause of the instrument by which the patent was transferred to the Barrel Pitching Machine Company, to wit: that any re-assignment of the patent to the assignors should be subject to the lawful rights of the creditors of the company.

The answer to this contention is, that Smith was the creditor of Comegys, and not of the company, and the clause in the instrument of transfer to the Barrel Pitching Machine Company gave Smith no claim on the patent to secure a debt due him, not from the company, but from a stockholder in the company.

The fact that Comegys held stock in the company gave him no title to its property. *Mr. Justice* Bradley in *Morgan* v. *R. R. Co.*, 1 Woods,

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15; *Bradley* v. *Holdsworth*, 3 Mees. & W., 422; *Arnold* v. *Ruggles*, 1 R. I., 165, and the attachment of his stock did not in the least incumber the property of the company, or prevent the assignment of the letters patent by it to Smith, [529] Holbeck and Comegys, or the transfer by Comegys to Stromberg.

It remains to consider whether the sale by Stromberg to the defendant, Miller, of one of the pitching machines, containing the improvement described in the patent, protects him from liability for its use in this suit.

By the contract of sale, Stromberg warranted not only the title to the machine itself, but of the right to use it. If, at the time of the sale, he had been the owner of the patent, the sale would have constituted a license to Miller to use the machine as long as it lasted. But Stromberg did not acquire any interest in the patent until long after the date of his sale to Miller.

If he had subsequently become the sole owner of the patent, his previous sale to Miller of a machine embodying his patented invention, would have estopped him from prosecuting Miller for an infringement of the patent by the use of the machine. In analogy to estates in land by estoppel, Miller would have acquired a right to use the machine which could not have been controverted by Stromberg.

But having acquired only a part interest in the patent, we do not undertake to decide that his previous sale of the machine to Miller bound the other joint owners of the patent. It is clear, however, that such sale was a license to Miller to use the machine so far as Stromberg could grant a license. And, in our opinion, the covenants of Gottfried and Holbeck in the contract by which Stromberg assigned his interest in his patent to them, are sufficient to protect Miller from this suit. In that contract it is declared to be part of the consideration of the transfer by Stromberg of his interest in the patent to Gottfried and Holbeck "That he should be released from all claims which Gottfried or Holbeck, or either of them, or any person to whom they, or either of them, may have assigned an interest in said letters patent, might or could have against him * * * or against any person or persons to whom Stromberg may have granted licenses to use the said patented improvement." And by said instrument Gottfried and Holbeck, for and in consideration of the premises, declare that they do release said Stromberg from all claim they or either of them may have against him or the parties to whom he may have granted [530] licenses to use said patented improvement.

We think there can be no doubt that it was the purpose of all the parties to this instrument, and it is clearly expressed therein, that, as a part of the consideration of the transfer, Stromberg was released from claims against him arising out of his transactions in reference to said patent, and that all licenses granted by him were in effect confirmed. This contract, therefore, affords complete protection to Miller, the appellee, and is an effectual bar to the prosecution of this suit.

The decree of the Circuit Court dismissing the bill must, therefore, be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JACOB S. MERRELL, *Plff. in Err.*, [557]

v.

JOHN H. TICE.

(See S. C., 14 Otto, 557-562.)

Copyright—proof of deposit—certificate.

1. The deposit of two copies of a book, after its publication, either with the Librarian of Congress, or in the mail addressed to him, is an essential condition of the proprietor's right to a copyright thereof, and must be proved in an action for infringement.
2. An exemplification of the record, by the librarian, required to be made on the filing of the title before publication, is not competent proof of such deposit.
3. A memorandum, under a certificate or indorsed upon it, is no part of the certificate.

[No. 198.]

Argued Jan. 6, 1882. Decided Jan. 23, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Mr. **Melvin L. Gray,** for plaintiff in error.

Mr. **C. P. Culver,** for defendant in error.

Mr. Justice **Bradley** delivered the opinion [558] of the court:

This was an action at law to recover damages for the infringement of a copyright. Tice, the plaintiff below, is the author of an almanac known as "Professor Tice's Almanac." The copyright alleged to be infringed was that of the almanac for 1877. The declaration contained the proper averments, and the answer a general denial. On the trial the plaintiff produced a copy of his almanac, having on its title-page the words required by the Act, "Entered according to Act of Congress, etc.;" and then, to show that he had complied with the law of copyright, produced a certificate of the Librarian of Congress, under his seal of office, in the words following:

Library of Congress, Copyright Office, United States of America.	Library of Congress Copyright Office, Washington.

No. 12,579 G.

To wit: Be it remembered that on the 18th day of November, *anno Domini* 1876, John H. Tice, of St. Louis, Mo., has deposited in this office the title of a book, the title or description of which is in the following words, to wit:

Professor Tice's Almanac for the year 1877, etc.

The right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights.

Librarian of Congress, Copyright Office, United States of America.	(Signed) A. R. SPOFFORD, *Librarian of Congress.*

I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of my office, this 11th day of May, 1878.

A. R. SPOFFORD,
Librarian of Congress.

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Two copies of the above publication deposited December 6, 1876."

To the introduction of that portion of said paper in the words "two copies of the above [559] publication deposited December 6th, 1876," the defendant objected, on the ground that it was no part of the certificate, but a mere anonymous statement, when and by whom made not appearing, and incompetent; which objection the court overruled, and permitted the statement to go to the jury; to which ruling the defendant excepted. No other evidence was given to show that any copy or copies of the book had been deposited with the librarian or in the mail. The infringement was proved to the satisfaction of the jury, who, under the charge of the court, rendered a verdict for the plaintiff. Other exceptions to evidence appear in the bill of exceptions, but it is unnecessary to consider them. The questions to which we have given attention, and which are decisive of the case, are:

First, whether the plaintiff was bound to prove that two copies of the book had been deposited with the librarian or in a postoffice according to the requirements of the law.

Secondly, if he was, whether the proof adduced was competent for that purpose. These questions will be considered together.

The Acts of Congress relating to the subject are found in sections 4956 to 4961 of the Revised Statutes.

Section 4956 declares that no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail addressed to the Librarian at Washington, a printed copy of the title of the book or other article, etc.; nor unless he shall also, within ten days from the publication thereof, deliver at the office of the Librarian, or deposit in the mail addressed to him, at Washington, two copies of such copyright book or other article, etc.

Section 4957 requires the Librarian to record the name of the book or other article in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered that on the —— day of ———, A. B. of —— hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit: (here insert the title or description) the right whereof he claims as author, etc., in conformity with the laws of the United States respecting copyrights. C. D., Librarian of Congress." [560] The Librarian is required to give a copy of the title or description, under the seal of the Librarian of Congress, to the proprietor whenever he shall require it.

Section 4958 prescribes the Librarian's fees: "First, for recording the title or description of any copyright book or other article, fifty cents; second, for every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents, etc."

Section 4959 declares that the proprietor of every copyright book, etc., shall deliver at the office of the Librarian of Congress, or deposit in the mail addressed to him, within ten days after its publication, two complete printed copies thereof, of the best edition issued, and a copy of every subsequent edition wherein any substantial changes are made.

Section 4960 imposes a penalty of $25 for failure to deposit the published copies as required in the previous sections.

Section 4961 declares as follows: "The postmaster to whom such copyright book, title or other article is delivered, shall, if requested, give a receipt therefor; and when so delivered, he shall mail it to its destination."

On a mere inspection of these enactments it is very obvious that the deposit of two copies of the book, after its publication, either with the Librarian of Congress, or in the mail, addressed to him, is an essential condition of the proprietor's right; and must, in some way, be proved in an action for infringement. The words of the law are: "No person shall be entitled to a copyright unless he shall also within ten days, etc., deliver at the office of the Librarian of Congress, or deposit in the mail, etc., two copies of such copyright book." Nothing can be plainer than this.

Then, what is competent proof of such a deposit? If, after complying with all the requisite conditions, the law had authorized letters patent for the copyright to be issued to the proprietor, such letters would be competent if not conclusive evidence that the conditions had been complied with. But no such letters are issued in the case of copyrights. It is contended, indeed, that the Librarian's certificate answers the same purpose. But it is plain that this certificate was only an exemplification of the record required to be made on the filing of the title [561] before publication. Its form, as prescribed by the law, and its contents as shown by the copy produced in evidence, show that it relates to nothing else. The publication of the book, and the deposit of copies thereof, may not take place until the lapse of months afterward. The certificate, therefore, has no relation to the deposit of the books. The record of which it is an exemplification is made without reference to any such deposit. Whether, after the deposit has been made, the certificate of the Librarian, under his official seal, that the books were deposited on such a day, would be competent evidence of the fact, is not now the question; and it may admit of considerable doubt. Perhaps a certificate of the Librarian, attached to a copy of the book, certifying that two copies of the same book, or of which that is a true copy, were deposited in his office on such a day, would be competent evidence, inasmuch as the Librarian's office is a public one; the copyright books deposited with him are *quasi* records, kept in his custody for public examination; one object, no doubt, being to enable other authors to inspect them in order to ascertain precisely what was the subject of copyright. But we express no opinion whether such a certificate would be competent or not. In the present case no such certified copy of the books deposited, nor a certificate of the fact that they were deposited, was adduced in evidence. The memorandum under the certificate had no validity as evidence. It might have been put there by any person. It would be unsafe to hold that a memorandum under a certificate, or indorsed upon it, is part of the certificate. A certificate under seal, when invested with legal force and effect, is a solemn instrument, and ought to be complete, certain, and final in itself, without any collateral addition or commentary. Its very form and char-

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acter as a certificate presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contained in the body of the instrument, has not this verification and protection. Such
562] extraneous matter may be added by other persons, or may be erased or altered, without involving the offense of forgery or alteration of the certificate. Memoranda of various kinds are frequently indorsed on instruments of this sort for the convenience of the possessors, either to indicate their contents, or to furnish other information with regard to their subject-matter. To hold that such memoranda are evidence, except as against the party making them, would be wholly inadmissible.

We are satisfied that the evidence offered and objected to was incompetent for any purpose in the cause, and that the judgment must be reversed and a new trial granted.

Judgment reversed and the cause remanded to the Circuit Court, with directions to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[578] *Ex Parte:*

J. H. V. COCKCROFT.

(See S. C., 14 Otto, 578, 579.)

Who may not appeal.

One who is not a party to a suit, either by an express order of the court to that effect, or by being treated as such, cannot take an appeal therein.

[No. 13, Orig.]

Submitted Jan. 16, 1882. Decided Jan. 23, 1882.

PETITION for a writ of *mandamus*.

The case is sufficiently stated by the court.

Mr. **William E. Earle,** for petitioner.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a petition for a writ of *mandamus* requiring the Circuit Court of the United States for the District of South Carolina to allow an appeal by the petitioner from an order of the court, entered on the 7th of October, 1881, confirming a sale of a railroad made pursuant to a decree filed on the 25th of September, 1880, in the suit of *Calvin Claflin and others* v. *The South Carolina Railroad Company and others.* The petitioner was not a party to the suit, neither does it appear that he ever asked to be made a party. He is not the holder of any of the bonds that by the decree under which the sale was made are entitled to a distributive share of the proceeds. Unless the property should bring at another sale enough to satisfy the mortgages and leave a balance for distribution among the general creditors of the company, he can get no advantage from setting aside the sale which has already been made. In his showing to the Circuit Court he certainly did not make it appear that he had any real interest in the controversy. He was evidently heard as a matter of favor, and not because he had any right to intervene. Before confirming the sale the court seemed desirous of ascertaining whether, under all the circumstances, in the exercise of its judicial discretion such an order ought to be made. For this purpose it was willing to consider the affidavits produced by the petitioner. This seems to have been done out of abundant caution, not because it was necessary in law.

Inasmuch, therefore, as the petitioner was not [579]
made a party to the suit, either by an express order of the court to that effect, or by being treated as such, his application for an appeal was properly denied. This case cannot be distinguished in principle from that of *Ex parte Cutting*, 94 U. S., 14 [XXIV., 49].

The motion is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF CLAY, *Plff. in Err.*, [579]

v.

SOCIETY FOR SAVINGS.

(See S. C., 14 Otto, 579–591.)

Recital in county bonds—repeal of statute—Illinois law—effect of State Constitution on contract—estoppel.

1. The recital in county bonds, that they were issued pursuant to the orders of the Board of Supervisors as authorized by virtue of the laws of the State, is conclusive and binding upon the county as against a *bona fide* holder; and he need not, in a suit upon them, aver or prove the performance of any of the requisites necessary to give them validity; the want of such performance is a matter of defense.
2. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together nor be consistently reconciled.
3. The Act incorporating the Ill. S. R. R. Co. does not repeal or modify the general state railroad subscription law of November 6, 1849.
4. Where a contract existed between a county and a railway company to the effect that, in consideration that the railway company should construct its road, the county would deliver its bonds to the railway company, and this contract had been partly performed by the railway company before the Illinois Constitution of 1870 went into effect, the adoption of the Constitution could not annul or impair it.
5. Where county taxes have been levied to pay interest on county bonds, and interest has been paid on them for a number of years, this cures mere irregularities in the issuing of the bonds when they are sued on by a *bona fide* holder for value.

[No. 1006.]

Submitted Dec. 5, 1881. Decided Jan. 23, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Statement of the case by *Mr. Justice* **Woods:**

On November 6, 1849, the Legislature of Illinois passed an "Act Authorizing Counties and Cities in the State of Illinois to Subscribe to the Capital Stock or Make Loans to Railway Companies," which contained the following provisions:

"Section 1. Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company, already organized or incorporated, or hereafter to be organized or incorporated, under any law of this State, such city or county may and are hereby authorized to

NOTE.—*No one but parties to the record can be heard on appeal or writ of error.* See *note* to Harrison v. Nixon, 34 U. S. (9 Pet.), 483.

NOTE.—*Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited.* See, *note* to Mercer Co. v. Hackett, 68 U. S., XVII., 548.

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[580] purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000, for each of such cities or counties, and the stock so subscribed for or purchased shall be under the control of the county court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

Sec. 2. For the payment of said stock the judges of the county court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding 10 per cent per annum, and to pledge the faith of the county or city for the annual payment of the interest and the ultimate redemption of the principal, or if the said judges or common council should deem it more advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county, making such subscription to be drawn for that purpose in sums not less than $50, bearing interest not exceeding ten *per centum* per annum; *Provided*, That no bond shall be paid out at a rate less than par value.

Sec. 3. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company at par and in lieu of cash.

Sec. 4. No subscription shall be made, or purchase or bond issued by any county or city, under the provisions of this Act, whereby any debt shall be created by said judges of the county court of any county or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this Act) shall vote for the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in the same manner as notices are given for election of state and county officers in said counties, requiring said electors of said counties or cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for such capital stock which they may propose to make," etc., etc. See, Gross, Statutes of Illinois, 3d ed., pp. 552, 553.

Afterwards, on February 26, 1867, the Legislature passed an Act to incorporate the Illinois Southeastern Railway Company, the 7th section of which was as follows:

"The county court or board of supervisors [581] (where such county has adopted township organization) of any county into or through which this road or its branches may pass, is hereby authorized and fully empowered to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding $100,000, and may order the clerk of the county court or board of supervisors of such county to issue bonds of the county to the amount donated; and such clerk of the county court or board of supervisors, as the case may be, of such county, shall countersign and deliver such bonds so issued, to the president or directors of said company; which said bonds may bear any rate of interest not to exceed ten per cent per annum, payable at the maturity of the bonds, as hereinafter expressed, and yearly thereafter; *Provided*, That no donation by the county court or board of supervisors of any such county shall be of a greater sum than $50,000, until the question of such larger donation shall have been submitted to the legal voters of such county, at an election to be called, conducted, returns made, canvassed and published, in the usual manner of calling, conducting, making returns, canvassing and publishing special county elections," etc.

On February 24, 1869, an Act was passed to amend the Act to Incorporate the Illinois Southeastern Railway Company, section 10 of which provided:

"That any village, city, county or township organized under the township organization law, or any other law of this State, along or near the route of said railway, or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or make donations to said company, to aid in constructing and equipping said railway; *Provided*, That no such subscriptions or donations shall be made until the same shall be voted for, as hereinafter provided."

The section then proceeded to declare that upon the application of twenty legal voters of any such city, village, county or township, the clerk thereof should call an election to be held by the legal voters, to determine "Whether such village, city, county or township shall subscribe to the capital stock of said company, or make a donation thereto to aid in building or equipping said railway, and whether to be subscribed or donated, and the rate of interest and the time of payment of the bonds to be issued in payment thereof." Section 12 of the Act declared as follows:

"That when payment of subscription to the capital stock of said company or payments for [582] donations to said company have been or shall be made by villages, cities, counties or townships, in bonds of such villages, cities, counties or townships, under any Act authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties or townships, and appearing regular on the face thereof, shall, in the hands of said company or any other *bona fide* holder thereof, be deemed and taken in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several Acts in relation to the issuing of said bonds or by any other Act to be done preliminary to the issuing and negotiation of said bonds."

On April 16, 1869, the Legislature of Illinois passed an Act for the registration of municipal bonds in the office of the auditor of State, section 7 of which required that before any county bond could be registered, the presiding judge of the county court should certify under oath to the auditor that all the preliminary conditions to their issue required by law had been complied with. See, Underwood, Statutes of Illinois, p. 994.

The Constitution of Illinois, which went into effect August 8, 1870, declares (Second Additional Section): "No county, city, town, town-

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ship, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation; *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions when the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

This suit was brought in the court below upon certain bonds with the coupons attached, of a series issued by the County of Clay to pay for stock in the Illinois Southeastern Railway Company subscribed by the County Board of Supervisors, and upon certain bonds with coupons attached, of another series issued by the same County to pay for a donation made to the same company by said Board of Supervisors, both series being issued, as was claimed, by authority of the foregoing legislation.

Although the bonds are under seal, the suit [3] is called in the record an action of *assumpsit*, and the defendant pleaded *non assumpsit*.

Upon the trial, a jury being waived, the court made an elaborate and comprehensive finding of the facts, in which is set out in full a copy of one of the bonds belonging to each class sued on, and of one of the coupons attached to each respectively.

The subscription series of bonds, as appears by the finding of the court, contained this recital: "This bond being issued under and pursuant to orders of the Board of Supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois. And the faith of the County of Clay is hereby irrevocably pledged for the payment of said principal and interest as aforesaid."

The donation series of bonds the court found to contain the following recital: "This bond is one of a series of bonds issued by Clay County to aid in the construction of the Illinois Southeastern Railway Company, in pursuance of the authority conferred by an Act of the General Assembly of the State of Illinois, entitled an Act to incorporate the Illinois Southeastern Railway Company, approved February 25, 1867, and an Act amendatory thereof approved February 24, 1869, and of an election of the legal voters of Clay County, Illinois, held on April 22, 1868, under the provisions of said Act."

"This bond is not to become a binding obligation of the said County of Clay until the following conditions shall have been complied with, to wit: this bond to become due and payable on the express conditions that said company shall have completed the whole length of its line from Shawneetown, on the Ohio River, to the Chicago branch of the Illinois Central Railroad, and shall have the cars running thereon."

Upon the back of each one of the donation series of bonds was printed the following certificate:

"STATE OF ILLINOIS, CLAY COUNTY, *ss*:

I, Jno. L. Moore, clerk of the County Court of Clay County, in the State of Illinois, do hereby certify that the County Court of said County [4] have entered an order on the records of said county court, directing me to indorse upon this bond the following words, to wit: All the conditions upon which this bond was to become a binding obligation of the County of Clay have been complied with.

In testimony whereof, I hereto affix my hand and the seal of said court, at Louisville, this 4th day of January, A. D. 1871.

[SEAL.] JNO. L. MOORE, *Clerk*."

Upon all the bonds of both series was printed the certificate of the auditor of public accounts, as follows:

"STATE OF ILLINOIS, AUDITOR'S OFFICE.

Jan'y 9, 1871, Springfield.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of An Act entitled "An Act to Amend an Act Entitled 'An Act to Incorporate the Illinois Southeastern Railway Company,'" approved February 24, 1869, as well as the provisions of an Act entitled 'An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns,' in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*"

The court further found that on March 2, 1868, the Board of Supervisors of Clay County made an order calling an election to be held by the qualified voters of the county upon two propositions: first, that the County should subscribe $100,000 to the capital stock of the Illinois Southeastern Railway Company and issue in payment thereof the bonds of the County for an equal amount; and, second, that the County of Clay should donate $50,000 to the railway company and issue bonds of the County to pay said donation; that the election was held in accordance with the order of the Board of Supervisors and resulted in a majority of votes being cast in the County in favor of both of the propositions; that at a special meeting of the Board of Supervisors held on the first Monday of November, 1868, the president of the Board was instructed, by resolutions duly passed by the Board, to make such donation, and to subscribe said amount upon the books of said railway company, the subscription and donation to be made strictly and only in accordance with the terms of the proposition aforesaid, submitted and voted upon on April 22, 1868. [585]

The court also found that the railway company had located its road and graded, bridged and tied ten miles thereof before the first day of November, 1869, and that on that day the president of the Board of Supervisors made the subscription upon the books of the railway company, under and in pursuance of the submission, vote and resolution aforesaid, the subscription being made upon the terms and conditions aforesaid.

The court further found that the $100,000 of bonds so voted as subscription as aforesaid were delivered to the railway company on November 1, 1869, and subsequent thereto, the company having fully complied with the terms and conditions of said vote before receiving the bonds.

The court further found that, on January 1, 1871, "$50,000 so donated as aforesaid, under

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and in pursuance of the vote aforesaid, in the bonds of said County, were delivered and donated to said railway company, said railway company having complied with the conditions of said vote," etc.

The court also found that both series of bonds had been registered in the office of the auditor of public accounts, and that taxes had been certified by him, and the interest paid on the bonds up to the commencement of this suit.

The findings of the court further state that the plaintiff purchased all the bonds sued on for full value before maturity, and was an innocent holder thereof without notice of any irregularity in the issue, except such constructive notice as the law charges it with.

Messrs. **W. J. Henry,** *Cook & Lord* and *Hagle & Finch*, for plaintiff in error.

Mr. **David T. Littler,** for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

Two classes of bonds are sued on, namely: the subscription bonds and the donation bonds. The defenses set up against each class will be separately considered.

The findings of the court and the sections of the Act of 1849, above recited, furnish ample [586] ground for the judgment which the court below rendered in favor of the defendant in error upon the subscription bonds held by it.

The plaintiff in error, however, insists that there is no evidence or finding that the thirty day's notice of the election required by the statute had been given, or that a majority of the legal voters, taking as a standard the number of votes thrown at the last general election for county officers, voted in favor of the proposition to subscribe stock and issue the bonds of the county to pay for it.

There are three conclusive answers to this contention:

First, the bonds recite on their face that they were issued under and pursuant to the orders of the Board of Supervisors of Clay County, as authorized by virtue of the laws of the State of Illinois. By the Act of November 6, 1849, it was provided that the judges of the county court were authorized to issue the bonds of the County only in case a majority of the voters of the County, taking as a standard the number of votes thrown at the next preceding general election, should vote in favor of the proposition to subscribe to the stock of some designated railroad company, and pay for it by the issue of county bonds. The ultimate decision of the question whether such a vote had been cast was, therefore, left with the judges of the county court. The recital made in the bonds that they were issued pursuant to the orders of the Board of Supervisors, the successor of the county court, as authorized by virtue of the laws of the State of Illinois, is equivalent to a declaration by the Board of Supervisors, upon the face of the bond, that the election had been held and had resulted so as to authorize the lawful issuing of the bonds. When the bonds are in the hands of a *bona fide* holder this recital is conclusive and binding upon the municipality. *Coloma* v. *Eaves*, 92 U. S., 484 [XXIII., 579]; *Marcy* v. *Oswego*, 92 U. S., 637 [XXIII., 748].

The second answer is, that if the County had, under the law, authority to issue bonds, and it did issue them, and they went into circulation and came to the hands of a *bona fide* holder, he was not, in a suit upon the bonds, required to aver or prove the performance of any of the requisites necessary to give them validity. The want of such performance is a matter of defense, and the burden of proof is upon the County to establish it. *Lincoln* v. *Iron Co.* [*ante*, 518]. In this case the plaintiff in error offered no evidence in any degree tending to show that the conditions precedent, upon the performance [587] of which the law authorized the issue of the bonds, had not been complied with. He cannot, therefore, assume that the conditions were not performed, and insist on the want of performance as a defense.

The third answer is, that, by section 12 of the Act of February 24, 1869, amendatory of the Act to incorporate the Illinois Southeastern Railway Company, and which was indorsed on the bonds, it was expressly provided that when payment to the capital stock of said company should be made in the bonds of counties or townships, under any Act authorizing such subscription, all such bonds issued by the proper authorities and appearing regular on their face should, in the hands of a *bona fide* holder, be deemed and taken in all courts, and elsewhere, as *prima facie* evidence of the regularity of everything required by the several Acts in relation to the issuing of said bonds or by any other Act to be done preliminary to their issue and negotiation.

As no proof has been submitted of any irregularity in the issuing of the bonds, this section of the law is conclusive against the existence of any.

It is next insisted by plaintiff in error that the general Statute of November 6, 1849, so far as it concerned the Illinois Southeastern Railway Company, was repealed by section 7 of the Act to incorporate that company. That section authorized the county court of any county or the Board of Supervisors (when the county had adopted township organization) to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding $100,000, and to issue to the company its bonds in satisfaction of said donation; *provided*, that no donation of a greater sum than $50,000 should be made until the question of such larger donation should have been submitted to the vote of the legal voters of the county and a majority thereof should have voted in favor of such donation. The contention is that it was not the purpose of the Legislature in these enactments to permit a county to purchase or subscribe to the capital stock of a railroad company and also make a donation to the same company.

There is not a word in the charter of the Illinois Southeastern Railway Company which ex- [588] pressly excludes it from the benefits of the general Railroad Subscription Law of November 6, 1849. Nor is there the slightest repugnancy between the provisions of the two Acts. The latter, being a general law, authorized any city or county in the State to purchase or subscribe to the capital stock of any railroad company anywhere in the State; the former, being an Act to incorporate a private corporation, authorized any county through which the rail-

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road of the company or any of its branches might pass, to make a donation to the company as a bonus or inducement towards the building of the railroad or its branches. There is no ground whatever for the contention that the general law was repealed or modified, in any respect, by the Act incorporating the Illinois Southeastern Railway Company. There is no repugnancy or inconsistency between them. A statute can be repealed only by an express provision of a subsequent law or by necessary implication. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. *McCool* v. *Smith*, 1 Black, 459 [66 U. S., XVII., 218]; *Wood* v. *U. S.*, 16 Pet., 342.

We are of opinion, therefore, that the Act incorporating the Illinois Southeastern Railway Company does not repeal or modify the general Law of November 6, 1849.

The plaintiff in error further insists that section 10 of an Act approved February 24, 1869, amendatory of the charter of the Illinois Southeastern Railway Company, had the effect to repeal, not only section 7 of the charter of the company, but also the general Law of November 6, 1849, so far as it concerned the said railroad company.

This section provides "That any village, city, county or township along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company or make donations to said company to aid in constructing and equipping said railway," provided the same shall be voted for at an election called by the clerk of the village, city, county or township, upon the written request of twenty legal voters thereof, and upon thirty days' notice.

[589] Conceding that this section is a substitute for section 7 of the original charter, it cannot be held to repeal the general law, for the reasons already stated in reference to section 7 of the original charter, namely: that there is no direct repeal, and there is no repugnancy between the two Acts which would make a repeal by implication.

The subscription bonds sued on were, according to the findings of the court, issued in substantial conformity, not only with the general Act of November 6, 1849, but also with the amendatory Act of 1869, so that, conceding that the latter Act is applicable to the issuing of the bonds in question, they are valid in the hands of a *bona fide* holder. When these bonds were issued there was ample authority for their issue under the laws of the State of Illinois. The recital that they were issued in conformity with the laws of the State, as already shown, is binding on the county, when the suit is brought on the bonds by a *bona fide* holder, and concludes the county from setting up any irregularities in their issue, if any existed. We are of opinion, therefore, that the suit upon the subscription bonds was well maintained.

The objections to the bonds known and designated as donation bonds have nothing substantial in them. The bonds refer on their face to the laws which authorized their issue, and recite that they were issued in pursuance of authority granted thereby. They carry an indorsement made by the clerk of the County Court of Clay County, by order of the court and under its seal, that all the conditions upon which the bonds were to become a binding obligation of the County of Clay have been complied with, and printed on every one of them is a copy of section 12 of the Act of February 24, 1869, amendatory of the charter of the Illinois Southeastern Railway Company, which makes the fact of the negotiation of the bonds in payment of a donation to said company to be *prima facie* evidence of the regularity of their issue when in the hands of a *bona fide* holder. There is no proof or offer of proof that they were not issued in conformity with the requirements of law.

The plaintiff in error argues, however, as conclusive against the validity of these bonds, the fact that they were not issued until after August 8, 1870, the date upon which the present Constitution of Illinois went into effect, which by section 2 of article 14 declared that no municipal corporation should make donations to any railroad or private corporation.

The findings of the circuit court show that the people of Clay County, on April 22, 1868, voted in favor of a proposition to donate $50,000 to the Illinois Southeastern Railway Company, [590] provided the railroad of said company should be located on a certain line specifically described, and provided the bonds issued in payment of such donation should not be payable until the railway had been completed the whole length of the line, from Shawneetown, on the Ohio River, to the Chicago Branch of the Illinois Central Railroad, and the cars running thereon; that on the first Monday of November, 1868, the Board of Supervisors of the County, by resolution duly passed, directed its president to make the donation aforesaid upon the books of the railway company, in accordance with the condition of said vote, and that, before the first day of November, 1869, the railway company had located its line of road, as required by the conditions upon which the donation was to be made, and had "graded, bridged and tied ten miles thereof."

We think it may be fairly deduced from the findings of the court below that, on November 1, 1869, the president of the Board of Supervisors subscribed upon the books of the railway company as directed by the Board of Supervisors the donation of $50,000, which the county had voted, and the brief of counsel for plaintiff in error distinctly admits that such is the proper construction of the findings of the court.

These transactions made a contract between the County and the railway company to the effect that, in consideration that the railway company should construct its road upon the line designated, and should complete it and have the cars running thereon between the points mentioned, the County would deliver its bonds to the railway company in satisfaction of its donation. This contract had been partly performed by the railway company before the Constitution of 1870 went into effect. The adoption of the Constitution could not annul or impair it. The County was bound notwithstanding the provision of the Constitution of 1870. *Concord* v. *Bank*, 92 U.S., 630 [XXIII., 630].

And when, as appears by the findings of the court, the railway company had, on January 1,

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[591] 1871, fully completed its road according to the terms upon which the donation was to be made, it was entitled in law under its contract to the bonds of the County in satisfaction of the donation.

There was, therefore, authority to issue these bonds upon the conditions prescribed. The court below has found that the defendant in error is a *bona fide* holder, and that the railroad company had complied with all the conditions upon which the bonds were to be issued to it. Upon this state of facts, the attempt of the plaintiff in error to avoid its liability upon these bonds seems a hopeless undertaking.

Other defenses are set up against a recovery in this case. Plaintiff in error alleges that the authority to donate $50,000 to the railway company was expressly conferred upon the Board of Supervisors without any vote or precedent condition whatever, and the authority being conferred upon the Board could not be by it "delegated to the people to be voted upon at a popular election." It further alleges that the bonds are not negotiable, and it insists that the authority of the Board of Supervisors, under the original charter of the railway company, to make the donation was repealed by the amendatory Act of February 24, 1869.

These defenses do not, in our judgment, merit reply.

The plaintiff in error has received, in consideration for the issue of both the subscription and donation series of bonds, everything for which it bargained. The bonds were regularly issued and have been registered under the Statute of Illinois with the auditor of public accounts, upon the strength of a certificate under oath made by a supervisor of the County pursuant to law, to the effect that all the preliminary conditions to the issue of the bonds required by law had been complied with. The record shows that taxes had been levied to pay interest, and that interest had been paid on the subscription bonds for eleven years and on the donation bonds for nine years. This fact would of itself cure mere irregularities in the issuing of the bonds when they were sued on by a *bona fide* holder for value. *Supervisors* v. *Schenck*, 5 Wall., 772 [72 U. S., XVIII.,556]. Under these circumstances, when a suit is brought on them by a *bona fide* holder for full value, as found by the circuit court to be the case here, some substantial defense must be set up by the County before it can escape its liability. Such defenses as are relied on in this case will not avail.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[604] *Ex Parte:*

PETER M. ROWLAND ET AL.

(See S. C., 14 Otto, 604–618.)

Void mandamus—*public officer—commissioner when not liable for contempt*—habeas corpus.

1. If the command of a writ of *mandamus* in whole or in part is beyond the power of the court, the writ, or so much as is in excess of jurisdiction, is void, and the court has no right in law to punish for any contempt of its unauthorized requirements.
2. More cannot be required of a public officer by *mandamus* than the law has made it his duty to do.
3. A judge of a state court, who is also a county commissioner, is as commissioner amenable to the authorized process of the Courts of the United States, in the same manner and to the same extent that his associates are.
4. Such commissioners are not liable for contempt in not causing a tax to be collected after they have done all they were required to do to charge the tax collector with the duty of making the collection.
5. Where the order of the court, under which the marshal holds the petitioners in custody, was a nullity, a writ of *habeas corpus* will be issued.

[No. 11, Orig.]

Submitted Dec. 16, 1881. Decided Jan. 23, 1882.

PETITION for writ of *habeas corpus*.

The case is stated by the court.

Messrs. **John T. Morgan,** *James L. Pugh* and *Thomas H. Watts*, for petitioners.

Messrs. **Samuel F. Rice** and **A. A. Wiley,** for U. S. Marshal.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application for a writ of *habeas corpus* to procure the discharge of Peter M. Rowland, D. C. Shultze and R. C. Germany, from the custody of the Marshal of the United States for the Middle District of Alabama. The facts, as shown by the return to a rule to show cause heretofore made, may be stated as follows:

On the 31st of December, 1868, the General Assembly of Alabama passed an Act to authorize counties, towns and cities to subscribe to the capital stock of railroad companies. The sections of the Act material to the present case are the 7th, 8th, 9th and 12th. These are as follows.

"Sec. 7. *Be it further enacted*, That the court of county commissioners of said counties in which the electors shall have voted in favor of said subscription, are hereby authorized and required to levy and assess in the same manner as is now required by law for the collection of state and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and such other reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax and for issuing said bonds; *Provided*, That in no case shall such tax exceed one per cent per annum upon the value of the real and personal property in said county, as yearly assessed and returned to the proper officers. [605]

Sec. 8. *Be it further enacted*, That the courts of county commissioners in the various counties in which such subscriptions shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax assessors and tax collectors to assess and collect said tax. Then said courts of county commissioners shall be, and they are hereby invested with all the powers, privileges and rights, and bound by the same duty of proceeding against said tax collectors and tax assessors, and their sureties, as are vested in, granted to and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected and paid over, or misapplied.

Sec. 9. *Be it further enacted*, That the tax assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby invested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of state and county taxes, and be bound by the same duties, and that the same

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pains and penalties as are now prescribed by law shall attach to all persons for failing to render a tax list or for rendering a false list.

Sec. 12. *Be it further enacted*, That the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all the provisions of this Act, which are not inconsistent with the Act itself, and the laws of the State and the United States." Pamph. L., 1868, pp. 516, 517.

Under the authority of this Act the County of Chambers issued a series of coupon bonds to the Eufaula, Opelika, Oxford & Guntersville Railroad Company. On the 25th of May, 1875, Dix & Co., subjects of Spain, recovered a judgment against the county in the Circuit Court of the United States for the Middle District of Alabama, for $2,040.50 and costs on account of unpaid coupons cut from these bonds. Execution was issued on this judgment, and returned "No property found," August 6, 1875. On the 19th of November, 1875, an alternative writ of *mandamus* was issued from the circuit court, on the petition of Dix & Co., directed [606] "to P. M. Rowland, Judge of Probate of Chambers County, Alabama, and *ex officio* Judge of the Court of County Commissioners of said County, and J. H. Forman, R. C. Germany, W. C. Grady and D. C. Shultze, members of said Court of County Commissioners," commanding them "to levy and assess in accordance with the provisions of said Act of the General Assembly * * * such a tax upon the real and personal property in said County of Chambers as will satisfy the said judgment with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is fully satisfied with interest and costs," or show cause on the 3d of December why they ought not to be required to do so. No cause being shown against the writ, the court, on the 17th December, issued a peremptory writ with the following command:

"Now, therefore, you, the said P. M. Rowland, Judge as aforesaid, and R. C. Germany, J. H. Forman, W. J. Grady and D. C. Schultze, members of and composing the Court of County Commissioners of said County, are hereby commanded forthwith and without delay to levy and assess, and cause the collection of, in accordance with the provisions of said Act of the General Assembly of said State of Alabama, such a tax upon the real and personal property in said County of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax and cause the same to be collected, as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit, and how you shall have executed this writ, make known to us, to the Judge of this court, at the next Term of said court, on the first day of said Term, on, to wit: on the first day in May, A. D. 1876."

On the 24th of April, 1876, the court of county commissioners, at a regular adjourned Term, made the following order, which was duly recorded:

"On the 17th day of December, 1875, a peremptory *mandamus* was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th of Feby., 1876, at the suit of Dix & Co., commanding the commissioners' court of Chambers County to levy a tax for the purpose of paying a judgment in said court in favor of said Dix & Co. against said county, [607] rendered at the May Term, 1875, for the sum of $2,040.50, and $51 costs, and that they report their action in the premises to the May Term, 1876, of said court. Now, as required by said order, it is ordered that a tax of one fourth of one per cent on the value of the real and personal property of Chambers County be levied for the purpose above set forth, and that the tax collector proceed to collect said tax as required by law."

In obedience to the command of the peremptory writ, the commissioners, on the 3d of May, made return that they had levied the tax as required, and accompanied their return with a copy of the order entered to that effect. Nothing more was done in the suit until May 23, 1881, when, on motion of Dix & Co., the return to the peremptory writ was quashed, and a rule entered on the court of county commissioners, "as well as the members thereof, to wit: P. M. Rowland, Judge of Probate and *ex officio* Judge of the said Court of County Commissioners, and to J. H. Forman, R. C. Germany, W. J. Grady and D. C. Shultze, who were members of and together constituted said court of county commissioners" when the peremptory writ of *mandamus* was served, to appear forthwith and show cause why an attachment should not issue against them and each of them for not obeying the command of the writ. This rule was served on Rowland, Shultze and Germany on the 29th of May. Forman and Grady had died before the rule was entered. The surviving members of the court of county commissioners made return to the rule on the 16th of July, as follows:

"In this case a rule *nisi* having, on the 25th day of May, 1881, issued out of said court, commanding P. M. Rowland, as Probate Judge of Chambers Co., Ala., and *ex officio* a member of the court of county commissioners in and for said county, and J. N. Forman, R. C. Germany, W. J. Grady and D. C. Shultze, members of said court of county commissioners, to appear *instanter*, or as soon as duly served with said rule *nisi*, and show cause why an attachment should not issue against them and each of them for violating and disregarding the peremptory writ of *mandamus* heretofore issued and served upon them at the suit of said Dix & Co., the [608] said P. M. Rowland, Judge of Probate and *ex officio* a member of said court as aforesaid, begs leave to make the following return, and to show cause under oath as follows why he should not be attached for contempt of the said Circuit Court of the United States:

He respectfully states that he was at the service of said peremptory writ of *mandamus*, has ever since been and is now Judge of the Court of Probate in and for said County of Chambers, and as such *ex officio* a member of the court of county commissioners in and for said county, and that on the 24th day of April, 1876, the Court of County Commissioners of said County of Chambers, at a regular Term of said court, levied a tax of one fourth of one per cent on the assessed value of the real and personal property of the taxpayers of said County of Chambers, to pay off and discharge the judgment mentioned in the peremptory writ of *mandamus*

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issued and served on him and the members of said court, as aforesaid, which said levy is sufficient to pay off and discharge said judgment, together with all interest and costs of suit—the assessed value of the taxable property of said county for said year 1876 being $1,631,566, and the levy of one fourth of one per cent thereon is more than sufficient to pay off and discharge the judgment, together with all interest and costs. A copy of said levy is hereto attached, marked 'Exhibit A,' and made part of this return. Affiant, said P. M. Rowland, gave notice to J. G. Weaver, the then tax collector of said county, and requested him to collect the said one fourth of one per cent, levied as aforesaid for the purpose aforesaid. Said J. G. Weaver, tax collector, as aforesaid, refused to collect said taxes upon the ground that he had previously qualified under the Act of the Legislature of Alabama, approved on the 4th day of March, 1876, by giving a bond for the collection of the state and county taxes, for general and not for special purposes; and his successor, J. M. Driver, who is the present tax collector of said county, executed his official bond in the same manner, and has upon the same ground refused to collect said special taxes, so levied by said court, as aforesaid; and that the said P. M. Rowland notified the Governor of Alabama, in the manner and within the time provided by law, of the failure of each of said tax collectors to make a bond for the collection of special taxes. The said P. M. Rowland has done all that the law authorized him to do in relation to the levy and collection of said taxes. Under the laws of Alabama, the said P. M. Rowland, as Judge of Probate of Chambers County and *ex officio* a member of the court of county commissioners of said county, is simply the presiding officer of the said court of county commissioners, and has no authority to vote as a member of said court, except in cases of a tie, a thing that has not occurred in any matter growing out of the assessment or collection of the said special taxes to pay said judgment, as aforesaid. If in anything affiant has been mistaken in his duties in the premises, he is willing to correct his mistakes and do whatever this honorable court may require. At no time has said P. M. Rowland been actuated by any intention to disobey the mandate of this honorable court, and if he has omitted any duty, it has been through mistake of his official duties, and not from any attempt to evade or oppose the authority of this honorable court. All of which is respectfully submitted.

[609]

PETER M. ROWLAND.

Sworn to and subscribed before me, this day of June, 1881.

J. W. DIMMICK,
U. S. Com'r Mid. Dist. of Ala."

"R. C. Germany and D. C. Shultze show cause as follows why they should not be attached for contempt of said circuit court for disobedience to the peremptory writ of *mandamus* mentioned in the above return of P. M. Rowland: Wm. J. Grady and James H. Forman were members of the court of county commissioners of said County of Chambers on the 24th day of April, 1876, and on that day, in obedience to the peremptory writ of *mandamus*, mentioned in the above return of P. M. Rowland, the said Germany, Shultze, Forman and Grady, who constituted said court of county commissioners, on said day, at a regular Term of said court, levied one fourth of one per cent upon the assessed value of the real and personal property of the taxpayers of said County of Chambers, to pay off and discharge the judgment mentioned and described in the peremptory writ of *mandamus* served on them, together with all the interest due on said judgments, and the costs of suit, and instructed the then tax collector to collect the same. Said levy was sufficient to pay off said judgment, as shown by the return of said P. M. Rowland, and the then tax collector, and his successor in office, the present tax collector of said county, have refused to collect the same, for the reasons set forth in the return of *Judge* P. M. Rowland, above set forth.

Sometime in the year 1878 J. H. Forman, and sometime in the year 1880 Wm. J. Grady, died, and John H. Seroyer and John H. Higgins have been elected as their successors in office, and are now members of the court of county commissioners of said county.

[610]

Affiants further state that they are plain men, not learned in the law; that they never knew that there was any other duty devolving on them in relation to the collection of said tax than the levy of a sufficient tax to pay said judgment, with interest and costs of suit, until the service of the rule *nisi* in the present case.

Affiants honestly believed that when they had levied said tax and ordered the tax collector to collect the same, they had done all they were required to do, and until the service of the rule *nisi*, they did not know they were required to do anything more; and whatever duty they may have omitted to perform, was omitted through innocent or ignorant mistake of their duties; that they are willing and now offer to perform any and every duty required of them in relation to causing said taxes to be collected. All of which is respectfully submitted.

D. C. SHULTZE.
R. C. GERMANY.

Sworn to and subscribed before me, this 14th day of June, 1881. J. W. DIMMICK,
U. S. Com'r for said Mid. Dist. of Ala."

On the same day the return was filed the court made the following order:

"The respondents then filed their respective answers to said rule, which were considered and held in all respects to be insufficient, and to furnish no excuse or exoneration for their failure to obey said writ. Said respondents, P. M. Rowland, D. C. Shultze and R. C. Germany, are therefore adjudged to be guilty of contempt of this court in relation to said writ, but sentence is hereby suspended, and this cause continued until the next Term of the court, in order that said respondents may have an opportunity by that time to pay said judgment, with interest and costs; and said respondents are each required to be and appear before this court upon the first day of the next Term of this court, to wit: upon Monday, the 7th day of November, A. D. 1881, at 12 o'clock M., to certify obedience to this order, and to receive such sentence as the court may deem meet to pronounce in the premises."

And on the 21st of November, the following:

"In this proceeding by attachment for contempt, all the parties this day appeared in this

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[611] court, and were further heard by this court touching the matters of contempt involved in this proceeding. And it appearing to the court that at the last Term of this court, to wit: on July 16, 1881, the respondents, the said Rowland, Shultze and Germany, were fully heard as to the said matters of contempt in disobeying the said peremptory writ of *mandamus* duly issued out of this court theretofore to them and duly served on them, and that upon said hearing the said respondents were duly and properly adjudged and found by this court to be guilty of contempt of this court in relation to said peremptory writ of *mandamus* mentioned in this proceeding for contempt and in disobeying said last mentioned writ, but that said respondents were required to appear in this court on the first day of this Term to receive such sentence as this court may deem meet to pronounce in the premises; and it is now made further to appear to this court that said respondents have not obeyed said peremptory writ of *mandamus* nor certified any such obedience, but still continue to disobey said writ of peremptory *mandamus;* and that said respondents are guilty of said contempt in disobeying said peremptory writ of *mandamus;* and that the judgment of said Dix and Company mentioned in that writ, and in respect to which that writ was issued, remains wholly unpaid and unsatisfied and of full force; and that the amount due upon said last mentioned judgment, including the principal and lawful interest thereon and the costs up to this day, is $3,152.

It is, therefore, considered, ordered and adjudged, by this court, that the said respondents, the said P. M. Rowland, D. C. Shultze and R. C. Germany, are guilty of said contempt in disobeying as well as in continuing to disobey the said peremptory writ of *mandamus*, and the order and command of this court therein; and that for said contempt each of respondents is here and now sentenced by this court to pay to the United States, as a fine for his said contempt, the sum of $1,088, and to be and to stand imprisoned in the common jail of Montgomery County, in the State of Alabama, until the said fine hereby imposed upon him, and all the costs of this proceeding for contempt are paid; that, in addition to said fines hereby imposed upon each of said respondents respectively, the sentence of this court also is, that said respondents pay all the costs of this proceeding, and stand imprisoned, as aforesaid, until the whole of said costs shall be paid. But the court further orders and adjudges, that if the said judgment of said Dix & Co., under and in respect to which said peremptory writ of *mandamus* issued, and also all the costs of this proceeding [612] and of the proceedings in which said peremptory *mandamus* issued, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court before the said fines are paid, then and in that event all further proceedings under said sentence of this court shall thereupon cease, and the said respondents shall thence be discharged from imprisonment under said sentence."

The marshal shows this order as the cause of his imprisonment of the parties named therein who are the petitioners here.

The single question we have to consider on this application is, whether the order of the circuit court, made on the 21st of November, is sufficient authority to the marshal for the detention of the persons he holds under it; and that question, as is conceded on both sides, depends entirely on the power of the circuit court to require the court of county commissioners to do what its members have been held to be in contempt for not doing. If the command of the peremptory writ of *mandamus* was, in all respects, such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. *Ex parte Lange*, 18 Wall., 165 [85 U. S., XXI., 875]; *Ex parte Parks*, 93 U. S., 22 [XXIII., 788]; *Ex parte Siebold*, 100 U. S., 371 [XXV., 717]; *Ex parte Virginia*, 100 U. S., 339 [XXV., 676].

It is also settled that more cannot be required of a public officer by *mandamus* than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one. In the present case the law made it the duty of the court of county commissioners to levy the tax required to pay the judgment rendered by the circuit [613] court. This levy was to be made in the same manner as was required by law for the collection of state and county taxes. Whatever, therefore, the court of county commissioners was bound to do to secure the collection of state and county taxes, the circuit court had jurisdiction to require it to do in respect to this special tax. Section 8 also made it the duty of the court of county commissioners to require the tax collector to collect the tax, and for that purpose the commissioners were invested with all the powers, privileges and rights, and bound by the same duty of proceeding against tax collectors and their sureties as were vested in, granted to or imposed upon the auditor of public accounts, for the amount of taxes not assessed, collected and paid over, or misapplied. The commissioners had no authority to collect the tax. That duty was, by section 9, put on the tax collector, who was invested with all the rights and remedies and bound by all the duties he had by law for the collection of state and county taxes.

The court of county commissioners, while called a "court," is, in fact, the board of officers through whom the affairs of the county are managed. The duties of this board, at least so far as this case is concerned, are administrative, not judicial. The county is a body corporate and the court its governing body. The judge of probate is, *ex officio*, a member of this body. In performing his duties in that capacity he acts not as a judge of probate but as county commissioner. The *mandamus* went against him in this case as commissioner, not as judge. No question arises here as to the power of the courts of the United States to imprison a judge of a state court for what he does, or omits to do, in his judicial capacity. As commissioner, this probate judge was amenable to the authorized process of the courts of the United State in the same manner and to the same extent that his associates were.

The laws of Alabama provide for a tax as-

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sessor, a court of county commissioners, a tax collector, and a county treasurer. The services of all these officers are required in the levy, collection and disbursement of taxes. The assessor lists the taxable property in the county, and values it for taxation. His list, when made out, constitutes the assessment and is entered by the assessor in a book, called the assessment book. [614] When the book is completed by the assessor, he delivers it to the probate judge. It is then examined by the probate judge, the county commissioners, county treasurer, and clerk of the circuit court, who constitute a board of equalization, of which the probate judge is, *ex officio*, chairman. This board equalizes the assessment and corrects any errors that may be discovered. When the equalization has been perfected and all the necessary corrections made, the chairman of the board certifies to that effect on the assessor's book, and the assessment thus becomes the basis of taxation in the county for the current year. The court of county commissioners then levy the amount of county taxes required. The taxes thus levied are to be collected by the tax collector, who is an independent officer and makes his settlements with the county treasurer and not with the court of county commissioners. He is chargeable with all the taxes levied, but upon his report the commissioners may allow him credit for such as he had been unable to collect and for erroneous assessments.

The peremptory writ of *mandamus* was served on the 14th of February, 1876. The first regular meeting of the commissioners thereafter was on the second Monday in April, and at an adjourned day in that meeting the order levying the tax was made. On the 4th of March before, an Act was passed by the General Assembly of Alabama (Pamph. L. 1875-6, 93) to the effect that whenever any county of the State should be authorized by law, or required by the judgment of any court, to levy any tax for any special purpose, otherwise than the taxes authorized by the general revenue laws of the State, the tax collector might execute separate bonds—one for the collection of the taxes levied under the general laws, and one for the collection of taxes levied for special purposes, or in obedience to the requirements of the judgment of a court. If he should give one of the bonds and fail or refuse to give the other, it was made his duty to proceed to collect the taxes for which he gave the bond, and of the probate judge to notify the Governor of his failure to give the other. The Governor was then to appoint a special tax collector for the collection of the taxes for which the regular tax collector had [615] failed to give bond.

The performance of the duty of the court of county commissioners in respect to the levy of taxes was complete when a valid levy had been made, and all had been done which was necessary to enable the collector to proceed with the collection. The duty to collect rested entirely on the collector. He accounted for his collections to the treasurer, who alone was the custodian of the moneys of the county, and paid them out to the parties entitled thereto, on proper vouchers. If the collector failed to perform his duty, he could be compelled by *mandamus* to do what was required of him by law, but it is nowhere made the duty of the court of county commissioners to institute any such proceeding. As the duty of collection was one the tax collector owed to the judgment creditor as well as the commissioners, we see no reason why the creditor could not himself apply for the necessary writ. If the collector made collections which he failed to pay over, he and his sureties could be proceeded against summarily for the moneys in his hands. So, too, if he failed by his own fault or neglect to make his collections, he and his sureties would, undoubtedly, be liable to an action on that account; but we have been referred to no statute which made it the official duty of the court of county commissioners or the auditor of public accounts to bring such an action. Under the law as it stood when the bonds sued on were issued, the auditor could obtain a summary judgment for certain penalties imposed by law upon a tax collector for the non-performance of his duties, but it was not made his absolute duty to institute the necessary proceedings for that purpose. And, besides, the writ in this case does not require the commissioners to do any such thing.

We proceed now to the consideration of the return of the commissioners to the rule upon them to show cause why they should not be attached for disregarding the writ. Their statements in the return have not been controverted, and are, consequently, to be taken as true. While the return to the *mandamus* itself was quashed, the return to the rule stands in the place of a return to the writ for all the purposes of this proceeding. The command of the writ was that the commissioners levy, assess and *cause to be collected* the necessary tax. They return that they did levy the tax and order its collection by the tax collector. It is true that while the writ [616] ordered the tax to be levied on the real and personal property *in* the county, the levy as ordered was on the real and personal property *of* the county. Clearly there can be no difference between what was done and what was ordered to be done. A tax was levied, and that implies a levy on property which was in law taxable. The property belonging to the county was exempt. It was so expressly provided by law. Pamph. L. 1868, p. 298, sec. 3; Pamph. L., 1875-6, p. 44, sec. 2, part. 2. Consequently, the return that a tax had been levied, which the tax collector was directed to collect, necessarily implied that the levy was made on the taxable property in the county, and the circuit court could not have understood otherwise. It is, then, to be taken as a fact that the levy which was commanded was actually made, and on the proper assessment. It follows, therefore, that the fine, for the non-payment of which the commissioners are now held in custody, must have been imposed because they failed to cause the tax which was levied to be collected. The orders themselves indicate as much on their face, for in the first the sentence was delayed after the commissioners were adjudged to be in contempt, to give them time to pay the judgment, and in the second, the fine is to be remitted and the contempt purged if the judgment shall be paid.

The case, then, clearly presents itself to us as a proceeding against the commissioners for contempt in not causing the tax to be collected after they had done all they were required to do to charge the tax collector with the duty of mak-

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ing the collection. This we cannot but think was beyond the jurisdiction of the circuit court. The duty of the commissioners in respect to the collection of the tax is performed when they have done all that is necessary to authorize a qualified tax collector to enter upon his work under the law. The original Act of 1868 made it the duty of the collector of general taxes to collect the special tax as he did the others. If the Act of 1876, which permitted the regularly elected collector to disqualify himself from collecting the special tax by not giving the new bond, was unconstitutional as to Dix & Co.'s [617] coupons, which the Supreme Court of the State is reported to have decided recently in the case of *Edwards* v. *Williamson*, the judgment creditors might, by proceedings in *mandamus* against him, have required that he make the collection, notwithstanding the change in the law; but we are referred to no statute which makes it the duty of the court of county commissioners to test that question in that way or any other. As the law stood on its face, the commissioners and the probate judge had performed their duty when the Governor was informed, in the proper way, of the failure of the tax collector to give his bond for the collection of the special tax. Whatever it is within the power of the creditor to compel the tax collector to do without the intervention of the court of commissioners, the commissioners are not required by the writ against them to do. Their whole duty in respect to the collection of the tax is performed when they have so far set the machinery of collection in motion that others are required to keep it going. Their obligations in this respect end where those of another public officer begin. They cannot be required by *mandamus* to compel another officer to do his duty, if, without their intervention, the moving party can himself accomplish the same result. It is true that, under section 12, general powers are conferred on the commissioners to carry out the provisions of the Bonding Act, but this does not change the rule of their liability to the bondholder in the particular now under consideration. The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy. As a necessary consequence the writ must issue directly against him whose duty it is to do the thing which the parties seek to have done; for, as was said in *Reg.* v. *Mayor of Derby*, 2 Salk., 436, "It is absurd that the writ should be directed to one person to command another." The question here is, whether it was the duty of the tax collector under the law to collect the special tax which the commissioners had levied. That question the creditor could have had determined in a direct proceeding against the collector, without the help of the commissioners. It follows, that if the command of the writ against the commissioners was what the circuit court has construed it to be, it was in excess of the jurisdiction of the court and, consequently, void. If the command of the writ was in excess of jurisdiction, so necessarily were the proceedings for contempt [618] in not obeying. We are led, therefore, to the conclusion that the order of the court under which the marshal holds the petitioners in custody was a nullity, and that a writ of *habeas corpus* should issue as prayed for, unless the parties are willing that an order of discharge shall be entered without further proceedings.

It is, consequently, so ordered.

Ex parte: State of Alabama, Petitioner, No. 12.

The writ asked for in this case is refused, as the relief sought can be had under the application of Rowland and others, just decided.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 375, 522; 112 U. S., 180.

JOHN J. STEWART, *Plff. in Err.*,
v.
TOWN OF LANSING. [505]

(See S. C., 14 Otto, 505-512.)

Holder of negotiable paper—coupons—certiorari, *effect of on town bonds*—bona fide *holder—former adjudication—direction to find verdict.*

1. If fraud or illegality in the inception of negotiable paper is shown, an indorsee must prove that he is a holder for value before he can recover.
2. Coupons detached from bonds are negotiable instruments.
3. Where an order of a County Judge for the issue of town bonds was reversed on *certiorari*, but the town commissioners, after the commencement of the proceedings, issued and delivered to the railroad company the bonds with full knowledge of the proceedings by *certiorari*, the bonds, as between the town and the company, were illegal.
4. It was incumbent, therefore, on the plaintiff to whom they had been transferred, to show that he occupied the position of a *bona fide* holder before he could recover.
5. A determination in one action, that a plaintiff was the owner for value of certain coupons sued on, did not estop the town from proving in another action that he was not such an owner of other coupons detached from the same bonds.
6. If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is not sufficient to warrant a particular verdict, the jury may be so instructed.

[No. 184.]

Argued Dec. 21, 22, 1881. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **James R. Cox**, for plaintiff in error.

Messrs. **Francis Kernan** *and H. L. Comstock*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit against the Town of Lansing to recover for interest coupons due July 1, 1872, January 1, 1873, January 1, 1874, July 1, 1874, January 1, 1875, July 1, 1875, January 1, 1876 and July 1, 1876, attached to seventy-five bonds of $1,000 each, purporting to have been issued by the Town under the authority of a Statute of New York, passed May 18, 1869, to permit municipal corporations to aid in the construction of railroads. The defense, stated generally, was that the bonds had been issued without authority of law. At the trial, after the testimony,

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NOTE.—*When a verdict may be directed by the court.* See, *note* to Grand Chute v. Winegar, 82 U. S., XXI., 174.

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on both sides was in, the court instructed the jury to find a verdict for the defendant, which was done, and judgment entered accordingly. This ruling furnishes the principal ground of error assigned here.

The testimony is all se' out in the bill of exceptions, and the undisputed facts are these:

On the 21st of March, 1871, the County Judge of Tompkins County, within which the Town of Lansing is situated, assuming to act under [506] the authority of the Law of 1869, rendered a judgment appointing commissioners to execute bonds of the Town to the amount of $75,000 and invest them in the capital stock of the Cayuga Lake Railroad Company. On the 27th of the same month, at the instance of the opposing taxpayers of the Town, a writ of *certiorari* directed to the County Judge was issued from the Supreme Court of the State for a review of this judgment. This writ was served on the Judge at or about its date, and on the first of September he made his return thereto, sending up, as required by law, a transcript of the record of the proceedings before him which were brought under review. Of this writ and what was done thereunder, both the commissioners appointed by the Judge and the railroad company had full notice; but the commissioners, on or about the 14th of October, 1871, executed the bonds which had been authorized, payable to bearer on the first day of January, 1902, with coupons for semi-annual installments of interest attached, and delivered them to the company in exchange for seven hundred and fifty shares of its capital stock. At the same time the commissioners took from the company a bond of indemnity to save them harmless from all costs, liabilities or expenses on account of what had been done.

The bonds as soon as delivered were taken by the company to New York and there pledged as collateral security for money borrowed. On the 27th of May, 1872, the Supreme Court in General Term reversed and in all things held for naught the judgment of the county judge appointing commissioners and authorizing the issue of the bonds. This judgment of the Supreme Court still remains in force.

On the 26th of November, 1872, the company arranged with Elliott, Collins & Co., a banking firm in Philadelphia, for the money to take up the bonds in New York, and they again pledged the bonds to that firm as security for the advances made. On the 8th of February, 1873, this debt to Elliott, Collins & Co. was paid, and they parted with the bonds. The entire testimony as to what took place at this time is as follows:

William Elliott, the senior member of the [507] firm, examined as a witness, said: "We did not sell the bonds at all. The bonds, on the 8th of February, 1873, we parted with. The cash we received on parting with them was $54,-337.50. I have never seen any of the bonds since. The loan negotiated by us was paid in this way. Up to this time the loan had not been paid. It was paid by this money."

On cross-examination he said: "I cannot tell through whom personally we received the bonds. Think we received them by express. They were negotiated by Mr. Delafield, either personally or by letter. All our transactions with that company have been done through Mr. Delafield. * * * I am not acquainted with John J. Stewart, the plaintiff in this action. I do not know where he lives, or in what State he lives. Neither myself or my banking firm ever had any transactions with him to my knowledge." This testimony was taken in behalf of the plaintiff, by deposition, on the 18th of July, 1876.

Afterwards, on the 18th of August, in the same year, another deposition of the same witness was taken in behalf of the plaintiff. In this deposition, looking at Exhibit D, which was as follows:

"PHILADELPHIA, Feb'y 8, 1873.

Cayuga Lake R. R. Co.

75,000 Town of Lansing bonds, -	$54,337 50
Notes March 29, $50,000; 49 days' interest, $408.33, - -	49,591 67
Credit Cayuga Lake, - -	$4,745 83"

he said: "This is a statement of the sale of said Town of Lansing bonds by the firm of Elliott, Collins & Co. The sale was made at the time it bears date, Feb'y 8, 1873; it was made out and sent to the Cayuga Lake R. R. Co. at that date. I said in my previous examination that we did not sell the bonds in question. I intended by that to say that we did not make the negotiation for the sale of them, but they passed through our hands, on terms which were agreed on by others. The price at which they were sold we were consulted about, and our advice asked. We received the money and delivered the bonds on that day." On cross-examination, he said: "I do not wish to change, but merely explain my testimony given at the previous examina- [508] tion. Exhibit D is in the handwriting of my son, who generally makes out the accounts, Adolphus William Elliott. He is still living in this city. To my present recollection, the first time I saw Exhibit D is to-day. I have no recollection of ever having seen it before. The statement first credits the Cayuga Lake R. R. Co. with $54,337.50, under date of Feb'y 8, 1873, that being the avails of the bonds. * * * It was sent to the Cayuga Lake R. R. Co. at the time, as I have stated before. I have no personal knowledge of Mr. Stewart; I mean the Mr. Stewart who is plaintiff in this action. I have no personal knowledge of any business transaction whatever between myself or my house and Mr. Stewart. I have no personal knowledge whether these bonds ever passed into the hands of Mr. Stewart, the plaintiff in this action, nor whether he ever paid anything for them. Somebody paid for them and we got the money."

Talmadge Delafield, the treasurer of the company, a witness called on the part of the plaintiff, testified that Elliott, Collins & Co. held the bonds after the transfer to them until February 8, 1873, when they rendered an account of the sale. On cross-examination, he said "he had no personal knowledge of the sale of the bonds. Never saw Mr. Stewart; don't know that there is such a man. I have never corresponded with him, nor he with me. Whatever occurred between them and him was entirely without my knowledge."

On the 30th of May, 1874, a suit was brought in the name of Stewart, the present plaintiff in error, in the Circuit Court of the United States for the Northern District of New York, to re-

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cover the coupons due July 1, 1873, averring his ownership thereof.

On the 20th of July, 1872, Manassah Bailey brought suit in the same court to recover the coupons of July 1, 1872. In each of the suits the defenses were that the bonds and coupons were issued without the authority of law, and that the plaintiffs respectively were not *bona fide* holders. The suits were tried together, and upon the same evidence, so far as applicable. In both cases it was decided that the bonds were invalid, and in that of Bailey, judgment was given for the defendant, because it had not been satisfactorily shown that he was a *bona fide* holder. In the *Stewart Case*, however, the court used this language in its opinion: "The suit of Stewart differs from the one by Bailey, in that [509] it appears that the bonds were pledged as collateral in February, 1873, to Elliott, Collins & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins & Co. were holders for value before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser. Whether the plaintiff was the purchaser from them directly or not is not clear, but, however this may be, he succeeds to all the rights of Elliott, Collins & Co., and occupies the position of a *bona fide* purchaser. As against a *bona fide* holder of the coupons, none of the defenses interposed are tenable." Acting on this principle, the court gave judgment in favor of Stewart for the coupons he held.

Upon the trial of the present action, the record of the first Stewart judgment was given in evidence, and the counsel for the plaintiff, who had also been counsel for Stewart and Bailey in the former suits, was examined as a witness. He testified that after the judgment against Bailey, he gave the coupons sued for in that action to a Mr. Tryon, in New York. He was unable to say from whom he got them back, nor when. Neither did he tell from whom he got the bonds and coupons which were used in evidence at the present trial.

As between the railroad company and the Town, the judgment of the Supreme Court reversing and annulling the order of the county judge invalidated the bonds. If the bonds had not been delivered before they could not have been afterwards. The judgment of reversal was equivalent between these parties to a refusal by the county judge to make the original order.

The next inquiry is, whether, on the evidence, Stewart occupied in this suit a better position than the Town. That depends on whether the testimony was such as to make it the duty of the court to submit to the jury under proper instructions the determination of the question whether he was, in a commercial sense, the *bona fide* holder of the coupons sued for.

It is an elementary rule that if fraud or illegality in the inception of negotiable paper is [510] shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough. *Smith* v. *Sac Co.*, 11 Wall., 147 [78 U. S., XX., 104].

Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover. This, it is contended, was conclusively established by the judgment in the suit on the coupons of July, 1873. The issue in that case was as to the ownership of those coupons, not of the bonds. That did not necessarily involve an ownership of the bonds. We have often held that coupons detached from bonds are negotiable instruments, and capable of separate ownership and transfer. *Clark* v. *Iowa City*, 20 Wall., 589 [87 U. S., XXII., 429]. While the court in its opinion when rendering the former judgment used language broad enough to cover the bonds, this language must be confined in its effect to the issues on trial, that is to say, the ownership of the coupons alone. In *Cromwell* v. *Sac Co.*, 94 U. S., 351 [XXIV., 195], it was distinctly held that a determination in one action, that a plaintiff was not an owner for value of certain coupons sued on, did not estop him from proving in another action that he was such an owner of other coupons detached from the same bonds. The proposition in this case is but the converse of that.

This makes it necessary to inquire whether upon the testimony, the burden of establishing a *bona fide* ownership was so far overcome at the trial as to make it improper for the court to take that question from the jury. The testimony is noticeable rather for what is omitted than for what was introduced. It would seem to have been easy to prove the exact facts as to the "parting with" the bonds by Elliott, Collins & Co. Although the bonds had been pledged in New York before, Elliott, Collins & Co. took them from the company, not from the New York holders. The company negotiated the loan from them, and on taking up the bonds in New York made a new pledge. This was all done after the judgment of the Supreme Court upon the *certiorari*. In the former suit a judgment had been secured only by proving a *bona fide* ownership in the plaintiff. Notice of the necessity of establishing the same fact in this case was, therefore, given the plaintiff and his counsel. Acting on this notice, the same counsel who appeared in the former case went [511] to Philadelphia to get the necessary testimony. He called on the senior member of the firm of Elliott, Collins & Co. and took his deposition. In this deposition it was clearly shown that although that firm had "parted with" the bonds, and got some money when they did so, which was put to the credit of the company, they did not sell the bonds. That was done, if done at all, by some one else. Not satisfied with this testimony, the same counsel went again to Philadelphia to make another effort. He took with him a paper he had found in the handwriting of the junior member of the firm, now known as Exhibit D. Instead of examining the junior partner, he went again to the senior partner, who evidently knew but little personally about the transaction, and stopped with him, although it appears that the witness who made out the exhibit was then in the city, and it was again stated that the sale was not negotiated by the firm, but that the bonds only passed through their hands under terms which had been agreed on by others. Who those others were is not stated. Neither the actual purchaser nor his representative in the negotiation was named. Stewart, the plaintiff, was not known to any of the witnesses examined. No one had ever seen him.

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His counsel, though examined as a witness, gave no information in respect to him, and was also unable to tell from whom the Bailey coupons were received. It is by no means certain from the testimony whether such a man as the plaintiff is actually in existence. Even the witness Elliott was not asked whether he knew of the decision of the Supreme Court when his firm took the bonds. The sale, if actually made, was at an enormous discount. Although the Bailey coupons are included in this suit, another action for their recovery was pending at the time Elliott, Collins & Co. parted with the bonds, in which the same defenses now relied on were set up. The counsel now appearing for the present plaintiff was also the counsel for Bailey in that action, and for the railroad company when the bonds were got from the commissioners. It would have been apparently so easy to make the necessary proof if it could have safely been done, that we are unable to account for its absence, except on the theory that a disclosure of the whole truth would be fatal to a recovery. While it would not, perhaps, have have been improper for the court, in the exer- [512] cise of its rightful discretion, to leave the case to the jury on the evidence, we cannot say it was error not to do so. In *Pleasants* v. *Fant*, 22 Wall., 122 [89 U. S., XXII., 783], it was held, that "If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant" a particular verdict, the jury might be so instructed. *R. R. Co.* v. *Fraloff*, 100 U. S., 26 [XXV., 533]; *Oscanyon* v. *Arms Co.* [*ante*, 539]. This case, in our opinion, comes under that rule.

The record in the Bailey suit was certainly admissible in evidence upon the issue as to the *bona fide* ownership of the coupons of July, 1872.

Without, therefore, considering any of the other questions presented for our consideration, on the argument, the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 542.

UNITED STATES
[621] *v.*
JACK McBRATNEY.

(See 14 Otto, 621-624.)

Criminal jurisdiction of Circuit Court.

*The Circuit Court of the United States for the District of Colorado has no jurisdiction of an indictment against a white man for the murder of a white man within the Ute Reservation in the State of Colorado.

[No. 879.]

Argued Jan. 18, 1882. Decided Mar. 6, 1882.

UPON certificate of division of opinion from the Circuit Court of the United States for the District of Colorado.

The case is stated by the court.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for United States.

Messrs. **Thomas G. Putnam** and *S. E. Browne*, for defendant.

Mr. Justice **Gray** delivered the opinion of the court:

The defendant, having been indicted and convicted, in the Circuit Court of the United States for the District of Colorado, of the murder of Thomas Casey, within the boundaries of the Ute Reservation in that District, moved in arrest of judgment for want of jurisdiction of the court. The indictment does not allege that either the accused or the deceased was an Indian. The certificate of division, upon which the case has been brought to this court, states that at the trial it appeared that both were white men, and that the murder was committed in the District of Colorado, within the Ute Reservation, the said Ute Reservation lying wholly within the exterior limits of the State of Colorado; and that, upon the motion in arrest of judgment coming on to be heard before *Mr. Justice* Miller and *Judge* Hallett, their opinions were opposed upon this question: "Whether the Circuit Court of the United States sitting in and for the District of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute Reservation in said District, and within the geographical limits of the State of Colorado."

The Circuit Courts of the United States have jurisdiction of the crime of murder committed in any "place or district of country under the exclusive jurisdiction of the United States;" and, except where special provision is made, "The general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Co- [622] lumbia, shall extend to the Indian country." R. S. sec. 629, cl. 20; sec. 2145; sec. 5339, cl. 1.

By the 2d article of the Treaty between the United States and the Ute Indians of March 2, 1868, the United States agreed that a certain district of country therein described should be set apart for the absolute and undisturbed use and occupation of the Indians therein named, and of such other friendly Tribes or individual Indians as from time to time they might be willing, with the consent of the United States, to admit among them; and that no persons except those therein authorized so to do, and except such officers, agents and *employes* of the Government as might be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to pass over, settle upon or reside in the territory so described, except as otherwise provided in the treaty. The 6th article provided that, "If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians," the United States, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs, would proceed at once to cause the offender to be arrested and punished according to the laws of the United States; and "If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black or Indian, subject to the authority of the United States and at peace therewith, the Tribes herein named solemnly agree that they will, on proof

*Head note by *Mr. Justice* GRAY.

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made to their agent and notice to him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws." By the 7th article, "The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of such Indian settlers in their improvements, and may fix the character of the title held by each;" and "The United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the Government of the Indians on said reservation and the internal police thereof, as may be thought proper." 15 Stat. at L., 619-621.

[623] By the 1st section of the Act of Congress of February 28, 1861, to provide a temporary government for the Territory of Colorado, all territory which, by treaty with any Indian Tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any State or Territory, was excepted out of the boundaries and constituted no part of the Territory of Colorado; and by the 16th section "The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States." 12 Stat. at L., 172, 176. If this provision of the 1st section had remained in force after Colorado became a State, this indictment might, doubtless, have been maintained in the Circuit Court of the United States. *U. S.* v. *Rogers*, 4 How., 567; *Bates* v. *Clark*, 95 U. S., 204 [XXIV., 471]; *U. S.* v. *Ward*, 1 Woolw., 17, 21.

But the Act of Congress of March 3, 1875, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "To form for themselves out of said Territory a state government with the name of the State of Colorado, which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever;" and the Act contains no exception of the Ute Reservation or of jurisdiction over it. 18 Stat. at L., 474. The provision of the subsequent Act of June 26, 1876, section 1, 19 Stat. at L., 61, that upon the admission of the State of Colorado into the Union "The laws of the United States, not locally inapplicable, shall have the same force and effect within the State as elsewhere within the United States," does not create any such exception. Such a provision has a less extensive effect within the limits of one of the States of the Union than in one of the Territories of which the United States have sole and exclusive jurisdiction.

The Act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing Treaty which are clearly inconsistent therewith. *Case of the Cherokee Tobacco*, 11 Wall., 616 [78 U. S., XX., 227]. Whenever, upon the admission of a State into the Union, [624] Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *Case of the Kansas Indians*, 5 Wall., 737 [72 U. S., XVIII., 667]; *U. S.* v. *Ward* [*supra*]. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the Treaty with the Ute Indians as remain in force. But that Treaty contains no stipulation for the punishment of offenses committed by white men against white men. It follows that the Circuit Court of the United States for the District of Colorado has no jurisdiction of this indictment, but, according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the State of Colorado to be dealt with according to law. *U. S.* v. *Cisna*, 1 McLean, 254, 265; *Coleman* v. *Tenn.*, 97 U. S., 509, 519 [XXIV., 1118, 1123].

The record before us presents no question under the provisions of the Treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians. The single question that we do or can decide in this case is, that stated in the certificate of division of opinion, namely: whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation and within the limits of the State of Colorado; and for the reasons above given, *that question must be answered in the negative.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 115; 109 U. S., 562; 112 U. S., 597.

CAROLINE A. MOORES, *Plff. in Err.*, [625]
v.
CITIZENS' NATIONAL BANK OF PIQUA.

(See S. C., 14 Otto, 625-631.)

State decisions when followed—sustaining demurrer.

*1. The construction given by the Supreme Court of a State to a Statute of Limitations of the State will be followed by this court in a case decided the other way in the Circuit Court before the decision of the State Court.

2. The erroneous sustaining of a demurrer to a replication to one of several defenses in the answer, requires the reversal of a final judgment for

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state statutes; power of state courts to construe their own statutes.* See, *note* to Jackson v. Lamphire, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions except when specially authorized to by law. See, *note* to Com. Bk. v. Buckingham, 46 U. S. (5 How.), 317.

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the defendant, which is not clearly shown by the record to have proceeded upon other grounds.

[No. 205.]

Argued Jan. 11, 12, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Statement of the case by *Mr. Justice* **Gray:**

The action was brought by Caroline A. Moores against the Citizens' National Bank of Piqua, in March, 1873. The amended petition, filed on the 11th of February, 1874, and subsequently amended by leave of court in some particulars, after a motion of the defendant to require the plaintiff to make it more specific, alleged that the defendant was a banking corporation duly incorporated under the laws of the United States in 1864, with a capital stock of one thousand shares of $100 each, of which the whole was paid in, and certificates issued to the stockholders; that on the 15th of July, 1867, G. Volney Dorsey was president and Robert B. Moores was cashier, and they were charged with the keeping of its transfer books and the issue of certificates of stock; that on that day Robert B. Moores represented himself to the plaintiff, and appeared on the books of the Bank, to be the owner of more than ninety-one shares, and she purchased of him ninety-one shares and paid him therefor the sum of $9,100 in money and he, as cashier and stockholder, falsely and fraudulently represented to her that he had, in consideration of such purchase and payment by her, assigned and transferred the ninety-one shares to her on the books of the Bank, and thereupon Dorsey as president, and Robert B. Moores as cashier, signed and issued to her a certificate therefor in the usual form; that the plaintiff believed and relied upon the representations of Robert B. Moores, as cashier and stockholder, that the stock had been duly transferred by him to her on the books of the Bank, and that the certificate was duly issued and was valid; that she was recognized as a stockholder for that amount of stock until on or after the 1st of January, 1873, when she first learned that the defendant disputed the validity of the certificate, denied that any transfer had been made to her upon its books, and refused to recognize her as a stockholder; that, after the issue of the certificate to her, the defendant fraudulently permitted and procured Robert B. Moores to make on its books transfers of all the stock owned by him, or standing in his name, to Dorsey, its president, for its benefit, and refused and still refuses to recognize the plaintiff as owner of the stock, or to recognize the validity of the certificate; that the facts that no transfer had been made to the plaintiff on the books of the Bank at the time of the issue and delivery of the certificate to her, that the certificate was not authorized by the Bank or recognized by it as valid, and that the stock standing in the name of Robert B. Moores had been transferred on the books to its president, were fraudulently concealed by the defendant, through its cashier, Robert B. Moores, and she was aware of no circumstances calling for inquiry on her part until after the 1st of January, 1873; that, by reason of the fraudulent conduct and acts aforesaid of the defendant, the certificate was invalid and worthless in her hands, and she had lost the sum of $9,100 paid by her therefor; and that the defendant had been requested by the plaintiff to repay or re-imburse that sum to her, or to recognize the validity of the certificate, and had refused so to do.

[626]

The defendant filed an answer, setting up three grounds of defense: 1. Averring that the plaintiff's alleged cause of action did not accrue within four years next preceding the commencement of the action; and denying that the plaintiff was ignorant of the facts set forth in her petition, if they existed, or of facts which called upon her to inquire as to the validity of the certificate, until the 1st of January, 1873, or any other date after the 15th of July, 1867. 2. Averring that, pursuant to an agreement made by the plaintiff and her husband with Robert B. Moores and William B. Moores on the 15th of July, 1867, which the defendant had no knowledge of, interest in or connection with, the sum of $9,100 had been repaid to the plaintiff by William for the paper purporting to be a certificate of stock, and Robert had thereby become entitled to take up the same. 3. Averring that the paper purporting to be a certificate of stock was executed and delivered by Robert to the plaintiff, in violation of his duty, and without the knowledge or consent of Dorsey or any other officer of the defendant; that, according to the defendant's rules and usages, no one could procure a certificate of stock without the contemporaneous surrender of a certificate for an equal amount for cancellation; and that before the 15th of July, 1867, all the shares previously held by Robert had been transferred by him, and on the books of the Bank, to other persons.

[627]

The plaintiff replied, alleging, as to the first ground of defense: 1st, that at and before the 15th of July, 1867, and ever since, she was a married woman; and, 2d, that the cause of action did accrue within four years; and, as to the second ground of defense, denying the agreement and payment therein alleged; and demurred to the third ground of defense. And the defendant demurred to both the replies, for the reason that they did not constitute good replies to the first ground of defense.

The court ordered that the defendant's demurrer to the plaintiff's first reply to the first ground of defense be sustained, to which the plaintiff excepted; ordered that the defendant's demurrer to the plaintiff's second reply to the first ground of defense be overruled, to which the defendant excepted; ordered that the plaintiff's demurrer to the third ground of defense be sustained, to which the defendant also excepted; and gave the parties leave to plead within thirty days, which did not appear to have been availed of.

The defendant afterwards, by leave of court, in lieu of the third ground of defense, filed an amendment of the answer, denying that Dorsey had any connection with the transaction alleged in the petition, or that he issued to the plaintiff the certificate therein set forth, or that Robert B. Moores, as its cashier, or in his official capacity, issued the certificate to her, or that he held any certificate of stock in the Bank on the 15th of July, 1867, or at any time thereafter; alleging that, according to its rules and usages, no one was entitled to receive a certificate of ownership of shares without the surrender of a cer-

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tificate of corresponding amount for cancellation, all of which was well known to the plaintiff; and denying generally all allegations of [628] fraud or negligence contained in the petition. And it was ordered by the court that "the default herein" (of which there was no previous mention in the record) be set aside, and the plaintiff have leave to reply; and she did reply, joining issue on the denials and denying the allegations of the amended answer.

The record stated that the parties afterwards, by their attorneys, filed a written stipulation waiving a jury, and "submitted the case to the court upon the issue joined. On consideration whereof, the court find the issues to be in favor of the defendant, to which finding the plaintiff by her attorneys excepts." The bill of exceptions presented by the plaintiff, and allowed by the Judge presiding at the trial, stated that the case was submitted to the court upon all the evidence (which was in writing and annexed to the bill), and "thereupon the court found for the defendant, to which the plaintiff excepted."

The Civil Code of Ohio of 1853, in the chapter concerning the limitation of personal actions, provided that the following actions should be brought within four years next after the cause of action shall have accrued, namely: "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated;" and "an action for relief on the ground of fraud; the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud;" secs. 12, 15; and that "If a person entitled to bring any action mentioned in this chapter, except for a penalty or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after such disability shall be removed;" sec. 19; and, in the chapter concerning parties to civil actions, provided that "Where a married woman is a party, her husband must be joined with her; except, when the action concerns her separate property, she may sue without her husband, by her next friend; when the action is between herself and her husband, she may sue or be sued alone; but in every such action other than for a divorce or alimony, she shall prosecute and defend by her next friend;" sec. 28. 2 Rev. Stat. of Ohio, Swan & Critchfield's ed., 947, 949, 953. The section last cited has been amended by the Act of April 15, 1870, sec. 1, by providing that in actions concerning [629] her separate property she may sue and be sued alone, and shall in no case be required to promote or defend by her next friend. 67 Ohio Laws, 111.

Messrs. **Taft** *& Lloyd, Stallo,* **Kittredge** *& Shoemaker,* for plaintiff in error.

Messrs. **William M. Ramsay** and *Stanley Matthews,* for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

The principal embarrassment in this case arises from the difficulty of ascertaining from the prolix and obscure record what was actually decided in the court below.

The decision of that court sustaining the demurrer to the plaintiff's first reply to the first ground of defense was based upon the position that the exception in the Statute of Limitations of Ohio in favor of a married woman was repealed by the Statute of 1870, by which it was enacted that a married woman might sue alone in actions concerning her separate property. That decision was in accordance with an opinion of the majority of the Superior Court of Cincinnati in *Ong* v. *Sumner*, 1 Cin. Sup. Ct., 424, which appears to have been the only decision upon the question in the courts of Ohio at the time of the trial of the present case in the Circuit Court. But in *R. R. Co.* v. *Cobb*, 35 Ohio St., 94, the Supreme Court of Ohio has since adjudged that, even if the Statute of 1870 withdrew the protection of coverture (a point which it did not decide), yet the action of a married woman was not barred until four years after the passage of this statute; and the construction thus given to the statute by the highest court of the State should be followed by this court. *Tioga R. R. Co.* v. *Blossburg & C. R. R. Co.*, 20 Wall., 137 [87 U. S., XXII., 331]; *Kibbe* v. *Ditto*, 93 U. S., 674 [XXIII., 1005]; *Fairfield* v. *Gallatin Co.*, 100 U. S., 47 [XXV., 544].

It follows that the order sustaining the demurrer to the plaintiff's first reply was erroneous, and that the judgment below in favor of the defendant must be reversed, unless it clearly [630] appears that the plaintiff was not prejudiced by the error. *Deery* v. *Cray*, 5 Wall., 795 [72 U. S., XVIII., 653]; *Knox County Bank* v. *Lloyd*, 18 Ohio St., 353.

To the first ground of defense stated in the answer, namely: that the cause of action did not accrue within four years, the plaintiff had made two replies: the first, in the nature of confession and avoidance, that she was a married woman; the second, in the nature of a traverse, that the action did accrue within four years. This allegation of fact in the second reply cannot affect the issue of law raised by the defendant's demurrer to the first reply. After that demurrer had been sustained, the case, as was assumed and contended by the learned counsel for the defendant at the argument, presented three issues: 1. Whether the cause of action accrued within four years. 2. Whether there had been a payment, as alleged in the second ground of defense. 3. Upon the third ground of defense, which included a general denial of all the material allegations in the petition.

A verdict of a jury, or, where a trial by jury is waived, a finding by the court, upon any one of these issues, would be sufficient to sustain a general finding for the defendant, and would render the other issues of fact immaterial. The bill of exceptions merely states generally that "the court found for the defendant;" and the statement in the record, that under a submission "upon the issue joined" the court found "the issues" to be in favor of the defendant, is too ambiguous to enlarge the effect of the general finding as stated in the bill of exceptions.

The sustaining of the demurrer to the plaintiff's first reply deprived her of the right to insist upon the ground of action, which was open under the petition, that the defendant, more than four years before the action was brought, permitted and procured the transfer upon its books to other persons of shares of which the plaintiff held the certificate. *Bank* v. *Lanier*, 11

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Wall., 369 [78 U. S., XX., 172]; *Telegraph Co. v. Davenport*, 97 U. S., 369 [XXIV., 1047]; and limited her, so far as regarded the first ground of defense, to proof of a cause of action accruing within the four years. The general finding [631] in favor of the defendant may have proceeded solely upon that ground of defense, without touching the second and third grounds.

The defendant, therefore, fails to show that the error in sustaining its demurrer did not prejudice the plaintiff *and, consequently, the judgment must be reversed and a new trial ordered.*

Mr. Justice **Matthews** did not sit in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct., U. S.

Cited—111 U. S., 156.

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[631] FREDERICK HOPT, *Plff. in Err.*,

v.

THE PEOPLE OF THE TERRITORY OF UTAH.

(See S. C., 14 Otto, 631-635.)

Evidence of intoxication in criminal case—erroneous instruction to jury.

*1. Under a statute establishing degrees of the crime of murder, and providing that willful, deliberate, malicious and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing, is competent for the consideration of the jury upon the question, whether he was in such a condition of mind as to be capable of deliberate premeditation.

2. Under a statute, which requires the instructions of the judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine.

[No. 1112.]

Argued Jan. 20, 1882. Decided Mar. 6, 1882.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. J. G. Sutherland, Lee J. Sharp and **John R. McBride**, for plaintiff in error.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

The plaintiff in error was indicted, convicted and sentenced, for the crime of murder in the first degree, in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding Judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court. Of the various errors assigned, we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of or attempt to perpetrate, any arson, rape, burglary [632] or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law,

* Head notes by *Mr. Justice* GRAY.

NOTE.—*Criminal law; evidence of intoxication of accused; for what purpose may be shown in defense.*

Intoxication may be shown, to determine the degree of the crime or in mitigation of the offense. Curry v. Com., 2 Bush, 67; Kriel v. Com., 5 Bush, 362; Blimm v. Com., 7 Bush, 320; Shannahan v. Com., 8 Bush, 463; 1 Green, C. L. R., 373; Smith v. Com., 1 Duval, 224.

It may be considered, where the offense or its degree depends upon premeditation. 1 Whart. C. L., 8th ed., sec. 51; 1 Bish. C. L., 6th ed., sec. 414; Golden v. State, 25 Ga., 527; Jones v. State, 29 Ga., 594; Henry v. State, 33 Ga., 441; Colbath v. State, 2 Tex. Ct. App., 391; Ferrell v. State, 43 Tex., 503; Brown v. State, 4 Tex. Ct. App., 275; McCarty v. State, 4 Tex. Ct. App., 461; State v. Bullock, 13 Ala., 413; Mooney v. State, 33 Ala., 419; People v. Belencia, 21 Cal., 544; Com. v. Hart, 2 Brewst., 546; Roberts v. People, 19 Mich., 401; Lancaster v. State, 2 Lea, 575; Golliher v. Com., 2 Duval, 163; People v. Lewis, 36 Cal., 531; Pirtle v. State, 9 Humph., 663; Harte v. State, 11 Humph., 154; People v. Dawson, 16 Ind., 428; State v. McCants, 1 Spear, 384; Rex v. Moore, 3 Car. & K., 319; Rex v. Meakin, 7 Car. & P., 297; Rex v. Thomas, 7 Car. & P., 817; Reg. v. Monkhouse, 4 Cox, C. C., 55; Reg. v. Doody, 6 Cox, C. C., 463; Pa. v. McFall, Addis., 255; Kelly v. Com., 1 Grant, Cas., 284; Boswell v. Com., 20 Gratt., 860; Rafferty v. People, 66 Ill., 118; Smith v. State, 4 Neb., 277; People v. Odell, 1 Dak., 197; Com. v. Haggerty, Lewis, Cr. L., 402; Kelly v. State, 3 Smedes & M., 518; Jones v. Com., 75 Pa. St., 403; Cornwell v. State, Mart. & Y., 147; Hopt v. People, *supra*.

Intoxication may be considered in connection with other facts in rebuttal of malice (State v. Tatro, 50 Vt., 483; Shannahan v. Com., 8 Bush, 463; S. C., 1 Green, C. L. R., 373; Golden v. State, 25 Ga., 527; Dawson v. State, 16 Ind., 428; Henry v. State, 33 Ga., 441); or to test capacity to form a purpose (Kenny v. People, 31 N. Y., 330; People v. Odell, 1 Dak., 203); or to decide between right and wrong, to show incapacity to deliberate or to attack or defend (State v. Johnson, 40 Conn., 136; Wenz v. State, 1 Tex. Ct. of App., 36; State v. Home, 9 Kan., 119; S. C., 1 Green C. L. R., 718); or as to whether threats were its result, or deliberate (Lanergan v. People, 50 Barb., 267; People v. Eastwood, 14 N.Y., 562).

It is available to disprove a specific intent, as to pass counterfeit money with intent to cheat (U. S. v. Rondenbush, Bald., 514; Pigman v. State, 15 Ohio, 555; but see, Nichols v. State, 8 Ohio St., 435; State v. Avery, 44 N. H., 392); or to commit suicide (Lytle v. State, 31 Ohio St., 196); or perjury (Real v. People, 42 N. Y., 270); or, in assault, an intent to murder (Reg. v. Cruse, 8 Car. & P., 541; State v. Garvey, 11 Minn., 154; Mooney v. State, 33 Ala., 419); or to do great bodily harm (State v. McCants, 1 Spear, 384; Golliher v. Com., 2 Duval, 163; Roberts v. People, 19 Mich., 401; Reg. v. Moore, 3 Car. & K., 319.

In case of wanton killing without provocation, intoxication is not available to disprove the criminal intent. O'Herrin v. State, 14 Ind., 420; Choice v. State, 31 Ga., 424; Humphreys v. State, 45 Ga., 190; Estes v. State, 5 Ga., 30; Rafferty v. People, 66 Ill., 118; 5 Chic. L. N., 100; Reg. v. Gamlen, 1 Fost. & F., 90.

Intoxication furnishes no extenuation where a man forms the purpose when sober and takes liquor to prepare himself for the act. People v. Fuller, 2 Park. Cr. R., 16; State v. Johnson, 41 Conn., 584; State v. Cross, 27 Mo., 332; State v. Harlow, 21 Mo., 446; Com. v. Hawkins, 3 Gray, 463; Com. v. Malone, 114 Mass., 295; U. S. v. Cornell, 2 Mason, 91; Fridry v. People, 54 Barb., 319; State v. John, 8 Ired., 330; but see, State v. Hundley, 46 Mo., 414, Curry v. Com., 2 Bush, 67; Kriel v. Com., 5 Bush, 362; Shannahan v. Com., 8 Bush, 463; 1 Green, Cr. L. Rep., 373.

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is murder in the second degree." Sec. 89. "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Sec. 90. Compiled Laws of Utah of 1876, pp. 585, 586.

By the Utah Code of Criminal Procedure, the charge of the Judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally;" sec. 257, cl. 7; the jury upon retiring for deliberation, may take with them the written instructions given, sec. 289; and "When written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." Sec. 315. Laws of Utah of 1878, pp. 115, 121, 126.

It appears by the bill of exceptions that evidence was introduced at the trial, tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was indorsed "refused" by the Judge, [633] was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery or burglary. The degree of the offense depends entirely upon the question, whether the killing was willful, deliberate and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present determine the degree of the crime."

Upon this subject the Judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused, and the instruction given, being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure, sec. 315, above quoted, their correctness is clearly open to consideration in this court. *Young* v. *Martin*, 8 Wall., 354 [75 U. S., XIX., 418].

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. *U. S.* v. *Drew*, 5 Mason, 28; *U. S.* v. *McGlue*, 1 Curt., C. C., 1; *Commonwealth* v. *Hawkins*, 3 Gray, 463; *People* v. *Rogers*, 18 [634] N. Y., 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points; *Commonwealth* v. *Dorsey*, 103 Mass., 412; and in well considered cases in courts of other States. *Pirtle* v. *State*, 9 Humph., 663; *Haile* v. *State*, 11 Humph., 154; *Kelly* v. *Commonwealth*, 1 Grant, 484; *Keenan* v. *Commonwealth*, 44 Pa., 55; *Jones* v. *Commonwealth*, 75 Pa., 403; *People* v. *Belencia*, 21 Cal., 544; *People* v. *Williams*, 43 Cal., 344; *State* v. *Johnson*, 40 Conn., 136, and *S. C.*, 41 Conn., 584; *Pigman* v. *Ohio*, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, sec. 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569.

The instruction requested by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

One other error assigned presents a question of practice, of such importance that it is proper to express an opinion upon it, in order to prevent a repetition of the error upon another trial.

By the provisions of the Utah Code of Criminal Procedure, already referred to, the charge of the judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and [635] the written charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury, in deliberating upon the case, nor a court of error, upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury, which are not so reduced to writing and recorded, is error. *Feriter* v. *State*, 33 Ind., 288; *Missouri* v. *Cooper*, 45 Mo., 64; *People* v. *Sanford*,

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47 Cal., 29; *Gile* v. *People*, 1 Col., 60; *State* v. *Potter*, 15 Kan., 302.

The bill of exceptions shows that the presiding Judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July, 1868, page 559;" and that, to the instruction so given, an exception was taken and allowed.

This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed and made part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the Judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. *Merrill* v. *Nary*, 10 Allen, 416.

For these reasons, the judgment must be reversed and the case remanded, with instructions to set aside the verdict and order a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Cited—20 W. Va., 737; 43 Am. Rep., 807.

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[636] ST. LOUIS SMELTING AND REFINING COMPANY, *Plff. in Err.*,

v.

THOMAS KEMP ET AL.

(See S. C., "*Smelting Company* v. *Kemp*," 14 Otto, 636-657.)

Patent for lands—power of courts of equity—evidence to impeach—mining claim—location—separate patent unnecessary.

1. A patent for lands issued by the United States is conclusive in an action at law as to the legal title, and cannot be collaterally impeached in such action, unless it is absolutely void on its face, or is issued without authority.
2. Courts of equity have power to correct mistakes and relieve against frauds and impositions; and to give the proper relief where it is clear that the officers of the Land Department have, by a mistake of the law, given land to one man which belongs to another.
3. Records of the proceedings of the Land Department, upon which the patent was issued, are not admissible in order to impeach its validity.
4. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it.
5. A patent may issue for a mining claim which embraces over one hundred sixty acres.
6. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules.
7. One individual can hold as many locations as he can purchase, and rely upon his possessory title. A separate patent for each location is unnecessary.

[No. 458.]

Argued Jan. 13, 16, 17, 1882. Decided Mar. 6, 1882.

ERROR to the Circuit Court of the United States for the District of Colorado.

Statement of the case by *Mr. Justice* **Field:**

This was an action at law for the possession of a parcel of land in the City of Leadville in Colorado. It was commenced in one of the courts of that State and, on application of the [637] defendants, was removed to the Circuit Court of the United States for the district. The plaintiff is a Corporation created under the laws of Missouri. The complaint is in the usual form of actions for the possession of real property under the practice obtaining in Colorado. It alleges that the plaintiff was duly incorporated under the laws of Missouri, with power to purchase and hold real estate; that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them from the plaintiff to its damage of $5,000.

The defendants filed an answer to this complaint, in which they admitted that the plaintiff was incorporated as averred, but denied that it was the owner in fee of the demanded premises, or that the premises were wrongfully detained from its possession, or that it had sustained any damage. They also set forth the certificate of the incorporation of the plaintiff, and alleged that, as a foreign corporation, it was incompetent to acquire title to any real estate in Colorado, except such as might be necessary for the transaction of its business as a smelting and refining company, and that the premises in controversy were not necessary and were not acquired for that purpose, but for speculation.

To this answer the plaintiff filed a replication, in which, after denying its incompetency to hold real estate as alleged, it averred that it was authorized, under the laws of Missouri, to buy, sell and deal in real property for any purpose whatever, and that the property in controversy was acquired as a site for smelting and reduction works, and that such works were afterwards erected upon it and used for reducing and smelting silver ores.

The case was tried at the circuit in November, 1879. To maintain the issues on its part the plaintiff offered in evidence a patent of the United States to Thomas Starr, dated March 29, 1879, for mining ground, which it was admitted included the premises in controversy. The patent recited that, pursuant to provisions of chapter 6 of title 32 of the Revised Statutes, there had been deposited in the General Land-Office the plat and field-notes of the placer mining claim of Thomas Starr, the patentee, accompanied by a certificate of the register of the land-office at Fairplay, Colorado, within which district the premises are situated; that Starr had, on the 6th of March, 1879, entered an application for the said claim, which contained one [638] hundred and sixty-four acres of land, and sixty-one hundreths of an acre, more or less. The patent also specified the boundaries of the tract in full, according to the field-notes, and contained the recitals and words of grant and transfer which are usually inserted in patents of the United States for placer mining land. To the introduction of this patent the defendants objected, but it is not stated in the record on what ground the objection was founded, and it was overruled. The patent was accordingly admitted in evidence, and the plaintiff traced title to the land by sundry *mesne* conveyances from the patentee. It also introduced the certificate of

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the register of the land-office at Fairplay, showing that the application of Starr at that office to enter and pay for his claim, was made on the 18th of March, 1878; also a copy of the articles of incorporation of the plaintiff, and of the laws of Missouri under which the incorporation was had; and proved that the Company purchased of the claimant the tract embraced in the patent in 1877, prior to the existence of the Town of Leadville, for the purpose of using it for the construction of reduction works thereon; and that, at the time of the purchase and when it commenced the construction of the works, the land was unoccupied by other parties.

The plaintiff having rested its case, the defendants offered in evidence a certified copy of the record of proceedings in the General Land-Office at Washington, upon which Starr obtained his patent, to the introduction of which the plaintiff objected, on the ground that it could only show or tend to show the regularity or irregularity of the proceedings before the Executive Department in obtaining the patent, or the validity or invalidity of the possessory title or preemption right upon which the patent was founded, and that no evidence could be introduced to impeach the patent or attack it collaterally, or in any way affect it in this action. But the court overruled the objection and admitted the record. To this ruling an exception was taken.

The case being closed, the court instructed the jury substantially as follows: that a patent for a mining claim, since the passage of the Act of Congress of 1870, could not embrace more than one hundred and sixty acres; that individuals and associations were, by that Act, put upon the same footing, and that either might take that amount; but that by the mining Act of Congress of 1872, an individual claimant was limited to twenty acres, whilst an association of persons could still take one hundred [639] and sixty, as before; that the proceedings in the land-office were allowed in evidence in order to show whether the patent was issued upon locations made prior to 1870, and that they showed that the claim of Starr was based upon twelve or fifteen locations, some of which were prior to 1870, and some since then; and added, that "If Mr. Starr was the owner of these claims, if he had obtained them by purchase and they were valid and regular locations, he would, under the Act, be required, if he desired to obtain a patent for them; to make application for each one of them; to post the notice, as required by the statute; and give the publication and file his plat and survey, and do all these things which are required in the several claims upon each one of them. If he had done so, and his right had been supported as to all of them, and the patent had been issued for all of these claims, and each of them described in the patent, there would have been no objection to the patent; but it was not competent for him to consolidate these claims and put them all in as one claim, and upon notice given as one claim, and publication as one claim, and proceeding throughout as one claim embracing 164 acres," and that the officers of the Land Department had no authority, in law, to proceed in that way and, therefore, the patent upon which the plaintiff relied was void and its title failed.

To the instructions given, exceptions were taken. The jury thereupon found for the defendants, and judgment in their favor was accordingly entered. To review this judgment the plaintiff has brought the case to this court on writ of error.

Messrs. A. T. Britton and **Walter H. Smith**, *G. G. Symes* and **J. H. McGowan**, for plaintiff in error.

Mr. **A. G. Thurman** appeared for others interested, in support of the plaintiff in error.

Messrs. William Drummond, Robert H. Bradford, **Fletcher P. Cuppy**, *Edward C. Ingersoll*, **T. A. Green**, **T. M. Patterson** and *Robert G. Ingersoll*, for defendants in error.

Mr. Justice **Field**, after stating the case as above, delivered the opinion of the court, as follows:

As seen by the statement of the case, the plaintiff relies for a reversal of the judgment [640] upon three grounds: 1. Error in admitting the record of the proceedings of the land-office to impeach the validity of the patent to Starr issued upon them; 2. Error in instructing the jury that a patent for a placer claim, since the Act of 1870, could not embrace in any case more than one hundred and sixty acres; and 3. Error in instructing the jury that the owner by purchase of several claims must take separate proceedings upon each one in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, nor for the land officers to allow such application and to issue a patent thereon.

We are of opinion that these several grounds are well taken and that, in each particular mentioned, the court below erred.

The patent of the United States is the conveyance by which the Nation passes its title to portions of the public domain. For the transfer of that title, the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been [641] taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements pre-

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liminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. *Moore* v. *Wilkeson*, 13 Cal., 478; *Beard* v. *Federy*, 3 Wall., 478, 492 [70 U. S., XVIII., 88, 92].

Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act. [642]

These views are not new in this court; they have been, either in express terms or in substance, affirmed in repeated instances. One of the earliest cases on the subject was that of *Polk* v. *Wendal*, reported in 9th Cranch, 87, where the doctrine we have stated was declared, and the exceptions to it mentioned. There the plaintiff brought an action upon a patent of North Carolina, issued in 1800, for five thousand acres. The defendants relied upon a prior patent of the State for twenty-five thousand acres, issued in 1795 to one Sevier, through whom they claimed. Each patent embraced the lands in controversy, and they were situated in that portion of Tennessee ceded to the United States by North Carolina. On the trial it was contended that the elder patent was void on its face because it covered more than five thousand acres, the limit prescribed for a single entry by the laws of that State. Proof was also offered that the lands had not been entered in the office of the entry taker of the proper county before their cession to the United States, and it was contended that the patent was, therefore, invalid. We shall hereafter refer to what the court said as to the alleged excess of quantity in the patent. At present we shall only notice the general doctrine declared as to the unassailability of patents in a court of law, and its decision upon the admissibility of the proof offered. It seems that a Statute of 1777 directed the appointment in each county of an officer called an entry taker, who was required to receive entries of all vacant lands in his county and, if the lands thus entered were not within three months claimed by some other party than the person entering them, to deliver to such person a copy of the entry, with its proper number, and an order to the county surveyor to survey the land. This order was called a warrant. Upon it and the survey which followed, a patent was issued. If there were no entry there could be no warrant and, of course, no valid patent. The 9th section declared that every right claimed by any person to lands which were not acquired in this mode, or by purchase or inheritance from parties who did so acquire them, or which were obtained in fraud or evasion of the provisions of the Act, should be declared void. In 1779 North Carolina ceded to the United States the territory in which the lands lie for which the patent to Sevier was issued, reserving, however, to the State all existing rights, which were to be perfected according to its laws. The cession was accepted by Congress. The survey, upon which the patent to Sevier was issued, was made in 1795, and the plaintiff, to impeach the patent, offered, as already stated, to show that there had been no entry of the land in the office of the entry taker of the county where it was situated, previous to the cession; that is, in substance, that the grantor had no authority to make the grant, the land having been previously conveyed to the United States. This offer was disallowed by the court below, and as judgment passed for the defendants, the case was brought to this court, where, as mentioned, the general doctrine as to the presumptions attending a patent, which we have stated, was declared, with the exceptions to it. Upon the general doctrine the court observed, speaking through *Ch. J.* Marshall, that the laws for the sale of the public lands provided many guards to secure the regularity of grants and to protect the incipient rights of individuals and of the State from imposition, that officers were appointed to superintend the business, and rules had been framed prescribing their duty; that these rules were, in general, directory, and when all the proceedings were completed by a patent issued by the authority of the State, a compliance with those rules was presupposed, and that "Every prerequisite has been performed, is an inference properly deducible and which every man has a right to draw from the existence of the grant itself." "It would, therefore, be extremely unreasonable," said the court, "to avoid the grant in any court, for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of the title from its commencement to its consummation in a patent;" but that there were some things so essential to the validity of a contract that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which the elder title [643]

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was acquired might be examined, and that a court of equity was a tribunal better adapted to this object than a court of law; and it added that "There are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is, necessarily, examinable [644] at law." So the court held that proof that no entry had been made in the office of the entry taker in the county where the lands patented were situated, prior to the cession to the United States, was admissible under the 9th section, for without such entry they would not be within the reservation mentioned in the Act of cession. In other words, proof was admissible to show that the State had not retained control over the property, but had conveyed it to the United States.

In *Patterson* v. *Winn*, reported in 11th Wheaton, 380, this case is cited, and after stating what it decided the court said: "We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it could be impeached collaterally in a court of law in an action of ejectment, *but, in general, other objections and defects complained of must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent.*"

The doctrine declared in these cases as to the presumptions attending a patent, has been uniformly followed by this court. The exceptions mentioned have also been regarded as sound, although from the general language used some of them may require explanation, to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, it may be collaterally impeached in a court of law. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is meant, when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by statute from sale, or otherwise appropriated; or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue [645] grants of portions of the public domain.

So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification, that when the authority depends upon the existence of particular facts or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts exist or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision.

With these explanations of the exceptions, the doctrine of the cases cited may be taken as expressing the law accepted by this court since they were decided. *Hoofnagle* v. *Anderson*, 7 Wheat., 212; *Boardman* v. *Reed*, 6 Pet., 342; *Bagnell* v. *Broderick*, 13 Pet., 448; *Johnson* v. *Towsley*, 13 Wall., 72 [80 U. S., XX., 485]; *Moore* v. *Robbins*, 96 U. S., 535 [XXIV., 850].

In *Johnson* v. *Towsley* the court had occasion to consider under what circumstances the action of the Land Department in issuing patents was final, and after observing that it had found no support for the proposition offered in that case by counsel upon certain provisions of a statute, said, speaking by *Mr. Justice* Miller, that the argument for the finality of such action was "Much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others." "That the action of the Land-Office," the court added, "in issuing a patent for any of the public land, subject to sale by preemption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted under the circumstances under which it was obtained," and then observed that there exists in the courts of equity the power to correct mistakes and to relieve against frauds and impositions; and that in cases where it was clear that the officers of the Land Department had, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give proper relief. The doctrine thus stated was [646] approved in the subsequent case of *Moore* v. *Robbins*.

The general doctrine declared may be stated in a different form, thus: a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in *Minter* v. *Crommelin*, reported in 18th Howard, 87 [59 U. S., XV., 279], where it appeared that an Act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the Land Department unless specifically directed by the Secretary of the Treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the Secretary had ordered it to be sold, and the court said: "The rule being that the patent is evidence that all previous steps had been regularly taken to justify making a patent, and one of the necessary steps here being an order from the Secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the or-

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der was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of *Bagnell* v. *Broderick*, 13 Pet., 448, and is not open to controversy anywhere, and the state court was mistaken in holding otherwise."

On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department, upon matters properly [647] before it, is not assailed nor is the regularity of its proceedings called into question; but its authority to act at all is denied and shown never to have existed.

According to the doctrine thus expressed and the cases cited in its support, and there are none in conflict with it, there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs* v. *Merced Mining Co.*, 14 Cal., 279, 363. It does not lie in the mouth of a stranger to the title, to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation.

This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims. Thus, in a contest between two patentees for the same land, it may be shown that a junior patent was founded upon an earlier entry than an older patent, and therefore passes the title. Such evidence in no way trenches upon the ruling of the department upon matters pending before it. Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of a party resisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, where a statute, as was the case in North Carolina, mentioned in [648] *Polk* v. *Wendal* [9 Cranch, 87], declares that proceedings for the title, when such entry has not been made, shall be adjudged invalid. A statute may in any case require proof of a fact which otherwise would be presumed. Except with reference to such anterior matters and others of like character, no one in a court of law can go behind the patent and call in question the validity of the proceedings upon which it is founded.

The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the Land Department supervised the proceedings. It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing; it is properly countersigned, and the seal of the General Land-Office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded. The case of the defendants rests on the correctness of their assertion, that a patent cannot issue for a mining claim which embraces over one hundred and sixty acres. Assuming that the words "*more or less*," accompanying the statement of the acres contained in the claim, are to be disregarded, and that the patent is construed as for one hundred and sixty-four acres and a fraction of an acre, there is nothing in the Acts of Congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing nor in the language of the Acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the court below, as seen in its charge, evidently arose from confounding "location" and "mining claim," as though the two terms always represent the same thing, [649] whereas they often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the Statute of 1872, 17 Stat. at L., 91, according to the provisions of that Act. Sec. 2324 of R. S. The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining claim originally appropriated. So, now, if a miner has only the ground covered by one location, "his mining claim" and "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor, that is, the ground which his neighbor has taken up, and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining

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locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes; or, in other words, will constitute his mining claim and be so designated. Such is the general understanding of miners and the meaning they attach to the term.

Previously to the Act of July 9, 1870, 16 Stat. at L., 217, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold seekers into that territory. They spread over the mineral regions and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up; in other words, mining claims be located and their continued [650] possession secured. Those rules were so framed as to give to all immigrants absolute equality of right and privilege. The extent of ground which each might locate, that is, appropriate to himself, was limited, so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth. But a few months' experience in the precarious and toilsome pursuit, drove great numbers of the miners to seek other means of livelihood and fortune, and they, therefore, disposed of their claims. They never doubted that their rights could be transferred so that the purchaser would hold the claims by an equally good title. Their transferable character was always recognized by the local courts, and the title of the grantee enforced. Many individuals thus became the possessors of claims covering ground taken up by different locations, and the amount which each person or an association of persons might acquire and hold was only limited by his or their means of purchase.

The rules and regulations originally established in California have, in their general features, been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they have not, to any great extent, been interfered with by legislation, either state or national. In the first mining statute, passed July 26, 1866, 14 Stat. at L., 251, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the States and Territories in which mines of gold and silver were found. That Act declared, and the declaration was repeated in a subsequent statute, that the mineral lands of the public domain were free and open to occupation and exploration by all citizens of the United States, and by those who had declared their intention to become such, subject to such regulations as might be prescribed by law, and subject also, "to the local customs or rules of miners of the several mining districts," so far as the same were not in conflict with the laws of the United States. It authorized the issue of patents for claims on veins or lodes of quartz or other "rock in place" bearing gold, silver, cinnabar or copper. Placer claims first became the subject of regulation by the Mining Act of July 9th, 1870, which provided that patents for them might be issued under like cir- [651] cumstances and conditions as for vein or lode claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The Mining Act of May 10th, 1872, 17 Stat. at L., 91, declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are re-enacted in the Revised Statutes. Secs. 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim. Section 13 of the Act of 1870 declares, that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the Statute of Limitations of the State or Territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Section 5 of the Act of 1872, rendering a mining claim subject to re-location where certain conditions of improvement or expenditure have not been made, has a proviso that the original locators, "*their heirs, assigns or legal representatives* have not resumed work upon the claim after such failure and before such location." These provisions are, of themselves, conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject, in the absence of express statutory prohibition. Those of the Act of 1870 are also conclusive of the right of the purchaser of claims to a patent, for it is with reference to it that the derivative right by purchase or assignment is mentioned. R. S., secs. 2332, 2324.

In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently pur- [652] chased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them, subject to the condition of certain annual expenditures upon them in labor or improvements. If he wishes, however, to obtain a patent, he must, in addition to other things, pay the government a fee of $5 an acre, a sum that would not be increased if a separate patent were issued for each location.

The decision of this court upon one point in the case of *Polk* v. *Wendal*, already cited, is directly applicable here. The patent to the defendants in that case was for twenty five thousand acres of land, and one of the objections taken was, that it was void because the Statute of North Carolina limited an entry of one per

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son to five thousand acres. But the statute declared that where two or more persons had entered, or should afterwards enter, lands jointly, or where two or more persons agreed to have their entries surveyed jointly in one or more surveys, the surveyor should survey the same accordingly in one entire survey. It was contended that as the statute provided for entries made by two or more persons, it could not be extended to the case of distinct entries belonging to the same person. To this the court replied as follows: "For this distinction it is impossible to conceive a reason. No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with, at least, as much force for allowing a single person to unite his entries, *adjoining each other*, in one survey. It appears to the court that the case comes completely within the spirit, and is not opposed by the letter of the law. The case provided for is 'where two or more persons agree to have their entries surveyed jointly, etc.' Now this does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor that the assignee may survey the entries jointly or severally, at his election. The court is of opinion that, under a sound construction of this law, entries, which might be joined in one survey, if remaining the property of two or more persons, may be joined, though they become the property of a single person." The objection to the patent by reason of its embracing over five thousand acres was, accordingly, overruled.

[653] By a provision of the Mining Act of 1870, 16 Stat. at L., 217, still in force, two or more persons, or association of persons, having contiguous claims *of any size*, are allowed to make a joint entry thereof. R. S., sec. 2330. If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by one entry as when they were held by the original parties. To quote the language of the case cited, "No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries adjoining each other, in one survey."

The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each and obtain a separate survey and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is, to vest the fee in the miner and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens. The services of an attorney are usually retained when a patent is sought, and the expenses attendant upon the proceeding are, in many instances, very great. To lessen these as much as possible, the practice has been common for miners to consolidate, by conveyance to a single person or an association or company, many contiguous claims into one, for which only one application is made and of which only one survey is had. Long before patents were allowed, indeed, from the earliest period in which mining for gold and silver was pursued as a business, miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one for convenience and economy in working them. [654] It was, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset and has ever since been approved by the department, and its propriety has never before been questioned. Patents, we are informed, for mining ground, of the value of many millions of dollars, have been issued upon consolidated claims, nearly all of which would be invalidated if the positions assumed by the defendants could be sustained.

It was urged on the argument that a patent for each location was required to prevent a monopoly of mining ground; to prevent, to use the language of counsel, the public domain from being "monopolized by speculators." The law limiting the extent of mining lands which an individual may locate, has provided, so far as it was deemed wise, against an accumulation of them in one person's hands. It could not have prohibited the sale of the location of an individual without imposing a restriction injurious to his interests and, in many instances, destructive of the whole value of his claim. Everyone, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines and, in many instances, can be obtained only from great distances by means of canals, flumes and aqueducts, requiring for their construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depth, and flumes constructed to carry away the *débris* of the mine. Indeed, successful mining, whether on lode claims or placer claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

There is no force in the suggestion that a separate patent for each location is necessary, to insure the required expenditure of labor upon it. The Statute of 1872 provides that on each claim subsequently located, until a patent is issued for it, there shall be annually expended in labor or improvements $100; and on claims previously located, an annual expenditure of $10 for each one hundred feet in length along [655] the vein; but where such claims are held "in common," the expenditure may be upon any one claim. As these provisions relate to expenditures before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not perceived in what way this proof can be changed

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or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development; that is, to facilitate the extraction of the metals it may contain; though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the *débris* or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim when one shaft would suffice for all the locations; and yet that is seriously argued by counsel and must be maintained to uphold the judgment below.

The statutes provide numerous guards against the evasion of their provisions by parties seeking a mining patent, and afford an opportunity to persons in the neighborhood of the claim to come forward and present any objections they may have to the granting of the patent desired. By sections 6 and 7 of the Act of 1872, which constitute sections 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation, must follow is prescribed:

1. The party must file an application in the proper land-office under oath, showing a compliance with the law, together with a plat and the field notes of the claim, or "claims in common," made by or under the direction of the [656] Surveyor-General of the United States, showing the boundaries of the claim or claims, which must be distinctly marked by monuments on the ground.

2. Previously, however, to the filing of the application, the claimant must post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land embraced in it, and file an affidavit of at least two persons that such notice has been duly posted with a copy of the notice in the land-office.

3. When such application, plat, field notes, notice and affidavits have been filed, the register of the land-office is required to publish a notice of the application for the period of sixty days, in a newspaper to be designated by him, nearest to the claim, and post such notice in his office for the same period.

4. The claimant, at the time of filing his application or at any time thereafter within sixty days, is required to file with the register a certificate of the United States Surveyor-General, that $500 worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors; that the plat is correct, with such further description, by reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent.

5. At the expiration of sixty days the claimant is required to file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land-office, within the sixty days of publication, it is then to be assumed that the applicant is entitled to a patent upon the payment to the proper officer of $5 per acre, and that no adverse claim exists.

6. The statute then proceeds to declare that if an adverse claim is filed during the period of publication, it must be upon the oath of the party making it, and must show the nature, boundaries and extent of such adverse claim, and all proceedings, except the publication of the notice and the making and filing of the affidavit, shall be thereupon stayed until the controversy shall have been settled by a decision of a court of competent jurisdiction, or the adverse claim waived. And it is made the duty [657] of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment; and a failure to do so is to be deemed a waiver of his adverse claim. After judgment has been rendered in such proceedings, the party entitled to the possession of the claim or any portion of it may file a certified copy of the judgment roll with the register of the land-office, together with a certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases; and must pay to the receiver $5 an acre for his claim, together with the proper fees; and then the whole proceedings and the judgment roll are to be certified by the register to the Commissioner of the General Land-Office, and a patent thereupon issued for the claim, or such portion thereof as the applicant, by the decision of the court, shall appear to be entitled to.

It will thus be seen that if an adverse claim is made to the mining ground for which a patent is sought, its validity must be determined by a local court, unless it be waived, before a patent can be issued. There would seem, therefore, to be more cogent reasons, in cases where a patent for such ground is relied upon, to maintain the doctrine which we have declared, that it cannot be assailed in a collateral proceeding, than in the case of a patent for agricultural land.

But it is unnecessary to pursue the subject further. *The judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.*

The St. Louis Smelting and Refining Co., Plff. in Err., v. *Sarah Ray et al.*, No. 459. Error to the Circuit Court of the United States for the District of Colorado.

This case presents for consideration the same questions determined in the case of the plaintiff against Kemp and others, and upon its authority *the judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 454; 109 U. S., 444; 111 U. S., 291.

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[658]

CITY OF ST. LOUIS, *Appt.*,
v.
THE KNAPP, STOUT & CO. COMPANY.

(See S. C., "*St. Louis* v. *Knapp Company*," 14 Otto, 658-661.)

Bill in equity—requisites of.

1. A bill in equity must contain a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests his claim for relief. It is not necessary to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill.
2. General certainty is sufficient in pleadings in equity.

[No. 813.]

Submitted Jan. 4, 1882. Decided Mar. 6, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

Statement of the case by *Mr. Justice* **Harlan**:

This is a suit by the City of St. Louis against the defendant in error, a Corporation created under the laws of the State of Wisconsin. It was commenced by petition filed in the Circuit Court of that City, and was thence removed upon the application of the defendant, into the Circuit Court of the United States for the Eastern District of Missouri. The defendant, treating the petition as a bill in equity, filed its demurrer, which was sustained. The complainant elected to abide by the bill, and it was dismissed with costs. This appeal, therefore, presents the question, whether the City, upon the showing made by its bill, is entitled to the relief asked.

The case, as made by the averments of this bill, is this: since the year 1822 the City has been, as it still is, a municipal Corporation, its eastern boundary being the middle of the main channel of the Mississippi River. It is the proprietor of the bed of that river within the city limits and, by its charter, is authorized to construct all needful improvements in the harbor; to control, guide or deflect the current of the river; to erect, repair and regulate public wharves and docks; to regulate the stationing, anchoring and mooring of vessels and wharf-boats within the City; to charge and collect wharfage; and to set aside and lease portions of the improved wharf. By an ordinance to establish and open the wharf from Biddle Street to the northern boundary of the City, and from Hazel Street to its southern boundary, the lines of the wharf have been laid down and established upon a certain piece of real estate fronting the river and the southern boundary of which is about 320 feet north of the north line of Bremen Avenue, produced to the river. The defendant is engaged in the business of manufacturing and selling lumber, and is erecting a saw-mill upon the premises just described. [659]

For the purpose of hauling saw-logs from the river, the defendant is constructing a runway, extending from the mill into the river, a distance of about one hundred feet eastwardly from its western bank. It is also driving piles in the bed of the river east of the eastern boundary of its premises, and east of the eastern line of the wharf, as established by the City. Portions of the wharf, established by the ordinance, to the north and to the south of defendant's premises, have been improved and completed by the City, and are used for landing boats and vessels engaged in navigation.

After averring, in substance, these facts, the bill proceeds: "That the effect of driving the piles in the bed of the river and constructing the runway as aforesaid, as proposed and intended by defendant, will be to divert the navigable water of the Mississippi River from its natural course and throw it east of its natural location, and from along the river bank north and south of said runway and piling, and create, in front of and upon plaintiff's improved wharf, as aforesaid, a deposit of mud and sediment, so that it will be impossible for boats and vessels engaged in navigating the Mississippi River to approach or land at the improved wharf north and south of defendant's premises."

The formal allegation is then made that the act of defendant, in building the proposed runway and driving piles, east of the western water's edge and in the bed of the river, is a legal wrong for which no adequate remedy can be afforded by an action for damages, and will be a substantial impairment of and obstruction to the navigation of the river.

The prayer of the complaint is, that the defendant, its agents and servants, be forever enjoined from driving piles and constructing its runways east of the western water's edge in front of its premises; that it be required to remove the piles already driven, and the runway so far as constructed; and that the City have such other and further relief in the premises as may be proper.

Mr. **Leverett Bell**, for appellant.

Messrs. **J. M. Krum & C. H. Krum**, and *George M. Stewart*, for appellee.

Mr. Justice **Harlan**, after stating the facts, delivered the opinion of the court:

Upon the hearing of the demurrer two questions were considered by the court: first, whether the bill, upon its face, shows that the construction of the run-way will intrude upon the City's rights and cause special damage; second, whether, upon its allegations, the City is entitled to a decree in advance of the construction, and to prevent the completion, of the work sought to be enjoined. [660]

The circuit court, in disposing of the demurrer, waived a final decision of the first question, expressing, however, some doubt as to whether the bill brought the case within the general rule that a suit in equity to enjoin or abate a public nuisance must be brought by one who has sustained or is in danger of sustaining individual special damages, apart from those suffered by the community at large.

Touching the second question, the court below remarked, it was very clear that a public navigable stream must remain free and unobstructed; that no private individual has a right to place permanent structures within the navigable channel; and that if the proposed runway, when completed, proved to be a material obstruction to the free navigation of the river, or a special injury to the rights of others, it might be condemned and removed as a nuisance. It was, however, of opinion that the case presented was one of a threatened nuisance only, and that the reasons assigned for interference by injunction, in advance of the construction of the runway, were not sufficient.

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We are of opinion that the demurrer should have been overruled, and the defendant required to answer. The bill makes a *prima facie* case, not only of the right of the City to bring the suit, but for granting the relief asked. It distinctly avers what the defendant proposes to do, and that averment is accompanied by the general charge or statement that the driving of the piles in the bed of the river, and the construction of the runway, will not only cause a diversion of the river from its natural course, but will throw it east of its natural location, from along the river bank north and south of the proposed runway and piling, creating in front of [661] the City's improved wharf a deposit of mud and sediment, and rendering it impossible for boats and vessels engaged in the navigation of the Mississippi River to approach or land at the improved wharf north and south of defendant's premises. This is not, as ruled by the circuit court, merely the expression of an opinion or apprehension upon the part of the City, but a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet. There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law. Cooper, Eq. Pl.,5. But in most cases, general certainty is sufficient in pleadings in equity. Story, Eq. Pl., secs. 252, 253, p. 228, 9th ed. by Gould. Let the case go back for preparation and hearing upon the merits. If it should be again brought here, we may find it necessary to discuss the numerous authorities cited in the arguments of counsel. In its present condition we do not deem it wise to say more than we have in this opinion.

The judgment is reversed, with directions to overrule the demurrer, and for further proceedings according to law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

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[662] UNION PACIFIC RAILROAD COMPANY,
Appt.,
v.
UNITED STATES.

(See S. C., 14 Otto, 662-668.)

Contract for transporting mails—compensation to railroad—performance.

1. The 6th section of the Act of July 1, 1862, as to transporting mails, etc., constitutes a contract between the United States and the Union Pacific R. R. Co., which has not been terminated by subsequent legislation.

2. The Company is entitled, under its provisions, for the services rendered in transportation of the mails, to fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for similar services.

3. The Revised Statutes do not alter the contract; and give to the Postmaster-General no authority to insist that it was not binding or to change it; and as the Company, by its terms, was bound to render the service, if required, its compliance cannot be regarded as a waiver of any of its rights. It might perform, rejecting illegal conditions attached to the requirement, and save all its rights.

[No. 860.]

Argued Jan. 26, 1882. Decided Mar. 6, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. **Sidney Bartlett,** *S. Shellabarger,* and *J. M. Wilson,* for appellant.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The controversy in the Court of Claims related to the amount of compensation to which the appellant was entitled for postal services from January 1, 1876, to October 1, 1877. The claim is based upon the 6th section of the Pacific Railroad Act of 1862, 12 Stat. at L., 489 which reads as follows: [663]

"Section 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said Company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad, for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service; and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

The contention on the part of the appellant is, that this section of the statute is a contract between the Government and the Company, whereby the former bound itself to furnish the employment specified, and the latter to render the corresponding services; that this contract has not been abrogated or modified by subsequent legislation, and regulates the rate of compensation for the services rendered during the period named; that the agreed rates of compensation are to be equal to those paid by private parties for the same kind of service; and that the compensation received by the appellant from private parties for the transportation of matter in express cars, furnishes the true standard of that comparison

We have no hesitation in conceding that the section quoted constitutes a contract between the United States and the Railroad Company; [664] but we are unable to find in it an absolute obligation on the part of the Government to employ the railroad in the described services. It reserves the right so to do at its option; but it does not stipulate that it will do so.

On this point we agree with the opinion of the Court of Claims, and adopt its language, as follows:

"The section means, we think, that the Company shall transport the Government's mails, munitions, troops, etc., whenever required so to do, and that the Government at all times shall have the preference over private parties; but that

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the transportation in all cases shall be done at fair and reasonable rates, which in no case (of preference or otherwise) shall exceed the rates paid by any private party for the same kind of service, while in all cases, even where the ordinary rates are fair and reasonable, *per se*, the Government shall have the benefit of those exceptional reductions of rate which railroads frequently make, sometimes as a matter of policy and sometimes as a matter of favor."

But it is contended on the part of the Government that this contract does not apply to the services, the compensation for which is in question, because prior to the time when they were rendered it had been terminated by subsequent legislation. The legislation which it is claimed has that effect is embraced in title XLVI., ch. 10, of the R. S., secs. 3997–4005, inclusive, regulating the subject of the railway postal service.

Section 4002, R. S., fixes a scale of maximum rates, graded according to the average weight of the mails carried, according to which the Postmaster-General is authorized and directed to readjust the compensation thereafter to be paid for the transportation of mails on said railroad routes. And it was in accordance with a readjustment based on these rates that, in the present case, the Government insisted that the appellant was bound to conform its claims, and the Court of Claims so adjudged.

Section 4001 provides that "All railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as Congress may provide; and until such price is fixed by law, the Postmaster-General may fix the rate of compensation." [665]

The substance of this provision, as is pointed out by the counsel for the appellant, first appeared in the Act of September 20, 1850, granting the right of way and public lands to the State of Illinois, in aid of the construction of the Central railroad, 9 Stat. at L., ch. 61, sec. 6, p. 467, said to be the first land-grant to aid in the construction of a railroad. The grant was accompanied by the condition that the "United States mail shall at all times be transported on said railroad, under the direction of the Post-office Department, at such prices as Congress may by law direct." All similar subsequent grants to such corporations were coupled with the same condition. Prior to 1850 the legislation of Congress had regard only to the transportation of the mails over railways established in the various States to which no government grants or subsidies had been made; and it merely enabled the Postmaster-General to contract for the service, if terms could be made with the corporations; and if not, to resort to the previous methods of transportation. The provision in the 6th section of the Act of 1862, 12 Stat. at L., 489, the Pacific Railroad Act, is the first of its kind. The clause in section 4001, authorizing the Postmaster-General to fix the rate of compensation to land-grant roads, in the absence of a price fixed by law, was first added to the general postal legislation in the Act of June 8, 1872, 17 Stat. at L., sec. 214, p. 309, which purports to be "An Act to Revise, Consolidate, and Amend the Statutes Relating to the Postoffice Department," and is substantially a codification of the provisions of the law then in force relating to the subject. From that Act it is transferred into the Revised Statutes in the form as quoted.

It is certainly true that these provisions, in their primary intention, did not apply to the case of the appellant, for no such company then existed, and when it came afterwards into being, by virtue of the Act of 1862, it did so with the special legislative contract in the 6th section of its charter, which constituted it a land-grant Railroad Company, *sui generis*, differing at least in that respect from those previously provided for; and these diverse rules as to compensation for service rendered for the Government continued thenceforth to co-exist without conflict. No change of a substantial character was made in the provisions enacted prior to 1862, either by the consolidated Act of 1872 or the Revised Statutes, and there is not, therefore, any ground for the inference of a change of the legislative intention that might be drawn from a significant change of language. There is, consequently, no present inconsistency between the existing provisions of the Revised Statutes, as applicable to the land-grant roads within their purview, and the continued existence of the contract contained in the 6th section of the appellant's charter. [666]

We find no evidence, therefore, in the legislation referred to, of any intention on the part of Congress to alter the relation between the appellant and the Government established by the 6th section of the Act of 1862, and are of the opinion that the Company is entitled, under its provisions, for the services rendered during the period covered by the present claim, to fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of services. To what extent and upon what considerations Congress has the power to make such change, under the reservations in the Act, in a case where it manifests an intention to do so, is a question which does not arise in this suit and has not been considered.

This conclusion cannot be reconciled with the view taken by the Court of Claims: that the Government, having the option under its contract to employ the appellant or not in its postal service, had the right to prescribe the terms on which it would do so; that the sections referred to in the Revised Statutes contain the terms so prescribed, and that the appellant having performed the service with notice of the law, must be taken to have assented to those terms, notwithstanding its protest, in which it claimed the benefit of its contract as still in force. For the Revised Statutes as we have found, do not apply and, therefore, did not alter the contract, and gave to the Postmaster-General no authority to insist that it was not binding; and as the Company, by its terms, was bound to render the service, if required, its compliance cannot be regarded as a waiver of any of its rights. The service cannot be treated as voluntary, in the sense of submission to exactions, believed to be illegal, so as to justify an implied agreement to accept the compensation allowed; for, according to the terms of the obligation, which it did recognize and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirement, and save all its rights. This it did. [667]

In computing the amount of compensation

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to which it claimed to be entitled, under its contract for the services performed, the appellant insisted upon the adoption of the rates charged by it to private parties, for goods carried in express cars, as being the only service of the same kind, and so furnishing the criterion of its compensation. In the agreed statement of facts two other modes of computation were introduced: one, including with express matter, cars transporting fruit, fish and perishable articles hauled in passenger trains; the other, adopting the charges upon the latter exclusive of the express matter, as furnishing alternatives for the judgment of the court in determining the amount due according to the contract.

Viewed as a question of law, it is impossible to say that either of these rules of computation is the true one. The question is: what is a fair and reasonable rate of compensation? and in reference to that we adopt the opinion of the Court of Claims as thus expressed:

"Construing the statute as we do, we think the court would not be limited, in an action where it was compelled to estimate damages, to the rates charged by the Company to private parties for a single kind of similar service. We think that a court or jury would be authorized to look over the entire field of service in determining what was a fair and reasonable charge for a kind which was similar to, but not identical with, any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars, and the cost and running expenses no greater, we are inclined to think that that fact might be a proper element in the problem of estimating the amount of 'fair and reasonable rates of compensation.' The reports of the auditor of railroad accounts show what rates of compensation the claimant has received for passenger cars, but in the determination of the case we do not feel at liberty [668] to go outside of the agreed statement of facts upon which, it was submitted."

The case was not submitted to the Court of Claims in a way to enable it to determine the question of fact; and upon a retrial, if the parties do not agree upon the amount or upon the rule of computation, the compensation, at fair and reasonable rates, must be determined upon a consideration of all facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service.

It will be just and necessary to include in that estimate and finding an allowance for compensation for the transportation of mail agents and clerks; not, however, as a separate item of service, to be paid for, necessarily, at the rates which might reasonably be charged if that were the whole; but as a part of and incident to the entire service rendered in the transaction of the postal business required by the Government, for which, as an entirety, the compensation should be made, at fair and reasonable rates, according to, and subject only to, the limitation required by the 6th section of the Act of 1862, 12 Stat. at L., 489.

To this end, for the reasons assigned, the judgment of the Court of Claims is reversed and the cause is remanded, with instructions to proceed therein in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TOWN OF KOSHKONONG, *Plf. in Err.*, [668]
v.
OSCAR A. BURTON.

(See S. C., 14 Otto, 668-680.)

Wisconsin Statute—limitation of actions—impairing contract.

*1. Limitation under the Statutes of Wisconsin to actions upon coupons of municipal bonds issued in 1857, payable twenty years after date. The cause of action upon a coupon, whether detached from the bond or not, held to accrue, and limitation to commence, from its maturity, re-affirming Amy v. Dubuque, 98 U. S., 470 [XXV., 228].

2. It is within the constitutional power of the Legislature to require as to existing causes of action that suits for their enforcement shall be barred, unless brought within a less period than that prescribed when the contract was made or the liability incurred, from which the cause of action arose. The exertion of this power is, however, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law before the bar takes effect.

3. If interest upon interest, whether arising upon express or implied agreement, is allowed by the local law, at the time of the contract, that right cannot be impaired by a subsequent legislative declaration as to what was, in the judgment of that department, the true intent and meaning of the statutes, prescribing and limiting the rate of interest, in force when the contract was made. The utmost effect to be given to such legislative declaration is to regard it as an alteration of the existing law in its application to future transactions.

[No. 827.]

Submitted Dec. 12, 1881. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The case is stated by the court.

Mr. **L. B. Caswell,** for plaintiff in error.

Messrs. **John A. Sleeper, Henry K. Whiton** *&* *Brown*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion [669] of the court:

The object of this action, which was commenced on the 12th day of May, 1880, is to recover the amount due on bonds, with interest coupons attached, issued on the first day of January, 1857, by the Town of Koshkonong, a municipal Corporation of Wisconsin, pursuant to authority conferred by an Act of the Legislature of that State. They were made payable to the Chicago, St. Paul and Fond du Lac Railroad Company or its assigns, on the first day of January, 1877, at the American Exchange Bank, in the City of New York, with interest at the rate of 8 per cent per annum, payable semi-annually, on the presentation of the interest warrants at that bank on the first day of each July and January, until the principal sum should be paid. Of the bonds in suit, with their respective coupons, Burton became the owner

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*When a statute of limitations or change in existing statute impairs obligation of contracts.*

So long as a reasonable time be given, a statute of limitations does not impair the obligation of contracts, and it is constitutional. Jackson v. Lamphire, 28 U. S. (3 Pet.), 280; Hawkins v. Barney, 30 U. S. (5 Pet.), 457; Christmas v. Russell, 72 U. S., XVIII., 475; Johnson v. Waterson, 84 U. S., XXI., 737; Terry v. Anderson, 95 U. S., XXIV., 305; Lewis v. Broadwell, 3 McLean, 568; Samples v. Bank, 1 Woods, 523; Barber v. Jackson, 1 Paine, 559; Lockhart v. Yeiser, 2 Bush, 231; Beal v. Nason, 14 Me., 344; Cummings v. Maxwell, 45 Me., 190; Sampson v. Sampson, 63 Me., 328; Miller v. Com., 5 Watts & S., 488; Lewis v. Har-

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by written assignment from the railroad company, indorsed upon the bonds, under date of November 16, 1857. None of the coupons have ever been detached from the bonds nor paid, except those maturing July 1, 1857, and January 1, 1858.

The coupons are all alike, except as to dates of maturity. They are complete instruments, capable of sustaining separate actions, without reference to the maturity or ownership of the bonds. [*Knox Co.* v. *Aspinwall*], 21 How., 539 [62 U.S., XVI., 208]; [*Clark* v. *Iowa City*], 20 Wall., 583 [87 U. S., XXII., 427]; [*Amy* v. *Dubuque*], 98 U.S., 473 [XXV., 230]. The following is a copy of the one last due: "The Town of Koshkonong will pay to the holder hereof, on the first day of January, 1877, at the American Exchange Bank, in the City of New York, forty dollars, being for half yearly interest on the bond of said Town No. 22, due on that day. S. R. Crosby, Clerk."

The main question is, whether the action, as to coupons maturing more than six years prior to its commencement, is not barred by the Statutes of Limitation of Wisconsin. The court below, being of opinion that no part of plaintiff's demands was barred, gave judgment for the [670] principal of the bonds, with interest from the first day of January, 1877, at the stipulated rate of 8 per cent per annum until paid, and also for the amount of each coupon in suit, with interest from its maturity at the rate of 7 per cent per annum; the latter being the rate established by the local law in the absence of a special agreement by the parties.

The present writ of error questions the correctness of that judgment, as well because it overrules the defense of limitation to coupons maturing more than six years before the commencement of this action, as because it allows interest upon the amount of each coupon from its maturity.

The Statutes of Wisconsin, in force when the bonds and coupons were issued, provided that "All actions of debt founded upon any contract or liability, not under seal" (except such as are brought upon the judgment or decree of some court of record of the United States, or of a State or Territory of the United States), shall be commenced within six years after the cause of action accrued, and not afterwards; and that all personal actions on any contract, not otherwise limited by the laws of the State, shall be brought within twenty years after the accruing of the cause of action. R. S. Wis., 1849, secs. 14-22, pp. 644, 645.

We remark that the foregoing provisions, without substantial change of language, were taken from the Statutes of the Territory of Wisconsin, adopted in 1839. Further; that the revision of 1849 did not, in terms, prescribe any limitation to actions upon sealed instruments. They were, therefore, embraced by the limitation of twenty years as to personal actions on contracts not covered by other provisions.

The revision of 1849 was superseded by one made in 1858, which went into operation on the first day of January, 1859. By the latter, as modified by an Act passed in 1861, civil actions, other than for the recovery of real property, were required to be commenced within the following periods: actions upon judgments or decrees of courts of record of the State, and actions upon sealed instruments when the cause of [671] action accrued in the State, within twenty years, R. S. Wis., 1858, ch. 138, sec. 15; actions upon the judgments or decrees of courts of record of any State or Territory of the United States or of courts of the United States, and actions upon sealed instruments, when the cause of action accrued out of the State, within ten years, *Ib.*, sec. 16; and actions upon contracts, obligations or liabilities, express or implied, excepting those mentioned in sections 15 and 16, within six years; the time to be computed, in each case, from the date where the cause of action accrued. Gen. Laws, Wis., 1861, p. 302. The revision of 1858 also contained the general clause that, "In any case where a limitation or period of law, prescribed in any of the Acts hereby repealed, (which included the revision of 1849), for the acquiring of any right or barring of any remedy, or for any other purpose, shall have begun to run, and the same or any similar limitation is prescribed in the Revised Statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the operation of the Revised Statutes." *Ib.*, ch. 191, sec. 13, p. 1038.

Thus stood the law of the State until the 9th day of March, 1872, a little over fifteen years after these bonds and coupons were issued, when an Act was passed entitled 'An Act to Limit the Time for the Commencement of Actions against

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bin, 5 B. Mon., 564; Pearce v. Patton, 7 B. Mon., 162; Call v. Hagger, 8 Mass., 423; Smith v. Morrison, 39 Mass., 439; Smith v. Packard, 13 Wis., 371; Blackford v. Peltier, 1 Blackf., 36; State v. Bermudez, 12 La., 352; Holcombe v. Tracy, 2 Minn., 241; Stone v. Bennett, 13 Minn., 153; Bell v. Roberts, 13 Vt., 582; Rexford v. Knight, 11 N. Y., 308; Newland v. Marsh, 19 Ill., 376; Stearns v. Gittings, 23 Ill., 387; Butler v. Palmer, 1 Hill, 324; State v. Jones, 21 Md., 432; Stephens v. St. L. Nat. Bk., 43 Mo., 385; Griffin v. McKenzie, 7 Ga., 163; McKenny v. Compton, 18 Ga., 170; George v. Gardner, 49 Ga., 441; Briscoe v. Anketell, 28 Miss., 361; De Cordova v. Galveston, 4 Tex., 470.

But if the time for bringing the action is not reasonable, the statute is void. Society for Prop. of Gospel v. Wheeler, 2 Gall., 105; Johnson v. Bond, Hemp., 533; Perelcs v. Watertown, 6 Biss., 79; Osborne v. Jaines, 17 Wis., 573; Robinson v. Magee, 9 Cal., 81; Berry v. Ransdall, 4 Met., 292; Garrett v. Beaumont, 24 Miss., 377; Auld v. Butcher, 2 Kan., 135; Prop. v. Laborers, 2 Me., 275; Amy v. Smith, 1 Litt., 326.

Instances of a reasonable time: Burt v. Williams, 24 Ark., 91; Coxe v. Martin, 44 Pa. St., 322; Adamson v. Davis, 47 Mo., 268; Adamson v. Wilson, 47 Mo., 272; Adamson v. Marshall, 47 Mo., 273; Coffman v. Bk. of Ky., 10 Miss., 29; Hill v. Boyland, 10 Miss., 618.

A statute limiting actions is constitutional, as it merely affects the remedy. Bertrand v. Taylor, 87 Ill., 235; George v. Gardner, 49 Ga., 441.

An extension of time for bringing an action does not impair the obligation of the contract. Smith v. Tucker, 17 N. J., 82; Pleasants v. Rohrer, 17 Wis., 577; Cox v. Berry, 13 Ga., 306; Gitman v. Cutts, 23 N. H., 376; Winston v. McCormick, 1 Ind., 56; Wardlaw v. Buzzard; 15 Rich., 158; Edwards v. McCaddon, 20 Iowa, 520; Swickard v. Bailey, 3 Kan., 507.

A statute of limitations, repealing a former Act, is void as to actions pending at the time of the repeal. Sturges v. Crowninshield, 17 U. S. (4 Wheat.), 207; McElmoyle v. Cohen, 38 U. S. (13 Pet.), 312; Bk. of Ala. v. Dalton, 50 U. S. (9 How.), 522; Society for Prop. of Gospel v. Wheeler, 2 Gall., 141; Woart v. Wimmick, 3 N. H., 473; S. C., 14 Am. Dec., 384; Kennebec Land Co. v. Laborse, 2 Me., 293; Beal v. Nason, 14 Me., 344; Kingsley v. Cousins, 47 Me., 91; Call v. Hagger, 8 Mass., 429.

The Legislature may repeal or suspend a statute of limitations before it takes effect. Pearsall v. Kenan, 79 N. C., 472; S. C., 28 Am. Rep., 336.

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Towns, Counties, Cities and Villages on Demands Payable to Bearer.' It provided that "No action brought to recover any sum of money, on any *bond, coupon, interest warrant*, agreement or promise in writing, made or issued by any *town, county, city* or *village*, or *upon any installment of the* principal or *interest thereof*, shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money has or shall become due, when the same has been or shall be made payable to bearer or to some person or bearer, or to the order of some person, or to some person or his order; *Provided*, That any such action may be brought within *one year after this Act shall take effect; Provided, further*, [672] That this Act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing." Gen. Laws, Wis., 1872, p. 56.

Our attention has also been called to certain sections in the revision of the Statutes of Wisconsin of 1878, which went into operation on the first day of November of that year, superseding that of 1858, as well as the Act of 1872. Those sections contain, in substance, the clauses first quoted from the revision of 1858, with the modifications made by the Act of 1872. R. S. Wis., 1878, pp. 1015, 1016. It is to be observed in this connection, for it has some bearing upon what we shall presently say, that section 4220 of the revision of 1878, in terms, prescribed twenty years as the limitation for "An action upon a *sealed* instrument when the cause of action accrues within this State, except those mentioned in section 4222," while the latter section embraces, among others, "An action upon any bond, coupon, interest warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district in this State;" thus indicating that the framers of the revision of 1878 regarded municipal securities for the payment of money, as belonging to the class of sealed instruments. We observe, also, that the revision of 1878 contains a provision in reference to those cases in which limitation had commenced to run, similar to that already quoted from the revision of 1858. R. S., 1878, sec. 4984; R. S., 1858, p. 1038.

From the foregoing summary, it will be seen that, by the local law, when the bonds in suit were issued, all civil actions for debt, founded on contract or liability, not under seal (except actions upon judgments or decrees of some court of record of the United States or of a State or Territory), could be brought within six years after the cause of action accrued and not afterwards; while such actions, if founded on contract or liability, under seal, would not be barred until twenty years after the cause of action accrued. If, as contended by plaintiff, the question of limitation is to be determined exclusively by the revision of 1849, in force when the bonds were issued; and if, as is further insisted, an action on municipal bonds and coupons, such as are here in suit, is, within the meaning of that revision, "founded on contract or liability not under seal," it is clear that, without reference to the Statute of 1872, this action is barred as to all coupons maturing more than six years before its commencement, whether such coupons were separated or not from the bonds to which they were originally attached. [673] This, upon the authority of *Amy* v. *Dubuque*, 98 U. S., 470 [XXV., 228], with the doctrines of which we are entirely satisfied. We there said, construing the Statutes of Iowa, upon the subject of limitation, that suits upon unpaid coupons, such as those in suit, might be maintained in advance of the maturity of the principal debt; that "Upon the non-payment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. * * * Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment could not prevent the statute from running."

But we are inclined to the opinion, although uninformed upon the subject by any direct decision of the Supreme Court of the State, to which our attention has been called, that municipal bonds and coupons were regarded by the framers, both of the revision of 1849 and that of 1858, as, alike, sealed instruments to which the limitation of twenty years was applicable. The word "bond" at common law (and even now as a general rule), imports a sealed instrument. And although, under some circumstances, a municipal corporation issuing and delivering bonds and coupons, in aid of railroad enterprises, may be liable thereon, notwithstanding they are unattested by its corporate seal, we are satisfied that the Legislature of Wisconsin intended, by the revision of 1849, as well as that of 1858, to prescribe the same limitation for actions upon such obligations, as was, in terms, prescribed for actions upon what, technically or in common legal parlance, are denominated sealed instruments.

If this interpretation of the revision of 1849 and 1858 be correct, it would follow that this action was not, at the passage of the Act of 1872, barred by limitation as to any of the coupons in suit. Twenty years had not then expired from the maturity of any of them.

It remains now to inquire as to the effect of the Act of 1872 upon municipal obligations executed and outstanding at the date of its passage. Of the object of that statute there cannot, it seems to us, be any reasonable doubt. [674] The specific reference to coupons and interest warrants made or issued by towns, counties, cities and villages, without distinguishing such as are sealed from those unsealed, and the express requirement as to the time within which actions thereon must be brought or be barred, indicates a purpose upon the part of the Legislature to reverse the policy, which had been pursued by holders of such securities, of postponing the collection of interest coupons until after the bonds, to which they were annexed, had matured; a delay which had the effect, in some instances, of compelling municipal corporations to meet all at once, a large indebtedness, which the Legislature intended, at least as to the interest accruing thereon, should be provided for in installments or through a series of years. Whatever considerations, however, may have suggested that legislation, it is clear that its object was such as we have indicated.

We are here met with the argument that the

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Act of 1872, neither in terms nor by necessary implication, applies to any municipal obligations, except those "payable to bearer or to some person or bearer, or to the order of some person or to some person or his order;" whereas, the bonds in suit are payable to the railroad company *or its assigns*, and the coupons are payable to the *holder* thereof. Waiving any expression of opinion as to whether the phrases "payable * * * to the order of some person," or "payable * * * to some person or his order," do not, upon a reasonable construction of the Act, embrace the case of a bond payable to a railroad company or its assigns—a question which need not be determined, since it is conceded that the action, as to the principal of the bonds, is not, in any view of the case, barred by limitation—we are of opinion that a coupon, payable to the holder thereof, is, within the meaning of the Act and according to the usages of the commercial world, payable to bearer. Consequently, the suit as it respects interest coupons, is embraced by the terms of the Act of 1872.

But the further contention of plaintiff's counsel is, that the Act of 1872 is unconstitutional, as impairing the obligation of the contract between the Town and the holders of its securities. This objection is founded upon the proviso, which declares that "Any such action (of the class specified in the Act) may be brought (only) within one year" after the Act takes effect. While that proviso is very obscurely worded, its meaning is, that no action to recover money due upon a municipal bond, coupon, interest warrant, or written agreement or promise, or upon any installment of the principal or interest thereof, whether such obligations were issued before or after the passage of the Act, should be maintained, unless brought within six years (not from the passage of the Act, but) from the time the money sued for became due; except, and no other exception is made, that when the six years from the maturity of any past-due bond or coupon would expire within less than a year after the Act passed, the action should not be barred, if brought within that year. It was, undoubtedly, within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. *Terry* v. *Anderson*, 95 U. S., 633 [XXIV., 366]; *Hawkins* v. *Burney*, 5 Pet., 457; *Jackson* v. *Lamphire*, 3 Pet., 280; *Sohn* v. *Waterson*, 7 Wall., 596 [84 U. S., XXI., 737]; *Christmas* v. *Russell*, 5 Wall., 290 [72 U. S., XVIII., 475]; *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Osborn* v. *Jaines*, 17 Wis., 576. *Parker* v. *Kane*, 4 Wis., 1; *Falkner* v. *Dorman*, 7 Wis., 393. Whether the first proviso in the Act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand. And we think it is not. For, if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the Town and its existing creditors, it does not follow that the entire Act would fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons, would have not simply one year, but, under the construction we have given to the statutes in force prior to the Act of 1872, to a reasonable time after its passage within which to sue. And if a proper construction of that Act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. For this action was not instituted until more than eight years after the passage of the Act of 1872. It is, consequently, barred by limitation as to all coupons falling due (and, therefore, collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the Legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But, neither upon principle nor authority, could that position be sustained.

The question next to be considered relates to that portion of the judgment allowing interest upon the amount of each coupon from its maturity.

The general proposition suggested by this question seems to have been determined, in 1865, in *Mills* v. *Jefferson*, 20 Wis., 56. That was a suit upon interest coupons attached to bonds issued by a municipal corporation to a railroad company, under the authority of an Act passed in the year 1857. The coupons were similar to those here in suit. While recognizing the fact that many courts of high authority had disallowed interest upon interest, the Supreme Court of Wisconsin expressed its approval of those cases in which it was adjudged that an express agreement in a note or bond to pay interest at a specified time, as annually or semi-annually, entitled the holder to interest upon interest from the time it became due. "For," said the court, "when a person agrees to pay interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest upon interest from the time he should have made the payment? If he undertakes to pay in a sum at a given time to the owner, and makes default, the law allows interest on the sum wrongfully withheld from the time he should have made such payment." To the same effect is *Pruyn* v. *Milwaukee*, 18 Wis., 367, where, without question, so far as we can gather from the report of the case, interest upon interest was given upon the amount of coupons from their respective maturities. We remark, in this connection, that among the authorities cited by the state court in 20 Wis., 56, in support of its conclusion, is *Gelpcke* v. *Dubuque*,

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1 Wall., 175 [68 U. S., XVII., 520], where it was said (the suit being upon coupons of municipal bonds) that, "If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed." In harmony with this view are *Aurora* v. *West*, 7 Wall., 105 [74 U. S., XIX., 50]; *Town of Genoa* v. *Woodruff*, 92 U. S., 502 [XXIII., 586]; *Amy* v. *Dubuque*, 98 U. S., 471 [XXV., 229], and *Walnut* v. *Wade* [*ante*, 526].

Another question arises upon this branch of the case. The law of Wisconsin, as declared in *Mills* v. *Jefferson*, remained, without attempt to change it, until March 3, 1868, when an Act was passed entitled "An Act to *Construe* Sections One and Two of Chapter 160 of the General Laws of 1859, and to Amend Section Two of said Chapter." Its 1st and 2d sections are as follows:

"1. It was and is the true intent and meaning of sections one and two of chapter 160 of the general laws passed in the year 1859, and of all other laws heretofore enacted in the State prescribing and limiting the rate of interest, that interest should not be compounded or bear interest upon interest, unless an agreement to that effect was clearly expressed in writing, and signed by the party to be charged therewith.

2. Section 2, of chapter 160 of the General Laws of 1859 is hereby amended by adding thereto the following: 'And in the computation of interest upon any bond, note or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest.'" Gen. Laws, Wis. 1868, pp. 62, 63.

[678] In the Revised Statutes of 1878 the following provision appears:

"Sec. 1689. * * * And in the computation of interest upon any bond, note or other instrument or agreement, interest shall not be compounded, nor shall interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

It is contended that the foregoing enactments govern the present case and preclude recovery of interest upon the amount of the respective coupons from their maturities. In this view we do not concur. By the 1st section of the Act of 1868 the Legislature assumed to declare what was the true intent and meaning of previous legislation prescribing and limiting the rate of interest. It was said by *Chancellor* Walworth, in *Salters* v. *Tobias*, 3 Paige, 344, that, "In England, where there is no constitutional limit to the powers of Parliament, a declaratory law forms a new rule of decision and is valid and binding upon the courts, not only as to cases which may subsequently occur but also as to pre-existing and vested rights. But even then the courts will not give it a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it." When counsel, in *Ogden* v. *Blackledge*, 2 Cranch, 276, announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is, that the legislative power shall be separate from the ju- [679] dicial, this court interrupted them with the observation that it was unnecessary to argue that point. Prior to the passage of the Act of 1868, the highest judicial tribunal of the State had adjudged that when a sum was to be paid at a specified time, as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law in that class of cases. And the utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, especially where, as was the case in the Act of 1868, that declaration was accompanied by a distinct provision, in terms, changing the pre-existing law. In *Stockdale* v. *Ins. Co.*, 20 Wall., 331 [87 U. S., XXII., 351], this court, speaking by *Mr. Justice* Miller, said, that "Both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may, in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated." Sedgwick, Stat. and Const. Law, 2d ed., pp. 214, 227; Cooley, Const. Lim., 93, 94. It is clear, therefore, that neither the Act of 1868, nor the provision quoted from the revision of 1878, which is but a continuation of the 2d section of the Act of 1868, can be deemed applicable to the case before us. The contract between the Town and the holders of its securities was entered into prior to those enactments, and the rights of the parties must, necessarily, be determined by the law as it was when the contract was made. It was not within the constitutional power of the Legislature to take from the plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right, under the law of the State.

Without pursuing the case further, it is sufficient to say that we do not concur with such of the views of the learned District Judge as are inconsistent with those here announced. *The judgment is reversed*, with directions to enter [680] judgment in behalf of plaintiff for the amount of the bonds, with interest at the stipulated rate, from their maturity until paid; *Spencer* v. *Maxfield*, 16 Wis., 185, 545; *Pruyn* v. *Milwaukee*, 18 Wis., 367; and also for the respective amounts of those coupons only which fell due within six years preceding the commencement

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of this action, with interest thereon at the rate established by the law of the State.

It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 521.

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[680] CHICAGO AND NORTHWESTERN RAILWAY COMPANY, *Appt.*,

v.

UNITED STATES.

(See S. C., 14 Otto, 680-687.)

Mail service by railroads—power to alter contract—damages—performance.

1. Although Congress has power to direct the price at which the mail service shall be performed by railroads who have received land-grants, where it is expressly reserved as a condition of the land-grants, it cannot impose new contracts upon them.
2. The Government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals.
3. It cannot retain the obligation of the contract as against a company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself.
4. The United States is liable to damages for a breach of its contract, on the same principles and to the same extent as a private party, and a suitable remedy has been provided by law in the jurisdiction conferred upon the Court of Claims.
5. The performance by the Chicago and N. W. R. Company, of the mail service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, cannot be construed as a waiver of its rights or an acquiescence in new proposals, whether it protested against the erroneous construction of the law or not.

[No. 508.]

Argued Jan. 28, 1882. Decided Mar. 6, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **John F. Farnsworth,** for appellant.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellant owns and operates lines of railroad, of which parts were constructed by companies which severally received grants of public lands from the United States to aid in their construction.

The condition attached to these grants was:

"That the United States mail shall be transported over such roads, under the direction of the Postoffice Department, at such price as Congress may by law direct; *Provided*, That, until such price is fixed by law, the Postmaster-General shall have the power to determine the same." Act, May 15, 1856, 11 Stat at L., p. 9, sec. 5; Act of June 3, 1856, *Ib.*, p. 20, sec. 5.

In September, 1875, the appellant entered into three contracts in writing with the United States, acting by the Postmaster-General, each for conveying the mail on a certain route num-
[681] bered and described therein, over a part of its line, for four years from July 1, 1875, at a fixed price *per annum*, being at the rate of a specified sum per mile per annum. These contracts were in the usual form prescribed by the department and specified the services to be performed, among other things requiring the Company to convey, free of charge, all mail bags and postoffice blanks, and all accredited agents of the department free of charge, and to collect from postmasters on the route, quarterly balances due from them to the Government, and account for the same; and stipulated for the payment of fines to be imposed upon the Company for certain defaults. The ninth clause of each is as follows:

"That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

These contracts were entered into by the Postmaster-General under the authority of the following sections of the Revised Statutes:

"Sec. 3942. The Postmaster-General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor.

Sec. 3946. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

The prices agreed to be paid were in conformity with the provisions of section 1 of the Act of March 3, 1873, ch. 231, 17 Stat. at L., 558, being section 4002 of the Revised Statutes.

On the 12th day of July, 1876, in the Act making appropriations for the service of the Postoffice Department, etc., Congress inserted the following provision, *viz.*:

"*Provided*, That the Postmaster-General be, and he is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for [682] the transportation of mails ten *per centum* per annum from the rates fixed and allowed by the 1st section of an Act entitled 'An Act Making Appropriations for the Service of the Postoffice Department for the Fiscal Year Ending June 30th, 1874, and for Other Purposes,' approved March 3, 1873, for the transportation of mails on the basis of the average weight."

"Sec. 13. That railroad companies, whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such prices as Congress should by law direct, shall receive only eighty *per centum* of the compensation authorized by this Act." Richardson's Sup., 224, 226; 19 Stat. at L., pp. 79, 82.

On August 18, 1876, the Postmaster-General issued an order, which was communicated to the appellant, reciting the foregoing proviso in the Act of July 12, 1876, relative to the 10 per cent deduction, and stating that the Assistant Attorney-General of the Postoffice Department had advised, with reference to railway service performed under contract with the Government, "That when the contract has been made in due form of law with a railroad company for the

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transportation of the mails for a term not yet expired, such contract is not affected" by the proviso.

And on October 20, 1876, the Postmaster-General issued another circular, reciting the proviso and also section 13 of the Act of July 12, 1876 and informing the appellant that a reduction would be made for mail service performed after July 1, 1876, upon those routes over the roads aided by land-grants, of the amount of 20 per cent, as required by the 13th section of the Act.

To this notice, the appellant replied with a protest against the proposed reduction as in violation of its contract.

The Act of Congress making appropriations for the service of the Postoffice Department, etc., approved June 17, 1878, 20 Stat. at L., 140, contained this proviso:

"That the Postmaster-General be and he is hereby authorized and directed to re-adjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails five *per centum* per annum from the rates for the transportation of mails, on the basis of the average weight, fixed and allowed by the 1st section of an Act entitled 'An Act Making Appropriations for the Service of the Postoffice [683] Department for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Seventy-seven, and for Other Purposes,' approved July twelfth, eighteen hundred and seventy-six."

On July 29, 1878, the Postoffice Department notified the appellant that there would be a reduction of 5 per cent from its compensation, under this Act, against which the appellant promptly protested.

The appellant performed all the service required by its contracts during the entire period covered by them; but deductions from the contract rates were made in accordance with the notices of the department, at each settlement, amounting in the aggregate to $83,310.91, for which the appellant, on July 14, 1879, after the contracts had been completely performed on its part, brought the present suit. The Court of Claims rendered judgment in its favor for the sum of $876, being the amount of the deductions for the services rendered from July 1 to July 12, 1876; the latter being the date when the first Act, under which they were made, took effect.

From this judgment an appeal is prosecuted on behalf of the Railroad Company.

The power of Congress to direct, by law, the price at which the mail service here in question should be performed was expressly reserved as a condition of the land-grants, which formed, in part, their motive and consideration. But, when Congress authorized the Postmaster-General to fix the price by contract, within specified maximum rates, and for a period of four years, it was an agreement on the part of the United States that the stipulated compensation should not be withheld during that period, which it could not refuse to perform without a breach of the public faith. The contract was an exercise of the reserved power, with an added obligation not to exercise it otherwise for the period agreed on, and we are unable to perceive any ground on which its validity can be denied. The stipulations in the contract on the part of the Railroad Company transcend its necessary obligations, growing out of the acceptance of [684] the conditions of the land-grant, and furnish a sufficient and distinct consideration for the promise of the Government not to disturb the rates of the contract during the period of its existence. For there are several stipulations collateral to the service to be rendered, which the Government could not have exacted as due by previous obligation and irrespective of the assent of the Company.

The power to establish the price includes the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The Government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It might, by a repeal of the contract expressly stipulated, restore the previous state, and claim the bare rights it had before; but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the Company, and at the same time vary its own, unless it has reserved the right to do so, in the contract itself.

Some claim of this kind is put forward in the present case, and the ninth clause in the contracts is referred to as containing such a reservation. Clearly, this confers power upon the Postmaster-General to discontinue or curtail the service, in whole or in part, he allowing, as an indemnity to the contractor, a month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for that retained and continued. But this is not a power to reduce the compensation for the full service performed, or to alter the terms of the contract. It is true that, under this reservation the Postmaster-General would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself, on making the indemnity specified. But in that event, the contract being at an end, the Company would no longer be under any obligation, except that impose l by the original conditions accepted with the land-grants, and the Government could [685] rightfully impose upon it no others. There is, therefore, in the contract itself, no power reserved to alter the amount of compensation, except by a reduction of the required service. If the Government insists upon full performance of that, it can be only upon the terms fixed by the contract.

It is argued, however, on the part of the Government, that the legal effect of what was done was to abrogate the old contracts and make new ones. It is claimed that the passage of the Acts of Congress of July 12, 1876, 19 Stat. at L., 79-82, and of June 17, 1878, 20 Stat. at L., 140, and the notices from the Postoffice Department that the reductions assumed to be contemplated by them would be insisted on; the fact that they were made in the adjustment of accounts, and that the Railroad Company, notwithstanding its protest, continued to perform the service, had the effect to supersede the contracts of 1875, and

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substitute new ones in their stead, on the basis of the reduced compensation. Such in substance was the view taken by the Court of Claims.

In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid and binding on the United States as well as upon the Railroad Company. They contained, within themselves, a mode for lessening or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement; and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right.

If, in these circumstances, the Government not merely accepted but demanded the performance of the contract service, the presumption is, that it meant to pay the contract price. It would require positive and express words to [686] negative that presumption. We find none such in the Statutes of 1876 and 1878. Their language may be well satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter to be entered into. They do not legitimately apply to contracts then existing, whose terms had not expired, such as those in the present case.

Such was the opinion of the Attorney-General at the time, to whom the Postmaster-General submitted one of the contracts on which this suit is founded, for his opinion; whether it was affected by the Act of July 12, 1876. He replied in the negative, saying:

"In my opinion, Congress did not intend it to have this effect. The contracts, of which that with the Chicago and Northwestern Railway submitted by you for inspection is a sample, were authorized by the law in force at the dates of their execution. They bound both parties. A breach of them by either would subject the delinquent to a claim for damages. The Act of July 12, 1876, was apparently passed with a view to reduce the public expenses. But it would not have this effect if an equivalent to the reduction of pay were recoverable under the name of damages, with perhaps the expenses of litigation added. Therefore, I conclude that the construction most consistent with justice and fair dealing is the true one, *viz.*: that, as to existing contracts, the rate remains as stipulated in the agreement during the term therein mentioned, but that in those cases where no contract prevailed the reduction should be made." Opinion of Attorney-General Taft, *R. R. Co.* v. *U. S.*, 15 Ops. Attys-Gen., 182.

Of course, if it was not the intention of the Acts of Congress referred to, to affect the contracts of the appellant, the erroneous interpretation of them by the Postmaster-General, and his action under it, cannot give to them any different effect, for the rights of the parties depend on the law itself. And the performance by the Railroad Company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and that, whether it had protested against the erroneous construction of the law or not; for it had no option. It was bound by its contract to perform the service, [687] and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so without prejudice to its lawful claims, leaving the ultimate right to future and final decision. It was not the case of a voluntary payment of an illegal exaction, where the maxim, *Consensus tollit errorem*, prevents a recovery, because in such case there is the legal presumption of an abandonment of the claim. *Volenti non fit injuria.* But here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both and cannot, therefore, be a bar to either.

We are of opinion, for these reasons, that the Court of Claims should have rendered judgment in favor of the appellant for its whole claim. *The judgment appealed from is accordingly reversed and the cause remanded, with instructions to render a judgment in conformity with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 735.

CHICAGO, MILWAUKEE AND ST. PAUL [687]
RAILWAY COMPANY, *Appt.*,
v.
UNITED STATES.

UNITED STATES, *Appt.*,
v.
CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

(See S. C., 14 Otto, 687-689.)

Case followed—price for mail service by railroad —Act of 1876.

1. Ry. Co. v. U. S. *ante*, followed.
2. The reduction of price for mail service, under section 13 of the Act of July 12, 1876, cannot be made against a railroad company whose road has been the subject of a land-grant, when the service has been rendered during the term of a written contract for four years, and which had not terminated when the Act took effect.
3. The Act was not intended to apply to the case of contracts previously made for a term of years, not expired when it took effect.

[Nos. 194, 195.]

Argued Jan. 28, 1882. Decided Mar. 6, 1882.

CROSS appeals from the Court of Claims.

The case is sufficiently stated by the court.

Mr. **John W. Cary**, for the Company.

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Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for the United States.

Mr. Justice **Matthews** delivered the opinion of the court:

The action in the Court of Claims was brought by the Railway Company to recover compensation withheld by the Postmaster-General, [688] claimed to be due upon a written contract for mail service, entered into July 1, 1875, for the period of four years.

The amount in controversy had been retained by the Postmaster-General as a reduction of the 10 *per centum* on the previous rates, under the provision in the Act of July 12, 1876, and of the further reduction of 20 per cent on the remainder, under the 13th section of that Act, it being insisted that the claimant was a Company whose railroad had been constructed, in whole or in part, by the aid of a grant of public lands by Congress.

The Court of Claims found that the railroad had not been aided by a land-grant in its construction and that the Company was, therefore, not subject to the deduction from its compensation, made on that account. From that part of the judgment the United States appealed.

It also found that the Postmaster-General was entitled to make the deduction of 10 per cent, and from that part of the judgment the Railway Company appealed.

This case is covered by the decision in that of the *Chicago and Northwestern R. Co.* v. *United States*, [*ante*, 891], where it is held that the deduction under the 15th section of the Act of July 12, 1876, could not be made against a company whose railroad had been the subject of a land-grant, when the service had been rendered during the term of a written contract for four years, which had not terminated when the Act took effect.

The question in the present case, therefore, whether the railroad of the Company was or was not the subject of a land-grant becomes immaterial; although, were it otherwise, we should have no hesitation in affirming the finding of the Court of Claims upon that point, for the reasons set forth in its opinion.

Upon the question of the 10 per cent deduction, the Court of Claims held that the Act of July 12, 1876, operated as a notice to the claimants that the service would be discontinued under the old rates, and would be continued, if at all, under the new rates; and that, as the claimants continued to render the service under the new law without dissent or protest, it was to be presumed that they acquiesced in its provisions and accepted the change which it made in their contract.

We are unable to agree with this view, for [689] the reasons already stated; holding that the Act of July 12, 1876, was not intended to apply to the case of contracts previously made for a term of years, not expired when it took effect.

The judgment of the Court of Claims is, therefore, reversed and the cause remanded, with instructions to render a judgment in favor of the claimants for the full amount of their claim.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 735.

[689]

WILLIAM P. MASON ET AL., *Plffs. in Err.*,
v.
JOHN SARGENT, Late Collector of INTERNAL REVENUE.

(See S. C., 14 Otto, 689-693.)

Succession tax—construction of Act.

1. Where property bequeathed did not vest in possession of the legatee until after Oct. 1, 1870, when the repeal of the legacy succession tax went into effect, a tax thereon cannot be thereafter imposed, under section 124, of the Act of June 30, 1864.

2. The provision in section 125, of the Act of 1864, that the tax or duty thereby imposed shall be a lien or charge upon the property bequeathed, determines nothing as to the time when the tax accrues.

[No. 380.]

Argued Jan. 20, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. **Geo. Putnam,** for plaintiffs in error.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The action was originally brought in the state court and removed into the circuit court, and was to recover back the amount of a legacy tax paid, under protest, by the plaintiffs in error, who were also plaintiffs below, to the defendant as Collector of Internal Revenue for the Fourth Massachusetts District.

The facts upon which the judgment was rendered in the court below, it was agreed, were as follows:

William P. Mason, the plaintiff's testator, died December 4, 1867. By his will, duly proved and allowed, the personal property upon which the tax in question was levied, was bequeathed to plaintiffs in trust for his widow for her life, and upon her death one half to the plaintiff, William P. Mason, and one half to [690] Elizabeth R. Cabot, children of the testator of full age at his death.

The widow died on June 17, 1872.

In April, 1873, the tax in question was assessed by Jonathan H. Mann, assessor of said district, and May 13, 1873, plaintiffs paid defendant said tax under protest to avoid distraint or other forcible process to collect the same.

May 19, 1873, plaintiffs duly made claim upon the Commissioner of Internal Revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiffs, *cestuis que trust* until the death of the testator's widow, which occurred after October 1, 1870, the date at which the repeal of the legacy succession tax went into effect, and that the tax had not accrued at said date so as to come within the saving clause of the Act of repeal. Act of July 14, 1870, sec. 17.

August 5, 1873, the Commissioner of Internal Revenue rejected the appeal, "For the reason that the tax accrued under the 128th section of the Act of June 30, 1864, and was saved by section 17 of the Act of July 14, 1870, 16 Stat. at L., 256, and still existing, was properly assessed."

The tax in question was imposed by section 124 of the Act of June 30, 1864, 13 Stat. at L.,

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285, upon legacies or distributive shares of personal property exceeding the sum of $1,000, passing, after the passage of the Act, from a decedent, either testate or intestate, in the hands of an executor, administrator or trustee, varying in rate, as the party beneficially entitled was less or more remote in consanguinity, or a stranger in blood, to the person from whom it passed; with a proviso, that legacies or distributive interests in intestate estates, passing to husband or wife, should be exempt from such tax.

Section 125 of the same Act, as amended by the Act of June 13, 1866, 14 Stat. at L., 140, provides that this legacy tax or duty "Shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom," etc. It also provides that it shall be a [691] lien for twenty years, unless sooner paid, upon the property taxed; and the executor, administrator or trustee having charge of the property, is required, within thirty days after he shall have taken charge of the trust, to give notice thereof to the assessor of the district in which the deceased last resided. He is also required, before payment of the legacy to the legatee, to pay the tax to the collector. As a preliminary to the payment of the tax to the collector, he is further required to make out in duplicate a schedule, list or statement containing the names of every person entitled to any beneficial interest in the property, together with the clear value of such interest, the original of which he renders to the assessor, and the duplicate of which "shall be by him immediately delivered and the tax thereon paid to such collector." The collector gives him a receipt, which is his voucher for that much paid on account of the legacy, in his settlement with the legatee.

By the 3d section of the Act of July 14, 1870, 16 Stat. at L., 256, the taxes imposed by the laws then in force on legacies and successions, among others, were repealed "On and after the first day of October, eighteen hundred and seventy;" and by the 17th section of that Act, p. 261, it was enacted that "All Acts and parts of Acts relating to the taxes herein repealed, and all the provisions of said Acts, shall continue in full force for levying and collecting all taxes assessed, or liable to be assessed, or accruing under the provisions of former Acts or drawbacks, the right to which has already accrued or which may hereafter accrue, under said Acts; and for maintaining and continuing liens, fines, penalties and forfeitures incurred under and by virtue thereof. And this Act shall not be construed to affect any act done, right accrued or penalty incurred under former Acts, but every such right is hereby saved."

The court below decided that the tax in question had been properly exacted and collected, on the ground that the right to it had accrued to the United States before October 1, 1870, when the repealing Act took effect, and was within the saving clauses of the 17th section.

The contention of the plaintiffs in error, on the other hand, is, that the tax upon the legacy did not become a claim in favor of the government until the legacy itself became payable; and as the payment of the legacy was postponed until the death of the widow, in whom it vested during her life, which occurred June 17, 1872, [692] after the repealing Act had taken effect, there was no right accrued at that time that could be saved by the exceptions.

It is our opinion that the tax was illegally demanded and collected.

The property or fund which is the subject of the legacy was expressly exempt from tax or duty, in the hands of the trustee, during the life of the testator's widow. It seems to us very plain that the trustee was not bound to make return of the legacy upon the schedule, list or statement specified in section 125 of the Act of 1864, until, by the death of the owner of the life estate, the legacy became payable to those entitled in remainder; for the delivery of that list or statement to the assessor is to be followed immediately by a delivery by the trustee of its duplicate to the collector, and the tax paid thereon to such collector; whereas, by the express terms of the section, as amended by the Act of 1866, the tax or duty becomes due and payable only when "the party interested in such legacy, etc., shall become entitled to the possession or enjoyment thereof," etc. The return for assessment and the actual payment of the tax, therefore, are made by the law so nearly simultaneous as that one follows the other in immediate succession; and it cannot well be said, upon the terms of the Act, that the right to the tax has become vested until the obligation arises to list the property for taxation. The subject of the tax is the interest of the legatees in remainder; but it is not taxable as a remainder, for, by the terms of the law, it does not become a subject of taxation until the right accrues to reduce it to possession. Until then, it is expressly exempt from taxation.

The amendment to section 125 of the Act of 1864, made by the Act of 1866, which requires [693] the trustee to give written notice to the assessor of his trust within thirty days after he shall have taken charge of it, is not material to the argument, because it does not appear that this requirement has any other purpose than to give information to the officer for future use. It does not seem to have any connection with the present assessment and collection of the tax.

The provision in section 125 of the Act of 1864, that the tax or duty thereby imposed shall be a lien or charge upon the property bequeathed for twenty years, or until the same is paid within that period, determines nothing as to the time when the tax accrues. It becomes a lien only from that time, for the lien presupposes the existence of the tax, for which it is a security, and is a charge upon the property, out of which it is payable and upon which it is imposed. In the present case it is clear, beyond dispute, that during the life estate of the widow there was no lien upon the fund because during that period it was expressly exempt from the tax.

In the case of *Clapp* v. *Mason*, 94 U. S., 589 [XXIV., 212], a similar question, as to the liability of these parties under the same will, for a tax collected on their succession to the real estate of the testator, devised upon the same limitations, was decided in their favor. The court, in that case, said: "It is manifest that the right does not accrue until the duty can be demanded; that is, when it is made payable." P 592.

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The statement is equally applicable here, and leads to a similar result.

No right to the payment of the tax had accrued at the date when the repealing Act took effect; and, therefore, none to collect it can be deduced from its saving clauses.

The judgment of the Circuit Court is, therefore, reversed, with instructions to render a judgment upon the agreed statement of facts, in favor of the plaintiffs below, for the amount therein specified.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

694] EDWIN A. MERRITT, Collector of the PORT OF NEW YORK, *Plff. in Err.*,
v.
SAMUEL WELSH ET AL.

(See S. C., 14 Otto, 694-707.)

Duties on sugars—standard prescribed.

1. Under the Revised Statutes, and section 3 of the Act of March 3, 1875, the dutiable quality of sugars is to be decided by their actual color, graded by the Dutch standard.
2. The Secretary of the Treasury is not authorized to adopt a different standard from that prescribed by Congress.

[No. 1066.]

Argued Jan. 19, 20, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **William M. Evarts, Stephen G. Clarke** and **Edwin B. Smith,** for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action brought by S. & W. Welsh, the plaintiffs below, to recover back duties alleged by them to have been illegally exacted by the defendant below, as Collector of the Port of New York, on certain sugars imported by them. The importations were made in 1879, and were subject to the duties imposed by schedule G, section 2504, of the Revised Statutes, and by the 3d section of the Act of March 3, 1875, chapter 127, 18 Stat. at L., 339, which are in the following words:

"Sec. 2504, schedule G:

Sugar not above number seven, Dutch standard in color: one and three quarter cents per pound.

Sugar above number seven, and not above number ten, Dutch standard in color; two cents per pound.

Sugar above number ten, and not above number thirteen, Dutch standard in color; two and one quarter cents per pound.

Sugar above number thirteen, and not above number sixteen, Dutch standard in color; two and three quarter cents per pound.

Sugar above number sixteen, and not above number twenty, Dutch standard in color; three and one quarter cents per pound."

Etc., etc.

The following sections of the Revised Statutes were appended as provisos to the original Acts from which the above articles were taken:

"Sec. 2914. The standard by which the color [695] and grades of sugar are to be regulated shall be selected and furnished to the collectors of such ports of entry as may be necessary, by the Secretary of the Treasury, from time to time, and in such manner as he may deem expedient.

Sec. 2915. The Secretary of the Treasury shall, by regulation, prescribe and require that samples from packages of sugar shall be taken by the proper officers, in such manner as to ascertain the true quality of such sugar; and the weights of sugar imported in casks or boxes shall be marked distinctly by the custom-house weigher, by scoring the figures indelibly on each package."

To the foregoing duties, 25 per cent was added by the 3d section of the Act of March 3, 1875.

The plaintiffs claimed that the sugars imported were all below number 7, Dutch standard in color and were, therefore, chargeable, under schedule G, with only a duty of one and three quarter cents per pound, with the addition of 25 per cent under the Act of 1875. The defendant, under general instructions from the Treasury Department, rated them at a higher grade, and charged a duty of two cents upon some of them, and two and one quarter cents upon others, with the addition of the twenty-five per cent under the Act of 1875. This action of the defendant was based on the position that the sugars in question had been colored by artificial means, so as to reduce them, in appearance, below the grade of the Dutch standard to which they properly belonged according to the amount of crystallized sugar which they contained, as shown by chemical test by the polariscope.

The treasury instructions under which the test was applied were issued on the 19th of July, and 2d of September, 1879. After premising that it had been decided by the courts that the term "Dutch standard in color," as used in the statutes, means the color of the sugar obtained by the ordinary processes of manufacture as practiced at the time of the enactment of the law, and that any means used to degrade the color of sugars, during or after the process of manufacture, is a fraud upon the revenue, the instruction of July 19, 1879, declares that:

"All sugars containing ninety per cent and not more than ninety-four per cent of crystallizable sugar, the apparent color of which is not above No. 7, Dutch standard in color, [696] shall be classified as above No. 7 and not above No. 10, Dutch standard in color.

All sugars containing more than ninety-four per cent of crystallizable sugar, the apparent color of which is not above No. 10, Dutch standard in color, shall be classified as above No. 10 and not above No. 13, Dutch standard in color."

As the presence of water in the sugars was found to interfere with uniform results, the instruction was changed in September, as follows:

"All sugars, the apparent color of which, as imported, is not above No. 7, Dutch standard in color, and which contain over ninety-three per cent and not over ninety-seven per cent of crystallizable sugar in one hundred parts of the dry substance, shall be classified as No. 7 and not above No. 10, Dutch standard.

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All sugars, the apparent color of which, as imported, is not above No. 10, Dutch standard in color, and which contain over ninety-seven per cent of crystallizable sugar in one hundred parts of the dry substance, shall be classified as above No. 10 and not above No. 13, Dutch standard."

It was shown, beyond dispute, on the trial, that, so far as their color was concerned, the sugars were below No. 7 of the Dutch standard, a grade chargeable, by the statute, with only one and three quarters cents per pound; but the court allowed the defendant to prove, if he could, that the color of the sugars was an artificial color, imparted after the process of manufacture, or, after they became the sugars of commerce. As no proof was offered to show that the sugars were artificially colored after the process of manufacture was completed, the court instructed the jury to find a verdict for the plaintiffs for the difference of duty.

The defendant offered to prove that color was imparted to the sugars in the course of manufacture, by the use of an extra quantity of lime (some quantity of which is always used to neutralize acids) or by the introduction of molasses, and increasing the temperature of the vacuum pan or boiler; but this evidence the court held [697] to be incompetent. To narrow the point of difference, the defendant offered to show that coloring matter, namely: molasses, was introduced into the vacuum pan or boiler, after the mass had been brought to the state of sugar, but before its final passage through the coolers and the centrifugal tubs, the last process through which it goes; but this evidence was also decided to be incompetent.

The position and argument of the defendant may be more fully shown by the instructions which his counsel asked the court to give the jury, and which were severally refused. They were as follows:

"1. That, if the jury shall find from the evidence that the true color of the sugar, in suit, as ascertained by comparing them in every respect with the standard selected by the Secretary of the Treasury and actually used in ascertaining and determining their dutiable character, was not sugar 'not above number seven Dutch standard in color' they shall find a verdict for the defendant.

2. That, if they shall find from the evidence that on December 22, 1870, and prior thereto, the sugars of commerce were comprised substantially of crystallized sugar and molasses and that the color of the different grades of such sugar was produced by molasses, the highest grades being No. 20, Dutch standard in color, having no molasses in them, and the lower grades being 16, 13, 10 and 7, Dutch standard in color, having molasses in them, each of the lower grades having more molasses than the other, so that the greatest quantity of molasses was contained in the lowest grades;

And if the jury shall also find from the evidence that the sugars in suit were not generally known as the sugars of commerce in December 22, 1870, and prior thereto, and that their color at the time of importation was not produced by molasses, but was produced by the introduction of some foreign substance after the sugars were made for the purpose of giving to them a color darker than their true color;

And if the jury shall also find from the evidence that the true color of said sugars is different from its apparent color, and that the true color of said sugars at the time of their importation was above No. 7, Dutch standard in color, they shall find a verdict for the defendant.

3. If the jury shall find that the sugars were [698] colored with burnt molasses, and were manufactured prior to the time when the burnt molasses was introduced into the vacuum pan, and that the same was so introduced into the pan merely for the purpose of producing a dark surface color upon the sugars, so that the sugars, the true color of which was above No. 7, Dutch standard in color, appeared to the eye by comparison with the Dutch standard in color, to be sugars not above No. 7, Dutch standard in color, and shall also find that the true color of the sugar when it became manufactured was above No. 7, Dutch standard in color, they shall find a verdict for the defendant."

The court ruled there was no evidence to submit to the jury tending to show that the color was not imparted to the sugar during the process of manufacture.

"4. If the jury shall find from the evidence that the Dutch standard consists of sugars in which the color indicates the grade of the sugar, and shall also find that the color of the samples in suit does not indicate at all the grades of the sugar, but that the sugars in suit are, in fact, of a high grade, say number 16 as indicated by the Dutch standard, but have a surface color of the lowest grade, say not above No. 7, Dutch standard in color, which surface color was imparted to it after the crystals of sugar were found in the vaccum pan at a time when the boiling of the sugar was completed, they shall find a verdict for the defendant.

5. That the surface or external color of the sugars in suit was not, necessarily, the color by which their dutiable character was to be ascertained, but the true color of the sugars in suit, as ascertained by comparison with the standard which was in use by the Collector, and was actually used for the purpose of ascertaining the dutiable character of the sugars in suit, was the color to guide him in ascertaining and levying duties upon them.

6. That, if the jury shall find from the evidence that the surface or external color of the sugars in suit was produced by the introduction of a foreign substance, at a time subsequent to the manufacture of sugar, and shall also find from the evidence that when said foreign sub- [699] stance is removed from the surface of said sugars, that they have not a color of sugars not above No. 7, Dutch standard in color, but do have a color of sugars above No. 7, Dutch standard in color, they shall find a verdict for defendant."

The court ruled there was no evidence to submit to the jury tending to show that the color was not imparted to the sugar during the process of manufacture.

"7. That, for tariff purposes, centrifugal sugars are required to have a color obtained by the process of manufacture, without the introduction of any foreign substance in the process of manufacture for the purpose only of obtaining a darker color than that which the sugars would have obtained in the natural process of manufacture.

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8. That, if the jury shall find from the evidence that a foreign substance was introduced into the sugars in suit, during the process of the manufacture, which made them darker in color than they would have been but for the introduction of such foreign substance, and shall also find from the evidence that but for the introduction of said foreign substance the apparent color of the sugars in suit would not have been that of sugars not above No. 7, Dutch standard in color, but would have been of a higher grade, they shall find a verdict for the defendant.

9. The jury may examine the samples of the sugars in suit, and themselves compare them with the sugars of the Dutch standard; and that if the jury find as a matter of fact that the sugars in suit are not of the color of any of the colors of the Dutch standard, they may find, as a matter of fact, whether the defendant erred in his classification.

And that if they find the Collector did classify the sugars in suit according to their true color from the best means in his control, they may find for the defendant.

10. Sugar is above No. 7, Dutch standard in color, within the intent of the statute, if it be above that number when reduced mechanically to the same fineness and packed in the same manner as such standard.

11. Sugars composed of crystals larger than those of the standards furnished by the Secretary of the Treasury may properly be reduced to the same fineness as those of such standards, and packed in bottles in the same manner for [700] comparison with such standards, in order to determine the color or classification."

It will be perceived that the real question in the case is, whether (supposing that sugars are not artificially colored for the purpose of avoiding duties after being manufactured) their dutiable quality is to be decided by their actual color, graded by the Dutch standard, or by their saccharine strength as ascertained by chemical tests. The plaintiff maintains the former proposition; the defendants, the latter.

The test described by the statute is "Dutch standard in color." The first question that naturally arises is: if Congress desires the application of the chemical test, in order to determine the saccharine strength of the sugar, why does not Congress say so? There are two very distinct and different modes of distinguishing sugar: by its color, and by the intrinsic percentage of specific crystalline sugar in the mass. One is determined by a color standard, the other by a chemical standard. Which of these did Congress adopt? We think, clearly, the former.

Perhaps Congress may have acted under a mistaken idea, that color would always indicate quality. Perhaps, up to the time that the law was passed, as the processes of manufacture had been conducted, color was an approximate or general indication of quality. Suppose this to be so, does it derogate from the fact, that color was the standard which Congress, with the lights which it had, saw fit to adopt? Does it not tend to fortify that fact? If it be found by experience that the standard is a fallacious one, can the Executive Department supply the defects of legislation? Congress alone has the authority to levy duties. Its will alone is to be sought.

It appears very clear, from the evidence, that the Dutch standard is a color standard only. As applied to the sugars of the Island of Java, brought to the mother country, it was, undoubtedly, a very fair standard of the quality of sugar. The juice of the cane was reduced in open boilers, and the viscous or molasses matter was expelled by drainage, assisted by percolation of water from a covering of white clay, which improved the sugar both in quality and color. The sugar merchants of Holland adopted a scale of colors from No. 1 to No. 20, which is exhibited [701] in small square bottles, containing sugar of the different shades of color from dark up to nearly white. These bottles were prepared by leading firms of high standing in Holland, and were accepted by the trade as the true standard by which to estimate the grade of sugars. Other nations adopted it as a matter of convenience. It was not an infallible test of quality; because some sugars had a higher color than their intrinsic character entitled them to, whilst others had a lower. Nevertheless, no more convenient standard was at hand; and if, by the feel or the taste or other physical indications, the merchant had reason to believe that the standard was not a strictly accurate test of quality in a particular case, he exercised his own judgment as to the price he would give or take for the article.

In process of time new modes of manufacture were adopted; the vacuum pan in place of the open boiler, for condensing the liquor; the centrifugal tube in place of the old inverted cone, or leech tub, for expelling the molasses; and animal charcoal, instead of clayey infiltration, for refining and whitening the result. The perfection of the refining process as now practiced, renders color in raw sugars a matter of little consequence, provided they contain abundance of saccharine matter. The color standard has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopts the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.

Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interest of the government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand: that of the polariscope, or other chemical test. If the quantity of saccha- [702] rine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said, with much truth, "Where law ends, tyranny begins."

It is argued that, although the Dutch standard of color is named in the statute, yet the

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intent of the law was to adopt it as a standard of quality; and if, in consequence of changes in the mode of manufacture, it ceases to be such, the reason of the law ought to prevail, and quality ought to be still the test. And that quality was the object sought is inferred from the language of sections 2914 and 2915 of the Revised Statutes.

This reasoning would be very good if the law prescribing the standard were not explicit in its terms. Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, to previous or concurrent enactments, to the history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used. But there is no obscurity or ambiguity here. Two tests for fixing the dutiable grade of sugars, were open to the legislative choice: that of color and that of constitution or chemical quality. Congress chose the the former. It is not strange that it did so: the color test had long been used and was well calculated to designate quality in the old sugars, manufactured in the old way. But in making its election, Congress did not leave any room for doubt as to its meaning. It used apt terms to express it; terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience or loss to the treasury need only be temporary; it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words and seeks to spell out or guess at the supposed [703] intent of the Legislature, contrary or supplementary to that which is clearly embodied in the words it has used.

We see nothing in the sections referred to, to change this plain and simple view of the subject. Section 2914 merely directs that the standards to be used by the collectors shall be furnished by the Secretary of the Treasury. This was to insure certainty and uniformity in the selection of the Dutch standards. The evidence shows that the Secretary performed this duty by procuring the standards from the proper parties at Amsterdam, and furnishing them to the Collector. They were exactly the same, however, as those procured by private dealers. It cannot be justly contended that this section authorized the Secretary to adopt a different standard from that prescribed by Congress, to wit: a standard of chemical constitution indicated by a polariscope, instead of a standard of color indicated by the Dutch glass bottles, carefully sealed, graded and numbered. This would be to give to the section an unnatural force and cause it to overrule the primary section to which it was a proviso. In like manner, when section 2915 authorizes the Secretary, by regulation, to require that samples from packages of sugar shall be taken in such manner as to ascertain the true quality of such sugar, there is no indication of an intent to change the dutiable standard adopted in the purview of schedule G. Even if it be conceded that the word "quality," as here used, has reference to saccharine purity or strength, the most that can be inferred is, that it was the aim of Congress, by this clause, to enable the officers to take samples from the packages in such manner as to secure a knowledge of their entire contents, in the interior and in every part, as well as on the surface; in other words, to see that there was no fraud in making up the packages. It was supposed that the true quality of an entire package could be ascertained by proper care in taking out the samples; by the manner in which they were taken out. Whether the quality was to be ascertained by any other test than that of the color is not stated; and, if it was, there is no indication that a different standard from that of the Dutch standard of color, prescribed in the principal section, was to be used in fixing the amount of duty. It may have been the object of section 2915 to detect [704] the use of artificial coloring on the surface of the packages, applied after the sugar was manufactured and after the packages were made up. At all events, we think that there is nothing in either of these sections that modifies or qualifies the plainly prescribed standard by which imported sugars were to be graded and assessed for duty.

We have examined the prior legislation on the subject from the first Act of 1861, 12 Stat. at L., 330, down to the Act of December, 1870, 16 Stat. at L., 397, which is substantially reproduced in the Revised Statutes; but, without reviewing the laws in detail, it suffices to say that we find nothing in this legislative history to change or affect our views. The concession that Congress may have supposed that the Dutch standard of color would be a sufficient test of quality, answers all that can be deduced from the prior statutes. If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department or the courts to take the part of legislative guardians and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does, namely: so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced; so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra [705] quantity of molasses for that purpose? If, after the sugars are manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different mat-

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ter. The sugars would then have a different color from that which belonged to them when manufactured. This might be held to be a fraud on the revenue. But it is unnecessary to decide this question in this case.

A better remedy than that of making a forced construction of the law is in the power of Congress All that has to be done is, to change the law so as to reach the goods in their new form, if it is thought desirable to do so. If the law is found defective, let it be altered so as to attain the result desired.

The argument that the sugars in question, are not "sugars" in the sense of the law, because the standard adopted by the law for fixing the grade is, as to the sugars in question, defective in its application, is too metaphysical to be of weight in the consideration of the question. They are sugars of commerce, and the complaint of the custom-house is, that they are better sugars than they appear to be.

We think that the decision of the court below was right, and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Matthews** dissenting:

It seems not to be denied by the opinion of the majority of the court, as it was expressly conceded by the court below, that if an artificial color had been imparted to the sugar *after* its manufacture, by which it was made identical in appearance with the color of the sample of the Dutch standard of a particular number, below that with which it would have been classified but for such adulteration, the government would have been entitled to prove the fact and exact duties according to the classification of sugar of equal grade in its natural color.

This admission is not gratuitous, but is required upon any just construction of the law. And yet I cannot perceive what difference there ought to be, if the same color is artificially produced during the process of manufacture, by the introduction of foreign matter, not necessary to the production of the sugar, and introduced for the express purpose of counterfeiting the color of a lower grade, in order to evade the law and escape the duties imposed by it. This is precisely what the plaintiff in error offered to prove on the trial, and what, by the rulings of the court, he was not permitted to do. In my opinion, this was error, for which the judgment should be reversed.

[706]

The admission that it would be unlawful to produce artificially the color of the Dutch standard, after manufacture, to disguise the grade of the article, is inconsistent with the proposition that the color of that standard, as a visual impression, is the sole ground of distinction for rating duties on sugar; and yet that proposition is the only foundation that supports the judgment of the court below.

The phrase "No. 7, Dutch standard in color," and other similar phrases in the Act of Congress, were not, in my opinion, intended to establish mere sensible color as the test for distinguishing the grades of sugar, for the purposes of the Act, so as to embrace every description of sugar that could not, by the unaided eye, be differentiated in color from the sample. If so, sugar of the highest grade in other respects might be painted on the surface of its grains after its manufacture was complete, without affecting its nature or quality commercially as sugar, so as perfectly to imitate an article of inferior strength and value, whose color had been naturally produced, and thus be imported at a lower rate of duty than would otherwise be lawful. For if mere color is the sole test to be regarded at the custom-house, as it may be determined by the eye alone, on comparison with the color of the standard, the officer has no right to inquire when or how the color was produced, so that it does not destroy the commercial character of the article. If the article is and continues to be sugar, and corresponds in color with the color of the sample used as the standard, it is to be rated accordingly.

A color imparted to sugar artificially, either during the process of manufacture or after its completion, and which it would not contract, by means of any of the processes necessary merely to the production of sugar, is, in my opinion, not its natural color and not the real and true color of the Dutch standard, however closely it may resemble it, or however impossible it may be, by sight merely, to distinguish it from the color of the sample. It is a mere imitation and counterfeit of the Dutch standard in color; for that means, not merely an abstract color, of a certain hue, but a concrete color inhering in and belonging only to sugar when produced according to the processes which, in the Dutch standard, result in differences of color, according to differences in the quality of the sugar itself. Congress, by the use of the phrase in question, intended to refer to color as resulting from and indicating a certain quality of sugar, considered in reference to its strength and corresponding value; and hence used words, not descriptive of color, in reference to the various hues into which the ray of light is divided by the differences of refrangibility as it passes through the prism, and which are represented as primitive colors to the human eye and designated by their associated names. Congress did not mean to scale the duty, as the sugar might be considered, according to such a standard, light yellow, yellow, dark yellow, light brown, brown, dark brown, etc. It meant to divide sugars for purposes of duties, according as they corresponded with certain samples of other sugars, produced according to a certain known mode of manufacture and designated in commerce as well as in the statute, as of the Dutch standard, and classified by numbers, according to a gradation of color, resulting from that mode of manufacture and not otherwise. So that, to correspond with the color designated as a particular number of the Dutch standard, the sample produced must have to the sight, not merely a color so like it that the eye cannot distinguish between them, but the resemblance must be, in all respects, such that it is manifest that it is not a mere similarity by reason of imitation, but an identity of color, because it has resulted from the necessary processes of the manufacture, and belongs, by necessity of its nature, to the sugar itself, and not to a foreign ingredient, mixed with it, as a coloring matter. In other words, sugar, which is classed as No. 7, Dutch standard in color, must be sugar of that quality in other respects, which, in the Dutch standard, has a color known as No. 7.

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For these reasons, I feel compelled to dissent from the opinion of the court, and am authorized to state that *Mr. Justice* **Harlan** concurs in these views.

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GERMAN SAVINGS BANK IN THE CITY OF NEW YORK, *Piff. in Err.*,

[708] *v.*

JOSEPH ARCHBOLD, Collector of INTERNAL REVENUE.

(See S. C., 14 Otto, 708-710.)

Taxation of savings banks.

The concluding clause of section 3408 of the Revised Statutes, exempting from taxation deposits of money in savings banks, exempts from tax all deposits to the extent in which they were invested in United States securities, and also to the extent of $2,000.

[No. 297.]

Argued Jan. 18, 19, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **William M. Evarts, Lewis Sanders,** *George N. Sanders, John S. Woodward* and *Segismund Kaufman*, for plaintiff in error.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff is a Savings Bank, incorporated by the Legislature of New York, and the defendant was in 1876 a Collector of Internal Revenue in the district in which the plaintiff did business. The present action is brought to recover the amount of certain taxes and penalties collected by him from the Bank in that year. Its determination involves the construction of the concluding clause of section 3408 of the Revised Statutes, exempting deposits of money in savings banks, under $2,000 from the tax imposed by the previous clause of the same section on deposits generally. The section declares, that a tax of one twenty-fourth of one per cent shall be levied each month on the average amount of deposits of money, subject to payment by check or draft, with any person, association, company or incorporation engaged in the banking business. The concluding clause provides that deposits in savings banks "Having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits not exceeding $2,000 made in the name of any one person."

[709] The plaintiff is a Savings Bank of the character here mentioned, but the language used in expressing the exemption, is not as happy as could be desired. "Deposits in * * * savings banks * * * shall be exempt from the tax on so much thereof as they have invested in securities of the United States * * * and on all deposits not exceeding $2,000," is the form in which the law is given. "Deposits on deposits" not exceeding a certain amount is not a felicitous mode of expressing the legislative purpose. The Bank, believing that the exemption extended to $2,000 of all deposits, reported the balance as the amount of its deposits subject to the tax, and paid the sum of $253, assessable thereon. The Collector of Internal Revenue took a different view of the law, and held that the exemption applied only to such deposits as amounted to $2,000 or under that sum. He, accordingly, levied upon all other deposits a tax, which amounted to $5,236; and although the Savings Bank acted on the advice of counsel and, as the court specifically finds, in good faith, without any fraudulent intent, and readily informed the Collector, at his request, of the amount of all its deposits, that officer added to this $5,236, a penalty of 100 per cent, as though the return made by the Bank had been a false and fraudulent one; and, also, a further penalty of 5 per cent for a failure to pay the tax assessed within the prescribed period, and interest upon the whole, making the gross sum of $10,888.52. This amount being collected by distraint, the present action is brought to recover it.

The concluding clause of the section in question, in our judgment, intended to exempt from the tax all deposits to the extent in which they were invested in United States securities, and also to the extent of $2,000. We think that the term "deposits," as it is last used, is to be taken as equivalent to the terms "sums deposited" or "sums," and the clause be read as if the language were: "The deposits in * * * savings banks * * * shall be exempt from tax on so much thereof as they have invested in securities of the United States, and on all sums not exceeding $2,000 deposited in the name of any one person."

This construction gives a clear meaning to the clause and avoids the inconsistency of holding that the addition of a single mill to $2,000 would subject the whole deposit to the tax, [710] even though such addition might be the accumulation of interest. It upholds, also, the policy of encouraging and protecting savings by exempting those of each depositor to a certain amount; and is in harmony with the amendment of the Act made in 1879, to obviate the possibility of the construction which the defendant adopted. That amendment declares that savings banks shall be exempt from tax on so much of their deposits "As they have invested in securities of the United States, and on $2,000 of savings deposits, and nothing in excess thereof, made in the name of and belonging to any one person." 20 Stat. at L., 327, 352, ch. 169.

But the section, as it originally stood, meant, in our judgment, the same thing. The interpretation we give to it secures, equally with the amendment, uniformity in the tax, and lays its burdens alike upon all. An interpretation which accomplishes this end in the operation of tax laws should be preferred to one leading to a different result.

It follows that the defendant erred in his construction of the law; that the assessment of the tax on all deposits which exceeded $2,000, with-

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out any deduction of that amount, and the imposition of a penalty for not making a return in accordance with his views, were illegal, and that the moneys thus exacted from the Savings Bank should be returned. We express no opinion as to the legality of imposing a penalty where no fraud was intended. As a general thing, the imposition of a penalty implies delinquency by the party on whom it is imposed. Its consideration, however, is immaterial, in view of the construction we give to the law.

Upon the agreed statement of facts, the plaintiff was entitled to recover the amount exacted from him, with interest. *The judgment of the court below must, therefore, be reversed and the cause remanded, with directions to enter judgment in his favor accordingly; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[711] THE AMERICAN PRINTING HOUSE FOR THE BLIND, OF LOUISVILLE, KENTUCKY, *Appt.*,

v.

THE LOUISIANA BOARD OF TRUSTEES OF THE AMERICAN PRINTING HOUSE FOR THE BLIND ET AL.

(See S. C., "*Printing House* v. *Trustees*," 14 Otto, 711-727.)

Contributions to charities—Printing House for the Blind.

1. Where contributions to a charity are proposed to be made upon certain express conditions, the rights of the donors stand upon contract; and if the conditions are not performed, their obligation to contribute is discharged.
2. This principle applied to moneys raised for the American Printing House for the Blind, established in Kentucky.

[No. 334.]

Submitted Dec. 21, 1881. Decided Mar. 6, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **J. D. Rouse** and **William Grant,** for appellant.

Messrs. **Edwin T. Merrick, George W. Race, John A. Campbell,** *Thomas Hunton* and *H. B. Magruder*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This case was instituted in May, 1876, by a bill in equity filed by the appellants, praying for an account and payment of moneys alleged to be in the hands of the Louisiana Corporation, and raised by contributions for the benefit of the complainant. An amended bill was filed in December, 1876, adding as defendants Henry B. Foley, Valsin J. Dupuy, Nathaniel Cropper, of Louisiana, who claimed to be original contributors to the fund in question, and who had sued the Louisiana Board of Trustees, the defendant Corporation, for a return of their several con-
[712] tributions; also Magruder & Richardson, a law firm, who represented other contributors making the like claim; also, the Attorney-General of the State of Louisiana, which had contributed to the same fund, and had brought suit to recover its contribution; also, finally, the American Printing House for the Blind and the American University for the Blind, a Corporation of the District of Columbia, which made some claim to the fund.

The claim of the original and amended bills was based upon an allegation to the effect that in the year 1858 the complainant received a charter from the State of Kentucky to enable it to raise and collect funds for establishing at Louisville, Kentucky, a publishing house for printing and publishing books in raised letters for the use of the blind in the United States; that said charter contemplated and was granted in expectation of aid and co-operation from other States, particularly Tennessee, Mississippi and Louisiana; that the defendant was chartered by the Legislature of Louisiana in 1859 for the express purpose of collecting funds to aid the Kentucky Corporation to carry out its benevolent enterprise; and that the funds in question had been collected and were held for that purpose, and no other, and ought in equity to be paid over to the complainant, who, as was alleged, had complied with all the conditions required to entitle it to the money.

The Louisiana Board filed an answer, in which the principal point of defense set up was, that, although the moneys in question had, indeed, been collected for the purpose indicated by the bill, yet that after their collection, and in the year 1861, the Kentucky Corporation obtained a new charter materially different from the original one, and subversive of the rights which the Louisiana Board were to enjoy in the administration of the scheme, and which were expressly named in their own (Louisiana) charter as a condition of entering into said scheme and contributing to it. They also set up the delay of fifteen or sixteen years in making any demand for the fund as a fatal objection to any such demand being sustained now. The rights referred to as being abrogated by the new charter are specially set forth in the answer; being the right of visitation, supervision and control over the affairs and management of the central institution at Louisville, to be exercised by the presidents of the several state boards of trustees contributing to the general scheme, who were to constitute a Board of Visitors, with the right to visit the [713] Printing House, examine the books and investigate the proceedings of the trustees, and of discharging them and vacating their offices and appointing new trustees in case of finding them guilty of mismanagement, malfeasance in office, or neglect of duty. The answer alleges that all this was abrogated by the new charter of 1861, and the right of visitation, instead of being left to the presidents of the state boards of trustees, was given to Governors of States of North America contributing the smallest aid in sustaining the Printing House, and superintendents of institutions devoted exclusively to the education of the blind, and state auxiliary boards. The answer also contended that the new charter created a new and different corporation by the substitution of new names of corporators in place of those contained in the original charter.

The allegations of the answer, in point of fact, are clearly proven; but the complainant contends that, in point of law, no such change was made in the new charter as to exonerate

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the defendants from the duty of paying over the funds collected by them; and that the defendants in their litigation with the original contributors, have acknowledged the rights of the complainant, and are estopped from denying them.

The other defendants filed answers and cross-bills, in which they contend that the complainant failed to perform the conditions on which the money was contributed, as, that the sum of $25,000 should be raised within seven years, and that a permanent printing establishment should be erected and in operation within nine years from the date of the charter; and claimed to have their several contributions restored to them with interest.

This is a general description of the litigation. Considerable evidence was taken, much of it being directed to the supposed admissions of the Louisiana Board as to the right of the complainant to the money. On final hearing, the court below dismissed the bill. The complainant has appealed from that decree.

In order to a proper understanding of the con- [714] troversy, it will be necessary to examine somewhat more minutely the charters of the respective parties, and the Acts and proceedings which led to their formation, and to the collection of the fund sought to be recovered.

The scheme for establishing a general printing house for printing books for the blind of the United States, which led to the organizations referred to, originated in Mississippi as early as 1857, if not earlier. A Mr. Dempsey B. Sherrod took much interest in the subject, and visited several of the Southwestern States, for the purpose of getting up organizations and collecting funds. His operations were commenced in Mississippi, and extended thence to Kentucky, Tennessee, Louisiana and other States. In December, 1859, he was appointed, by the Kentucky Board, agent to organize auxiliaries in Missouri, Illinois, Indiana and Ohio; and acted as such during the year 1860. But he had previously been appointed agent for the Mississippi Board, which was the first organized, and afterwards by the Louisiana Board. The Mississippi Board was chartered November 14, 1857. The preamble of the charter recites as follows: "Whereas, it is contemplated to establish at Louisville, Kentucky, a publishing house to print books in raised letters for the use of the blind in the United States; and whereas, to establish said publishing house, upon a permanent basis and with a sufficient capital, contributions from various States of the Union will be necessary; to effect which object Acts of incorporation like this will be applied for in other States, the object of which incorporation will be to aid in collecting and effectually securing for such object the money which may be contributed in each State;" therefore, it was declared (sec. 1), that the Hon. C. P. Smith, Hon. Wm. L. Sharkey, and three others named, and their successors, etc., should be a body corporate under the name of the "Board of Trustees to aid in establishing a publishing house to print books, etc., for the benefit of the blind," with power to use a common seal, and to make such contracts as might be necessary to effect the objects of their Corporation. By section 3, Dempsey Sherrod was appointed general agent of said Board to solicit subscriptions and contributions for the above purpose in this and other States of the Union, and to apply to other States for similar Acts of incorporation. Upon his death or [715] resignation, the Board should have power to appoint another. By section 6, the Board of Trustees were authorized to receive contributions in money, etc., for the purpose aforesaid, and, until $25,000 should be raised in this and other States, were to invest the same at interest. By section 7, if the sum named should not be raised within seven years, and the Publishing House should not be established within nine years, the contributions should be returned to the contributors with interest. By section 8, it was declared that, so soon as the Legislature of Kentucky should pass an Act incorporating trustees for establishing said Publishing House in Louisville, and this Board had evidence that $25,000 were raised, the fund in the hands of this Board should be transferred to the Board of Trustees incorporated by the State of Kentucky, in such sums as might be needed to carry on the business; provided, if Kentucky, should not pass such a law incorporating said Board, the Mississippi Board might select some other place for publication in such State as might pass such Act.

At the same time, the Legislature of Mississippi passed an Act, by which, after reciting that $12,000 had been subscribed by private individuals, they appropriated $2,000 to the Board of Trustees in aid of the object.

It may be remarked here, that only about $1,000 of the money raised in Mississippi were ever paid to the Kentucky institution. What was the cause of this does not clearly appear. From the evidence of Mr. Bullock, the president of the complainant, it appears that the Kentucky Board became dissatisfied with Sherrod after 1860, and he was no longer employed as their agent. Mr. Foster, a witness for the defendant, and one of its Trustees from its organization, testifies that after the war they learned from Mr. Sherrod that the trustees at Louisville had changed their charter, making material changes which affected the whole institution, and he, Mr. Sherrod, had withdrawn entirely his connection from it; so had the parent society, organized in Mississippi, and he had established another institution called the American Publishing House and American University for the Blind, in the District of Columbia. It may be that this explains the discontinuance of co-operation on the part of the Mississippi Board.

Although a Board of Trustees was chartered in Tennessee, and an appropriation of $2,000 [716] was made by the Legislature of that State in 1858, and a law was passed making an annual appropriation of $10 for every blind person in the State, according to the census, which amounted in seven years to the sum of $38,780; yet, for some unexplained reason, no money was ever contributed from that State to the Kentucky institution, and in 1867 the law was repealed.

The first charter granted by Kentucky and under which the complainant claims to have been organized, was an Act of the Legislature, passed January 26, 1858. As this charter is important, because it is the charter which was in force when the charter of the Louisiana Board of Trustees was adopted and when the

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funds in question were mostly contributed, it will be proper to give the exact language of its most important provisions. It commenced with the following recital:

"Whereas, the State of Mississippi has by law made an appropriation of $2,000 to aid in establishing in Kentucky a national institution to print and circulate books in raised letters for the blind; and whereas, said State has incorporated a Board of Trustees to receive said money, and $12,000 which have been subscribed for the aforesaid purpose by citizens of Mississippi, and to transfer said fund to said institution in Kentucky; and whereas, it is anticipated that other States will make donations and incorporate trustees to aid in this enterprise." It was then enacted:

"Sec. 1. That an institution under the name of the American Printing House for the Blind be established in Louisville, Kentucky, or its vicinity, and that James Guthrie, William F. Bullock, Theodore S. Bell, Bryce M. Patten, John Milton, H. T. Curd and A. O. Brannin, and their successors be and they are hereby declared a body corporate under the name and style of the Trustees of the American Printing House for the Blind, with the right as such to use a common seal, to sue and be sued, to plead and be impleaded, in all courts of justice and in all cases in which the interests of the institution are involved. The said Trustees are hereby fully empowered to receive, by legacies, conveyances or otherwise, lands, money and other property, and the same to retain, use and apply to the publishing of books in raised [717] letters for the blind in the United States. Said Trustees are authorized to purchase land and erect, purchase or rent buildings for the use of said institution, and to make all such contracts as may be necessary to accomplish the purposes of their incorporation. * * *

Sec. 2. The Trustees shall elect, annually, a president, a treasurer and a secretary, who shall hold their offices until their successors shall be elected and duly qualified. Said Trustees may prescribe the duties and fix the compensation of said officers. * * *

Sec. 6. It shall be the duty of the Board of Trustees, before commencing the publication of any book, to request the superintendent of every institution for the education of the blind in the United States to make out and send to the Trustees of the Printing House a list of such books as he may deem most desirable for the use of the blind; and said Trustees shall select for publication the book that shall have received the greatest number of superintendents in its favor. This mode of selecting books for publication shall be repeated at least once every year.

Sec. 7. Every school for the blind located in a State whose Legislature or citizens contribute to the funds of the American Printing House shall, in proportion to the funds, be entitled to copies of every book published by said House, to be distributed gratuitously to such blind persons as are unable to purchase them. And the superintendents of said schools shall be required to report to the Trustees of said house the names and residences of all persons to whom books may be thus distributed. The prices of books published by this institution shall be made so low as merely to cover the cost of publication and other incidental expenses of the institution.

Sec. 8. It shall be the duty of the Board of Trustees to make an annual report of its proceedings, which shall embrace a full account of the receipts and disbursements, the funds on hand, the number of books sold, and the number distributed gratuitously, and a general statement of the condition of the institution; and they shall transmit copies of said reports to the General Assembly of Kentucky, to the Governors of the several States of the Union, the President of each State Board of Trustees, to the superintendent of every institution of the blind in the United States, and to every person who shall have made to the institution a donation of more than five dollars the previous year.

* * * *

Sec. 10. The presidents of the state boards of trustees shall, *ex officio*, constitute a board of visitors, each member of which shall at all times be authorized to visit the Printing House, [718] examine the books and investigate the proceedings of the Trustees; and the president of the oldest state Board of Trustees shall, at the written request of a majority of the visitors, call a meeting of the board of visitors, who shall be fully empowered to investigate the proceedings of the Trustees of the institution, and in case they shall find said Board or any member thereof has mismanaged the affairs of said institution, by malfeasance in office or neglect of duty, they may, a majority of three fourths of all the members concurring, declare the office or offices of said Trustee or Trustees vacant, and proceed to fill such vacancy by election from the citizens of Louisville or its vicinity. Notice of all meetings of the Board of Visitors shall be sent by mail to all the presidents of the state boards and to all the Trustees of the Printing House at least one month before the time appointed for said meetings.

Sec. 11. The Trustees of said Printing House shall continue in office until their offices shall become vacant by resignation, death or removal from office as hereinbefore provided for. All vacancies caused by resignation or death shall be filled by the remaining members of the Board.

Sec. 12. *Be it further enacted*, That each donor shall be entitled to his donation with the interest, after the deduction of the necessary expenses are paid, provided said Publishing House is not established within nine years from the passage of this Act; and should the board refuse to make said distribution among the donors according to their respective interests, then, and in that event, said donors may have the right to proceed to recover the same by legal proceedings instituted in any of the courts of this Commonwealth having jurisdiction thereof."

The provisions of the 10th section of this Act are especially material in the determination of this cause. It was the change made therein by the subsequent Act of 1861, as will hereafter appear, on which the defendants principally rely for refusing to pay over to the complainant the moneys in controversy. It will be seen that direct reference was made to it in the Louisiana charter. This charter was taken out under the

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general corporation law of the State of Louisiana, and is dated January 3, 1859. It recites as follows:

"Whereas, it is contemplated to establish at Louisville, in the State of Kentucky, a Publishing House, to print and publish books in [719] raised letters for the use of the blind in the United States; and whereas, to establish said Publishing House on a permanent basis, and with sufficient capital, contributions from various States of the Union are anticipated; and whereas it is proper and just that a portion of said funds should be contributed by the citizens of the State of Louisiana, and believing the object to be worthy the consideration and liberality of a generous public, and desiring to cooperate in the accomplishment of the proposed enterprise, we, the undersigned, citizens of Louisiana, do hereby associate ourselves together and constitute ourselves and our successors a body corporate, under the provisions of an Act of the Legislature of the State of Louisiana, approved March 14th, 1855, entitled 'An Act for the Organization of Corporations for Literary, Scientific, Religious and Charitable Purposes,' and we do hereby agree to the following article of corporation:

1. The name and style of this Corporation shall be, 'The Louisiana Board of Trustees of the American Printing House for the Blind,' by which name it shall be known, and be capable to sue and be sued, and the domicil of this Corporation shall be in the City of New Orleans.

2. The object of this Association and Corporation shall be to raise funds for, and otherwise to aid in, the permanent establishment and successful management at Louisville, Kentucky, of a Publishing House for the printing and publication of books in raised letters for the use of the blind in the United States.

3. The Trustees shall annually elect, by ballot from their own number, a president, on whom all legal process shall be served, a treasurer and secretary, provided that said officers shall continue in office until their successors shall have been elected and qualified.

4. The Trustees shall have power to fill all vacancies occurring in the Board by death, resignation, or otherwise; to adopt by-laws for their own government, and prescribe the duties of its officers and members, and they shall be empowered to receive by donation, bequest, purchase or otherwise, and to hold and use properties, real and personal, to the amount of $100,000.

5. The Trustees shall hold the funds and properties of the Corporation for the purposes thereof, and until the sum of $25,000 is raised in this State and other States of the Union, the same may be safely invested at the discretion of the Trustees; that so soon as the Trustees are [720] officially informed by the Trustees of the American Printing House for the Blind, at Louisville, Kentucky, that the sum of $25,000 has been raised, they shall then remit the funds and properties received by them to said Trustees at Louisville, in such sums as may from time to time be required to establish and carry on said publishing house; *Provided*, That should said sum of $25,000 not be raised within seven years from the date of this incorporation, or said Publishing House not be established within nine years from said date, then the donations and contributions received, together with the interest thereon accrued, after deducting expenses of the incorporation, shall be returned to the contributors and donors thereof.

6. The Trustees reserve to themselves at all times the right, through their president, of visiting the establishment, or Printing and Publishing House, at Louisville, and inspecting the books and management of the same and, in conjunction with the presidents of other boards that may be formed, the supervision and administration of the affairs thereof, in accordance with the provisions of the 10th section of the charter of 'The Trustees of the American Printing House for the Blind,' as incorporated by the General Assembly of the State of Kentucky."

* * * * * * * *

From the 6th article above quoted, it clearly appears that the Louisiana Board regarded the provisions of the 10th section of the Kentucky charter as material and fundamental. It gave them, through their president, in conjunction with the other state boards, through their presidents, the ultimate control and management of the central institution; and they expressly reserve to themselves at all times this vital prerogative. It may be fairly presumed that without it they would never have engaged to pay over their contributions to the Kentucky Board.

The question then is, whether this provision has been materially altered by the Kentucky Legislature in the new or amended charter which was granted to the Kentucky Board in April, 1861.

A glance at this amended charter is sufficient to decide the question. It is a recast of the whole incorporating Act. After copying the preamble of the original charter, it proceeds to name the corporators, substituting two new names in place of two others in the original. Perhaps this is a change of but little mo- [721] ment; though the defendants regard it as a change of the Corporation. The general objects of the association, and duties of the Trustees are substantially the same as those contained in the original Act. It is observable, however, that in referring to States that may become interested in the institution, and to institutions for the education of the blind which it is anticipated will share in its benefits, the States of North America are named instead of the States of the Union, or of the United States; and institutions for the education of the blind in North America, instead of institutions in the United States; evidently contemplating the possibility of a disintegration of the United States, and the establishment of another government in its territories. But without further reference to this noticeable change, we proceed to copy the 9th section, which replaces the 10th of the original Act. It is in these words:

"Sec. 9. The superintendents of state institutions devoted exclusively to the education of the blind, and the Governors of the States that aid in sustaining the American Printing House for the Blind, and the presidents of the state auxiliary boards of trustees, shall, *ex officio*, constitute a board of visitors, each member of which shall be at all times authorized to visit the Printing House, examine the books and investigate the proceedings of the Trustees; and

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the president of any state board may, at the request of a majority of the visitors, call a meeting of the board of visitors, who shall be fully empowered to investigate the proceedings of the Trustees of the institution, and in case they shall find that said board, or any member thereof, has mismanaged the affairs of the institution, by malfeasance in office or neglect of duty, they may, a majority of three fourths of all the members present concurring, declare the offices or office of said Trustees or Trustee vacant, and proceed to fill the vacancy by election from the citizens of Louisville or its vicinity. Representatives from a majority of the States that contribute to the support of the American Printing House for the Blind shall constitute a quorum of the board of visitors, and each State represented shall be allowed one vote in the action of the board. Notice of every meeting of the board of visitors shall be sent by mail to all the members of the board and to the Trustees of the American Printing House for the Blind at least one month before the time appointed for the meeting."

[722] This is certainly a material change in the supervisory government and control of the institution; indeed, it may be denominated a subversion of the original constitution. By the original charter, the state boards of trustees, through their presidents, were constituted the board of visitors, with absolute supervisory control, even to the extent of discharging from office the entire Board of Trustees of the central institution for mismanagement of its affairs, malfeasance in office, or neglect of duty. By the new charter, the presidents of the state boards have a seat in the board of visitors, it is true; but their power, which before was exclusive, is now in effect taken from them, and shared by the Governors of all the States that aid in sustaining the institution, and the superintendents of all state institutions devoted exclusively to the education of the blind. In a matter so important as the government of the institution, such a change cannot be said to be immaterial, or anything less than fundamental. It is more especially important in this case because made the subject of an express reservation in the charter of the defendants.

In view of the facts above detailed, the question still remains, whether, after such a fundamental change in the constitution of the central organization, affecting so materially the rights of the auxiliary boards in regard to the control of the institution, they are bound to pay over to that institution the funds committed to their charge. If an individual should subscribe to a charitable scheme upon certain conditions as to its organization and control, and those conditions are violated before the payment of his subscription, it can hardly be doubted, that he would be discharged from his obligation to pay it. Whatever power the Legislature may possess to modify the organization of an established charity in point of form, it cannot change an executory contract to contribute to such charity. The power to do this would, in effect, be a power to make a contract for a party which he is himself unwilling to make. The authorities which affirm the legislative power to modify the forms of public and charitable institutions, do not apply to such a case.

The position of the defendants is somewhat anomalous. They are not themselves the original contributors; but they represent them. They are their Trustees as well as Trustees for the benefit of the proposed foundation. The money of the contributors has been deposited in their hands to be applied to a proposed charity on certain conditions. The defendant Board, as the representatives of the contributors, occupy a relation to the general foundation similar to that of a subscriber to its funds. They stand upon the terms of an agreement or contract, by which, in effect, they engage, upon certain conditions, to contribute and pay over to the central institution, the money intrusted to them. They cannot be considered as bound, in law, to pay it over at all events. They certainly would not be so bound if the character of the charity should be materially changed. It is difficult to see how they can be so bound if its constitution and government are so changed as to deprive the defendants of that participation in the control which it was stipulated they should have. If the original contributors were all willing to waive the objection, the case might be different; but the original contributors are claiming a return of their contributions; and if they were not doing this, it would, nevertheless, be difficult to ascertain their united will. The duty and only safe course of the defendant Trustees is, to withhold the contributions in their hands if they see that there has been a clear violation of those conditions upon which such contributions were made. By their own constitution, they have certain distinct rights and duties; rights which they not only may but ought to insist on; because they are not only theirs but, representatively, those of their constituents, the donors of the fund. They are not part and parcel of the Kentucky institution; though they were to have had an important share in its control. They are a separate organization, existing under distinct laws. It is apparent from the evidence in the case, that the several state contributions, and incorporations of trustees, whilst looking to a common and general foundation, or charity, for the benefit of the blind in the United States, had also special reference to the benefit of that class in the particular State. The Legislative appropriations which were graduated by the number of blind in the State, which were made in most of the States interested, indicate this. [724] The provision of the Kentucky charter securing to schools for the blind in a contributing State, a gratuitous distribution of books in proportion to the amount contributed, indicates the same thing. Reciprocal benefits were evidently expected in consideration of the amount of aid to be contributed. This is shown by the entire testimony. Mr. Bullock, president of the complainants, whilst complaining of the unwillingness of the Louisiana Board to pay over their fund, says: "From the beneficial agencies of our institution the blind of Louisiana have been almost entirely shut off through the unwillingness of the Louisiana Board to give up the money in their hands." Again; "It is easy to see that if the Louisiana Board gives us the money raised for us, every dollar will be returned to the blind of Louisiana in the shape of books and apparatus for their education, undiminished by any tax for the expenses incurred in starting our enterprise. The institution for the education of the blind in Baton Rouge, La.,

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is in need of books, maps, slates, models and educational appliances of all kinds. The funds held by the Louisiana Board should be sent to us to supply these wants." The testimony of the defendants' witnesses, Adams and Foster, who were members of the Louisiana Board from its first organization, is to the same effect in regard to the special advantages expected to accrue to the blind of Louisiana by joining with the boards of other States in the establishment of a general institution. In fine, the Louisiana Board, by virtue of their distinct organization, their separate position, the local character of their operations, and their just expectations of special benefit to the blind of their own State, not only had a right, but were under an obligation, to take due care that the institution to which their fund should be intrusted was such an institution in its objects and constitution as was contemplated when the scheme was undertaken and entered into, and not one materially different therefrom in either respect.

We think, therefore, that the defendants, when they found that the constitution of the Kentucky Corporation had been materially changed, and their share in its management and control had been superseded by a totally different arrangement, in which their influence was [725] or might be totally annihilated, were justified in refusing to pay over to such alleged body the funds in their hands.

The complainants, however, contend that the actual Trustees of the Louisiana Board have admitted the right of the complainants and are, therefore, estopped from setting up the defense which we have been considering. It is very questionable whether the personal admissions of the individual Trustees are entitled to any weight in such a case. But a careful examination of the whole evidence convinces us that no admissions of the kind, made under a full and fair knowledge of the circumstances, have been made by the Louisiana Trustees. Indeed, the argument might well be retorted, that the complainants, by their great delay in demanding the fund—a delay of fourteen or fifteen years, or, throwing out the period of the civil war, a delay of eleven years—are estopped from prosecuting for it now. No formal demand was made until the year 1876. An agent was sent to New Orleans in 1871, it is true, to get aid from the Louisiana Board, and to inquire into their mutual relations. But the latter always referred to legal impediments which would at least require the aid of legislation to remove. What the nature of these impediments were, does not clearly appear. But we may presume that the Louisiana Board had in view the change which Mr. Sherrod reported to them had been made in the Kentucky charter, the nature of which, however, had not been distinctly explained to them. In answer to a communication from Mr. Huntoon, Secretary of the Kentucky Board, Mr. Foster, the Secretary of the Louisiana Board, wrote the following letter in 1872, which seems to throw some light on the subject

"*December 22d*, 1872.

B. H. HUNTOON, Esq.,

Sec'ty Am. Printing House for the Blind, Louisville, Ky.:

DEAR SIR: Your favor of Dec. 11th is at hand, and contents noted, but Board of Trustees are not in condition at present to appropriate funds to any purpose. When the Board meets, your communication will be laid before them. Though not authorized to speak on their behalf, I may add that the change in your charter may be found upon examination, probably, to seriously change the relations of our Board to yours.

Our Board will probably have a meeting in [726] the course of the coming spring.

W. H. FOSTER, *Secretary, etc.*"

This was certainly a very pregnant intimation of the objection which lies at the foundation of the defense in the present case.

It is true that, in 1876, when the defendants were sued by several of their original donors for the recovery of their contributions, on the ground that the conditions of raising $25,000 within seven years and of establishing a printing house within nine years, from the date of the charter, had not been complied with, the Louisiana Trustees made inquiry as to these points from the complainants. They also had or some of them had a conference with Mr. Barrett, the Treasurer of the Kentucky Corporation, and inquired of him as to the change in their charter, which had been reported by Mr. Sherrod. They testified that Mr. Barrett assured them that Sherrod was entirely mistaken; that no material change had been made in their charter, and that they were acting under the original charter of 1858; at least, so he was understood by them. The defendants' counsel, acting on the supposition that these representations were correct, prepared the defense of the Board accordingly; and being satisfied that the amount of $25,000 had been raised within the seven years, and that an establishment sufficient to answer the requirements of the charter had been started within the nine years, on that basis contested the suits brought by the donors. During the progress of that litigation, however, having procured and examined the amended Kentucky charter of 1861, his views were entirely changed on the subject of the right of the Kentucky Corporation to demand the fund.

This is, in substance, the admission which is relied on by the complainants. We think it is quite satisfactorily explained in the testimony of *Judge* Merrick and Mr. Adams; and that it cannot, in the slightest degree, affect the rights of the parties in this case.

It is unnecessary to inquire what should be [727] done with the fund in question. The original scheme has failed. The cross-bills of the donors, who were made defendants in the case, were dismissed without prejudice, and they have not appealed. The Legislature of Louisiana, by an Act passed May 14, 1878, authorized the Trustees, in their own exoneration, to pay the whole fund into the State Treasury so far as the same remained in their hands unclaimed by the contributors; and appropriated the same as a special and inviolable fund for the sole and exclusive benefit of the Louisiana Institution for the Blind and the Industrial Home for the Blind, domiciled at Baton Rouge in said State. An additional section provides for paying to any original contributor, on judicial proof of his claim, the amount contributed by him, with interest. We have no doubt that the fund will be properly administered and disposed of under the laws of Louisiana, to whose superintending care the matter rightfully belongs.

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It is proper to add that, in our view of this case, the general doctrine of charities has nothing to do with its decision. When a charitable trust has been fully constituted, and the funds have passed out of the hands and control of the donors and into the hands of the proper institution or organization intended for its administration, the court of chancery or some analogous jurisdiction becomes its legal guardian and protector, and will take care that the objects of the trust are duly pursued and the funds rightfully appropriated. But where contributions to a charity are proposed to be made upon certain express conditions, the rights of the donors stand upon contract; and if the conditions are not performed, their obligation to contribute is discharged.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*,
v.
REAL ESTATE SAVINGS BANK OF PITTSBURGH.

[728] (See S. C., "*United States* v. *Savings Bank*," 14 Otto, 728-734.)

Jurisdiction of Court of Claims—Commissioner's allowance of claim—appeal—rejection of claim—action thereon—service.

1. The Court of Claims has jurisdiction of a suit against the United States, to recover back, revenue taxes illegally or erroneously assessed or collected.
2. The allowance of the claim made by the Commissioner of Internal Revenue may be used as the basis of the action, and it will be *prima facie* evidence of the amount that is due.
3. Until an appeal is taken to the Commissioner of Internal Revenue, no suit whatever can be maintained to recover back, taxes illegally assessed or erroneously paid.
4. If on the appeal the claim is rejected, an action lies against the collector, R. S., sec. 3228, and through him, on establishing the error or illegality, a recovery can be had.
5. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the Government in the Court of Claims.
6. The lodging of an appeal, made out in due form, with the proper Collector of Internal Revenue for the purpose of transmission to the Commissioner is, in legal effect, presentation of the appeal to the Commissioner.

[Nos. 900, 901.]

Argued Jan. 18, 1882. Decided Mar. 6, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. Samuel F. Phillips, Solicitor-Gen., **John S. Blair** and **William Lawrence**, for appellant.

Messrs. J. W. Douglass and **George L. Douglass**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Sections 3220 and 3228 of the Revised Statutes are as follows:

"Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. * * *

Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued. * * * "

The material regulations prescribed by the Secretary of the Treasury applicable to this case are these:

"Claims for the refunding of taxes erroneously assessed and collected should be presented through the collectors of the respective districts upon blank form No. 46. * * *

The collector should keep a perfect record, in a book furnished for the purpose, of all claims presented to the Commissioner, and must certify as to each claim, whether it has been before presented or not.

Where the case of an appeal involves an amount exceeding $250, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement." [729]

For some years it has been the practice of the officers of the Treasury Department to regard appeals for refunding taxes illegally assessed and paid, when deposited with collectors, under the rules, in season to be forwarded to Washington within the two years' limitation, to have been duly presented to the Commissioner according to law.

On the 10th of July, 1878, the Real Estate Savings Bank of Pittsburgh, Pa., paid to the Collector of Internal Revenue for the proper district in Pittsburgh, certain internal taxes which had before that time been assessed, and on the 9th of July, 1880, it presented to the same collector, at his office, an appeal to the Commissioner of Internal Revenue, made out on the blank form prescribed by the Secretary, to refund and pay back $972.69, which, it was alleged, had been illegally assessed and erroneously paid. This appeal was delivered to the collector in time to have reached Washington, by due course of mail, on the 10th of July, if it had been promptly forwarded, but it was retained until the 15th, when it was sent to the Commissioner, with an indorsement by the collector that he had investigated the facts and found the statements of the claimant were in all respects true. The papers reached the Commissioner on the 17th of July, and he, on the 18th of October following, submitted them to the Secretary of the Treasury, as required by the regulations, for his consideration and advice. On the 18th of October the Secretary signified to the Commissioner his approval of the payment of the claim, and on the 21st the Commissioner certified its allowance. On the presentation of this certificate, through the accounting officers of the Treasury Department, payment was refused. The certificate has never been revoked by either the Secretary or the Commissioner, but it is still in force so far as the action of these officers is concerned. After payment was refused, suit was brought on the certificate in the Court of Claims, where judgment was

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given for the claimant. From this judgment the United States appealed.

The objections made here to the recovery are in substance:

1. That the Court of Claims had no jurisdiction of the suit, because the claim sued for was not founded on any law of Congress, nor upon contract; and,

2. That the appeal to the Commissioner of Internal Revenue was not taken within two years after the cause of action accrued, and that, consequently, the allowance by that officer was without any authority of law.

The first of these objections is, we think, disposed of by *U. S.* v. *Kaufman*, 96 U. S. 567 [733] [XXIV., 792]. That case arose under section 3426, Rev. Stat., which is as follows:

"The Commissioner of Internal Revenue may, from time to time, make regulations, upon proper evidence of facts, for the allowance of such of the stamps issued under the provisions of this chapter, or any internal revenue Act, as may have been spoiled, * * * and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value, after deducting therefrom, in case of repayment the sum of five per cent, to the owner thereof. * * * "

And we held that the allowance of a claim by the Commissioner under this section, was equivalent to an account stated between private parties, and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because such an allowance raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant, and also because the claim for the payment of such an allowance would be founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court. We cannot discover any material difference between the powers of the Commissioner under section 3426 and those which he has under section 3220. Under section 3426, he is to "allow" the claim, which is done either by giving other stamps in lieu of those that have been spoiled, etc., or by repaying the amount or value. Under section 3220 he is to "refund" and "pay back." His payments of money in both cases must be made through the accounting officers of the Treasury Department, as he is not himself a disbursing officer. Whether his allowance is conclusive on the other officers through whose hands it must necessarily pass before it can be paid by the treasurer, we did not then and need not now decide. All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on [734] the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an Act of Congress. Until an appeal is taken to the Commissioner, no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. If on the appeal the claim is rejected, an action lies against the collector (R. S., sec. 3226) and, through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the Government in the Court of Claims. This, as it seems to us, is the logical result of the legislation of Congress upon the subject. A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims. To say the least, the decision of the Commissioner on the appeal is sufficient to determine whether one form of remedy shall be resorted to by the claimant, or the other.

Upon the other branch of the case, we are entirely satisfied with the conclusions reached by the court below, and that the lodging of the appeal made out in due form with the proper Collector of Internal Revenue for the purpose of transmission to the Commissioner in the usual course of business, under the requirements of the regulations of the Secretary, was in legal effect a presentation of the appeal to the Commissioner. The effect of the regulation was to designate the office of the Collector of Internal Revenue as a proper place for the presentation of the appeal. The whole subject is so fully and satisfactorily considered in the opinion below that we deem it unnecessary to do more than refer to what is there said.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

United States, Appt., v. *John Barnett*. No. 910, Appeal from the Court of Claims.

This judgment is affirmed on the authority of United States, v. *Kaufman*, 96. U. S., 567 [XXIV., 792], *from which it cannot be distinguished in principle.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES POTT ET AL., *Plffs. in Err.*, [735]
v.
CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK.

(See S. C., 14 Otto, 735, 736.)

Duty on imported books.

By section 2504, schedule M, of the Revised Statutes, a duty of 25 per cent *ad valorem* is imposed on imported books. This duty is not changed by section 2503.

[No. 183.]

Argued Dec. 20, 1881. Decided Mar. 6, 1882.

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IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **Edward Hartley** and **Walter H. Coleman,** for plaintiffs in error.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action brought against the Collector of Customs of New York to recover back duties paid on books imported in August, 1874. A duty of 25 per cent *ad valorem* was exacted; whilst the plaintiffs claim that they should have been required to pay only 90 *per centum* of that amount, or 22½ per cent *ad valorem*.

As the law stood at the time, in section 2504, schedule M, of the Revised Statutes, page 474, a duty of 25 per cent *ad valorem* was imposed on "books, pamphlets, blank books, etc." But by section 2503 it was provided that, on the goods enumerated therein, only 90 per cent of the duties imposed by the said schedules should be levied and collected; and amongst the articles enumerated for the reduction were those contained in the following specification, namely:

"All paper and manufactures of paper, excepting unsized printing paper, books and other printed matter, and excepting sized or glazed paper suitable only for printing paper."

Of course, the articles expressly excepted in this clause are not entitled to the proposed reduction. The question is, whether, by the words used, books are excepted from the general class of articles designated as paper and manufactures of paper, intended to be benefited, or whether they are enumerated as independent articles entitled to the reduction. The plaintiffs contend that they are not embraced in the exception, because they do not properly belong to the class of articles designated as [736] "paper and manufactures of paper;" and cannot, therefore, be excepted therefrom. A thing that is excepted, they argue, must necessarily belong to the class of things from which it is excepted. This, of course, is true, as a general proposition, but the question is, whether it applies to the clause of the Act in question. No man of literary culture, it is true, would call a book, paper or a manufacture of paper, any more than he would designate a masterpiece of Raphael, as canvas or a manufacture of canvas. By a license of speech, it is true, he might say that a particular book was mere waste paper, or rubbish, or that a particular picture was nothing but a piece of spoiled canvas; but, speaking seriously and in accordance with good usage, he would not make such an application of terms. All this, however, has little to do in construing the Act in question. If Congress had reduced the duty on all manufactures of wood and leather except cutlery, we should be obliged to regard cutlery as excepted, in the particular case, from the manufactures of wood and leather intended to be benefited by the law. Our duty is to get at the intent of the law; we are not responsible for its style. And in the present case the intent seems to be unmistakable. The language under consideration first appeared in the Act of 1872, ch. 315, and was not accompanied by the concluding exception, but read as follows: "On all paper and manufactures of paper, excepting unsized printing paper, books and other printed matter." The additional exception was added in the revision. It can hardly be doubted that, as the words were used in the Act of 1872, "books and other printed matter" were included in the exception. We have no doubt that such is the intent and meaning of the same words in the Revised Statutes. In transferring the language, it is to be presumed that it was intended to transfer the sense.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 99.

JOHN L. HEALD, *Plff. in Errr.*,
v.
HARVEY W. RICE. [737]

(See S. C., 14 Otto, 737-757.)

Invalid letters patent—re-issued patent—when allowed.

1. Re-issued letters patent for improvements in steam-boilers, are invalid because for a different invention from the original patent, and because anticipated by another patent.
2. The question of the identity of the invention in original and re-issued patents is to be determined from their face by mere comparison, if extrinsic evidence is not needed to explain them, and is matter of law for the court.
3. A patent, originally issued for one invention, cannot lawfully be surrendered as the basis for a re-issue for another. A patent for a machine cannot be re-issued for the purpose of claiming the process of operating it.

[No. 193.]

Argued Jan. 4, 5, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. **George Harding,** *M. M. Estee* and **John H. Boalt,** for plaintiff in error.

Mr. **Milton A. Wheaton,** for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action at law brought by Rice to recover damages for an alleged infringement of re-issued letters patent No. 6422, granted May 4, 1875, to him for improvements in steam-boilers. The original patent was No. 146614, dated January 20, 1874. The invention, as stated in the complaint, consisted, among other things, of a combination of a straw-feeding attachment with the furnace door of a return-flue steam-boiler, for the use of straw alone as fuel, in generating steam ample for practically operating steam-engines.

The case was tried by a jury, and resulted in a verdict and judgment for the plaintiff; to reverse which this writ of error is prosecuted.

A bill of exceptions sets out the exceptions of the plaintiff in error to the rulings of the court below, and all the evidence. The court was asked at the close of the plaintiff's testimony, and again when all the evidence on both sides [738] had been introduced, to instruct the jury to return a verdict for the defendant, the refusal to

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do which, amongst other rulings, is assigned for error, and thus the whole case on the merits is brought here for review, so far as they rest upon questions of law.

The plaintiff below introduced in evidence his original and re-issued patent. For the purpose of comparison, which, in view of the questions of law raised, becomes important and necessary, the specifications and claims are exhibited here in parallel columns, using one copy for both patents, when they are identical, and putting all the language that is in the original and not in the re-issued patent in the left hand column in italics, and putting in the right hand column, in italics, all the language used in the re-issued patent that is not in the original:

"Specifications forming part of letters patent No. 146614, dated January 20, 1874.

	Re-issue No. 6422, dated May 4, 1875, application filed
November 3, 1873,	March 17, 1875,

To all whom it may concern:

Be it known that I, Harvey Wood Rice, of Haywood, Alameda County, State of California, have invented new and useful improvements in steam-boilers; and I do hereby declare the following description and accompanying drawing are sufficient to enable any person skilled in the art or science to which it most nearly appertains to make and use my said invention without further invention or experiment.

My invention relates to

certain improvements in	*the combination of a straw-feeding device with the furnace door of that class of boilers which are known as return-flue boilers, by which combination I am able to provide a superior arrangement for utilizing straw as a fuel for generating steam.*
the construction of steam-	*Many attempts have heretofore been made, both in this country and in Europe, to successfully utilize straw as a fuel for generating steam in steam boilers; but these attempts have always resulted in failures or partial failures.*
739] *boilers, whereby I am en-*	
abled to utilize straw and	*When straw is fed into the furnace of an ordinary steam-boiler, it burns too quickly to do much good in heating the water in the boiler, until a sufficient quantity of cinders accumulates upon the grate bars to impede the draft; and unless the cinders are frequently removed from between the grate bars, they soon accumulate to such an extent as to choke the draft entirely and prevent combustion.*
other light substances for	
fuel, so that a complete	
combustion of the smoke	*Many devices have been tried and patented for overcoming these troubles; but, as far as I am aware, none of them have succeeded in remedying the difficulties sufficiently to make the straw-burning engine a practical success.*
is attained, and the dan-	
ger from fire in the har-	*My experiments, however, have developed the fact that, by attaching a tube or box door to the furnaces of that class of boilers known as return-*
vest fields, where those	
boilers are more especially	*flue boilers, in which the chimney or stack is constructed directly above the furnace, and the heat and products of combustion from the furnace are carried along under the boiler, and then returned back to the stack through flues or tubes leading through the length of the boiler, the combustion will be so complete that no sparks and but very little smoke, will escape from the chimney, and the straw will be burned freely, giving out a high degree of heat without danger of choking the grate bars.*
useful, is entirely obviat-	
ed; and	[740
	My invention also relates

See 14 OTTO.

to a novel method of securing the tubes and tube sheet within the shell of the boiler, so that they can be at any time easily removed for the purpose of cleaning or repairing, and at a much less expense than is ordinarily entailed for such work.

Referring to the accompanying drawings for a more complete explanation of my invention, Figure 1 is a perspective view

exposing the tube sheet of one end of the boiler. Fig. 2 is a longitudinal section. Fig. 3 is an end view with rear head removed. Fig. 4 shows the tube and tube sheet removed. Fig. 5 is an enlarged view showing the rear tube sheet, flange and ring.	*of my boiler from the rear end. Fig. 2 is a sectional elevation. Fig. 3 is a rear end view with cap removed. Fig. 4 is a view of tubes and sheet. Fig. 5 is an enlarged view, showing the manner of securing the tube sheet in the shell.*

A, is the shell of my boiler, which is more especially intended to be used for that class of engines employed in threshing and other field work where there is straw or other light material enough for fuel, but which has never been satisfactorily burned without an artificial draft or blast, and which has always been dangerous by reason of the sparks thrown out on account of incomplete combustion.

In order to remedy these faults, and perfectly consume all the smoke and sparks, I perforate my tube sheet B B, so as to admit one large

tube	*furnace*

C, near the bottom, which receives the fuel upon the grate, D, and acts at the same time as a tube and fire box.

Any suitable feeder may be employed to supply straw to the grate, but I have found the device patented by D. Morey, June 20, 1873, to be very suitable.	*To the door of the furnace C, I attach a straw-feeding tube, E, through which the straw or other light fuel is fed to the furnaces.*
	This tube can be constructed in the manner described by David Morey in his patents dated February 11, 1873, and May 25, 1873, for straw-feeding attachment for furnaces, or in some other similar manner for feeding the straw without admitting a draft of air. [741]

Above and around the sides of the large

tube	*furnace*

C, I place small or locomotive boiler tubes *e e*, as shown, and these serve to return the heat and the products of combustion to the chimney F, which is located at the front end of the boiler, and communicates with the chamber H, formed between the flue sheet and the head or door G. A similar chamber, H', is formed at the back

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end of the boiler, into which the products of combustion pass from the large

tube | *furnace*

C before entering the return flues *e*.

By this construction the light fuel is thoroughly ignited in its passage through the large tube, which has plenty of air admitted for the purpose. The heat and flame will be concentrated in returning through the small flues, and the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and this latter will not even need a bonnet.

The tube sheets B B are made with a flange, *i*, which is turned outward, and these flanges are pierced, so as to admit screw bolts, or rivets *g*, as may be preferred. These bolts secure the tube sheets in their places perfectly steam and water tight.

Whenever, by reason of long use, there is a collection of scale or sediment, or if the tubes or the interior of the boiler need repairing, the screw bolts can be removed; or if rivets are used, they can be cut off, when the two tube sheets, with the tubes, can be removed from the shell in a body, and repairs or cleaning can be easily effected with much less time and trouble than when the boilers are made in the ordinary manner.

The flange on the rear tube sheet is turned so much smaller than the interior of the shell that an iron ring, *n*, can be introduced between it and the shell, the bolt passing through it.

When it is necessary to remove the tubes and sheets, this ring can be taken out after removing the nuts and rivets, and this leaves the rear tube sheet small enough to pass any rivets or obstructions freely when taking it out.

By this construction I am enabled to make a boiler and furnace in which straw can be used as a fuel with perfect safety, and in which repairs can be easily effected.

[742] Having thus described my invention, what I claim, and desire to secure by letters patent is:

> *1. The boiler A, having the furnace C, grate D, return flues or tubes e e, and stack or chimney B, arranged as described, in combination with the straw-feeding furnace door attachment, substantially as and for the purpose described.*

2. ... a horizontal steam-boiler the

large tube | *furnace*

C, formed with a grate, D, to serve as a fireplace, in combination with small return flues, *e e*, when the tubes and tube sheets are secured by flanges *i* and bolts *g*, so as to be removable from the shell in a body, substantially as and for the purpose described."

It is admitted that there had been no infringement by the defendant of the second claim of the re-issued patent, which included that feature of the improvement described, which consisted in the peculiar construction by which the tubes and tube sheets were secured by flanges and bolts, so as to be removable from the shell in a body. This claim, therefore, is excluded from further consideration in the case.

The patents of David Morey for a straw-feeding attachment, referred to in the specifications in the Rice original and re-issued patent, consisted of an original patent, No. 185659, dated Feb. 11, 1878, re-issued as re-issue No. 6420, dated May 4, 1875, and original patent No. 189075, dated May 20, 1875.

The specifications of the latter describe the invention as relating to "An improved furnace door attachment, which is especially intended for facilitating the use of straw as a fuel, especially applicable to the removable furnaces of threshing-machine engines; and it consists in attaching to the opening of the furnace, intended for the door, a tube or funnel, having arranged within it a diagonal swinging valve, with its lower end turned up into a shoe, whereby the straw can be inserted into the furnace and no sparks allowed to fly out, nor a draft of air allowed to enter." It was also therein declared that the straw was to be fed through the tube [743] by means of an ordinary hayfork. When the straw is pushed through the tube, the valve or door will be lifted so as to allow the straw to pass through, when it will immediately drop down and cut off the draft of cold air which would otherwise be admitted into the furnace, to the detriment of the fire. The claim of the patent was for "The removable tube or funnel, having arranged within it the diagonal valve with its lower edge turned up, in combination with a furnace, as set forth."

In the re-issued Morey patent a revolving partition in the box or attachment is substituted for the diagonal swinging valve, suspended upon and revolving upon journals, and kept in position by means of springs. The office of the partition is to keep the box or tube closed and prevent the entrance of air after the straw has been pushed through the tube; though the specification adds that "It is evident that by leaving the tube or box filled, so as to choke the opening through it, the partition or door can be dispensed with." The straw is introduced into the furnace through the hopper of the box, by means of an ordinary hayfork. The fork load of straw is placed against the lower end of the partition and pushed through the box, the pressure turning the partition to a horizontal position to admit the hay or straw. As soon as the fork is unloaded and withdrawn, the partition is closed automatically by the springs, thus making a half revolution each time a fork load of straw is introduced, and immediately closing again, so as to shut off the draft. The claim of the re-issued patent embraced: first, "In combination with the furnace of a threshing-machine, the detachable box or tube, provided with a flaring mouth, the base of the tube projecting from the furnace at or nearly at a right angle to the front of the furnace, substantially as and for the purpose set forth;" and, second, "In combination with the furnace of a threshing-engine, the box or tube, provided with a flaring mouth, and having the partition or door, substantially as and for the purpose set forth."

The following is a statement in the language of counsel for the defendant in error, of what he claims to be the proof, on the trial of the cause, as contained in the bill of exceptions, showing the state of the art and the history of [744] the inventions attributed to Morey and Rice respectively:

"For many years before the invention, threshing-machines had been driven by steam as a motive power. In generating steam, portable fire-

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box boilers had been used. Such fire-box boilers were about like the ordinary locomotive boilers in common use. They had a fire-box furnace and a number of tubes or flues passing from one end to the other through the water in the boiler. The fire and products of combustion passed from front to rear through such tubes or flues, and thence out through a smoke-stack placed at the end of the boiler furthest from the furnace.

Wood or coal was used for fuel with such fire-box boilers. During all this time it had been a great *desideratum* to substitute straw as fuel, in place of wood and coal. In California, in most grain districts, wood and coal were very expensive, and were inconvenient on account of having to be transported to the harvest fields, and from place to place in the fields as the threshing-machine was moved from one spot to another, as one section of the field was threshed and another about to be commenced. The transportation of the wood and coal for fuel required teams and men at a time when all were needed in the harvest fields for other purposes. At the same time, where the threshing was done, there was always an accumulation of straw which was of no value, and which the farmers were glad to burn to get it out of the way.

With the portable engines and boilers then in use, straw could not be successfully used as fuel. Steam could be raised with it while the engine was not working, but when the engine was put to work the steam would run down. In 1872 David Morey attempted to accomplish the desired object by attaching straw-feeding attachments to the fire box boilers, then in use with wood or coal for fuel. He experimented with one in Watsonville, and believed from that experiment that his efforts were successful. He took out two patents early in 1873 for his inventions. * * * He made his experiment in Watsonville in 1872, after the threshing season was over for that year.

He was anxious to introduce his supposed invention, and desired to exhibit it to the large dealers in agricultural implements in San Francisco. He accordingly went to San Francisco and looked for a place to try his invention at which it would be convenient for the merchants to attend. Rice had a machine shop at Haywards, and also had threshing engines which he had for many years used in the harvest fields during the threshing season. He had at his place two portable engines with return-flue boilers, and one with a fire-box boiler; one of the engines with return flue boilers was used for running the machinery in his shop, when not in the field during the threshing season.

[745]

Morey went to Rice and requested the privilege of attaching his straw feeder to one of Rice's boilers, and exhibiting its operation. Rice readily consented and assisted in making the attachment and test. Morey wished to attach the straw-feeder to Rice's fire-box boiler, but Rice insisted on attaching it to the return-flue boiler. It was attached to the return-flue boiler; a test of it was made, and an exhibition given, by getting up steam and running the machinery in the shop with it. The test and exhibition gave satisfactory results as far as they went, as Morey's experiment had previously done when made with the same straw-feeder attached to fire-box boiler in Watsonville. *No one learned from the test and exhibition at Haywards whether there was any advantage in substituting the return-flues boiler for the fire-box boiler or not. Rice was the only man that thought the return-flue boiler was the better for the purpose.*

Morey then licensed the firm of Treadwell & Co. to make and sell his invention. The exhibitions of Morey had created a belief that straw could be used for fuel in generating steam for running threshing-machines, and that very season (1873) many of the heaviest firms in San Francisco, and Morey himself, used and exercised their means and abilities to make the invention practically successful. Hawley & Co. tried it. Baker & Hamilton tried it. Treadwell & Co. tried it and Morey tried it. *Some of the partners or engineers of each of the said firms had witnessed the exhibition with the return-flue boiler at Hayward's.* Yet each of said firms and Morey himself made all their *subsequent* tests in the season of 1873 *with fire-box boilers and they all failed.* They all gave up the invention after testing it that season, and believed that their tests and experiments had proved that straw could not be successfully used for fuel in generating steam for running threshing-machines. *Not one of them thought for a moment that anything could be gained by substituting the return-flue boiler for the fire-box boiler.* All of them worked and experimented with the fire-box boiler, and when they found it impossible to make that do the work with the straw-feeding attachment, *they believed that they had exhausted the subject by proving that it was impossible to utilize straw for fuel, as desired, by any possible means.* Yet they had all seen or thoroughly understood all that was shown or proved by the test and exhibition with the return-flue boiler at Haywards in the previous month of March.

[746]

Rice alone believed in the advantages of a return-flue boiler combined with the straw-feeding attachment. Rice alone went into the harvest fields with the return-flue boiler and straw-feeding attachment, and it proved entirely successful. Rice did not know at the time what the other parties were doing, neither were they informed of what Rice was doing. Rice's operations in the threshing season of 1873 were in different sections of the country from where the other parties were experimenting. While all the other parties were by their experiments with fire-box boilers proving that straw could not be utilized for fuel as desired, *Rice alone proved that it could be so utilized*, by substituting the return-flue boiler for the fire-box boiler. Rice was the first and only one that suggested the combination of the return-flue boiler with the straw-feeding attachment, and he was the only one that tested and proved its advantages, and except for this individual and independent idea and action of Rice, there is no reason for supposing that the great advantages of using straw for fuel in the harvest fields would have been enjoyed to-day."

It further appears from the testimony of Rice that he considered the main principle of his invention to be combining the arrangement, patented by Morey, with the return-flue boiler. He supposed at first that his invention covered the boiler itself, though he found afterwards that it was not new, but was on the contrary well known as the Cornish boiler. The main difficulty he claimed to overcome by his invention, was in preventing air from being admitted when

[747]

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the straw was fed into the furnace. He says: "I took his (*Morey's*) tube, and attached it to this boiler (*the return-flue boiler*), and it was a success." The act of invention he specified to consist in "combining the two together."

The contention on the part of the defendant in error is set forth in the language of his counsel in argument, as follows:

"Applying the rules of law to the Morey and Rice patents, and (admitting Morey's patents to be valid) the following are the extent and limits of their respective inventions, *viz.*: Morey discovered that by attaching a straw-feeding tube with a door in it to prevent a draft of air through it, to portable locomotive or fire-box steam-boilers, straw could be used with them for fuel more effectively than it could be without such tube. The combination of a straw-feeding tube which would prevent a draft of air through it, with portable steam-boilers, was Morey's invention. The discovery that a draft of air must not be admitted between the top of the fire and the bottom of the boiler was his discovery. All of Morey's discoveries and inventions, however, were insufficient to make portable steam-boilers adequate to the one great task which it was so desirable for them to perform, *viz.*: that of running threshing-machines with only straw for use as fuel.

Rice began his discoveries and invention where Morey left off. Morey's patents were both issued before Rice had given the subject a thought. Rice discovered that by tearing out the inside of the boiler, which he found in Morey's combination, and by adding to the combination, but inside of the boiler, the large tube *C*, to serve as a furnace and the return flues, that he obtained a combined machine which was a very great improvement over Morey's. Rice's combination may have and probably did include Morey's combination, but it included more, *viz.*: the large tube or furnace, *C*, and the return flues, *e*, *e*.

* * * * * * * *

In this case Morey's patents were for combining straw feeders with portable steam boilers generally. Rice discovered that by substituting one particular kind of portable steam-boiler, which no one else had used, for the steam-boilers which had been used, that he had a better combination than was ever before made; a [748] combination which did better work than any others and had within it a new and better mode of operation than any others. It burned all of the straw put in it, while the others would not. It did not choke up with partly burned straw and cinders, while the others would. It caused the heat and flame of the fire to pass twice through the length of the boiler, while in the others the heat and flame passed but once through the length of the boiler.

* * * * * * * *

It is to be noticed that the Morey patents describe and claim only the combination of the straw feeding device with the *furnace* of a boiler. His patents stop at the furnace door. They do not go into the boiler beyond the furnace.

Rice's patent, on the other hand, *begins at the furnace door where Morey's stop*, and goes beyond into the boiler, adding new elements."

The bill of exceptions contains fourteen exceptions to as many rulings of the court during the trial; but in argument all the points raised by them were reduced and classified by counsel for plaintiff in error under three heads, as follows:

1. That the re-issued letters patent to Rice, on which the action was founded, were for an invention different from that described in the original, and were, therefore, void.

2. That the invention described and claimed in the first claim of the plaintiff's re-issued patent, which alone was material to the controversy, was anticipated and covered by the letters patent granted to Morey.

3. That if, after the Morey patents were issued, there was any invention in the combination claimed in the Rice re-issued patent, then, in fact, it is to be attributed to Morey himself, and not to Rice.

I. The first question for our determination is that raised as to the identity of the invention intended to be described in the original and reissued patents to Rice, upon the answer to which the validity of the latter, so far as this suit is concerned, depends.

In cases of re-issues of patents, inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, it is im- [749] perative that the new patent, when issued, shall be for the same invention, and that no new matter shall be introduced into the specification, when, as in the present case, there is a drawing, with reference to which the invention is described. R. S., sec. 4916.

The principles for determining the validity of re-issued patents have been discussed and formulated so repeatedly and so recently in this court, that it is necessary at present only to refer to the cases of *James* v. *Campbell* [*ante*, 786], and *Miller* v. *Brass Co.* [*ante*, 783], decided at the present Term; *Burr* v. *Duryee*, 1 Wall. 531 [68 U. S. XVII., 650], and *Powder Co.* v. *Powder Works*, 98 U. S. 189 [XXV., 82].

In the present case the question of the identity of the invention in the original and re-issued patents is to be determined from their face by mere comparison, notwithstanding what was said in *Battin* v. *Taggert*, 17 How., 74 [58 U. S., XV., 37], and consistently with *Bischof* v. *Wethered*, 9 Wall., 812 [76 U. S., XIX., 829], according to the rule laid down in *Seymour* v. *Osborne*, 11 Wall., 545 [78 U. S., XX., 89], and *Powder Co.* v. *Powder Works*, 98 U. S., 184 [XXV., 80]. That is, if it appears from the face of the instruments that extrinsic evidence is not needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court is able from mere comparison to say what are the inventions described in each, and to affirm from such mere comparison that they are not the same, but different, then the question of identity is one of pure construction, and not of evidence and, consequently, is matter of law for the court, without any auxiliary matter of fact to be passed upon by a jury, if the action be at law.

The question arises in the present record, upon an exception of the defendant below to the refusal of the court, after the plaintiff had read in evidence the original patent, to sustain an objection to the introduction in evidence of the

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re-issued letters patent, on the ground that they were void for want of identity in the invention; and also upon the refusal of the court to instruct the jury, both after the close of the plaintiff's case and after all the evidence was in, to return a verdict for the defendant.

Looking, therefore, to the original patent, nothing can be more clear than that the supposed invention described in it is nothing more nor less than the return-flue boiler itself. The patent is for a new and useful improvement in steam-
[750] boilers. The specification begins by declaring that the invention relates to certain improvements in the construction of steam-boilers, whereby, the inventor says: "I am enabled to utilize straw and other light substances for fuel, so that a complete combustion of the smoke is attained, and the danger from fire in harvest fields, where these boilers are more especially useful, is entirely obviated." It also relates, as is said, to a novel method of securing the tubes and tube sheets within the shell of the boiler. Reference is then made to the accompanying drawings for a more complete explanation of the invention. He refers to the shell of the boiler, which he says is more especially intended to be used for that class of engines employed in threshing and other field work, where there is straw or other light material enough for fuel, but which has never been satisfactorily burned without an artificial draft or blast, and which has always been dangerous by reason of the sparks thrown out on account of incomplete combustion. It was, "In order to remedy these faults and perfectly consume all the smoke and sparks," he continues, that "I perforate my tube sheets, so as to admit one large tube near the bottom, which receives the fuel upon a grate and acts at the same time as a tube and fire box." Then occurs this sentence: "Any suitable feeder may be employed to supply straw to the grate, but I have found the device patented by D. Morey, June 20, 1873, to be very suitable." He then proceeds with the description of the tubes and the return tubes conducting to the chimney in front, and the communicating chamber between the flue sheet and the boiler head, and the similar chamber at the back end of the boiler, into which the products of combustion pass from the large flues before entering the return flues. "By this construction," the specification continues, "the light fuel is thoroughly ignited in its passage through the large tube, which has plenty of air admitted for the purpose. The heat and flame will be concentrated in returning through the small flues, and the combustion will be so complete that no sparks and very little smoke will escape from the chimney, and this little will not even need a bonnet." This is followed by a description of the device for removing the tubes
[751] and tube sheets from the shell in a body for repair or cleaning, which is not material. The inventor then adds: "By this construction I am enabled to make a boiler and furnace in which straw can be used as a fuel with perfect safety, and in which repairs can be easily effected," and concludes: "Having thus described my invention, what I claim and desire to secure by letters patent is: in a horizontal steam-boiler, the large tube, C, formed with a grate, D, to serve as a fire-place, in combination with small return flues, *e e*, when the tubes and tube-sheets are secured by flanges, *i*, and bolts, *g*, so as to be removable from the shell in a body, substantially as and for the purpose set forth."

The allusion to the mode of supplying straw to the grate is merely casual and incidental. Any suitable feeder may be employed, it is said; the inventor adds: "But I have found the device patented by D. Morey, June 20, 1873, to be very suitable." In what respect this device has been found to be very suitable is not mentioned, nor is it hinted that there are not many others quite as good. No attempt is made to explain what is needed in a feeder to make it suitable, nor any hint that any of the advantages described as resulting from the operation of the machine depend in any degree upon the character of the feeder. For aught that may be inferred from what is said concerning it, there need be nothing peculiar in the mode of supply, except what is rendered necessary by the character of straw as a fuel in lightness and bulk, and a supposed convenience on that account of supporting it, as it is pushed into the furnace. There is certainly no suggestion that is considered important, much less necessary, in supplying this fuel, to do it in such manner and by means of such device as will prevent the introduction of a draft of cold air between the top of the fuel and the bottom of the boiler while in the act of replenishing the supply. Neither the mode of feeding the fuel, nor any device for doing it is made any part of the described invention; nor is either referred to, in any way, as performing any useful or essential function in the operation of the machine described. Every desired advantage which it is expected to accomplish is referred expressly to the boiler itself, and its structure and internal arrangement. As is well said by counsel for plaintiff in error, on this point: "What he sought was complete *combustion* of the straw by making the products of combustion pass through the boiler twice before they were allowed to escape into the chimney; and the office of the feeder was [752]
not auxiliary to the combustion but preliminary to it. It supplied the straw. It did not burn it. It is true that a Morey tube is shown in the drawing as attached to the front of his engine, but that does not make it a part of his invention any more than a set of wheels and axles would have become part of it if the drawing had represented his boiler as mounted on running-gear."

If we turn now to the re-issued patent, we find that the patentee declares that, "My invention relates to the combination of a straw-feeding device, with the furnace door of the class of boilers which are known as return-flue boilers, by which combination I am able to provide a superior arrangement for utilizing straw as a fuel for generating steam." He then refers to the failure of previous attempts to utilize straw as fuel for generating steam, and gives as the reason, that "When straw is fed into the furnace of an ordinary steam-boiler, it burns too quickly to do much good in heating the water in the boiler, until a sufficient quantity of cinders accumulates upon the grate bars to impede the draft; and unless the cinders are frequently removed from between the grate bars they soon accumulate to such an extent as to choke the draft entirely and prevent combustion." He then adds that his experiments have developed the

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fact that by attaching a tube or box door to the furnaces, of that class of boilers known as return-flue boilers, the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and the straw will be burned freely, giving out a high degree of heat without danger of choking the grate bars.

He then gives a description, with reference to the drawings, which are the same as those attached to the original specifications. In that description, differing in that respect from the former one, he inserts: "To the door of the furnace C, I attach a straw-feeding tube E, through which the straw or other light fuel is fed to the furnaces;" and changes the sentence in reference to the character of the straw feeder, so as read as follows: "This tube can be constructed [753] in the manner described by David Morey in his patents dated February 11, 1873, and May 25, 1873, for straw-feeding attachment for furnaces, or in some other suitable manner, *for feeding the straw without admitting a draft of air*." The first claim of the re-issued patent reads thus: "The boiler A, having the furnace C, grate D, return flues or tubes *e e*, and stack or chimney B, arranged as described, *in combination with the straw-feeding furnace door attachment*, substantially as and for the purpose described."

It appears, then, from the mere reading of the two specifications, that the invention described in the first is for the return-flue boiler; while that described in the second, abandoning the claim for the boiler itself, is for a particular mode of using it, with straw as a fuel, by means of an attachment to the furnace door for that purpose. It might well be that Rice was entitled to patents for both, separately, or to one for both inventions. But it is too plain for argument that they are perfectly distinct. A patent, consequently, originally issued for one, cannot lawfully be surrendered as the basis for a re-issue for the other. They are as essentially diverse as a patent for a process and one for a compound, as in the case of *Powder Co.* v. *Powder Works*, 98 U. S., 134 [XXV., 80], where the re-issued patent was avoided, although the original application claimed the invention both of the process and the compound. The case comes directly within the principle held in *James* v. *Campbell* [*ante*, 786], that a patent for a machine cannot be re-issued for the purpose of claiming the process of operating that class of machines; because if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention.

II. The second principal objection to the validity of the Rice re-issued patent is, that it is anticipated by the Morey patents. We are of opinion that it also is well taken.

Morey's re-issued patent of May 4, 1875, covers distinctly and expressly a combination of the furnace of a threshing engine with a detachable box or tube provided with a flaring mouth, the base of the tube projecting from the furnace at or nearly at a right angle to the front of the furnace, the office of which is to furnish means for the supply of straw as fuel [754] to the furnace in such manner as to prevent the entrance of air after the straw has been pushed through the tube, which may be effected, either by means of a movable partition, for which a separate claim is made, or without it, by merely having the tube or box filled, so as to choke the opening through it, with successive supplies of straw.

It applies to every description of threshing-engines and boilers, whether fire-box or return-flue. It is true, that it does not specify either class, but it embraces both by its language; and in its application to both it operates in precisely the same manner and with precisely similar effect. If there is any superiority in the return-flue boilers used with this attachment as a straw burner, over the fire-box boiler, when used in the same way, the superiority is due, not to any difference in the straw-feeding attachment nor in the mode of its operation, nor to any new feature of the combination, but merely to the superiority of the return-flue boiler itself. And it does not militate against the validity of Morey's patent, nor limit the extent and effect of its application, to concede what is claimed: that he was not aware, at the time of his invention, of the superior value of its application to return-flue boilers over fire-box boilers, or that the discovery of that superiority is attributable to Rice. That application of it is within the scope and provision of Morey's invention, whether it had been tested by his experience, or was anticipated by his foresight or not. If, at the date of Morey's invention, return-flue boilers had not been known, but had been susequently invented, his patent, as applied to them, would still have prevailed against any new claimant; for the new application does not produce any new effect. It is only the occasion which is new; the use itself is merely analogous. The case of *Hall's patent*, 1 Web. Pat. Cas., 98, where the flame of gas was used instead of an argand lamp for singeing lace, is pressed upon us as authority for a different conclusion upon this point, but the decision of *Lord* Abinger in *Losh* v. *Hague*, 1 Web. Pat. Cas., 202, and his comments upon the case of *Hall's patent*, show that it has no application here.

There was no patentable invention in Rice's adaptation. The return-flue boiler, it is admitted, was old. The Morey attachment had been already invented. The idea and principle of its operation, in adapting boilers to the use of straw as a fuel, was the essence of his invention. Rice, [755] it is confessed, discovered nothing more than that, for such purposes, a return-flue boiler was better than fire-box boilers, which were the only kind that had then been used.

"But this," in the language of *Mr. Justice* Nelson in *Hotchkiss* v. *Greenwood*, 11 How., 266, "of itself, can never be the subject of a patent. No one will pretend that a machine made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of materials in the manufacture of the instrument for the purposes intended, but nothing more." *Hicks* v. *Kelsey*, 18 Wall., 670 [85 U. S., XXI., 852] affirms this case.

The same principle was applied in the case of *Stow* v. *Chicago*, decided at the present Term [*ante*, 816].

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The case would not be altered if we suppose that, at the date of Morey's patent, there had been also a valid patent outstanding in a stranger for the return-flue boiler. On that supposition, could it for a moment be contended that Rice could secure for himself a valid patent for the combination as an improvement on both? What invention could he claim? He uses Morey's device precisely as Morey's patent contemplated, and the Cornish boiler exactly as it was designed it should be used. And in the combination each operates separately, producing its own results. There was no inventive resource drawn upon to bring them together. Could not the owners of the patents for the straw-feeding attachment and the return-flue boiler unite their machines and work them together, in defiance of a claim for the combination? To ask the question is to answer it. Yet the case supposed does not differ from the case as it exists, for the public owned the right to the Cornish boiler and was entitled to every use to which a patentee owning it might lawfully apply it.

On the trial of the cause below, Morey's patent seems to have been treated, in the charge of the court, as if it were a patent for a combi-
[756] nation of a straw-feeding attachment with the furnace of boilers, other than those with return flues, and that Rice added to the combination the new element of the return flues with a new and important result. But this view, in our opinion, is not justified by the true construction of the patents. If Morey's patent is for a combination, it is a combination of the straw-feeding attachment with all boilers for generating steam, when it is desired to use straw for fuel and, therefore, includes the very combination claimed by Rice. And if it is for the straw-feeding attachment as an independent device, but to be used in boilers for generating steam, when straw is to be used as fuel, then the application of it to the return-flue boilers, although these were not actually known to the inventor, is merely a new and analogous use of an old device, operating in the very manner intended by its inventor, and the use of which, in the new application, involved no invention and could not, therefore, be the subject of a patent.

III. In fact, it is very apparent from the testimony on the part of the plaintiff below, that the actual application of the Morey straw-feeding attachment to the return-flue boiler, at Rice's establishment, was a demonstration made by Morey himself of the practical operation of his device; intended to show, what he had already proved by previous trials with fire-box boilers, to his own satisfaction, that he had invented an arrangement for applying the principle by which straw could be made useful as a fuel for steam-boilers; that principle being to prevent the introduction of a draft of cold air while feeding the supply. He showed this to Rice by the trial at the establishment of the latter, on one of his own return-flue boilers. Rice, by subsequent experience or previous knowledge, it matters not which, perceived the advantages of the return-flue boiler over the fire-box boiler for such a use. That was his sole discovery, and constitutes the basis of the claim for his patent. The marvel is, that he should have succeeded in persuading Morey that he had given all its value to the invention of the former, and obtained from him the conveyance of his patent, for a consideration dependent upon the result of this litigation.

The court below, in its rulings upon objec- [757]
tions to the introduction of the re-issued patent of Rice, in its refusals to charge the jury as requested by the defendant below, and in its charge as given, took views of the validity of the patent, on which the case of the defendant in error rested opposed to those expressed in this opinion, and which necessarily resulted in the verdict and judgment against the plaintiff in error. *For these errors, the judgment is reversed and a new trial ordered, and for that purpose the cause is remanded.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 146, 147, 428; 107 U. S. 635; 110 U. S., 494; 111 U. S., 103; 112 U. S., 249, 669.

AUDLEY C. BRITTON, Surviving Partner [757]
of BRITTON & KOONTZ, *Plff. in Err.*,
v.
ROBERT NICCOLLS.

(See S. C., 14 Otto, 757-766.)

Liability of bank for collection—agent.

1. By the law of Mississippi, a bank receiving commercial paper, as collection agent, properly discharges its duties, in case of non-payment, by placing the paper in the hands of a notary public, to be proceeded with in such manner as to charge the parties to it and secure the rights of the real owners; and the bank is not liable in such cases for the failure of the notary to perform his duty.

2. The notary is the subagent of the owner of the note, and as such is liable to him; he is not the agent of the bank.

[No. 192.]

Argued Jan. 4, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the counsel and court.

Messrs. **James Lowndes** and *A. H. Handy*, for plaintiff in error:

The record clearly shows, that the notes in question were delivered to Britton & Koontz, bankers, for collection, and if not paid, then for protest, legally, by a prosecuting officer; the notes bearing date at Natchez and not being payable at any stated place; that the bankers did not know and were unable, upon making diligent inquiry therefor in Natchez, to learn the residence, or place of business of the maker, and thereupon, at their maturity handed them to a regular notary public for presentment to the maker for payment, and for protest, in case of their non-payment, and notices thereof given by said notary to the indorsers. And the first instruction prayed that if the jury were satisfied of these facts, from the evidence, the bankers were not liable for negligence in the premises, and that they should find for the defendant.

The only point stated in it, about which any question could be raised was, whether the bankers, having received the notes for collection and not knowing the domicil of the maker nor his

NOTE.—*Liability of notary in protest of paper and of bank employing him.* See, *note* to Wiseman v. Chiappella, 64 U. S., XVI., 466.

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place of business, and being unable to ascertain the same after making diligent inquiries, were justified in handing them to a regular notary public, for presentment and in the event of non-payment, for protest, and notices to be sent by him to the indorsers.

That question is settled by numerous cases and upon the soundest principles, in Massachusetts, Connecticut, Illinois, Pennsylvania, Maryland, Louisiana and Mississippi.

Fabens v. *Bk.*, 23 Pick., 332; *Warren Bk.* v. *Suffolk Bk.*, 10 Cush., 582; *Bk.* v. *Scovill*, 12 Conn., 303; *Ins. Co.* v. *Bk.* 25 Ill., 243; *Bellemire* v. *Bk.*, 4 Whart., 105; *S. C.*, 1 Miles, 173; *Jackson* v. *Bk.*, 6 Harr. & J., 146; *Bk.* v. *Howell*, 8 Md., 530; *Baldwin* v. *Bk.*, 1 La. Ann., 13; *Frazier* v. *Gas Co.*, 2 Rob. (La.), 294; *Agricultural Bk.* v. *Commercial Bk.*, 7 Sm. & M. (Miss.), 592; *Tiernan* v. *Bk.*, 7 How. (Miss.), 648; *Bowling* v. *Arthur*, 34 Miss., 41.

The principal reason justifying such course is, that the notary is an independent public officer appointed by law, and is bound and empowered by law to act as such, in the presentment and protesting of commercial paper, and is not the agent of the bank, so as to make it liable for his neglect, and after receiving such paper for presentment, protest, etc., the notary becomes the holder of it, and is entitled to receive the amount of it from the parties.

Byles, Bills, 2 (marg).

In Mississippi there is a statute authorizing and making it the duty of notaries public to make presentment of promissory notes and to protest them for non-payment, and to make a public registry thereof, which is made evidence. See, Act making full provisions thereupon. Pamphlet Act 1872, ch. 120, p. 147, L. of Miss.

The rule held in the above cited cases is sanctioned in the work of Shearman & Redfield on Negligence, 273, 274.

Messrs. William L. Nugent and **J. R. Chalmers**, for defendant in error:

The law announced by the Supreme Court of the United States, after an elaborate review of the authorities, is thus stated: "When a bank, as a collecting agency, receives a note for collection, its position is that of an independent contractor, and the instruments employed by it in the business contemplated are its agents and not the subagents of the owner of the note; and when an attorney at law is employed, he is the agent of the collecting agent, and not of the creditor who employed the agent." We refer to the case, and those cited approvingly by the court therein:

Hoover v. *Wise*, 91 U. S., 313, 315 (XXIII., 395); citing, *Reeves* v. *Bk.*, 8 Ohio St., 465; *Mackersy* v. *Ramsays*, 9 Cl. & F., 818; *Montgomery Co. Bk.* v. *Albany City Bk.*, 7 N. Y., 459; *Allen* v. *Bk.*, 22 Wend., 215; *Bradstreet* v. *Everson*, 72 Pa., 124; *Cobb* v. *Becke*, 6 Ad. & El. (N. S.), 930; *Lewis* v. *Peck*, 10 Ala., 142; *Alley* v. *Rogers*, 19 Gratt., 366.

The decisions all fix the liability upon the bank undertaking the duty of collection, for any neglect by which the owner of the note or bill is damnified, in the absence of an express contract to the contrary.

The most recent adjudications in the several state courts conform to the doctrine thus announced; and it is universally held, we believe, that a bank receiving paper for collection, undertakes to use due diligence in making demand at maturity, and giving the proper notice of non-payment. Proof that the paper would not have been paid if presented, is no defense, and an unreasonable delay even, would charge the bank with a liability for the amount.

Bk. of New Hanover v. *Kenan* 76 N. C., 340; *Steele* v. *Russell*, 5 Neb. 211; *Bk.* v. *Lane*, 52 Miss., 677; *Fabens* v. *Bk.*, 23 Pick., 330; *Thompson* v. *Bk.*, Riley (S. C.), 81; *Bk.* v. *Knox*, 1 Ala., 148; *Bk.* v. *Huggins*, 3 Ala., 206.

Being thus bound to present the paper, at the proper time and place, for payment, and in case of neglect, liable for the loss sustained thereby, it is the agent of the owner of the paper and not, in any sense, the agent of the maker who pays it. It is hence bound to use reasonable skill and diligence to make a seasonable demand on the promisor, and give notice to the indorsers in case of dishonor. If it employs a notary to present the note for payment, and to give the proper notice to charge the parties, the notary is the agent of the bank and not of the depositor or owner of the paper, and the bank is liable for any neglect of duty by him, by which any of the parties are discharged. Although this liability may be varied by express contract or by implication arising from general usage, the facts that it is usual for banks to resort to a notary for such services, and that the owner, on depositing the note, said that he wanted it protested if not paid, are not evidence that the undertaking of the bank was simply to hand the note to a notary.

Ayrault v *Bk.*, 47 N. Y., 570; *Smith* v. *Bk.*, 22 Barb., 627; *Runyon* v. *Latham*, 5 Ired., 551; *Crow* v. *Bk.*, 12 La. Ann., 692; *Fabens* v. *Bk.*, 23 Pick., 330; *Bk.* v. *Fulmer*, 3 Pa. St., 399; *Allen* v. *Bk.*, 22 Wend., 215; *Com. Bk.* v. *Union Bk.*, 19 Barb., 391; *Reeves* v. *Bk.*, 8 Ohio St., 465; *Montillet* v. *Bk.*, 1 Mart. (N. S.), 365; *Montgomery Co. Bk.* v. *Albany City Bk.*, 7 N. Y., 460; *Van Wart* v. *Woolley*, 3 Barn. & C., 439.

Mr. Justice **Field** delivered the opinion of the court:

The defendant in the court below is the surviving partner of the firm of Britton & Koontz, which was engaged in the banking business at [758] Natchez, in the State of Mississippi, in 1874 and 1875. The plaintiff in the court below, Niccolls, was at that time a citizen of Illinois, and the present suit is brought by him to recover damages from the surviving partner of the firm, for its neglect to present for payment to the maker, at their maturity, two promissory notes sent to it for collection, by reason of which the liability of a responsible indorser was released.

The facts of the case are briefly these: in April, 1874, the plaintiff was the holder of a promissory note of one John I. Lambert for $3,666.66, dated at Natchez, April 24, 1872, and payable to his order two years after date, with interest at the rate of 8 per cent per annum. The note was indorsed by three parties besides the payee: J. M. Reynolds, John Flemming and J. S. Everet. Flemming's indorsement was without recourse to him; the other indorsements were without any such restriction upon the liability of the parties.

In April, 1874, the plaintiff caused this note to be sent, through a banking house in Bloomington, Illinois, to the firm at Natchez for collection. The only instructions accompanying

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it were, that it was to be collected if paid; and if not paid on presentment it was to be protested and notice of non-payment sent to the indorsers.

In April, 1875, the plaintiff was the holder of another note of the same maker, identical in amount, date and terms with the first, except that it was payable in three years after date; and it was indorsed in like manner by the same indorsers. This note matured on the 27th of that month. Some days previously the plaintiff sent it to the firm at Natchez, with instructions to collect it if paid, and if not paid to have it delivered to a protesting officer for protest, and to give notice to the indorsers.

No information as to the residence of the maker was given to the firm with the notes; nor does it appear that either member of it had, then or subsequently, any knowledge on the subject. The plaintiff himself was ignorant of it. He resided, in fact, on his plantation, twelve or fifteen miles from Natchez; he had no domicil or place of business in that city. The notes not being paid at their respective maturities—the first one on the 27th of April, 1874, and the second one on the 27th of April, 1875—
[759] before the close of banking hours on those days, were handed by the firm to a notary public of the county, with instructions to demand payment of them, and if they were not paid to protest them and send notice of non-payment to the indorsers. No other directions were given. The notary knew that the maker resided on his plantation, and had no place of business in the city, but he inquired for him at the postoffice, the city hall, and the court-house, three of the most public places there, and not finding him, protested the notes for non-payment and gave notice thereof to the indorsers.

The plaintiff soon afterwards brought suit against the maker and also against the indorser, Everet, which proceeded to judgment and execution; but nothing was obtained from the parties. Suit was also brought against Reynolds, the first indorser, in which judgment passed for the defendant, on the ground that due presentment of the notes to the maker and demand of payment had not been made at their maturity, by reason of which the indorser was released from liability. It is admitted that if judgment had been rendered against Reynolds, the money due upon the notes might have been collected upon execution. The plaintiff thereupon brought the present action.

The notary testified that, in his endeavors to make presentment of the notes for payment, he had acted upon his own opinion as to his duty, without instructions from the firm; and because he considered that the notes, being dated at Natchez, and no place of payment being stated, the place of presentment was, in law, at Natchez, and not at the maker's domicil outside of the city.

The surviving partner, Britton, testified that it was always the custom of the firm, when it had notes for collection, whether its own or those belonging to others, to send through the postoffice a notice of their amount and of the date of their maturity to the proper parties, a reasonable time before the notes became payable; and if payment was not made at their maturity, to place them in the hands of a notary for presentment and protest; that this course was pursued with respect to the notes in question; that Koontz, the deceased partner, who, it would seem, took special charge of the business of protesting paper left with the firm for collection, when that was necessary, had inquired [760] of several persons coming into the banking house as to the residence of the maker of the notes, and on one occasion left the house for the express purpose of trying to ascertain it, and returned stating that he had not succeeded; and that "The notary would have to comply with the law in such cases, and present at several of the most public places." He also testified that he was "certain that Koontz made diligent efforts to ascertain Lambert's (the maker's) place of residence, and that they were unsuccessful."

Upon the facts and testimony as stated, the defendant, among other things, requested the court to instruct the jury, in substance: that if the bankers had no knowledge of the residence or place of business of the maker, and were unable, after diligent inquiry in the City of Natchez, to ascertain the same, and thereupon, at the maturity of the notes, handed them to a notary public for the purpose of having presentment made thereof to the maker for payment, and of having them protested in case of non-payment and notice thereof given to the indorsers, then the bankers were not liable for negligence in performing the duties intrusted to them, nor for failure of the notary to discharge the duties required of him with respect to the demand of payment.

We do not give the precise language of the instruction asked, but only its substance and purport. The court refused it, and instructed the jury, in substance: that it was the duty of the bankers to perform such acts as the law required to charge the indorsers upon the notes, which were to present them to the maker for payment on their last days of grace respectively, and upon non-payment to give notice thereof to the indorsers; and that the bankers were not exonerated from this duty by the delivery of the notes to the notary for their performance, unless it was within a reasonable time for him to present the notes to the maker, and to demand payment, on the days they respectively became due, at his residence or place of business. To the refusal of the instruction asked and to those given, an exception was taken. The plaintiff recovered judgment for the amount due on the notes, and the case is brought here for review.

The notes being dated at Natchez, the presumption of law, in the absence of other evi- [761] dence on the subject, is, that that was the place of residence of the maker and that he contemplated making payment there. The duty of the bankers, as collecting agents, was, therefore, to make inquiry for his place of business or residence in that city, and if he had either, to make there the presentment of the notes, but if he had neither to use reasonable diligence to find him for that purpose; or if the employment of a notary public for that object was sanctioned by the usage of bankers, or by the law as declared by the courts of the State, instead of making the presentment and demand personally, they could have placed the notes in his hands for the performance of that duty. As it turned out that the maker had neither domicil nor place of business in the city, and was absent at the

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time from it, no demand upon him there was possible, nor was that essential to charge the indorsers.

The law on this subject we consider to be well settled, as will be seen by an examination of the numerous adjudged cases as to what constitutes due presentment and demand of payment of commercial paper, and what will excuse both. The only point upon which we find any marked difference of opinion in them respects the liability of the collecting bankers for the manner in which the notary, to whom the notes are delivered for presentment and protest, discharges his duty.

In the State of New York, the doctrine obtains that bankers, to whom notes are intrusted for collection, are responsible for the failure of agents employed by them in the presentation of the notes to the maker and in protesting them when not paid, though the agents are notaries exercising a public office and especially charged with the performance of such duties. In the case of *Allen* v. *Bank*, it was decided by the Court of Errors of that State that the liability of the bank extended to any neglect of duty, by which any of the parties to a bill are released, whether arising from default of its own officers or servants, or its correspondents at a distance, or agents employed by them. Previously, a more limited liability was supposed to rest upon a collecting bank. In that case, the bill was drawn [62] in New York upon parties in Philadelphia and placed in the defendant's bank of the former city for collection, and by it forwarded to a bank in Philadelphia. The latter bank handed it to a notary to present for acceptance. He presented it, but omitted to give notice of its non-acceptance, by which a responsible indorser was released. The action was against the collecting bank to recover the amount of the bill, and was brought in the Superior Court of the City of New York, where the jury was charged that the defendant was, upon general principles of law, independently of any custom or usage, or of any agreement, express or implied, only bound to transmit the bill to Philadelphia in due time to some competent agent; and that it was not liable for his negligence or omission in giving notice of its non-acceptance. Judgment having passed for the defendant, the case was taken to the Supreme Court of the State and was there affirmed. That court, speaking through *Mr. Justice* Nelson, said that "A note or bill of exchange left at a bank and received for the purpose of being sent to some distant place for collection, would seem to imply, upon a reasonable construction, no other agreement than that it should be forwarded with due diligence to some competent agent to do what should be necessary in the premises. The language and acts of the parties fairly import so much, but nothing beyond it. The person leaving the note is aware that the bank cannot personally attend to the collection, and that it must, therefore, be sent to some distant or foreign agent," and that there seemed to be nothing in the nature of the transaction which could reasonably imply an assumption for the fidelity of the agent abroad. 15 Wend., 482, 488. The case being carried to the Court of Errors the decision of the Supreme Court was reversed, and the doctrine declared that the bank was responsible for all subsequent agents employed in the collection of the paper. The reversal was by a vote of fourteen senators against ten, *Chancellor* Walworth, who composed a part of the Court of Errors in cases appealed from the Supreme Court, voting with the minority and giving an opinion for affirmation of the judgment. *Senator* Verplanck delivered the prevailing opinion. *S. C.*, 22 Wend., 215. The decision has since been followed in [763] New York, and its doctrine, we believe, has been adopted in Ohio. But in the courts of other States it has been generally rejected and the views expressed by the Supreme Court approved.

In *Dorchester and M. Bk.* v. *N. E. Bk.*, it was held by the Supreme Court of Massachusetts that when notes or bills, payable at a distant place, are received by a bank for collection, without specific instructions, it is bound to transmit them to a suitable agent at the place of payment, for that purpose; and that when a suitable subagent is thus employed, in good faith, the collecting bank is not liable for his neglect or default. In giving its judgment the court referred to the ruling in *Allen* v. *Bank*, and observed that it was opposed to a number of decisions of great authority and, in its opinion, was not well founded in principle; that if the bank in that case acted in good faith in selecting a suitable subagent where the bill was payable, there was no principle of justice or public policy by which the bank should be made liable for his neglect or misfeasance. 1 Cush., 177, 187.

In the Supreme Courts of Connecticut, Maryland, Illinois, Wisconsin and Mississippi, the doctrine of the Supreme Court of New York in the case reversed, and of the Supreme Court of Massachusetts in the case cited, has been approved and followed. In the New York case, in the Court of Errors, it was conceded that the general liability of the collecting bank might be varied and limited by express agreement of the parties, or by implication arising from general usage; and in some of the cases in other states, proof of such general usage of bankers in the employment of notaries was permitted, and a release thereby asserted from liability of the bank for any neglect by them. Thus in *Warren Bk.* v. *Suffolk Bk.*, which arose in Massachusetts, a note, left with the latter bank for collection, had been placed at the close of banking hours with a notary public for presentment and protest, and by his negligence in presenting the paper to the maker, the liability of an indorser was released. The bank was thereupon sued. On the trial, proof was offered to show that it was the invariable usage of banks in Boston, when notes were sent for collection by other banks, to keep them for payment until the close of banking hours on the day they became payable, and if not then paid to put them into the [764] hands of a notary public for demand on the maker and protest; and that the defendant had pursued that course. The court below decided that if there were negligence on the part of the notary, the evidence was immaterial, and that the usage did not constitute a defense. The Supreme Court reversed this decision, and held that the evidence was admissible. "It would, we think," said the court, "have authorized the jury to find an implied agreement or assent to the employment of a subagent or notary public for the purpose of making a demand on the maker, requiring only in the collecting bank due

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diligence and care in selecting the notary, or a general usage binding certainly those who were conversant of it. It is no sufficient answer to this to say that it was not absolutely necessary to employ a notary in a case like the present to certify to the demand and protest. If this was the well established course of business, and known to the plaintiffs when they sent to the defendants this note for collection, they must be bound by it." 10 Cush., 582–587. The court also said, that when the nature of the business in which an agent is engaged, requires, for its proper and reasonable execution, the employment of a subagent, the principal agent is not responsible for the default of the subagent, provided a proper one be selected; and it was of opinion that if the usage of the banks authorized the employment of a subagent holding an official character, it then became a case of subagency, with its incidents.

In the case at bar, there was no proof of any general usage of bankers at Natchez as to the employment of notaries public in the presentment and protest of notes left with them for collection. But we have before us the decisions of the Supreme Court of Mississippi, and they are of equal potency to limit the liability of the bankers for the negligence of the notary. We can look into those decisions to ascertain what the law is in that State, and how far it has modified what would otherwise be deemed the general law on any particular subject. By them we are informed that it is the settled law of the State, that "A bank receiving commercial paper, as an agent for collection, properly discharges its duties, in case of non-payment, by placing the paper in the hands of a notary public to be proceeded with in such manner as to charge the parties to it, and secure the rights of the real owner; and that the bank is not liable in such cases for the failure of the notary to perform his duty." This is the language used by that court in *Bowling* v. *Arthur*, 34 Miss., 41; and in support of it, the cases of *Tiernan* v. *Bk.*, 7 How. (Miss.), 648, and of *Agricultural Bk.* v. *Commercial Bk.*, 7 S. & M., 592, are cited. And the court adds, that these cases decide that the notary is the subagent of the holder, through the bank, and as such is liable to him; and it is satisfied that the rule declared in them is correct.

[765]

By a statute of Mississippi, notaries are authorized to protest promissory notes as well as bills of exchange; and they are required to keep a record of their notarial acts in such cases; and the record is admissible in evidence in the courts of the State just as though the notary were present and interrogated respecting the matters recorded. And it was decided in the case of *Bowling* v. *Arthur*, that, under the statute, it is a part of the duty of the notary, when protesting paper, to give all notices of dishonor required to charge the parties to it.

Judged by the law of Mississippi, the bankers, Britton & Koontz, discharged their duty to the plaintiff when they delivered the notes, received by them for collection, to the notary public. There is no question as to his habits or qualifications. He was not connected in business with the bankers, nor employed by them except in his official character. What more could they have done, as intelligent and honest collecting agents, desirous of performing all that was required of them by the law, ignorant, as they were, of the residence or place of business of the maker of the notes, and having unsuccessfully made diligent inquiry for them? Had they known that the maker resided on his plantation, without the city limits, in time to make the demand upon him, it might, perhaps, have been incumbent upon them to forward the notes there for presentment. It is not necessary to express any opinion on this head, for the only question is, whether, on the knowledge they possessed, they discharged their whole duty. For the reasons stated we are of opinion that they did all that the law required of them.

The notary, it is urged, was aware of the residence of the maker, but we do not perceive how this could affect the liability of the bankers. We are not prepared to say that even with this knowledge he was bound, receiving the paper at the close of banking hours, to go out of the limits of the city to present it to the maker. He took the paper to inquire for the maker in the city, not outside of it, and to make presentment if he were found. If his knowledge of the residence of the maker could have required him to leave the city, so it would have done had the maker resided one hundred miles distant instead of twelve or fifteen. But on this head we are not called upon to express an opinion. It is enough here that the notary was not, in this matter, the agent of the bankers. He was a public officer, whose duties were prescribed by law, and when the notes were placed in his hands, in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was liable; the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them.

[766]

The fact that in the action against the indorser, Reynolds, judgment passed in his favor, on the ground that due presentment and demand of payment had not been made of the maker, can have no weight in this case. The bankers were not parties to that action, had no control over its management, and are not bound by the judgment rendered. If the plaintiff was not satisfied with that judgment, he should have appealed from it. The rulings of the court in that case are not authority in this.

It follows, from these views, that the instruction refused should have been given, and that the instructions given should have been refused. The judgment must, therefore, be reversed and the cause remanded for a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 284, 287.

UNITED STATES, *Appt.*,
v.
LAWRENCE S. BABBITT.

[767]

(See S. C., 14 Otto, 767, 768.)

Decree by consent.

When a decree has been rendered by consent, no errors will be considered by this court on appeal, which were waived by such consent.

[No. 1073.]

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Submitted Jan. 16, 1882. Decided Mar. 6, 1882.

APPEAL from the Court of Claims.

The case is sufficiently stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for appellant.

Mr. **William Penn Clarke,** for appellee.

[68] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The question presented to the court below on the trial of this case was, whether in the computation of longevity pay for an officer in the Army of the United States, under the provisions of the Act of 1878, ch. 263, sec. 7, 20 Stat. at L., 145, Sup. R. S., 362, his period of service as a cadet at West Point was to be taken into account. The court decided it was not, and an elaborate opinion to that effect was filed; but the record shows that after the decision was announced a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal.

In *R. R. Co.* v. *Ketchum*, 101 U. S., 289 [XXV., 932], we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion this case comes within that rule. The consent to the judgment below was in law, a waiver of the error now complained of. *For this reason the judgment below must be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

[69]

NANNIE H. BLAIR AND WALTER D. BLAIR, CHARLES J. BLAIR, FANNIE BLAIR AND WILLIAM A. BLAIR, by NANNIE H. BLAIR, Their Guardian and Next Friend, *Plffs. in Err.*,

v.

FRANKLIN D. GRAY

(See S. C., 14 Otto, 769, 770.)

Liability of stockholder.

Where a charter of a corporation provided that "In all cases of losses exceeding the means of the corporation, each stockholder shall be held liable to the amount of unpaid stock held by him," unless the losses of the company exceed its assets, a creditor cannot sue a stockholder to enforce this liability.

[No. 207.]

Submitted Jan. 11, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case sufficiently appears in the opinion of the court.

Mr. **E. A. Otis,** for plaintiffs in error.

Mr. **Francis H. Kales,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The charter of the Republic Life Insurance Company of Chicago contains the following section:

"Section 6. The real and personal property of each individual stockholder shall be held liable for any and all liabilities of the company, to the amount of stock subscribed and held by him and not actually paid in. In all cases of losses [770] exceeding the means of the corporation, each stockholder shall be held liable to the amount of unpaid stock held by him."

The defendant, Gray, subscribed $10,000 to the capital stock of the company. He has paid only $2,000 on his subscription, and still owes the company for the rest. Under the foregoing section of the charter, some appropriate action for the benefit of creditors may, undoubtedly, be maintained against him for the recovery of this unpaid balance, if the losses of the company are in excess of its means.

This suit was at law by a policy-holder of the company against the defendant as a stockholder, to recover an amount claimed to be due on the policy. There is no averment in the declaration to the effect that the losses of the company, or its liabilities, exceed its assets. The case stands on demurrer to the declaration. Without, therefore, determining whether, under the decisions of the courts of Illinois, if it appeared that there was a deficiency of assets, an action like this might be maintained, *we affirm the judgment below, because we are all of opinion that, until such contingency arises, a creditor cannot sue a stockholder to enforce this liability.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BERNARD POPPE, *Plf. in Err.*, [770]

v.

B. F. LANGFORD.

(See S. C., 14 Otto, 770, 771.)

Federal question, what is not.

Whether or not, in California, the title of the true owner of lands is extinguished by an adverse possession under color of right, for the length of time which would be a bar to a recovery in ejectment, is not a federal question.

[No. 958.]

Submitted Jan. 23, 1882. Decided Mar. 6, 1882.

IN ERROR to the Supreme Court of the State of California.

Motion to dismiss.

This was an action brought by one John J. Valentine, in the District Court of the State of California for the recovery of the possession of a tract of land situated in the County of San Joaquin. Before the trial, Langford, the defendant in error, was substituted as plaintiff in the action in place of Valentine. Langford recovered judgment in the district court, which was affirmed on appeal by the Supreme Court of the State.

Messrs. **C. T. Botts** and *D. S. Terry*, for defendant in error.

Messrs. **C. R. Greathouse,** *J. H. Budd*, **A. Chester** and *Blanding*, for plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

NOTE.—*Individual liability of stockholders for corporate debts.* See, *note* to Hatch v. Dana, 101 U. S., XXV., 885.

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[771] It is clear we have no jurisdiction in this case. All the court below decided was, that in California the title of the true owner of lands is extinguished by an adverse possession under color of right for the length of time which would be a bar to a recovery in ejectment. This is not a federal question. All that was said about section 1007 of the Civil Code of California was unnecessary and not required in the determination of the cause.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[771] JAMES A. LOUDON, *Appt.*,

v.

TAXING DISTRICT OF SHELBY COUNTY, Substituted for the CITY OF MEMPHIS.

(See S. C., 14 Otto, 771-774.)

Interest as damages—dismissal of appeal.

1. All damages for delay in the payment of money owing upon contract are provided for in the allowance of interest. Interest is the only measure of all such damages.

2. Where a cross appeal has been dismissed for want of prosecution, the appellant therein can be heard, only in support of the decree.

[No. 146.]

Submitted Jan. 9, 1882. Decided Mar. 6, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

This was an action in equity, brought in the court below by James A. Loudon, against the City of Memphis.

It appears that, in the year 1867, the firm of J. & M. Loudon, of which the plaintiff was the [772] surviving partner, entered into certain contracts with the defendant to pave certain streets and alleys. During the progress of the work, the city gave its negotiable notes for the same, as provided in the contract. From time to time the firm had to borrow money, paying heavy rates of interest in order to carry on the work. The city failed to pay its notes at maturity, and suit was brought Nov. 4, 1871. Four judgments amounting to about $65,000 were recovered against the city. Under the contracts, the contractors were to look to the property holders for payment for work done in front of private property; but the city guarantied the the payment of sums so due, except as to one contract which expressly provided that the city should not be responsible. In May, 1872, the Supreme Court of Tennessee declared the Act providing for front foot assessment unconstitutional. 9 Heisk., 349. In September, 1872, the amount due from property holders guarantied by the city was over $30,000, while that not guarantied by the city was nearly $8,000. The judgments above named also remained unpaid. Under these circumstances it was agreed that the city should issue its gold bearing bonds at thirty years, equal in amount to the whole claim of Loudon against the city, aside from the judgments, which Loudon agreed to accept. These bonds at this time were known to be worth about fifty cents on a dollar. In consideration of this acceptance, as was alleged by Loudon, the city agreed to pay, on or before Mar. 1, 1873, the judgments above mentioned, principal and interest, and for that purpose agreed to appropriate a sufficient proportion of the general tax then levied or about to be levied for the year 1872. This alleged contract was verbal between the mayor, representing the city, and J. & M. Loudon. The evidence regarding it was somewhat conflicting. The claim of the defendant was, that the city agreed to set apart three tenths of the one dollar tax to be levied for the general purposes of the city government for 1872, to the payment of the judgments. Sep. 4, 1872, the General Council of the city passed a resolution to the effect that "Three tenths of the amount that may be collected upon the tax levied for the present year for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, or so much thereof as may be necessary for the purpose, be and the same is hereby appropriated and set apart for the payment of the said judgments, and shall be paid on said judgments according to priority in date from time to time as collected." From January, 1873 to January, 1874, something over $30,000 was paid on the judgment. Since then no payments have been made.

It was also alleged by the plaintiff that the city procured the General Assembly to repeal an Act which had been supposed to confer upon it the power to levy a tax to pay J. & M. Loudon's judgments.

The bill further alleged that, by reason of the failure of the city to keep its contracts, the firm had been compelled to borrow money at heavy rates of interest and to sell the bonds of the city and the judgments against it at large discount, and that these facts had been known to the city at the time they occurred. The city denied knowledge of these facts.

The bill prayed for a rescission of the con- [773] tract or arrangement of Sep. 1872, and asserts a demand for the debt amounting to about $45,000, for which the bonds were accepted, less the proceeds of the bonds; that the city pay all interest on what appellant had been compelled to borrow, or at least so much as was in excess of six per cent, and that the city pay all that was lost by the sale of the judgments at a discount.

The court below entered a decree, in effect substantially decreeing a specific performance of the contract of September, 1872. Both parties appealed, but the appeal of the city has been dismissed for failure to prosecute.

Messrs. **William M. Randolph** and **Fillmore Beall**, for appellant.

Messrs. **Isham G. Harris** and *C. W. Heiskell*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The questions in this case are:

1. Whether, because the City of Memphis neglected to pay the debts it owed the appellant when they fell due, it must make good to him the losses he sustained on that account through

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NOTE.—*Interest; when recoverable as damages or on money.* See, *note* to Sneed v. Wistar, 21 U. S. (8 Wheat.), 690.

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exactions of extraordinary interest and discounts on sales of securities to raise money to meet his own obligations; and,

2. Whether, upon the facts as shown, a decree should be passed rescinding the contract under which the appellant received bonds of the city in settlement of what was due him on certain of his claims.

74] As to the first of these questions, it is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.

As to the second, we are satisfied that the only contract which was entered into by the parties is that expressed in the resolution of the city council, accepting the proposition of the appellant to take bonds of the city in payment of what was due him on the designated claims. This required the city only to set apart, for the payment of the judgments which the appellant held, three tenths of the specified tax levied to defray the expenses of the city for the year 1872. That was done, and large sums of money collected and paid over under the appropriation. There was no fraud in the inception of the contract. The value of the bonds accepted by the appellant was well understood by him, and it is not denied that the officers of the city at the time acted in good faith. The failure of the city since 1874 to keep its contract and pay over the taxes of 1872 collected after that time, is certainly no ground for setting aside the contract altogether. The more appropriate relief certainly is that which was granted, to wit: provision for the payment of the balance that remains due out of the future collections of taxes levied or to be levied, in that behalf.

The city took an appeal from that part of the decree which gave the appellant affirmative relief, but that appeal has been dismissed, under the Ninth Rule, for want of prosecution. The case stands here now as though no such appeal had been taken. The city can, therefore, only be heard in support of the decree as it stands. This has long been the settled rule in this court. *Canter v. Ins. Co.*, 3 Pet., 318; *Chittenden v. Brewster*, 2 Wall., 196 [69 U. S., XVII., 841]; *The Stephen Morgan*, 94 U. S., 599 [XXIV., 266]. An appeal brings up for review only that which was decided adversely to the appellant. It is unnecessary to determine what might have been done in this case if the appeal of the city had not been formally dismissed for want of prosecution.

The decree of the Circuit Court is affirmed.

True copy, Test:

James H. McKenney, Clerk, Sup. Court, U. S.

'75] BASIL F. WARNOCK, Admr. of the Estate of HENRY L. CROSSER, Deceased, *Plff. in Err.*,

v.

GEORGE DAVIS ET AL., Composing the SCIOTO TRUST ASSOCIATION, OF PORTSMOUTH, OHIO.

(See S. C., 14 Otto, 775-783.)

Life policy, when not assignable—insurable interest—conflicting decisions—effect of assignment.

1. A policy on the life of a person is not assignable to one with no insurable interest in the life of the deceased, and who could not have taken out a policy in his own name.

2. What will constitute an insurable interest considered.

3. The question here presented has arisen, under somewhat different circumstances, in several of the state courts; and there is a conflict in their decisions.

4. The assured may assign the policy as security for moneys advanced on it. Such assignment will be invalid only as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest.

5. Cammack v. Lewis, XXI., 244, followed.

[No. 191.]

Submitted Jan. 4, 1882. Decided Mar. 6, 1882.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Statement of the case by *Mr. Justice* **Field.**

The plaintiff is the administrator of the estate of Henry L. Crosser, deceased, and a resident of Kentucky. The defendants are partners, under the name of the Scioto Trust Association, of Portsmouth, Ohio, and residents of that State. On the 27th of February, 1872, Crosser applied to the Protection Life Insurance Company, of Chicago, a corporation created under the laws of Illinois, for a policy on his life to the amount of $5,000; and, on the same day, entered into the following agreement with the Scioto Trust Association:

"This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at Town of Springville, County of Greenup, State of Kentucky, and the Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life Insurance Company, of Chicago, Illinois, for policy on his life, limited to the amount of $5,000, hereby agrees to and with the said Scioto Trust Association that nine tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of and be paid by said Protection Life Insurance Company to said Scioto Trust Association, and shall, by said party of the first part, be assigned and transferred to said Scioto Trust Association, and the remaining one tenth part thereof shall [776] be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy; that the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title and interest, whatever, in and to said policy, and the moneys due and payable thereon at the time of his death, save and except the one tenth part of such moneys being subject to his disposition as aforesaid; also to keep the Scioto Trust Association constantly informed concerning his residence, postoffice address, and removals; and further, that said party of the first part shall pay to the said Scioto Trust Association a fee of $6 in hand on the execution and delivery of this agreement, and annual dues of $2.50 to be paid on the first of July of every year hereafter, and that in

NOTE.—*Insurance on life of another; who may have; interest necessary.* See, *note* to Ætna L. Ins. Co. v. France, 94 U. S., XXIV., 287.

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default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one tenth part.

In consideration whereof, the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense; to pay all dues, fees and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues and assessments; and to procure the payment of one tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

It is hereby expressly understood and agreed by and between the parties hereto, that said Scioto Trust Association do not in any manner obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

Witness our hands, this 27th day of February, A. D. 1872.

HENRY L. CROSSER,
THE SCIOTO TRUST ASSOCIATION,
By A. MCFARLAND, *President*,
GEORGE DAVIS, *Treasurer*."

[777] On the following day, February 28, 1872, Crosser executed to the Association the following assignment:

"In consideration of the terms and stipulations of a certain agreement, concluded by and between the undersigned and the Scioto Trust Association, of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign to said Scioto Trust Association all my right, title and interest in and to the within life insurance policy No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing and recoverable by virtue of said policy, save and except the one tenth part of the same, which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser or, in case of her death, to such person or persons as the law may direct. And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorney, with full power, in their own name, to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association, to wit: nine tenths thereof, and to pay the balance, one tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom, as above directed and stipulated, the amount, if any, due from me at the time of my death to said Scioto Trust Association, for fees and dues.

Witness my hand and seal, this 28th day of February, A. D. 1872.

HENRY L. CROSSER." [SEAL.]

Crosser died on the 11th of September, 1873, and on the 16th of May, 1874, the Trust Association collected from the Insurance Company the amount of the policy, namely: $5,000; one tenth of which, $500, less certain sums due under the agreement, was paid to the widow of the deceased.

The present action is brought to recover the balance, which, with interest, exceeds $5,000. The defendants admit the collection of the money from the Insurance Company; but, to defeat the action, rely upon the agreement mentioned, and the assignment of the policy stipulated in it. [778] The agreement and assignment are specifically mentioned in the second and third of the three defenses set up in their answer. The first defense consists in a general allegation that nine tenths of the policy was assigned by the deceased to the defendants in good faith, and for a valuable consideration; and that a power of attorney was executed to them at the time to collect the remaining one tenth and pay the same over to the widow of the deceased; and that after the collection of the amount, they had paid the one tenth to her and taken her receipt for it.

The case was tried by the court without the intervention of a jury. On the trial, the plaintiff gave in evidence the deposition of the receiver of the insurance company, who produced from the papers in his custody the policy of insurance, the agreement and assignment mentioned, the proofs presented to the company of the death of the insured, and the receipt by the Trust Association of the insurance money. There was no other testimony offered. The court thereupon found for the defendants, to which finding the plaintiff excepted. Judgment being entered thereon in their favor, the case is brought to this court for review.

Mr. **J. B. Foraker**, for plaintiff in error:

Defendants had no insurable interest in the life of Crosser. He was not indebted to them, and could not be of kin to a partnership.

Ins. Co. v. *Schaefer*, 94 U. S., 460, (XXIV., 253).

No fraud was practiced on the insurance company by Crosser or anyone else.

The company paid the policy, with a full knowledge of all the facts.

Crosser authorized defendants to carry his policy for him, to collect it when he died, to reimburse themselves for all moneys expended on his account and pay $500 to his widow, all of which was done and about none of which do we make any complaint.

By the terms of the agreement, defendants were to keep all the balance as and for their own, and that they are endeavoring to do.

Our claim is, that Crosser had a right to insure his life. He did so. This policy was valid.

Having this policy, he had a right to assign it to defendants, to secure anything he might owe to them or anything they might agree to assume and pay for him. He had a right to procure them to carry his policy for him, and to assign it to them for their indemnity. They had a right to agree to pay his premiums and to take an assignment of the policy to secure their re-imbursement. Such, in part, was the

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transaction in question. So far we do not complain of it, but stand upon it. But while the law allows such a transaction it will not, we maintain, allow the assignor of a policy to go further, and by agreement and assignment acquire what has been fitly termed an interest in the death of the assured. Such speculation in life is against public policy.

Ins. Co. v. *Hazard*, 41 Ind., 116. *Ins. Co.* v. *Sturges*, 18 Kan., 93; see, especially, *Cammack* v. *Lewis*, 15 Wall., 643 (82 U. S., XXI., 244).

Messrs. W. A. Hutchins and **A. C. Thompson**, for defendants in error:

Counsel for plaintiffs seem to argue that the agreement, between Crosser and the defendants, and the assignment made in pursuance thereof, were illegal, but that the policy of insurance itself was valid and free from all taint; and he repudiates the agreement and assignment, and plants himself on the policy. But the agreement, the taking out of the policy, and the assignment, were only parts of one transaction; and the parties thereto were not only Crosser and the defendants, but the insurance company also. The company issued the policy with full knowledge of the agreement between Crosser and the defendants, and knew that it was to be owned by them in the proportions stipulated in the agreement. If the agreement and assignment were illegal, as claimed by plaintiff's counsel, for want of an insurable interest on the part of the defendants in Crosser's life, then, for the same reason, the policy was invalid because they were parts of one transaction. The doctrine of plaintiff's counsel would defeat, not promote, public policy in such cases. It might have enabled plaintiff to recover on the policy against the insurance company, notwithstanding nine tenths of it was really taken out for the benefit of persons having no insurable interest in the life of the assured. The contrary of this has been decided by the chancery division of the High Court of Justice in England, in the case of *Worthington* v. *Curtis*, L. R., 1 Ch. D. 419, Moak, 836.

Again; the assignment of the policy to the defendants was not made, as suggested by counsel for plaintiff, by way of indemnity, in whole or in part, to secure defendants for advances toward premium, but was an absolute assignment of nine tenths of the policy, in consideration of the terms and stipulations of the agreement in pursuance of which the policy was taken out. It is expressly stated to be "in consideration of the terms and stipulations" of that agreement. Counsel must not manufacture an assignment to suit the exigencies of this case, but must be content to stand upon the one made by the parties.

The transaction was not in contravention of any statute and was not, necessarily, wrong in itself. It is not impossible to conceive of a poor man, desirous of making provision for his family by insurance on his life, seeking the assistance and making the arrangement that Crosser made with the defendants, and of its being done in perfect good faith by both parties.

Can it be said as a matter of law, without reference to what the parties as a matter of fact intended, that in its nature necessarily it was a mere gambling speculation? We think not. Its charter is to be determined by the intention of the parties, and that intention is a question of fact for the jury.

Ins. Co. v. *France*, 94 U. S., 561 (XXIV., 287); *Ins. Co.* v. *Schaefer*, 94 U. S., 460 (XXIV., 253); see, also, *Brooks* v. *Martin*, 2 Wall., 70 (69 U. S., XVII., 732); Pollock, Cont., 339; Lindley, Part., 160.

Mr. Justice **Field** delivered the opinion of the court, as follows:

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defense. All the facts established by it are admitted in the other defenses. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine tenths of the money collected on the policy. For alleged error in these particulars, the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the Trust Association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the Association for any other purpose. The Association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination. [779]

It is not easy to define, with precision, what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor

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is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy or an interest in it could, in consideration of paying the premiums and assessments upon it, and the prom-
[780] ise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the state courts; and there is a conflict in their decisions. In *Ins. Co.* v. *Hazzard*, which arose in Indiana, the policy of insurance, which was for $3,000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for $20 to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." 41 Ind., 116. The court referred with approval to a decision of the same purport by the Supreme Court of Massachusetts, in *Stevens* v. *Warren*, 101 Mass., 564. There the question presented was, whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not, holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured and, after remarking that
[781] the contract in such a case might be sustained, said, "That the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon anyone was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the Association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary *chose* in action, and that the assignee is entitled, upon the death of the assured, to the full sum, payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John* v. *Ins. Co.*, 13 N. Y., 31; *Valton* v. *Loan Fund L. Assur. Co.*, 20 N. Y., 32. In the opinion in [782
the first case, the court cite *Ashley* v. *Ashley*, 8 Sim., 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other, so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject, we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in *Cammack* v. *Lewis*, 15 Wall., 643 [82 U. S., XXI., 244]. There a policy of life insurance for $3,000 procured by a debtor at the suggestion of a creditor to whom he owed $70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow $950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected and recovered judgment. The case being brought to this court, it was held

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that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned and for such advances as he might have afterwards made on account of it, and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

783] *The judgment of the court below will, therefore, be reversed and the cause remanded, with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendant; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 505; 112 U. S., 165; 29 Hun, 472; 104 Pa. St., 79; 49 Am. Rep., 573.

783] CHARLES FOX, *Plff. in Err.*,
v.
CITY OF CINCINNATI.

(See S. C., 14 Otto, 783-786

Lease of surplus water of canal—reserved right of State.

1. Where the Board of Public Works of Ohio leased the surplus water in the canals of the State, with a reservation of the right to resume the privilege, whenever it might be deemed necessary for the purposes of navigation, a subsequent statute of the State, granting part of the canal for a public highway, which amounted to a rescission of the lease, is not void under the Constitution of the United States, because it deprived the lessee of his property without due process of law and without just compensation.

2. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the State to discontinue its canal and stop his supply of water.

[No. 174.]

Submitted Dec. 9, 1881. Decided Mar. 6, 1882.

IN ERROR to the Supreme Court of the State of Ohio.

The case is stated by the court.

Messrs. **Charles Fox** and **Timothy D. Lincoln,** for plaintiff in error.

Messrs. **Clement Bates** and **P. H. Kumber,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

By the laws of Ohio the Board of Public Works was authorized to sell or lease, for hydraulic purposes, the surplus water in the canals of the State not required for the purposes of navigation. This included water passing round the locks from one level to another; but it was expressly provided that no power should be leased or sold except such as should accrue from surplus water "After supplying the full quantity necessary for the purposes of navigation." The laws also required that every lease or grant of power should contain a reservation of the right to resume the privilege, in whole or in part, whenever it might be deemed necessary for the purposes of navigation. In case of resumption, the rents reserved were to be remitted or correspondingly reduced. R. S., 1880, secs. 7775-7778; Act of March 23, 1840, Laws of 1840, p. 174, secs. 20-23. [784]

The State owned, among others, the Miami and Erie Canal, having one of its *termini* at the City of Cincinnati, where it connected with the Ohio River through a series of locks, beginning on the east side of Broadway, a street in the City. A lease was made, by the Board of Public Works, of the water which passed around one of these locks, known as lock No. 8, for hydraulic purposes. Provision was made in accordance with the requirements of the law for a resumption of the privilege, if deemed necessary for the purposes of navigation, etc. Charles Fox, the plaintiff in error, became the owner of this lease as early as 1855.

On the 24th of March, 1863, a statute was enacted, under which a grant was made to the City of that part of the canal between Broadway and the river for a public highway and sewerage purposes, but subject to all outstanding rights or claims, if any, with which the grant might conflict. No work could be done by the City upon the granted premises until its plan of improvement should be approved by the Board of Public Works. Section 2 of the statute authorizing this grant was as follows:

"Sec. 2. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said City, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes; and that said City shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by 'An Act to Provide for Leasing the Public Works of the State,' passed May 8, 1861, or by the instrument of lease executed in pursuance of said Act, except as and to the extent that they may be interfered with, as said City may, from time to time, enter upon, improve and occupy any part of said grant."

In constructing the avenue contemplated by the statute, it is claimed that the power to be furnished under the lease which Fox holds, has been destroyed. This suit was brought by Fox against the City to recover the damages which he alleges he has sustained on that account. [785] The City in its defense relied, among other things, on the statute as an abandonment of the canal by the State for the purposes of navigation, and claimed that this amounted to a rescission of the lease. To this Fox replied, that if the statute had that effect it was void under the Constitution of the United States, because it deprived him of his property without due process of law, and without just compensation. The Supreme Court of the State sustained the law, and to test the correctness of that decision this writ of error has been brought.

That the State by its grant to the City actually abandoned the canal at the point in question, cannot be denied. The use of the property as a public street is clearly inconsistent with all ideas of navigation by water. The single ques-

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tion we have to consider is, whether there is anything in the lease under which Fox claims which prevents the State from making such an abandonment without compensation to him. Whether the City has acted in excess of the grant and violated the provisions of section 2 of the statute, so as to render itself liable for damages on that account, is for the state court to determine, and its decision on that question is not reviewable here.

The use of the water for hydraulic purposes is but an incident to the principal object for which the Canal was built, to wit: navigation. The large expenditures of the State were not to create water-power, but to furnish a navigable highway for the transportation of persons and property. The authority of the Board of Public Works to contract in respect to power was expressly confined to such water as remained after the wants of navigation had been supplied, and it never could have been intended in this way to impose on the State an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the State to maintain the canal for navigation any longer than the public necessities seemed to require. When it was no longer needed, it might be abandoned; and if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation, but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the State was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements, with full notice of the reserved right of the State to discontinue its canal and stop his supply of water.

[786]

This is in accordance with repeated decisions, both in Ohio and other States, and seems to us fully sustained on principle and authority. *Hubbard* v. *Toledo*, 21 Ohio St., 379; *Elevator Co.* v. *Cincinnati*, 30 Ohio St., 629; *Trustees, W. & E. Canal* v. *Brett*, 25 Ind., 409; *Fishback* v. *Woodruff*, 51 Ind., 102; *Com.* v. *R. R. Co.*, 51 Pa., 351. We are referred to no case to the contrary.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD MELLON ET AL., *Appts.*, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

Burden of proof in action for infringement of letters patent.

In an action for infringement of letters patent, where the defense is a license to use the improvement, and the plaintiff asserts that the license had been delivered as an escrow and not absolutely, which the defendant denies and asserts that the delivery was upon a valuable consideration and was absolute, and the license is in defendant's possession and is produced by him on the trial, and is on its face absolute and without condition, the burden of proof is on the plaintiff to show that it was delivered as an escrow.

[No. 244.]

Submitted Mar. 24, 1882. Decided Apr. 3, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The case is stated by the court.

Messrs. **Hector T. Fenton** and **Furman Sheppard,** for appellants.

No counsel appeared for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The bill charged infringement of letters patent, dated October 2, 1866, granted to Edward Mellon, one of the complainants, for an improvement in the mode of attaching tires to wheels of locomotives. Mellon had assigned a one half interest in his letters patent to William Matthews and they two were joined as complainants.

The defendant pleaded that while Mellon was the sole owner of the patent, to wit: on May 15, 1867, he had, for a valuable consideration, granted a license in writing to the defendant for the full term of the patent to use the improvement described therein upon all its locomotives, locomotive tires and wheels.

The complainants took issue on this plea. The circuit court heard the cause upon the pleadings and evidence and dismissed the bill. The appeal of the complainants has brought up the case for our consideration.

To support the issue on its part the defendant produced a license in writing, signed and sealed by Mellon, dated May 15, 1867, which, its execution being admitted by Mellon, proved every allegation of the plea.

The appellants asserted, however, that the license had been delivered as an escrow to John Brisbin, the president of the appellee, in order that he might present it at the next meeting of the board of directors of the Company, and if the board consented to pay and did pay $3,500 for the license, it was to take effect, otherwise not; and that nothing whatever had been paid for it. The appellee denied this, and asserted that the delivery was upon a valuable consideration received by Mellon; was absolute and without condition or reference to any future contingency.

As the license is in the possession of appellee and is produced by it on the trial, and on its face is absolute and without any limitation or condition, the burden of proof is upon the appellants to show that it was delivered as an escrow.

The only evidence to maintain their side of the controversy is the deposition of Mellon. On the part of the appellee is the testimony of Brisbin, its president, to whom the license was delivered. His deposition contains a direct and explicit denial of the testimony of Mellon in reference to the delivery of the license, and he is corroborated by the evidence of another wit-

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ness, who was superintendent of the rolling stock of the appellee at the time the license was delivered

The case turns upon a single question of fact. The burden of proving that fact is on the appellants, but the weight of the evidence is with the appellee.

The decree of the Circuit Court dismissing the bill was right, and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

END OF VOL. 104

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1881,

Vol 105.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1881.

[6] THE BANKING HOUSE OF BARTHOLOW, LEWIS & COMPANY, *Plf. in Err.*,

v.

THE TRUSTEES OF SCHOOLS OF TOWNSHIP NO. 4 S. R. 8 W., RANDOLPH COUNTY.

(See S. C., 15 Otto, 6.)

Review of decisions of Circuit Court.

Final judgments or decrees of the Circuit Courts in civil suits or proceedings, wherein there has been a division of opinion of the judges, are only reviewable here on writ of error or appeal.

[No. 12.]

Submitted Oct. 25, 1881. Decided Oct. 30, 1881.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Illinois.

This action was brought in the court below by the banking house of Bartholow, Lewis & Co. against the defendants, upon certain coupons detached from bonds purporting to have been issued in payment of stock in the Cairo & St. Louis Railroad Company under an Act of the Legislature approved February 16, 1869, entitled "An Act to Amend 'An Act to Incorporate the Cairo & St. Louis Railroad Company.'" Each bond contained the following clause:

"This bond is issued under and in pursuance of, and authorized by, a vote of the legal voters of said township, and in accordance with the laws of the State of Illinois." The defendants filed a general demurrer to the declaration of the plaintiff, and the court below sustained the demurrer, dismissing plaintiff's suit, and rendering judgment of perpetual bar against the plaintiff.

The Judges being opposed in opinion upon the law of the case, certified to this court four questions, as follows:

1. Whether the defendant had authority, under the Constitution and laws of the State of Illinois at the time said subscription was made, to subscribe to the capital stock of the Carroll & St. Louis Railroad Company, all the facts averred in the declaration being true.

2. Whether the several provisions of the Act which authorized the defendants to hold an election, subscribe stock and issue and deliver bonds to aid in the construction of said railroad, were unconstitutional.

3. Whether such subscription by defendant to the stock of said company, and the taxes authorized to be assessed and collected under the Act mentioned, were for corporate purposes.

4. Whether the plaintiff, being a *bona fide* holder for value, the defendant is estopped by the recitals in the bonds from denying they were lawfully issued, as stated therein, and in full compliance with the constitution of the State.

Messrs. **John D. Stevenson** and *Noble & Orrick*, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

All the questions certified in this case are answered in the negative, on the authority of *Weightman* v. *Clark*, [*ante*, 392]. As the judgment was in accordance with this opinion, it would have been, in all respects, affirmed if the case had been brought here by writ of error. We find no such writ, however, and on that account *dismiss the suit for want of jurisdiction*. Under section 698, Revised Statutes, final judgments of the Circuit Courts in civil actions, wherein there has been a division of opinion of the judges, are only reviewable here on writ of error or appeal. The Act of 1802, 2 Stat. at L., 159, ch. 31, sec. 6, which allowed the questions to be certified up before judgment, was superseded by the Act of June 1, 1872, 17 Stat. at L., 196, ch. 255, sec. 1.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM K. PARCHER ET AL., *Appts.*, [773]

v.

JAMES H. CUDDY, Admr., ET AL.

(See S. C., "*The Mamie*," 15 Otto, 773, 774.)

Jurisdiction as to amount.

In a suit by the owners of a vessel to obtain the benefit of the Act of Congress limiting the liability

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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of vessel owners, the value of the matter in dispute is the full amount of all the claims against the owners, and if such amount is over $5,000, this court has jurisdiction of an appeal, although the value of the vessel is less than $5,000.

[No. 1114.]

Submitted Oct. 25, 1881. Decided Oct. 31, 1881.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

Motion to dismiss.

The libel and petition in this cause was filed by the appellants, the owners of the steam yacht Mamie in the District Court of the United States for the Eastern District of Michigan. They averred that The Mamie, a small pleasure yacht, was sunk in the Detroit River, by a collision with the steamer Garland, and that, in consequence, seventeen persons on board The Mamie were drowned; that thirteen suits had been commenced in a state court by one Cuddy, as administrator of the estates of the persons drowned, in each of which suits he claimed to recover $5,000 damages, and that petitioners had reason to believe that other claims would be made against them, growing out of the same collision, and that all of the claims made greatly exceeded the value of The Mamie. Petitioners prayed that they might be decreed entitled to the limitation of liability provided by sections 4283–4286, Rev. Stat. U. S.; that an appraisal be had of the value of The Mamie, and proffered payment into court or security for such appraised value. They also prayed an injunction against the further prosecution of the suits in the state court, and against the commencement of other suits. The administrator appeared and denied the right of the petitioners to the relief prayed, and pleaded to the jurisdiction of the district court. The district court dismissed the libel, and the circuit court, on appeal, affirmed the decree of the district court. The libelants thereupon appealed to this court.

Motion was now made to dismiss the appeal, on the ground that the matter in dispute, exclusive of costs, did not exceed the sum or value of $5,000.

Mr. **Alfred Russell,** in support of the motion.

Messrs. **A. B. Maynard & H. H. Swan** and *Moore, Canfield & Warner* opposed.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The record has not [774] been printed, but the value of the matter in dispute, as shown by the briefs submitted, is at least the full amount of all the claims against the owners of The Mamie in the several suits which it was the object of this proceeding to defeat, as against anything else than the boat or her value. This, according to the showing now made, is largely in excess of $5,000.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 6.

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[4] ANDREW J. DAVIS AND CHARLES L. CLARK, *Plffs. in Err.*,

v.

SARAH J. FREDERICKS AND WELLINGTON A. FREDERICKS.

(See S. C., 15 Otto, 4, 5.)

Immaterial error—objection, when taken—findings of fact.

1. A judgment will not be reversed because of an error of the court in directing as to the order in which testimony should be introduced, unless it clearly appears that the complaining party has been injured by what was done.

2. An objection not brought to the attention of either of the courts below, comes too late if made in this court for the first time.

3. The findings of the court below are conclusive as to the facts. Where the court declined to find facts, this court must assume that they were not established by the evidence.

[No. 178.]

Submitted Dec. 19, 1881. Decided Jan. 16, 1882.

IN ERROR to the Supreme Court of the Territory of Montana.

This cause grows out of the same controversy that is involved in No. 177, *ante*, 849, and is a consolidation of two suits into one.

Davis, one of the plaintiffs in error, having obtained a judgment against Wellington A. Fredericks, one of the defendants in error, caused a writ of attachment by way of execution to be issued and placed in the hands of his co-plaintiff, Charles L. Clark, the sheriff of Gallatin County, in the Territory of Montana. The sheriff levied upon some flour, wheat, shingles and lumber, alleged to be, in fact, the property of the judgment debtor, W. A. Fredericks, but claimed by his wife and co-defendant in error, Sarah J. Fredericks, to belong to her in her own right.

These suits were thereupon instituted, one in the name of Sarah J. Fredericks alone, and the other in the name of herself and her husband, to recover from the sheriff the property seized by him, or its value.

The main issue, therefore, was the question of the ownership of the property.

The consolidated cases were submitted to the District Court without a jury, which was waived under the Statute of Montana; and the court found the issue generally in favor of the defendants in error, the plaintiffs below.

The Supreme Court of the Territory affirmed that decision, and the cause is now here on writ of error to the judgment of the Territorial Supreme Court.

Messrs. **Richard T. Merrick** and **Martin F. Morris,** for plaintiffs in error.

Messrs. **Samuel Shellabarger** and **Jeremiah M. Wilson,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The assignments of error in this case are: [5]

1. That Mrs. Fredericks, when on the stand as a witness in her own behalf, was not permitted to answer certain questions put to her on cross-examination.

2. That the court did not separate its findings of fact from its conclusions of law. And,

3. That the court did not find the distinct facts requested by the plaintiffs in error.

As to the first assignment, it is sufficient to say that no harm could have resulted from the ruling on the cross-examination, as in a subsequent stage of the case, when the questions were clearly proper, the witness testified fully as to all the matters originally inquired about. A judgment will not be reversed because of an error of the court in directing as to the order in

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which testimony shall be introduced, unless it clearly appears that the complaining party has been injured by what was done.

The matter referred to in the second assignment does not seem to have been brought to the attention of either of the courts below, and the objection now made comes too late in this court for the first time. If the defect complained of had been specifically pointed out to the district court when the findings were filed, it would, no doubt, have been corrected. There is nothing in all this very confused record to indicate that the point was ever made until the brief for the plaintiff in error was filed here.

The findings are conclusive as to the facts, and they cover all the issues. Whether the distinct facts set forth in the requests for findings presented by the plaintiff in error were proved or not, we need not inquire. As the court declined to find them, we must assume they were not established by the evidence.

This record is so confused as to be almost unintelligible. If counsel here had been less careful in the presentation of the questions raised for our re-examination, we should have declined to consider the case on this account.

The judgment is affirmed.

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[3] LOGAN O. SWOPE, *Plff. in Err.*,

v.

HIRAM W. LEFFINGWELL, HENRY HONORE, CHAUNCEY I. BOWEN, JOHN W. DOANE AND THE ATLAS NATIONAL BANK OF BOSTON.

(See S. C., 15 Otto, 3, 4.)

Mortgage to national bank—validity of.

1. A suit, to restrain and enjoin the sale of real estate under a deed of trust executed to secure the payment of of a promissory note purchased by a national bank, presents a federal question, and this court has jurisdiction of the case.
2. As the only federal question presented on the merits was decided by the court below in accordance with our rulings in National Bk. v. Matthews, XXV., 188, and National Bk. v. Whitney (*ante*, 448), the motion to affirm is granted.

[No. 1143.]

Submitted Jan. 9, 1882. Decided Jan. 23, 1882.

IN ERROR to the Supreme Court of the State of Missouri.

Logan O. Swope, by his petition filed in the Circuit Court of St. Louis County, represented that he had executed certain promissory notes therein described, and to secure payment thereof, he had made to H. F. Leffingwell a deed of trust on certain real estate. The petition sets forth the transaction between the parties, by which it is claimed that these notes had been fully satisfied, so far as to relieve the petitioner from liability and to free the property contained in the trust-deed.

Notwithstanding this, it is averred that the defendants, Honore, Bowen, Doane, The Atlas National Bank and Leffingwell, refuse to enter satisfaction of said deed of trust, and insist that the notes are still valid and subsisting demands against petitioner.

The prayer is, that the defendants be enjoined from proceeding to enforce the deed of trust, etc., etc.

On the hearing, * * * to wit: November 9, 1876; * * * a judgment was rendered for petitioner as prayed for.

In the opinion filed by the Judge it is said, *inter alia*, that "The Atlas National Bank had acquired title to the notes held by it and to the deed of trust, in violation of the Act of Congress."

On appeal, this judgment was affirmed by the St. Louis Court of appeals, on December 4, 1877, where it was said: "The question as to the power of the bank to acquire real estate securities at the time it made the discount, we do not consider an open question, as it was directly passed upon by the Supreme Court of this State. *Matthews* v. *Skinker*, 62 Mo., 329.

The Supreme Court of the State however, reversed the judgment of the St. Louis Court of Appeals, and the bill was dismissed with costs, and Swope sued out the present writ of error.

The defendants in error now move to dismiss the writ of error for want of jurisdiction; uniting therewith a motion to affirm, on the ground that the writ was sued out for delay only, or that the question on which the jurisdiction depends was so frivolous as not to need further argument.

Mr. **Philip Phillips,** for defendants in error.

Mr. **E. B. Sherzer,** for plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We have jurisdiction of this case. *The motion to dismiss is, therefore denied;* but as the only federal question presented on the merits was decided by the court below in accordance with our rulings in *Bank* v. *Matthews*, 98 U. S., 621 [XXV., 188], and *Bank* v. *Whitney* [*ante*, 448], *the motion to affirm is granted.* [4]

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 413.

JOSEPH LEHNBEUTER AND CASPER CLAES, *Appts.*, [94]

v.

ARNOLD HOLTHAUS AND ANTON HOLTHAUS, Partners as HOLTHAUS BROTHERS.

(See S. C., 15 Otto, 94-97.)

Valid patent—patent as evidence.

1. Patent No. 8814 for show cases, granted to Joseph Lehnbeuter and Casper Claes, is valid.
2. A patent for an invention is *prima facie* evidence of both its novelty and utility.

[No. 203.]

Argued Jan. 6, 1882. Decided Mar. 6, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

NOTE.—*Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.* See, *note* to Martin v. Hunter, 14 U. S. (1 Wheat.), 304; *note* to Matthews v. Zane, 8 U. S. (4 Cranch), 382; and *note* to Williams v. Norris, 25 U. S. (12 Wheat.), 117.

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Statement of the case by *Mr. Justice* **Woods:**

The bill which was filed in the circuit court by the appellants, charged infringement by defendants of design patent No. 8814 for show cases, granted to the complainants jointly, and dated November 30, 1875.

The answer denied that the complainants were the first inventors of the design patented; denied its utility and denied that the defendants infringed. To sustain these denials, all the testimony offered by the defendants was directed.

[95] Upon final hearing the circuit court dismissed the bill because "Said letters patent were not good and valid in law," and the complainants have brought the case to this court by appeal.

The record contained certain stipulations in respect to the evidence. These were:

"That the following exhibits may be produced by either party at the hearing upon an appeal in the Supreme Court, and used in evidence as a portion of the transcript herein, *viz.*: 'Defendants' Exhibit, Wiegal Catalogue,' and 'Defendants' Exhibit, Maw's Price Current;' also, 'Design Patents Nos. 8287, 8813, and 8814;' also, 'Complainants' Exhibit Holthaus Circular.'

That it shall be taken as admitted for the purposes of this case that said exhibits, 'Wiegal Catalogue' and 'Maws' Price Current,' were issued prior to January, 1874.

That the circular marked 'Complainants' Exhibit Holthaus Circular, is a copy of circulars issued by the defendants in the month of July, 1877, and subsequently thereto; that the cuts therein correctly represent show cases made and sold by the defendants in St. Louis within said Eastern District of Missouri, during and after January, 1877, and before the commencement of this suit, and still made and sold by them; also, that the circular marked 'Complainants' Exhibit, Claes & Co., Circular,' is a copy of a publication issued and circulated by complainants in the month of September, 1875, and subsequently thereto; also, that the model marked on bottom 'Complainants' Exhibit Model No. 1,' under the hand of the same notary, correctly represents show cases made and sold by defendant in said St. Louis during and after the month of January, 1877, and before the commencement of these suits."

The only witness in the case was Charles K. Pickles, who testified for the complainants that he made the original drawings from which the plates were made of the cuts 33, 34 and 36 of the Holthaus Circular; that he made the drawings for Holthaus, the defendant, who gave him cuts from Claes & Co.'s Circular, from which to make the plates or prints, and that there were slight changes suggested by Holthaus, which the witness followed in making the drawings.

The Wiegal Catalogue, Maw's Price Current, the Holthaus Circular, and the design patents, [96] numbered respectively 8287, 8813 and 8814, with their drawings, the first granted to Joseph Lehnbeuter, and the other two to Lehnbeuter and Claes, the complainants, were put in evidence. The one last named was that on which this suit was brought.

Mr. **Robert H. Parkinson,** for appellants.

Mr. S. S. Boyd, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

A comparison of the drawing which is appended to patent No. 8814, with cut No. 34 of the Holthaus Circular, which it is admitted represents show cases manufactured and sold by the defendants, during and since January, 1877, makes it clear that the latter is a servile copy of the former, excepting a slight inclination backwards, hardly perceptible to the naked eye, of the glass constituting the front of the elevated portions of the case. We think, therefore, that the infringement is clearly established.

The attempt to prove that the complainants were not the first inventors of the design covered by their letters patent, has entirely failed. The only evidence offered on this branch of the defense are the publications designated as Maw's Price Current, and the Wiegal Catalogue. The first of these bears date in 1869, and the latter in 1872. After a careful search through both, we have been unable to find any design for a show case which remotely resembles that described in the complainants' patent.

The design patented by the complainants differs essentially from any other which has been called to our attention. It is not covered by the other patents which are set out in the record. Whether it is more graceful or beautiful than older designs, is not for us to decide. It is sufficient if it is new and useful.

The patent is *prima facie* evidence of both novelty and utility, and neither of these presumptions has been rebutted by the evidence. On the contrary, they are strengthened. No anticipation of the design is shown, although the attempt has been made to prove anticipation. The fact that it has been infringed by [97] defendants, is sufficient to establish its utility, at least as against them. Swayne, *J.*, in *Whitney* v. *Mowry*, 4 Fisher, 207.

Our conclusion is that the complainants have a valid patent which the defendants have infringed. *The decree of the Circuit Court dismissing their bill must, therefore, be reversed and the cause remanded for further proceedings in conformity with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MICHAEL McCORMICK, *Appt.*, [122]

v.

JOHN JAY KNOX, Commissioner of the FREEDMAN'S SAVINGS AND TRUST COMPANY, ET AL.

(See S. C., 15 Otto, 122-126.)

Redemption from mortgage.

A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid the sum so advanced, when the mortgagor or his vendee or a subsequent mortgagee comes to redeem.

[No. 1084.]

Submitted Jan. 23, 1882. Decided Mar. 6, 1882.

APPEAL from the Supreme Court of the District of Columbia.

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Statement of the case by *Mr. Justice* **Woods:**

The pleadings and evidence in this case disclose the following state of facts:

Prior to October 3, 1871, R. W. Bruff was the owner in fee of certain real estate in the City of Washington. On the day just mentioned he executed to Albert J. Meyer his promissory note of that date for $5,000, payable in five years, and secured it by a deed of trust on said property, with power of sale, to one Wimer, as trustee. On June 29, 1872, Bruff conveyed the property to Mary J. Wheeler (widow), who [123] afterwards, on July 1, 1872, for the accommodation of Bruff, made her note of that date, payable one year after date to the order of Bruff, for $2,000, and to secure it executed a deed of trust on the same property to W. H. Ward as trustee, with power of sale in case of default in the payment of the note.

On July 13, 1872, Bruff, for himself and his partner, one Holtzclaw, executed to the Freedman's Savings and Trust Company a note for $3,000, and as collateral security therefor deposited with the Company forty shares in the Capital Hill Building Association, and the above mentioned note of Mrs. Wheeler, secured as aforesaid. Payments were made upon the note of Holtzclaw & Bruff, so that on April 9, 1873, there appeared to be due thereon the sum of $1,045.

On June 3, 1873, Mrs. Wheeler conveyed the property to the appellant, Michael McCormick, by deed of that date, which, though absolute on its face, it is clear from the evidence was merely given as security for a pre-existing debt.

The Freedman's Savings and Trust Company having become insolvent, three commissioners were appointed under an Act of Congress to take possession of and administer its assets. They entered on their duties about July 12, 1874. Default having been made in the payment of the balance due on the note of Holtzclaw & Bruff, and also in the payment of the note made by Mrs. Wheeler, the Commissioners of the Freedman's Savings and Trust Company directed Ward, the trustee, to proceed to execute the trusts imposed on him by the trust-deed made by Mrs. Wheeler on July 1, 1872. He accordingly advertised the property conveyed to him by the trust-deed, and it was sold at public auction on March 17, 1876, and bid in by the commissioners, to whom Ward, the trustee, made a deed of conveyance.

The note for $5,000, which was held by Meyer, having become due, he insisted that it should be paid, and threatened, if it were not paid, to cause the property to be again advertised and sold under the trust-deed to Wimer. The commissioners thereupon paid Meyer the amount due on the note held by him, namely: $6,128 and received from the trustee, Wimer, a deed of release to the property.

After the conveyance of the property by Ward to the commissioners, they took possession of it, and received its rents until March 17, 1879.

[124] On March 15, 1879, McCormick filed the bill in this case against the commissioners. He founded his title to relief upon the deed made to him by Mrs. Wheeler on June 3, 1873. The prayer of his bill was, that on account of certain alleged informalities, the sale made by Ward, trustee, to the commissioners might be declared void and his deed canceled; that an account might be taken of the balance due on the note secured by the trust-deed to Ward, and that the rents received by the commissioners while in possession of the property might be set off against such balance, and for general relief.

The commissioners filed an answer and cross-bill. In the latter they prayed that the sale made to them by Ward, the trustee, might be ratified and confirmed, and their title to the property declared good and valid.

McCormick, the appellant, answered the cross-bill, in which he denied the right of Ward, the trustee, to sell the property, the regularity of the sale, etc.

There were other pleadings in the case which are not necessary to be stated, upon this appeal.

By virtue of an Act of Congress approved February 21, 1881, the court made an order substituting Knox, the present appellee, for the three original commissioners. Upon final hearing on the pleadings and evidence, the court, in Special Term, made a decree to the effect that McCormick or Mrs. Wheeler might redeem the property by paying the balance due on the note for $3,000 made by Holtzclaw & Bruff to the Freedman's Savings and Trust Company, and also the amount paid by the commissioners on the note held by Meyer, and the sums paid by them for taxes, insurance and repairs upon the property in question, after deducting the rents collected by them; but in case said sums were not paid within thirty days after confirmation of the auditor's report ascertaining the same, the sale and deed by Ward, the trustee, to the commissioners should stand ratified and confirmed. McCormick appealed from this decree to the court in General Term, by which it was affirmed, and has brought the case to this court by appeal from the latter decree.

Messrs. **John J. Weed, William A. Meloy** and *W. T. Johnson*, for appellant.

Mr. **Enoch Totten,** for appellee.

Mr. Justice **Woods** delivered the opinion of the court: [125]

The counsel for appellant has submitted an argument to show that the sale and deed made by Ward, the trustee, to the Commissioners of the Freedman's Savings and Trust Company, was void. Without discussion of this question, we simply declare our opinion to be, that there is no solid ground for this contention to rest upon. But, whether the sale is valid or not, is an immaterial question in this case, for the decree of the court below permitted the complainant to redeem the property and so avoid entirely the effect of the sale and deed by the payment of the balance due on the promissory note for $3,000 made by Holtzclaw & Bruff to the Freedman's Savings and Trust Company, and the amount due on the note for $5,000 made by Bruff to Meyer, and the taxes, etc., paid by the Commissioners of the Freedman's Savings and Trust Company, after deducting the rents received by them. The decree of the court below substantially gives the appellant all the relief prayed for by his bill, on condition, however, that he should pay off the incumbrances on the property in question, older and better than his own.

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The only practical question, therefore is, were the terms upon which the appellant and his grantor, Mrs. Wheeler, were allowed to redeem, just and right? Upon this point, it seems to us, there can be no doubt. The amount due on the note of Holtzclaw & Bruff, it is conceded, is less than the sum due on the note of Mrs. Wheeler, which it was pledged to secure. Neither she nor her grantee, the appellant, can complain if they are required to pay the balance, whatever it may be, due on the Holtzclaw & Bruff note before they can be allowed to redeem. It is equally clear that they ought to be required to pay the sum applied by the commissioners to discharge the amount due on the [126] note held by Meyer, which was secured by a trust-deed on the premises in controversy and was the first lien thereon.

The contention of complainant that he should receive a clear title to the property, without first discharging the lien thereon created by the trust-deed of Mrs. Wheeler, and without first paying the sums which had been applied by the commissioners to the discharge of the lien held by Meyer, both of which were prior in date to his own, is not founded on any equity and is not supported by any authority. On the contrary, it is clear that the Commissioners of the Trust Company, having paid off the oldest incumbrance on the property, are entitled to be subrogated to the rights of the incumbrancer. *Robinson* v. *Ryan*, 25 N. Y., 320; *Redmond* v. *Burroughs*, 63 N. C., 242.

A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid the sum so advanced when the mortgagor or his vendee comes to redeem. *Page* v. *Foster*, 7 N. H., 392; *Arnold* v. *Foot*, 7 B. Mon., 66; *Harper* v. *Ely*, 70 Ill., 581.

The same rule applies to the payment by the mortgagee of taxes on the mortgaged premises, or any valid assessment thereon for public improvement. *Dale* v. *McEvers*, 2 Cow., 118.

The decree of the court below gave the complainant every right which the law accorded him. *It must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[126]

WILSON AGER ET AL., *Appts.*
v.
TALBOT C. MURRAY.

(See S. C., 15 Otto, 126-132.)

Patent-right.

*A patent-right may be subjected by bill in equity to the payment of a judgment debt of the patentee.

[No. 1034.]

Submitted Jan. 16, 1882. Decided Mar. 6, 1882.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. Warwick Martin and **Thomas T. Crittenden,** for appellants.

Messrs. Durant & Hornor, **Lemon G. Hine** and **S. T. Thomas,** for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

*Head note by *Mr. Justice* GRAY.

This is a bill in equity by a judgment creditor, to subject to the payment of his debt the interest of his debtor in patent-rights. The case was heard in the Supreme Court of the District of Columbia upon bill and answers by which it appears to be as follows:

On the 10th of April, 1876, Talbot C. Murray, [127] in an action at law upon a promissory note, recovered judgment against Wilson Ager for the sum of $2,164.66, with interest and costs. Upon that judgment a writ of *fieri facias* was issued, and returned *nulla bona*. Wilson Ager had no real or personal property in the District, subject to execution at law, but was the owner of sundry letters patent issued to him by the United States for useful inventions, which, if sold, would produce more than enough money to satisfy that judgment. On the 26th of September, 1876, he conveyed all his right and interest in these letters patent to the other defendant, Elisha C. Ager, who owned an equitable interest of one third therein, and who, on the 8th of October, 1877, reconveyed the patent-rights to Wilson by an assignment which was not recorded in the Patent Office. Wilson Ager resides in the District of Columbia, and the other defendant resides in the State of California, and both have appeared in the cause and answered to the merits of the bill.

The bill prays for an injunction against further assignment pending the suit, and that the patents be sold under the direction of the court and the proceeds of the sale applied to the payment of the judgment debt; and the defendant, Wilson Ager, be required to execute such assignment as may be necessary to vest title in the purchaser or purchasers, in conformity with the patent laws, and for further relief. The decree is, that in default of his paying by a certain day the judgment mentioned in the bill, with interest and costs, and the costs of this suit, the patent-rights be sold and an assignment thereof executed by him as prayed for; and that, in default of his executing such assignment, some suitable person be appointed trustee to execute the same.

From that decree the original defendants have appealed to this court; and the single question argued before us is, whether a patent-right may be ordered by a court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee.

A patent or a copyright, which vests the sole and exclusive right of making, using and vending the invention, or of publishing and selling the book, in the person to whom it has been [128] granted by the government, as against all persons not deriving title through him, is property, capable of being assigned by him at his pleasure, although his assignment, unless recorded in the proper office, is void against subsequent purchasers or mortgagees for a valuable consideration without notice. Rev. Stat., secs. 4884, 4898, 4952, 4955. And the provisions of the patent and copyright Acts, securing a sole and exclusive right to the patentee, do not exonerate the right and property thereby acquired by him, of which he receives the profits, and has the absolute title and power of disposal, from liability to be subjected by suitable judicial proceedings to the payment of his debts.

In England it has long been held that a patent-right would pass by an assignment in bank-

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ruptcy, even without express words to that effect in the Bankrupt Act. *Hesse* v. *Stevenson*, 3 Bos. & P., 565; *S. C.*, Davies, Pat. Cas., 263; *Longman* v. *Tripp*, 2 Bos. & P. (N. R.), 67; *Bloxam* v. *Elsee*, 1 Car. & P., 558; *S. C.*, Ry. & M., 187; *S. C.*, 6 Barn. & C., 169; *S. C.*, 9 Dow. & R., 215; *Mawman* v. *Tegg*, 2 Russ., 385; *Edelsten* v. *Vick*, 11 Hare, 78; *Hudson* v. *Osborne*, 39 L. J. Ch. (N. S.), 79. In *Hesse* v. *Stevenson*, *Mr. Justice* Chambre, in the course of the argument, said: "The right to the patent is made assignable; why then may it not be assigned under a commission of bankrupt?" 3 Bos. & P., 571. And *Lord* Alvanley, delivering the unanimous judgment of the court, after observing that it was contended "That the nature of the property in this patent was such that it did not pass under the assignment," and "that although by the assignment every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignee, yet that the fruits of a man's own invention do not pass," said: "It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignee require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry." *S. C.*, 3 Bos. & P., 577, 578. The recent bankrupt Act of the United States, in defining what property should vest in the assignee in bankruptcy, expressly enumerated "all rights in equity, choses in action, patent-rights and copyrights," and required the assignee to sell all the property of the bankrupt for the benefit of his creditors. R. S., secs. 5046, 5062-5064. The only difference is, that in England all such rights pass that become vested in the bankrupt before he obtains a certificate of discharge; whereas, here only those rights pass which belong to him at the time of the assignment.

[129]

It has been said by an English text writer that "A patent-right may be seized and sold in execution by the sheriff under a *fieri facias*, being in the nature of a personal chattel." Webster, Pat., 23. We are not aware of any instance in which such a course has been judicially approved. But it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor, which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation, or of choses in action. *McDermutt* v. *Strong*, 4 Johns. Ch., 687; *Spader* v. *Davis*, 5 Johns. Ch., 280, and *Hadden* v. *Spader*, 20 Johns., 554; *Edmeston* v. *Lyde*, 1 Paige, 637; *Wiggin* v. *Heywood*, 118 Mass., 514; *Sparhawk* v. *Cloon*, 125 Mass., 268; *Daniels* v. *Eldredge*, 125 Mass., 356; *Drake* v. *Rice*, 130 Mass., 410.

In *Stephens* v. *Cady*, 14 How., 528, and again in *Stevens* v. *Gladding*, 17 How., 447 [59 U. S., XV., 155], the point decided was that by a sale of the copper-plate engraving of a map on execution from a state court against the owner of the copyright, the purchaser acquired no right to strike off and sell copies of the map.

Mr. Justice Nelson, in delivering judgment in *Stephens* v. *Cady*, said: "The copper-plate engraving, like any other tangible personal property, is the subject of seizure and sale on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process; certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of creditors." He then cited the cases in Johnson's and Paige's Reports, above referred to, and added: "But in case of such remedy, we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the Copyright Act, in order to vest him with a complete title to the property." 14 How., 531.

[130]

In *Stevens* v. *Gladding*, *Mr. Justice* Curtis said: "There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How., 531, it may be added, that these incorporeal rights do not exist in any particular State or District; they are co-extensive with the United States. There is nothing in any Act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and Districts. That an execution out of the Court of Common Pleas for the County of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That, by the levy of such an execution, the entire right could be divided, and so much of it as might be exercised within the County of Bristol sold, would be a position subject to much difficulty. These are important questions, on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it was attempted to be sold." 17 How., 451 [59 U. S., XV., 156]. The difficulties of which the learned Justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are *in personam*, and may be enforced in all cases where the person is within its jurisdiction. *Massie* v. *Watts*, 6 Cranch, 148. And the terms in which he refers to the statement of *Mr. Justice* Nelson show that there was no intention to criticise or qualify that statement.

[131]

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There are, indeed, decisions in the circuit courts that an assignee in insolvency, or a receiver, of all the property of a debtor, appointed under the laws of a State, does not, by virtue of the general assignment or appointment merely, without any conveyance made by the debtor or specifically ordered by the court, acquire a title in patent-rights. *Ashcroft* v. *Walworth*, 1 Holmes, 152; *Gordon* v. *Anthony*, 16 Blatchf., 234. But in *Ashcroft* v. *Walworth*, *Judge* Shepley clearly intimated that the courts of the State might have compelled the debtor to execute such a conveyance. And the highest courts of New York and California have affirmed the power, upon a creditor's bill, to order the assignment and sale of a patent-right for the payment of the patentee's judgment debts. *Gillette* v. *Bate*, 36 N. Y., 87; *Bank* v. *Robinson*, 57 California, 520.

In *Carver* v. *Peck*, 131 Mass., 291, the court reserved the expression of any opinion upon that question, because unnecessary to the decision. And the assumption in *Cooper* v. *Gunn*, 4 B. Mon., 594, that an author could not be deprived, against his will and in favor of any of his creditors, of any of the rights secured to him by the Copyright Acts, was merely *obiter dictum*, unsupported by reasoning or authority.

In the case at bar, the bill is filed by a judgment creditor of the patentee, in a court of the United States of appropriate jurisdiction, against the patentee, residing within the District and holding the entire legal title and two thirds of the equitable interest in the patent rights, and against the owner of an equitable interest in the remaining third, who is properly made a party to the bill. Both defendants are before the court and have filed answers. The debtor's interest in the patent-rights is property, assignable by him and which cannot be taken on execution at law. The case is thus brought directly within the opinion delivered by *Mr. Justice* Nelson in *Stephens* v. *Cady*, of the soundness of which we [132] entertain no doubt.

The clause of the decree below, appointing a trustee to execute an assignment if the patentee should not himself execute one as directed by the decree, has not been objected to in argument, and was clearly within the chancery powers of the court, as defined in the Statute of Maryland of 1785, which is in force in the District of Columbia. Maryland Stat., 1785, ch. 72 secs 7, 13, 25, 2 Kilty's Laws; Laws of District of Columbia, ed. 1868, pp. 326, 328, 333, 336

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 155.

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[231] W H. CHATFIELD, WILLIAM WOODS, THE POWERS PAPER COMPANY ET AL, *Appts.*,

v.

W. F. BOYLE, JEFFERSON DAVIS ET AL.

(See S. C., 15 Otto, 231-234.)

Jurisdictional amount.

Where a person files a bill, in behalf of himself and all others similarly situated who may thereafter be made parties complainant in the suit, to reach a fund in court, the matter in dispute is not the whole amount of the fund, but only so much thereof as will be distributable to the complainants if they are successful; and if that will be less than five thousand dollars, it is not enough to give this court jurisdiction, although the whole fund is more than that sum.

[No. 150.]

Argued Jan. 13, 1882. Decided Mar. 6, 1882.

MOTION to dismiss appeal from the Circuit Court of the United States for the Western District of Tennessee.

The case is stated by the court.

Messrs. **John D. McPherson** and **Jeremiah W. Clapp**, for appellees.

Messrs. Stanley Matthews and **William M. Ramsey**, for appellants.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Boyle & Co., a mercantile firm doing business at Memphis, Tenn., being insolvent, on the 17th of November, 1876, made a general assignment for the benefit of all their creditors to J. A. Omberg. Before this assignment a deed of trust, in the nature of a mortgage, had been made conveying some of the property of the firm as security for a debt said to be owing to Jefferson Davis. The total indebtedness of the firm at the time of this assignment, to creditors other than Davis and another person who has since been paid out of securities he held at the time, was $17,233 63

The debt claimed to be due Davis was 25,000 00

Making a total of..... $42,233 63

Chatfield and Woods, creditors of the firm to the amount of $3,440.37, filed a bill in equity in one of the state courts of Tennessee, on the 18th of January, 1877, against Boyle, Davis and others, the object of which was to set aside the deed of trust in favor of Davis, and also to prevent Davis from participating in the benefits of [232] the general assignment, on the ground that he was not in reality a creditor of the firm, but one of the partners. This suit was brought, as alleged, in aid of the assignment and in behalf of all the creditors of the firm who might be entitled to come and join therein. Omberg, the assignee, was also joined as a complainant. As to him, the allegations in the bill are as follows: "Complainant, J. A. Omberg, as the assignee in said deed of assignment, comes at the request of the creditors as aforesaid, and claims the benefit of all the matters and circumstances in this bill set up in behalf of all the creditors of Boyle & Co., and especially in behalf of all those creditors who may be hereafter made parties hereto, and may by proper averments and proof make good their claim, to be paid out of the proceeds of the property hereby proceeded against, and asks for them and each of them all the relief, under and by virtue and in aid of said assignment, to which they or either or each of them may as creditors be entitled as against defendant Davis or other defendants."

During the pendency of the suit in the state

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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court, the property held under the trust for the benefit of Davis was sold with the consent of all parties and realized $2,951.10, which is now in court subject to any decree that may be finally rendered. The assignee has also disposed of all the remaining property embraced in the assignment, and in the distribution that has been made of the proceeds, $3,403.81 was set apart for Davis, if he shall be adjudged to be a creditor of the firm and not a partner. These two sums, amounting in the aggregate to $6,354.91, constitute the entire fund about which the dispute in the case arises.

On the 16th of March, 1877, the Powers Paper Company, Edwin Hoole and L. Snider & Sons, also creditors of the firm, were, on their own petition, admitted as parties complainant. Their claims were respectively as follows:

Powers Paper Company - -	$2,689 60
Edward Hoole - - - -	1,232 61
L. Snider & Sons - - -	1,103 76

On the 23d of March, 1877, the following order was entered in the suit: "In this cause, it appearing to the court by a statement of J. A. Omberg that all the creditors who have demanded of James A. Omberg, the assignee, to join in this litigation, have come in and had themselves made parties therein, it is, therefore, on motion, ordered that this bill be dismissed, so far as said Omberg is concerned, and he go hence, without day."

[233]

On the next day, March 24, S. A. Tower & Co. and H. B. Graham & Brothers were, on their petition, made parties. Their claims are as follows.

S. A. Tower & Co - - -	$887 68
H. B. Graham & Brothers - -	318 41

No other parties have ever appeared to claim the benefit of the suit. The aggregate of all the several claims represented by all the complainants is $9,672.43.

On the 4th of April, 1877, after Omberg had been dismissed from the case, the remaining complainants united in a petition for the removal of the suit to the Circuit Court of the United States for the Western District of Tennessee, which was afterwards effected. Answers were filed and testimony taken in the circuit court. Upon final hearing the bill was dismissed. From the decree to that effect all the complainants united in this appeal. The appellees now move to dismiss because the matter in dispute does not exceed the sum of $5,000. In support of this motion two grounds are relied on. They are:

1. That the claims of the several complainants are separate and distinct, and cannot be united for the purpose of making up the amount necessary to give us jurisdiction. The effort in this connection is to bring the case within the operation of the principle under which motions to dismiss were granted in *Seaver* v. *Bigelow*, 5 Wall., 208 [72 U. S., XVIII., 595]; *Rich* v. *Lambert*, 12 How., 347; *Oliver* v. *Alexander*, 6 Pet., 143; *Stratton* v. *Jarvis*, 8 Pet., 4; and *Paving Co.* v. *Mulford*, 100 U. S., 148 [XXV., 591].

2 That the matter in dispute is not the whole amount of the fund in court which is claimed by Davis, but only so much as would be distributable to the complainants under the assignment, if Davis is adjudged to be a partner and not a creditor. For this *Terry* v. *Hatch*, 93 U. S., 44 [XXIII., 797], is relied on.

Without considering the first of these propositions, we think it clear the case comes within the last. These appellants on this appeal represent no one but themselves. Their rights here are just what Omberg asked for himself; that is to say, such as belong to creditors who in this suit make good their claim to be paid under the assignment out of the fund proceeded against. The complainants do not, necessarily, represent all the creditors entitled to the benefits of the assignment, neither have they assumed anything of the kind. They ask only for such relief as belongs to those who actually come in according to their invitation. They are in no situation to appropriate to themselves the whole of the fund. The other creditors may certainly abandon their interest and permit it to go to Davis if they choose. The complainants cannot compel them to take it whether they want it or not. By not coming into the suit they, in effect, have elected not to contend with Davis for their share, and to treat him as a creditor rather than a partner. When Omberg went out of the suit, all the creditors had come in who wanted him to proceed. Under these circumstances, if the bill had been sustained, no opportunity need have been given other creditors to come in. The court might very properly have said that, as they had staid out until all risks of liability for costs and expenses were gone, they should not then be admitted. Such being the case, a decree would have been entered in favor of the complainants for their distributive shares of the fund, and no more. The rest would have remained for Davis, the same as though no suit had been begun. The fund is $6,354.91, and the debts entitled to the benefit of the assignment, $17,233.63, of which the complainants represent only $9,672.43. Under this state of facts the whole of the distributive shares of the complainants, if they are successful, will be less than $5,000, not enough to give us jurisdiction. Upon an appeal we will not consider whether others may come in if we reverse the decree. We look only to the parties who are actually before us. The case is, therefore, within the rule stated in *Terry* v. *Hatch*, and the motion to dismiss is granted.

[234]

Mr. Justice **Matthews** having been of counsel in the court below, took no part in this decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF MOULTRIE, *Plf. in Err.*, [370]
v.
GEORGE B. FAIRFIELD.

(See S. C., 15 Otto, 370-380.)

Defense to county bonds—recitals—donation bonds—Illinois Constitution—immaterial variance—bona fide *holder.*

1. A defense against the donation bonds issued by Moultrie County, Ill., to the Decatur, Sul. & M. R. R. Company, that a subscription of stock had also been made, in payment of which the County had issued its bonds, is incomplete unless it is shown that the obligation of the County to issue bonds in payment of its subscription antedated its obligation to issue bonds to satisfy its donation.

2. As there was authority for the issue of the do-

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nation bonds, which is recited on their face by reference to the law from which it was derived, the purchaser before maturity was not bound to look further, nor to inquire whether the County had issued more bonds than the law authorized.

3. Under section 10 of the charter of the company, the County might subscribe for stock to an amount not exceeding $80,000, and issue its bonds in payment thereof, and under section 9 of the same charter make a donation to the same company, and issue its bonds in satisfaction thereof.

4. The prohibition of the Illinois Constitution, that no municipality shall make donations to or loan its credit in aid of any railroad, does not extend to the donation made in this case, nor to the bonds issued in satisfaction thereof.

5. In the petition for, and notice of, the election, the transposition of two of the words of which the name of the corporation to which the aid was to be voted was in part composed, cannot render the election invalid and void.

6. Even if the County, by reason of a limit on its taxing power, could not levy a tax to pay these bonds, nevertheless, they having been authorized, a *bona fide* holder of them is entitled to judgment on them, and to collect it out of any property of the County which can be subjected to the payment of its debts.

[No. 1137.]

Submitted Jan. 10, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Statement of the case by *Mr. Justice* **Woods:**

This was an action brought by George B. Fairfield, the defendant in error, against the County of Moultrie, the plaintiff in error, upon the common counts, for money lent, money had and received and money due on account stated, [371] with notice that the plaintiff would give in evidence coupons detached from certain bonds of said County issued in satisfaction of a donation made by the County in aid of the Bloomington & Ohio River Railroad Company, and also coupons detached from certain other bonds of the county issued in satisfaction of a donation made by the County in aid of the Decatur, Sullivan & Mattoon Railroad Company. The defendant pleaded *non assumpsit;* but it was agreed that under this plea the defendant might offer any evidence and make any defense that would be competent under any special plea well pleaded. The parties waived a jury and submitted the issues of fact as well as of law to the court. The court made a special finding of facts upon which it rendered judgment in favor of the plaintiff below, reverse which this writ of error is brought.

Mr. **John R. Eden,** for plaintiff in error.

Messrs. **E. S. Bailey** *&* *Sedgwick,* **Shelby M. Cullom** and *T. C. Mather,* for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

We shall first consider the objections raised by the plaintiff in error to the recovery upon the bonds of the County of Moultrie issued to the Decatur, Sullivan & Mattoon Railroad Company. The charter of this company took effect March 26, 1869. The 9th section provided as follows: "The several incorporated towns, cities, counties and towns organized under the township organization law, along or near the route of said road, or that are in any way interested therein, may, in their corporate capacities, subscribe to the stock of said company or make donations thereto to aid in constructing or equipping said railroad." Then followed a proviso making subscriptions to the stock and donations conditional upon a vote of the people and prescribing the mode of holding elections, etc.

Section 10 of the charter declared: "The board of supervisors of Moultrie County are hereby authorized to subscribe to the capital stock of said company to an amount not exceeding $80,000, and to issue the bonds of the County therefor, bearing interest at a rate not exceeding ten per cent per annum, said bonds to be issued in such denominations and to mature at such time as said board of supervisors may determine; *Provided,* That the same shall not be issued until said road shall be opened for [372] traffic between the City of Decatur and the Town of Sullivan aforesaid."

It appeared from the records of the board of supervisors of the County, as stated in the findings of the court, that on November 2, 1869, an election was held according to law in the County of Moultrie, at which a majority of the votes cast was in favor of a proposition to donate the sum of $75,000 to the Decatur, Sullivan and Mattoon Railroad Company, such donation to be paid in the bonds of the County when the railroad should be completed and in running order through the County; and that in pursuance of said vote the board of supervisors, on December 19, 1869, passed an order that there be donated by the County of Moultrie to the Decatur, Sullivan & Mattoon Railroad Company the sum of $75,000, and that when the company should have completed its railroad through the County of Moultrie there be issued and delivered to the railroad company the bonds of the County to the amount of $75,000, payable in ten years, in satisfaction of such donation; and that on November 1, 1871, the chairman of the board of supervisors and the clerk of the County issued and delivered to the railroad company seventy-five bonds of $1,000 each in satisfaction of said donation. These bonds recited on their face that they were "Issued by said County of Moultrie by virtue of a vote of a majority of the legal voters of said County voting at an election held in said County of Moultrie on the 2d day of November, 1869, which election was authorized by and conditioned according to the provisions of an Act of the General Assembly of the State of Illinois, approved March 26, 1869, entitled an Act to Incorporate the Decatur, Sullivan and Mattoon Railroad Company."

The court further found that the defendant in error was a *bona fide* purchaser for value, before maturity, of the bonds issued to the Decatur, Sullivan & Mattoon Railroad Company, from which the coupons offered in evidence were detached.

The facts above stated as found by the court, and the authority for the issue of the bonds contained in the charter of the Decatur, Sullivan & Mattoon Railroad Company, establish *prima facie* the validity of the bonds and the right of the defendant in error to a recovery upon the coupons cut from them.

The plaintiff in error insists, however, that there are other facts set forth in the findings of the court which show the invalidity of the bonds under consideration. These are that, at the De- [373] cember Special Term, 1869, of the Board of Supervisors of Moultrie County, an order was passed that the County subscribe to the capital

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stock of the Decatur, Sullivan & Mattoon Railroad Company, by authority of section 10 of its charter, above recited, the sum of $80,000; that said subscription was then and there made, and that on December 31, 1872, the railroad being then open for traffic between Decatur and Sullivan, the bonds of the County were issued and delivered to the company in payment of its subscription of stock.

The contention of counsel for plaintiff in error is, that the Board of Supervisors of the County of Moultrie having, in December, 1869, subscribed to the capital stock of the railroad company the sum of $80,000, by authority of section 10 of the charter of the company, it had given all the aid to the railroad company which the law authorized it to give. In other words, it is insisted that the County could not subscribe the full amount of stock authorized by section 10, and also make a donation to the company under section 9; that it could only do one of these two things. The inference which is drawn from this position is that the bonds issued in satisfaction of the donation to the railroad company, voted for by the people of the County and subscribed by the board of supervisors, were issued without authority, and are, therefore, void.

We cannot concur in the view of the plaintiff in error, for several reasons. First, it is conceded that the board of supervisors could either subscribe any sum not exceeding $80,000 to the stock of the railroad company, under section 10 of its charter, and issue the bonds of the County in payment thereof, or it could make a donation to the railroad company, under section 9 of the charter, of any amount which had been voted for by the voters of the County, and issue the bonds of the County in satisfaction thereof. As the County sets up as matter of defense, against the donation bonds issued to the Decatur, Sullivan & Mattoon Railroad Company, the fact that a subscription of stock had also been made in payment of which the County had issued its bonds, it stands it in hand to show that the obligation of the County to issue its bonds in payment of its stock antedated its obligation to issue its bonds in satisfaction of its donation. This the findings fail to show. They do not show which was first voted by the board of supervisors, the donation or the subscription. They do show, however, that before any action was taken by the Board in reference either to donation or subscription, to wit: on November 2, 1869, the electors of the County had voted in [374] favor of donation. They further show that the County agreed to issue its bonds in satisfaction of its donation when the railroad company had completed its road through the County of Moultrie, and to issue its bonds in payment of its stock when the railroad should be open for traffic between the City of Decatur and the Town of Sullivan; that the railroad was completed through the County of Moultrie as early as October 20, 1871, and that the donation bonds were issued and bore date November 1, 1871; that the railroad was not open for traffic between Decatur and Sullivan until December 31, 1872, and that on that day, fourteen months after the issue of the donation bonds, the subscription bonds were executed and issued. If either class of bonds, therefore, has any advantage over the other on the question of authority for their issue, it would seem to be the donation bonds.

We remark, secondly, that as there was authority for the issue of the donation bonds, and that authority is recited on their face by reference to the law from which the authority was derived, the purchaser before maturity was not bound to look further. The County having authority to issue bonds like those purchased by him, he was under no obligation to inquire whether the County had issued more bonds than the law authorized. *Lynde* v. *The County*, 16 Wall., 6 [83 U. S., XXI., 272]; *Lexington* v. *Butler*, 14 Wall., 282 [81 U. S., XX., 809]; *Marcy* v. *Oswego*, 92 U. S., 637 [XXIII., 748]; *Humboldt Township* v. *Long*, 92 U. S., 642 [XXIII., 752].

But, thirdly, we are clearly of opinion that under section 10 of the charter of the railroad company the County might subscribe for stock, to an amount not exceeding $80,000, and issue its bonds in payment thereof; and under section 9 of the same charter make a donation to the same company and issue its bonds in satisfaction thereof.

It is clear, and it is conceded in the brief of plaintiff in error, that the County of Moultrie is included within the terms of section 9, which applies to counties along or near the route of the railroad or that are in any way interested therein. It is, also, clear that if there were no section 10 the County might, upon a vote of the people authorizing it, make a donation of any amount to the railroad company.

Section 10, which authorizes a subscription to the stock of the company, within certain limits and without any vote of the people, does not preclude a donation under section 9. The obvious construction of the two sections taken together is, that any county along the line of [375] the railroad, upon a vote of the people, may, without limit, either subscribe to the stock of the company or make it a donation to be paid for in bonds, and that the County of Moultrie may subscribe to the stock of the company without a consenting vote of the people, any sum not exceeding $80,000. We must give this construction to the two sections, if we allow both to have their full effect; and, if possible, they should be so construed as to give full effect to both, without any limitation or condition not incorporated in them by the Legislature. The authority granted to Moultrie and other counties by section 9 to make donations is not restrained or repealed because authority is granted to Moultrie County, by another section and upon different conditions, to subscribe stock. One section is not inconsistent with the other and, therefore, does not repeal it.

The next reason upon which the invalidity of the bonds and coupons under consideration is based, is the section of the Constitution of Illinois of 1870, which declares: "No county, city, town or township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided*, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, when the same have

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been authorized under existing laws, by a vote of the people of such municipalities under existing laws." First additional section.

The proviso of this section has been construed by the Supreme Court of Illinois, and this court has followed that construction, to extend to donations as well as subscriptions of stock. *R. R. Co.* v. *Pinckney*, 74 Ill., 277; *Middleport* v. *Ins. Co.*, 82 Ill., 562; *Lippincott* v. *Pana*, 92 Ill., 24; and *Fairfield* v. *Gallatin Co.*, 100 U. S., 47 [XXV., 544].

According to the findings of the court below, the records of the Board of Supervisors of the County of Moultrie show that an election was held before the adoption of the Constitution of 1870, by which the donation was authorized, which the bonds in suit were issued to satisfy, and we have already seen that such election [376] was authorized by section 9 of the charter of the railroad company. The prohibition of the Constitution does not, therefore, extend to the donation made in this case, or the bonds issued in satisfaction thereof.

An attempt is, however, made by the plaintiff in error to show that no election by which said donation was authorized, was ever held; because in the petition for the election, and in the notice of the election, the railroad company to which the donation was to be made was designated as the Mattoon, Sullivan & Decatur Railroad Company, and not by its true name, to wit: the Decatur, Sullivan & Mattoon Railroad Company. And the contention is, that as there was no vote of the people which authorized the donation in question to the Decatur, Sullivan & Mattoon Railroad Company, the power of the County to make the donation was cut off by the Constitution of 1870.

There can be no doubt on the question what railroad company the people of Moultrie County intended to make their donation to. The statute-books of the State of Illinois will be searched in vain to find an Act incorporating a railroad company by the name of the Mattoon, Sullivan & Decatur Railroad Company. There can be no question that in the petition for, and notice of the election, the railroad company intended was that known and chartered as the Decatur, Sullivan & Mattoon, for the petition and notice designate the route upon which said road was to be built and upon which it afterwards was built; and they refer to the provision of the charter of the Decatur, Sullivan & Mattoon Railroad Company, which authorized the donation upon the making of which the voters were to express their will.

But a conclusive circumstance against the County to show to what railroad company the donation was voted, is found in the records of the Board of Supervisors, set out in the findings of the court, in which it is distinctly stated that the petition for the election requested that an election be held in pursuance of an Act entitled an Act to Incorporate the "Decatur, Sullivan & Mattoon Railroad Company," to decide whether a donation of $75,000 should be made to said Decatur, Sullivan & Mattoon Railroad Company, and that such election was held on November 2, 1869, and resulted in favor of donating said sum of $75,000 to the Decatur, Sul- [377] livan & Mattoon Railroad Company. It was therefore ordered that said sum be donated to the Decatur, Sullivan & Mattoon Railroad Company, and when said company should have completed its road through the County of Moultrie, that the bonds of the County should be delivered to it in satisfaction of such donation.

These records of the board of supervisors show what the understanding of the representative body of the County, was in respect to the railroad company to which the donation was voted. There can, therefore, be no doubt about the identity of the company which the voters of the County had in view when the election was held. It is certain that on November 2, 1869, an election was held by the voters of Moultrie County, and a donation of $75,000 voted to some railroad company. The circumstances to which we have adverted do not leave the least doubt that the company was the Decatur, Sullivan & Mattoon Railroad Company. Upon such a state of facts the law is well settled.

Even a contract is not avoided by misnaming the corporation with which it is made. *Building Asso.* v. *Martin*, 2 Beas., 427. And if a corporation is misnamed in a statute, the statute is not thereby rendered inoperative if there is enough from which to ascertain what corporation is meant. *Chancellor of Oxford's Case*, 10 Coke, 57 *b*.

"Although the names of corporations are not merely arbitrary sounds, yet if there be enough to show that there is such an artificial being, and to distinguish it from all others, the body politic is well named, though the words and syllables are varied from." Bac. Abr., tit. Corp., C, 2. And it has been held by the Supreme Court of Illinois that the transposition of words comprising the name of a corporation is unimportant if it be evident what corporation is intended. *Chadsey* v. *McCreery*, 27 Ill., 253.

We are, therefore, of opinion that the transposition, in the petition for and notice of the election, of two of the words of which the name of the corporation to which the aid was to be voted, was in part composed, cannot render the election invalid and void.

It is, therefore, clear that the donation voted for at that election, is taken out of the operation of that clause of the Constitution of State which [378] declares that no municipality shall make donations to or loan its credit in aid of any railroad or private corporation. In our opinion none of the objections which we have noticed, to the validity of the bonds under consideration, are well taken.

The remaining objection to the validity of these bonds and coupons is also urged against a recovery on those issued to the Bloomington & Ohio River Railroad Company, and is the only ground of defense against the last named bonds. This objection we shall now consider. It is based on section 8 of article IX. of the Constitution of Illinois, which declares: "County authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents per $100 valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote."

To show the applicability of this provision to the question in hand, the plaintiff in error offered evidence in the court below on which the court made the following findings:

"That at the time of the issuing of said bonds the indebtedness of said County, including said bonds, was $275,000, and the valuation

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of the taxable property of said County was $2,279,084, and that the sum of $10,000 per annum was required to defray the necessary, ordinary expenses of said County; and that at the time of the rendition of the judgment in this cause the indebtedness of the County, including accrued interest, was $375,000, and the valuation of the taxable property therein was $3,589,251, and that it required $12,000 per annum to defray the necessary, ordinary expenses of said County.

That, to enable said County to pay the indebtedness created by said donations to said Bloomington and Ohio River Railroad Company, and to said Decatur, Sullivan and Mattoon Railroad Company, evidenced by said bonds still outstanding, the interest coupons upon which were sued on and offered in evidence in this case, will require the annual assessment of taxes, which will exceed 75 cts. per [379] $100 valuation of the taxable property in said County of Moultrie."

The argument of the plaintiff in error is, that the indebtedness evidenced by the bonds issued by the County of Moultrie in aid of the two railroads mentioned does not fall within the exception found in section 8 of article IX. of the Constitution, and that the above recited findings of the court show that the authorized tax of 75 cents on the $100 would not be sufficient to pay the expenses of the County and the principal and interest on the bonds. And it is, therefore, contended that the bonds are void.

The authority cited to sustain this position, *Loan Association* v. *Topeka*, 20 Wall., 655 [87 U. S., XXII., 455], merely decides that where there is no power in the Legislature to authorize a tax in aid of the purpose for which the bonds are issued, the bonds are void.

But here it is conceded that there is power, within certain limits, to levy a tax to pay these bonds. The bonds cannot, therefore, be void. *Marcy* v. *Oswego*, 92 U. S., 637 [XXIII., 748].

Moreover, it appears from the findings of the court that at the time the bonds in question were issued, a levy of 75 cents on every $100 valuation of the taxable property of the County would produce a sum sufficient to pay the ordinary expenses of the County and leave a surplus of over $7,000 to be applied to the payment of the bonds, and that at the commencement of this suit such annual surplus, by reason of the increase in the taxable property of the County, would amount to nearly $15,000, a sum almost sufficient to pay the judgment rendered in this case. So that the defense now under consideration is reduced to this: that because the whole judgment cannot be at once collected, there should be no judgment at all.

But it nowhere appears in the record that the County has not ample means out of which the judgment could be collected besides its revenues derived from taxation. We know from the record that the County at one time owned $80,000 of the stock of the Decatur, Sullivan & Mattoon Railroad Company, and it does not appear that it is not still the owner of this stock, and that it may not now be subjected to the payment of the judgment recovered in this [380] case, or that the County may not have other similar assets sufficient to pay all its debts.

Therefore, even if the County, by reason of the limit on its taxing power, could not levy a tax to pay these bonds, nevertheless, the bonds having been authorized, the holder is entitled to judgment on them, and to collect it out of any property of the County which could be subjected to the payment of its debts.

Whether the indebtedness evidenced by the bonds which are the basis of this suit falls within the exception of section 8, article IX., of the Constitution of Illinois, so that taxation for their payment is without limit, is a question which does not necessarily arise upon this record, and which we are not now required to decide.

We are of opinion that there is no valid defense against a recovery on the coupons sued on. The people of the County of Moultrie almost unanimously voted for the issue of the bonds. The conditions upon which the donations were made were fully performed. The railroads which they were intended to aid were completed and in use before the bonds were executed. The bonds were regularly and honestly issued by the public officers charged with that duty. They are in the hands of *bona fide* holders for value. Common honesty demands that the County should apply its available means to their payment, and there is no obstacle to a recovery upon the coupons.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH A. THATCHER AND JOSEPH STANDLEY, *Plffs. in Err.*, [467]

v.

WATSON B. ROCKWELL.

(See S. C., 15 Otto, 467-470.)

Bankrupt proceedings—defense to suit—assignee.

1. Proceedings in bankruptcy are not a bar to the further prosecution of a suit in the name of the bankrupt.
2. If the claim in suit has been transferred by the bankrupt more than four months before the proceedings in bankruptcy are begun, and the suit, though in his name, is for the benefit of the transferee, the assignee in bankruptcy has no interest whatever in the suit, and if he expressly consents that the bankrupt may continue to prosecute it in his own name, the defendants cannot avail themselves of the bankruptcy as a defense.
3. If an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt, he is bound by any judgment that may be rendered therein.

[No. 693.]

Submitted Jan. 16, 1882. Decided Mar. 6, 1882.

IN ERROR to the Supreme Court of the State of Colorado.

On motion to dismiss, with which is united a motion to affirm.

The case is stated by the court.

Messrs. **J. Q. Charles & James B. Belford,** for defendant in error for motion.

Messrs. **Henry M. Teller** and *Willard Teller*, for plaintiffs in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 10th of June, 1875, Rockwell, the defendant in error, brought an action of *assumpsit* against Thatcher & Standley, the plaintiffs in error, in the State Court of Colorado. The

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declaration on which the trial was had contained the common counts only. The original pleas were the general issue, payment and set-off, but on the 26th of March, 1877, a supplemental plea was filed, to the effect that on the 26th of May, 1876, Rockwell had been adjudicated a bankrupt and, on the 14th of July, 1876, an assignee appointed, to whom the claim in suit passed under the operation of the bankrupt law; wherefore the defendants "prayed judgment if said plaintiff could longer have or maintain his action against them." To this plea a replication was filed confessing the bankruptcy and the appointment of an assignee, but averring that the claim in suit had been assigned to Kate Rockwell and L. C. Rockwell in November, 1875, and did not pass to the assignee. It was also averred that the suit was being prosecuted for the use and benefit of the persons to whom the transfer had been made, and that the assignee in bankruptcy claimed no interest whatever therein. To the replication the defendants rejoined, denying the assignment to the Rockwells.

Upon this issue, among others, a trial was had, and at the conclusion of the testimony the defendants asked the court to instruct the jury:

"3. That, if they believe from the evidence that the plaintiff, after the commencement of the suit, filed his petition in bankruptcy and was adjudged a bankrupt and an assignee in bankruptcy was appointed, then the plaintiff connot recover in this action, for if he had any [468] legal claim against the defendants, at the time the assignee in bankruptcy was appointed the same vested in the assignee in bankruptcy."

This instruction was refused, and the court did charge, as follows:

"4. The court further instructs the jury that if they believe from the evidence that Watson B. Rockwell, previous to his bankruptcy, assigned the claim now in suit to his wife, Kate, and L. C. Rockwell, one half to each, for a valuable consideration, that this suit is well maintained in W. B. Rockwell's name for their use and benefit, notwithstanding you may believe from the evidence that Rockwell was adjudged a bankrupt in May, A. D. 1876."

"6. The court instructs the jury that the defendants cannot avail themselves of the bankruptcy of the plaintiff if they believe from the evidence that the money claimed was assigned to the said Kate Rockwell and L. C. Rockwell four months before Rockwell's petition in bankruptcy was filed, and even if there had been no assignment of this claim, the defendants could not avail themselves of the bankruptcy if it appeared from the evidence that the assignee in bankruptcy expressly consented that the plaintiff might continue to prosecute the claim in his own name in this court."

Exceptions were taken in due form and incorporated into the record The case is here on a writ of error to the Supreme Court of the State for the review of a judgment overruling these exceptions.

A motion is now made to dismiss the writ for want of jurisdiction, and with that is united a motion, under Rule 6, to affirm.

By the exceptions to the charge, a federal question is, undoubtedly, presented upon the record. The court was asked to decide that the proceedings in bankruptcy were a bar to the further prosecution of the suit in the name of the bankrupt. This was refused and the jury were told that they might bring in a verdict for the plaintiff, notwithstanding the bankruptcy, if they found in his favor on the other issues, and the claim had been assigned, as alleged in [469] the replication, more than four months before the petition in bankruptcy was filed. We must, therefore, overrule the motion to dismiss, but what the court did was so clearly right that we are not inclined to retain the cause for further consideration on its merits. An assignment in bankruptcy only transfers to the assignee such property as the bankrupt had when the petition in bankruptcy was filed. If, in point of fact, the claim in suit was transferred by the bankrupt more than four months before the proceedings in bankruptcy were begun, the assignee in bankruptcy had no interest whatever in the suit that was pending because, from the time of the transfer, the transferees became entitled to the benefit of any recovery that might be had. The suit, though in the name of the bankrupt, was, in fact, for and on account of the transferees, whose trustee the bankrupt became when the transfer was completed.

The further charge of the court, to the effect, that if the assignee expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defense, was also right. By section 5047, R. S., the assignee may prosecute or defend suits pending in the name of the bankrupt at the time of the bankruptcy, but there is nothing which renders it necessary for him to make himself a party on the record to do what is thus allowed. What was said in *Herndon* v. *Howard*, 9 Wall., 665 [76 U. S., XIX., 809], must be construed in connection with the case then under consideration, which was an application by an assignee to be substituted in this court for the original appellant, who had become bankrupt after the appeal was taken. The true rule is stated in *Kyster* v. *Gaff*, 91 U. S., 521 [XXIII., 403]; *Burbank* v. *Bigelow*, 92 U. S., 183 [XXIII., 543]; *Norton* v. *Switzer*, 93 U. S., 364 [XXIII., 906]; *Jerome* v. *McCarter*, 94 U. S., 787 [XXIV., 137]; *McHenry* v. *La Société Française*, 95 U. S., 60 [XXIV., 371], and *Davis* v. *Friedlander* [*ante*, 818], at this Term, which, although cases where the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an inter- [470] est *pendente lite*. It is no defense to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor.

The motion to dismiss is denied, but that to affirm, granted.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[509] R. MORGAN FRENCH ET AL., *Appts.*,
v.
JONATHAN K. GAPEN ET AL.

JAMES S. SPEARS ET AL., *Appts.*,
v.
JONATHAN K. GAPEN, THE BOARD OF TRUSTEES OF THE WABASH & ERIE CANAL ET AL.

(See S. C., 15 Otto, 509-526.)

Wabash and Erie Canal—water power—surplus water—existing rights—decree of sale.

Contracts made by and on behalf of the State of Indiana in regard to the water-power of the Wabash and Erie Canal, construed, and held:

1. That the contractors, under the Act of January 9, 1842, in equity owned the water-power made available by what they had done until their charge upon it was paid, and the State held the legal title for them so long as anything remained due to them for what they had done.
2. There was an absolute grant, for a valuable consideration, by the State to Johns, of the right to draw water from the canal, whenever and so long as there was a surplus over what was wanted for navigation and the supply of the earlier leases.
3. By the grant to the trustees of the canal, their title was made subject to all such existing rights and equities.
4. That after a decree for the sale of the property, the owners of such rights and equities and their assignees could intervene and have their rights in the premises ascertained and established, or paid for from the proceeds of the sale.

[Nos. 81, 91.]

Argued Nov. 9, 1881. Decided Mar. 6, 1882.

APPEALS from the Circuit Court of the United States for the District of Indiana.

The cases are stated by the court.

Messrs. R. C. Bell, I. G. Kimball, **Shellabarger** *& Wilson* and **Hill** *& Nichol,* **John Morris** *& Withers,* for appellants.

Messrs. **R. S. Taylor, Claypool** *& Ketcham,* for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court.

[510] The State of Indiana constructed the Wabash & Erie Canal from La Fayette, on the Wabash River, through Delphi and Fort Wayne, to the Ohio State line. To meet the expense of this undertaking a large bonded debt was created and secured in a general way by statutory provisions of a character similar to those contained in section 5 of an Act of January 9, 1832, authorizing the first issue of bonds, and which is as follows:

"That for the payment of the interest, and the redemption of the principal of the sums of money which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this Act stated, there shall be, and are hereby irrevocably pledged and appropriated, all the moneys in any manner arising from the lands donated by the United States to this State for the construction of said section of canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof as finished; the sufficiency of which, for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee." Acts 1832, p. 2.

From the beginning, the use of water for hydraulic purposes, when not needed for navigation, seems to have been contemplated, and ample provision was made by statute for acquiring the necessary land and effecting leases of power. With a view to this end, the following "Act Relative to Water-Power at the Town of Delphi," was passed and approved January 9, 1842:

"Sec. 1. *Be it enacted by the General Assembly of the State of Indiana,* That it shall be the duty of the engineer, or other person having charge of the Wabash & Erie Canal, on or before the 1st day of May next, to let by contract, to the lowest bidder, the clearing out and removing all obstructions from the bayou which extends from the canal, at the said town, to the Wabash River, for the purpose of creating water-power upon the said canal at that place.

Sec. 2. *Be it further enacted,* That said engineer or other person, before letting the said work, shall give public notice of the terms, conditions, and also the time of the said letting, by publishing the same in the newspapers printed [511] in the said county, for two months, at least, previous to the time of said letting; *Provided,* That the said works shall be finished within six months from the time of said letting.

Sec. 3. *Be it further enacted,* That the said engineer, or person having charge of that part of the canal, shall cause the work to be estimated when the same is completed, and shall give to the person doing the same a draft or other evidence of indebtedness, specifying what the same was given for and the amount due him as by the said contract, and for the purpose of paying for the said work, the rents that may be received by the State for water-power created by this Act shall be appropriated for that purpose, and to no other purpose; and the person or persons doing the said work shall look to the said rents for their pay, and to no other source whatever; and as fast as the said rents may be due or received, they shall be expended in paying for the said work until the whole amount is paid.

Sec. 4. *Be it further enacted,* That so soon as the said work is let to some responsible person, it shall be the duty of the said engineer, or other person, to lease out a portion of the water-power by this Act created, not exceeding in all, what would be sufficient to propel thirty run of stones, at the same prices and upon the same terms and conditions as water-power under similar advantages is leased at other places upon the said canal, and it is made the duty of the said engineer, or other person, before leasing the same, to give at least two months' notice of the time, terms and conditions upon which the same will be leased, in the newspapers published in the said county

Sec. 5. *Be it further enacted,* That it shall be the duty of the said engineer, or other person, as the agent on behalf of the State, for the purpose of securing to the State the advantages by this Act contemplated, to purchase of the owner or owners of land lying adjacent to the place where said water-power is to be located, such real estate, not exceeding in all four acres, as

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may be necessary to carry into effect the provisions of this Act, at such reasonable prices as may be agreed upon by the said agent and the owner or owners thereof; and in case of disagreement, at such prices as may be fixed by persons chosen by the said agent and the said owners; *Provided*, That in no case shall the prices paid by the State for such land exceed what has heretofore been paid for such property under the same or similar advantages, and for such real estate so purchased the said agent shall take a conveyance to the State by deed in fee [512] simple; *And provided further*, That nothing in this Act contained shall be so construed as to authorize any interference whatever with the navigation of said canal.

Sec. 6. *Be it further enacted*, That this law shall be in force from and after its passage."

Under the authority of this Act James Spears and Reed Case entered into a contract with the State to do the work required, upon the terms proposed, and before the 1st of December, 1843, had it all done. On the 19th of January, 1846, another Act was passed, by which it was made the duty of the officer having charge of the canal east of Tippecanoe to settle as soon as possible with the contractors, and give them a certificate for the amount found their due, to be paid out of the rents derived from the power created by what had been done, and also providing that the certificate should draw interest from the time the contract was completed until paid.

The settlement contemplated by this Act was effected on the 29th of September, 1847, and the following certificate issued:

"DELPHI, Sep. 29, 1847.

I hereby certify that Spears & Case have performed work to the value of $10,854.20 in cleaning out the bayou which extends from the canal at Delphi to the Wabash River, estimating according to the terms of a contract between said Spears & Case and S. Fisher, Commissioner of the W. & E. Canal, dated May 1, 1842, made in pursuance of an Act entitled 'An Act Relative to Water-Power at the Town of Delphi, in Carroll County, approved January 20, 1842.' And according to the provisions of an Act entitled 'An Act Authorizing a Settlement with Spears & Case for Work Done on the Side Cut at Delphi, in Carroll County, approved January 19, 1846,' the said Spears & Case are entitled to receive interest on said sum until paid. And I certify also that said work was performed prior to the first day of December, 1843.

S. FISHER,
Gen'l Sup't W. & E. Canal."

On the 29th day of May, 1846, the State leased to George Robertson, at an agreed rent, a sufficient amount of power made available by the work done by Spears & Case to propel three runs of stone. Of this lease Enoch Rheinhart is the present assignee and owner. He still uses the [513] water. All the rents derived from this lease down to November 1, 1875, have been paid and accounted for to Spears & Case.

In the construction of the canal it became necessary to take the water from the St. Joseph River, near Fort Wayne. In doing this the power which supplied certain mills that had been erected on that river by Henry Johns was taken away, and on the 11th of February, 1843, the following statute was passed for his relief:

"AN ACT FOR THE RELIEF OF HENRY JOHNS.

Whereas, Henry Johns, of the County of Allen, previous to the commencement of the Wabash & Erie Canal, was the owner of a valuable mill privilege or water-power on the St. Joseph River, and had erected valuable mills thereon; and whereas, the State of Indiana did afterwards erect a feeder dam, to supply with water the summit level of the Wabash and Erie Canal, above the mills erected by said Johns, on the St. Joseph River, thereby abstracting from the mills aforesaid, about 5,000 cubic feet of water per minute, which, in low stages of water, is all the water contained in the said River St. Joseph, and renders wholly useless the mills erected by said Johns; therefore,

Sec. 1. *Be it enacted by the General Assembly of the State of Indiana*, That the Commissioner of the Wabash and Erie Canal be, and is hereby, directed to cause to be supplied to the said Henry Johns, his heirs and assigns forever, from the Wabash and Erie Canal, at the Town of Fort Wayne, in the County of Allen, on land now owned or to be purchased by said Johns, a sufficient quantity of water to propel three pair of burr millstones free of any toll or water-rent, and continue to supply the same for the use of said Johns, his heirs and assigns forever, at all times when the same shall not be needed to fill the contracts heretofore made with Samuel Edsall and Hamilton & Williams, or required for the purpose of navigating said canal; *Provided*, That the said Johns shall, for himself, his heirs and assigns, release to the State of Indiana all claims against the State for the abstraction of water from the St. Joseph River to supply the Wabash and Erie Canal, and shall also credit in full, any or all awards or judgments that shall have been recovered by said Johns against the State for the abstraction of any water-power.

Sec. 2. This Act shall take effect and be in force from and after its passage."

In accordance with the provisions of this statute, and to carry it into effect, the following [514] agreement was entered into between Johns and the State on the 6th of July, 1843:

"This agreement, made this 6th day of July, 1843, between the State of Indiana, party of the first part, by S. Fisher, Commissioner of the Wabash & Erie Canal, thereto duly authorized by law, and Henry Johns, of the second part, witnesseth:

That said party of the first part, in consideration of the covenants and releases hereinafter contained, and upon the express condition that the party of the second part shall at all times comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of the agreement by said party to be performed, agrees to lease to said paid party of the second part forever, subject to the restrictions, limitations and conditions hereinafter contained, the use and occupation of so much of the surplus water (not required for purposes of navigation, or to fill the contracts heretofore made with Samuel Edsall and Hamilton & Williams), at the Town of Fort Wayne, to be used on lot number nine (9) of the county addition to said town, as will be sufficient, when properly applied on an overshot wheel of sixteen feet diameter, with the proper gearing, to be approved by the commissioners of said canal, to propel

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three run of four and a half feet millstones, grinding at the rate of five bushels per hour each, to be applied to such manufacturing purposes as the said second party may choose. It is understood that the second party to this agreement is entitled to the same quantity of water, whenever there is a surplus in the canal as above, that Allen Hamilton and Jesse L. Williams are entitled to under the lease bearing date 29th of November, 1842. The water will be taken by a head-race from the canal, at the place above described, and after passing over the wheel will be conducted by a suitable tail-race, into the St. Mary's River. The flow of water to the wheel will be regulated and controlled by a permanent regulating weir, to be constructed in the most substantial manner, with stone side and breast walls, agreeably to a plan to be furnished by the commissioner of the canal, to be built in every respect according to his directions, as not to endanger the safety of the canal in any manner whatever. And it is understood that the necessary regulating weir, head-race, and trunk to conduct the water to the wheel, and the tail-race to pass it from the wheel as above specified, are to be constructed by the party of the second part at his own [515] expense and according to the direction of the commissioner aforesaid, and to be kept in good repair, so as to prevent the waste of water; and if at any time during the continuance of this lease any breach or other injury shall occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered to be out of repair, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the State the whole cost of repairing such breach or injury; and if the said party of the second part shall refuse or neglect to rebuild, repair or strengthen said regulating weir or other works necessary to the security of the canal, after being notified in writing by the commissioner, superintendent, or other proper agent of the State that such removal is necessary for the safety of the canal, such refusal or neglect shall subject the party of the second part to a forfeiture of this contract or lease at the option of the commissioner or other agent of the State thereto duly authorized.

It is expressly understood by the parties hereunto that the first party does not agree to furnish water to the second party except at such times as there is a surplus over and above what is required for purposes of navigation and to supply existing contracts with Samuel Edsall and Hamilton & Williams. And the right is also reserved by the first party to draw the water from the canal whenever it may be necessary to repair or prevent breaches, take out bars, or make any repairs whatever.

And the second party, for and in consideration of the right to the use and occupation of said water, agrees to release, and does hereby release, for himself, his heirs and assigns forever, all claim or claims against the State of Indiana for damages heretofore done or that may hereafter be done to any property now or heretofore owned by him, the said Henry Johns, in consequence of diverting water from the St. Joseph River to supply the Wabash and Erie Canal and the mills erected or to be erected thereon or supplied therefrom.

And the said Henry Johns hereby releases to the State of Indiana all his right and title to the water flowing in the St. Joseph River whenever the same may be necessary for the supply of the canal and mills aforesaid.

And the said Henry Johns acknowledges the foregoing lease as being in full payment for all awards of damages heretofore made and for all damages done or hereafter to be done by diverting the water as aforesaid.

And it is understood by the parties hereto [516] that the second party is to pay no rent other than releasing the first party from the payment of damages as above; and this agreement is made in pursuance of and with a view to carry out an Act of the Legislature, entitled 'An Act for the Relief of Henry Johns,' approved Feb. 11, 1843.

In testimony whereof we, the parties to this agreement, have hereunto set our hands and seals the day and year first above written.

S. FISHER, [SEAL.]
Com. W. & E. Canal.
HENRY JOHNS. [SEAL.]

Signed and sealed in presence of
ALEX. MCCULLOCH."

All the rights conferred by this agreement or grant are now owned by French, Hanna & Co.

The State having become embarrassed by reason of its large indebtedness, growing out of the construction of this canal and other public improvements, passed an Act, on the 19th of January, 1846, to provide for the liquidation of the debt, by which new certificates of state stock were to be issued. One of these certificates, representing one half the debt, was to be provided for by taxation in the usual way, and the other, representing the other half, out of the lands, tolls and revenues of the canal. As an instrument for carrying into effect the arrangement in respect to the half of the debt payable out of the tolls, etc., the Board of Trustees of the Wabash and Erie Canal was created and constituted a body corporate, to which, on the 30th of July, 1847, a conveyance was executed as provided for in section 8 of the Act, which is as follows:

"Sec. 8. So soon as said Trustees shall have been elected or appointed as aforesaid, it shall be the duty of the Governor, in the name and under the seal of the State, to execute and deliver to said Trustees, by the corporate name of the Board of Trustees of the Wabash and Erie Canal, a deed or patent for the bed of the Wabash and Erie Canal, and its extensions, finished and to be finished, from the Ohio state line to Evansville, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water-power and structures, and all materials provided or collected for its construction; and all the property, right, title and interest of the State in and to the same, [517] with all its appurtenance; and also all the lands and lots (not sold or disposed of) heretofore given, granted, or donated by the General Government to the State, to aid in the construction of said canal, or any part of it, or which may be hereafter acquired under or by reason of any existing grant, and all moneys due and to grow due, and remaining unpaid on account of any sale or sales heretofore made of any canal lands so donated, and all moneys due, or

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to grow due on account of any existing leases of any water-power or other privilege on said canal, its side-cuts, feeders, basins or other appurtenances; said Board of Trustees to have, hold, possess and enjoy the same as fully and absolutely as the State can or could do; subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto; and the same to be held by said Trustees in trust and security for the uses and purposes following; that is to say—"

It is unimportant in this case to notice the specifications in respect to the trust any further than to say that the Trustees were given no power to sell the canals.

The Trustees took possession under this conveyance, and on the 5th of July, 1852, executed a lease to Spears, Case & James P. Dugan of water at Delphi equivalent to three millstone powers, reserving a certain agreed rent. This lease is now owned and the power used by Abner H. Owen, and the Trustees accounted to Spears & Case for all rents collected under its provisions down to November 1, 1875.

On the 19th of November, 1874, Jonathan K. Gapen, a holder of certain of the certificates of stock provided for in the conveyance to the Trustees, filed a bill in equity in the Circuit Court of the United States for the District of Indiana, against the Trustees, in behalf of himself and the other holders of the same class of securities, setting forth in substance that by reason of the failure of revenues from the canal it was impossible to keep it in a condition for use; that the trust was insolvent and the trust property rapidly falling into decay, and praying "That the pledge and appropriation recited in said stocks shall be effectuated and the said canal and its appurtenances and lands may be decreed to be sold in such manner and on such terms as the court may deem best for the interests of those entitled to share in the proceeds thereof, and so as to bring the highest price therefor, and so as to vest title in the purchaser or purchasers thereof, with the right and duty to impose, maintain, and operate the same and [518] receive and enjoy the future tolls and revenues thereof as fully in all respects as the State might originally have done, and on such sale being made and the proceeds brought into court, your orator prays that the said fund may be divided among himself and all other holders of said canal stocks according as their several ownerships, amounts and priorities may be from time to time established to the satisfaction of the court and so decreed."

To this suit neither Spears & Case, nor Johns, nor anyone representing their interests, was made a party. The Trustees of the canal were the only defendants, and on the 24th of December, 1875, a decree was made "That the Wabash and Erie Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, rights of way, locks, dams, water-powers and structures, together with all its appurtenances; also all lands and lots * * * belonging to the trust and vested in the Trustees of the Wabash and Erie Canal," be sold. Under this decree all that part of the main line of the canal from the western boundary of the City of La Fayette to the Ohio state line was sold to William Fleming for $85,500. This sale was confirmed on the 12th of February, 1877.

On the 7th of July, 1877, before any final distribution of the proceeds of the sale had been made, Spears, for himself and as surviving partner of the late firm of Spears & Case, and the widow and children of Case, who had before that time died, filed an intervening petition, called in the record a cross-bill, in which they set forth their connection with the water-power at Delphi, substantially as has been already stated, and alleged that there was still due them from the State, on the certificate which they held, the sum of $24,678.86. They then averred that the purchasers of the canal had collected the water-rents under the leases owned by Rheinhart and Bowen that fell due after November 1, 1875, and refused to account to them, and that there was sufficient surplus water in the canal at Delphi to supply power for the stipulated amount of thirty runs of stones, which the trustees had declined to lease previous to the sale.

The prayer of their petition was as follows: [519]

"That upon the final hearing of this cause the court will order, adjudge and decree that the sum which shall be found to be due to the plaintiffs shall be paid by the said Samuel B. Gookins, as such receiver, out of the funds now in his hands; or if the court shall be of opinion that the plaintiffs are not legally entitled to any relief hereinbefore prayed for, then they pray that it shall be ordered, adjudged, and decreed by the court that they be entitled to demand and receive from the said lessees and their assigns all sums of money due from them for the rent of the water-power, as aforesaid, or that may accrue from the 1st day of May, 1877; that a receiver be appointed to take charge of the said water-power, manage and control the same, and collect the rents therefrom and apply the same to the payment of the claim of the plaintiffs until the same is fully paid; and that the said receiver shall be authorized and empowered to make such additional leases of the said water-power as can be safely done without interfering with the navigation of the said canal, but not to exceed thirty run of stone; that the said purchasers and owners of the said canal from the City of Logansport to the City of La Fayette, as aforesaid, be required to keep and maintain the dam, lock and canal in good condition; to preserve and maintain said water-power at the said City of Delphi, and that the said receiver be required to compel the lessees of the said water-power to keep and perform the stipulations contained in the leases aforesaid, as to making of repairs of the said canal; and for all other and further relief to which the plaintiffs are entitled by virtue of matters and things hereinbefore stated."

On the 15th of May, 1878, French, Hanna & Co., as assignees of Johns, filed their intervening petition in the cause, also called in the record a cross-bill, in which they set forth the facts in relation to the power granted to Johns, substantially as has already been stated, and then averred as follows:

"Your petitioners further show that, in expectation of the permanent enjoyment of said water-power, they have erected large and extensive woolen-mills on said lot nine (9) in Fort Wayne, at a cost of $25,000, and for many years

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[520] have been operating the same by means of said water-power on said canal so granted to said Johns, and thence conveyed to them; that the part of said canal in Allen County, including that supplying said water-power, is still kept up by said purchasers. That said water-power is of great value to your petitioners, as was the grant made by said Johns on the river for the same; that the annual value of said water-power is at least $1,500, and the aggregate value of the same is not less than $25,000, and in the sale of said canal the water-power so granted to said Johns and now owned by petitioners added at least $20,000 to the price paid and to the fund now in court. Your petitioners further show that by said sale so made of said canal property, of every nature and description, a large fund, to wit: $150,000, has been realized, and is now in the custody of this court, and that of said fund at least $50,000 has been derived from the sale of that part of said canal which is supplied with water only by the feeder constructed to divert the water, and from the water in fact diverted from the St. Joseph River above the mill of said Johns, as aforesaid, and which was so ceded by said Johns to the State, as aforesaid, and that of said $50,000 so realized at least four fifths was derived from the sale of the water-powers on said canal made by the water so diverted from the mill of said Johns and ceded to the State, as aforesaid, as the condition for the grant of said perpetual water-power to him; that said purchasers contend that said property was sold to them absolutely free and clear of all claims of your petitioners; while it is, on the other hand, pretended by the receiver and said Trustees that your petitioners have no claim whatever on said funds, whereas your petitioners insist that, as they had a claim in the nature of a personal liability against said State, that the same was assumed by said Trustees, and that their said claim was and is a charge not only on said fund, but that it also follows said property into whosesoever hands it passes."

The prayer of the petition is as follows:

"But insomuch as there is great danger that, from the abandonment of said canal as a public highway, it may go to ruin, and your petitioners' claim upon the property itself become of little value, and by reason of your petitioners' manifest equity in the premises, and forasmuch as this large fund, so derived from the [521] sale of said property, is now in the custody of this court for distribution to all parties equitably interested therein, and forasmuch as all the parties, as well the purchasers as the original complainants and defendants herein, are still before the court for the settlement of all equities in the premises:

Your petitioners pray that they have leave to file this their intervening petition; that said parties to this original suit, the said Samuel B. Gookins, as such receiver, and the said William Fleming, John H. Bass, Oscar A. Simons, James Lillie, George J. Bippus and Robert Simonton, as purchasers, and each of them, be required to make full and true answer in the premises, and show, if they can, why your petitioners should not be paid out of said fund any damages which they may sustain by reason of the abandonment of said canal by the State and by said Trustees, and why the estate of said purchasers in said property shall not be declared to be servient to that of your petitioners, and upon the hearing will Your Honors grant to your petitioners all such relief as may be just, equitable and proper."

In each of the petitions it was stated that Fleming, the original purchaser, had transferred a part of the property to others. All these purchasers, as well as Fleming, the Trustees of the canal, Gapen and Gookins, who in the progress of the cause had been appointed receiver, were named in the petitions as defendants, and they all appeared and filed demurrers. These demurrers were sustained below and the petitions dismissed. From the decrees to that effect the present appeals were taken.

The first questions to be settled relate to the rights of Spears & Case, Johns, and the Trustees of the canal respectively, under their several contracts with the State.

1. As to Spears & Case.

To our minds it is clear that the effect of what was done with these parties was to convey to them a property right in the rents produced by leasing the water-power made available through their work, to continue until the compensation stipulated for was paid in full. The State assumed no pecuniary obligation in the contract that was made, and Spears & Case agreed to look only to the rents for their pay. To this end the State "appropriated," that is to say, set [522] apart, the rents for the use of Spears & Case, and made itself a trustee to collect and pay them over as fast as received. No other reasonable construction can be given to the language of the statute on which the rights of the parties depend. In effect the State said to the contractors, "If you will do the work necessary to create the power, or, in other words, if you will make the water in the canal available for power at the place designated, you shall have the revenues which accrue from the use of the power so created and made available, until you are paid for your work at the agreed rate." The undertaking on the part of the State was not to pay out of a particular fund, but that the fund when raised should belong to the contractors. The debt was in reality not a charge against the State, but against the water-power. The language in this statute is even more explicit than that in the 5th section of the Act of 1832, which this court held in *Trustees* v. *Beers*, 2 Black, 448 [67 U. S., XVII., 327], created a lien on the canal, its lands and revenues, as security for the bonds that were issued, which could not be devested by any subsequent legislation. Here the very statute which authorized the creation of the power "appropriated" the revenue to be derived from the power primarily to the payment of the expense of its creation, and expressly provided that payment of such expense should not be made in any other way. Not only did the contractors agree to look alone to the rents for their compensation, but the State appropriated the rents to their use. There was both the giving and taking which operated as a complete transfer, at least in equity.

Our conclusion, then, is, that from the time Spears & Case completed the work under their contract, the State held the water-power made available by what they had done to the extent of the amount required to propel thirty run of stone, in trust to lease on the terms and conditions specified, whenever it could be done with-

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out detriment to navigation, and pay over the rents as received to Spears & Case until their claim was satisfied. In fact the State never became the beneficial owner of the power that was created. From the time of its creation it belonged in equity to Spears & Case until their charge upon it was paid. The State held the legal title coupled with authority to make the contemplated leases, but this was to be for the use and benefit of Spears & Case so long as anything remained due to them for what they had
23] done. Such was the manifest intention of the parties, and that, in a court of equity, is enough. *Ketchum* v. *St. Louis*, 101 U. S., 316 [XXV., 1002]. It is no doubt true that Spears & Case in their contract assumed the risk of a loss of the power by the decay or destruction of the canal, and that the State was under no binding obligation to keep up the repairs so as to supply the power; but that is not the case presented by this demurrer, for it is expressly averred that the canal is still maintained, and that the water is being furnished to the different lessees under their respective leases. For all the purposes of the present appeal, we must take that averment as true. If the facts are otherwise, it may, perhaps, be shown in defense.

2. As to Johns and his assignees.

Here, we think, was an absolute grant, for a valuable consideration, by the State to Johns, of the right to draw water from the canal for the purpose and on the terms and conditions specified. It was not a grant of the lands on which the canal was built, but of the right to draw water from the canal to be used in lieu of that which had been taken away. Originally Johns took the power directly from the river to his mill. Under his grant he was allowed to draw it through the canal, subject to the limitations and restrictions provided for. The only substantial difference between his rights and those of the other lessees of power was, that they were to pay rent at stated periods for the water they used, while he was to draw without payment of rent, in consideration of his release of the damages he had sustained by the diversion of the water from the river to the canal. What he got was the grant of a right to enter on the canal and draw water therefrom to his mill whenever and so long as there was a surplus over what was wanted for navigation and the supply of the earlier leases. This was a property right, and the legitimate subject of grant. *De Witt* v. *Harvey*, 4 Gray, 488. Johns could not, any more than Spears & Case, compel the State to keep the canal in repair so as to give him the water, but as long as the canal was maintained and the water furnished, he had the right to draw. In this petition, as in that of Spears & Case, it is expressly averred that the canal is still maintained and supplied with water.

3. As to the trustees of the canal.

24] By an express provision in the grant to the Trustees, their title was made subject to all existing rights and equities against the State on account of the property conveyed, or any part thereof, and to all liabilities of the State growing out of or in relation thereto. In other words, the State conveyed all its remaining interest in the canal, and the Trustees took what they got, charged with the same trusts, and incumbered by the same liabilities that rested on it when the grant was made. It follows that whatever property rights Spears & Case or Johns had in the canal before the grant, they retained after it. All that the State was bound to do in respect to them before, the Trustees must do afterwards. As the State was the trustee of the power at Delphi for the benefit of Spears & Case when the transfer was made, the Trustees took the title, subject to the same trust, and became bound in respect to its management in the same way and to the same extent the State had been until that time. Rents collected after the transfer were as much the property of Spears & Case, in the hands of the Trustees, as they were in the hands of the State. So, too, in respect to Johns. Whatever water he could draw from the canal before the transfer he was entitled to draw afterwards. All that the State could be required to do for his benefit at the time of the transfer, the Trustees were bound to do while they held the property. The obligations of the Trustees in respect to both these parties were precisely the same as those of the State; no more and no less.

It only remains to consider whether the petitioners are entitled to relief in this suit and under the form of proceeding they have adopted.

They were not originally parties to the suit. No sale of the trust property could be made in their absence which would dispose of their rights. All that could pass under such a sale would be that which was conveyed by the State to the Trustees, to wit: the canal, etc., subject to the prior rights of the petitioners. No decree binding on the petitioners could be rendered, defining what their rights actually were. A purchaser would take only what the Trustees held, and be left to settle with the petitioners as best he could.

But while the petitioners were not, in fact, parties, they might with propriety have been [525] made such, and there cannot be a doubt that if they had intervened before the decree of sale, and asked to be made defendants, it would have been within the power of the court, with the consent of the complainants, to take them in. The case did go on without them, presumably because it nowhere appeared until their intervention that there were any such outstanding rights as they claim. The decree, as entered, is broad enough on its face to authorize a sale of the property free of all incumbrances. The purchasers, acting on the idea that they bought all the water-power in the canal, and that the rights of the several petitioners had been extinguished, claim the rents under the Delphi leases as their own, and threaten to cut off the supply of water to the assignees of Johns unless rent is paid for what is used. In this condition of things, and while the purchase money was under the control of the court, the petitioners intervened and asked to have their rights in the premises determined before any final distribution of the money was made. To their intervention no exception is taken by any of the parties. They are, therefore, to all intents and purposes now to be treated as though they had originally been made defendants and set up their demands. It seems to us eminently proper that, before the money paid under the sale is put beyond the control of the court, it should be determined what, under the new develop-

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ments, the rights of the several parties in respect to the property in question really are. From what appears it is clear that the court expected to sell, and the purchasers supposed they were buying, the whole property free of all incumbrances. If that be so, the money in the hands of the court may not, perhaps, improperly be treated as representing what it was supposed would pass by the sale, rather than what actually did pass as the parties stood when the decree was entered. The petitioners, in their intervening petitions, state in terms their willingness to treat the sale as binding on them, if they can be paid from the proceeds what in equity represents the value of their interest in the property sold. As the case now stands, we see no reason why this may not be done. But we have only part of the record in the original suit here, and it may be that under all the circum- [526] stances such relief would not be just to the complainants. In that event it may be proper for the court to consider whether the facts connected with the sale were such as to make it inequitable to hold the purchasers to their purchase subject to the rights of the petitioners, in case they shall elect not to be bound.

Without deciding what upon the final hearing should be the form of relief afforded the petitioners, we are clearly of opinion that upon the facts stated in their petitions they are entitled to have their rights in the premises ascertained and something done in their behalf. The prayer of the petition of Spears & Case is for alternative relief. If it shall be determined that their interest in the property passes by the sale, they ask to be paid its value from the proceeds. If it does not, then they seek to have their rights, as against the purchasers, specifically ascertained and determined; the rents which have accrued and which may hereafter accrue from the Delphi leases paid over to them, and the proper steps taken to make the unused power at that point available for the liquidation of what is still due on their certificate. French, Hanna & Co., the assignees of Johns, ask to be paid the value of the power which was granted to them, and for general relief. Under this prayer for general relief the court will be authorized to establish their right to the use of the water as granted, free of rent, in case it shall be determined they are not entitled to be paid the value of their power from the proceeds of the sale.

Without pursuing the inquiry further, we conclude the court was wrong in sustaining the demurrers and dismissing the petitions. *The decrees dismissing the petitions are, therefore, reversed and the causes remanded with instructions to overrul the demurrers and proceed thereafter as justice may require, not inconsistent with this opinion.*

Reversed.

True copy. Test.

James H. McKenney, Clerk, Sup. Court, U. S.

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[728]

RALLS COUNTY, *Plff. in Err.*,

v.

JOSEPH M. DOUGLASS.

(See S. C., 15 Otto, 728-733.)

County bonds issued by de facto *officers—insufficient defense—Missouri county bonds—valid without being stamped—evidence—pleading—construction of law—instruction to jury.*

1. County bonds issued in Missouri by a *de facto* county court, and sealed with the seal of the court and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.

2. It cannot be shown, as a defense to such bonds issued in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter.

3. Bonds issued by counties in Missouri during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are not invalid under the State Constitution of 1865, if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken.

4. Such county bonds and the coupons thereof were admissible in evidence on the trial of an action against the county for the recovery of the amount due thereon, although not stamped as obligations for the payment of money under the provisions of the internal revenue laws of the United States in force at the time of their issue.

5. In such suit, it was not necessary to prove the order of the county court authorizing the president of the court to sign and the agent to countersign the bonds, if there was no plea or answer sworn to denying the execution of the bonds or coupons sued on.

6. The plaintiff may prove that he was a *bona fide* holder and owner of the coupons sued on, under an averment in the petition that he was the owner thereof, which was denied.

7. The rights of the parties are to be determined by the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

8. Where all the defenses relied on in an action involve questions of law only, and the court correctly decides the legal propositions in favor of the plaintiff, it is not error to instruct the jury to bring in a verdict for the plaintiff.

[No. 185].

Submitted Jan. 11, 1882. Decided Mar. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This action was brought in the court below by the defendant in error upon certain coupons detached from bonds alleged to have been issued by the County Court of plaintiff in error, under authority of section 29, of an Act of the General Assembly of the State of Missouri, entitled "An Act to Incorporate the St. Louis and Keokuk Railroad Company," approved February 16, 1867. Judgment in the court below having been rendered for the plaintiff, the County sued out this writ of error.

The case further appears in the opinion.

Mr. **Henry A. Cunningham,** for plaintiff in error.

Mr. **John H. Overall,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [729]

If we understand correctly the questions presented in this case, they are:

1. Whether, if county bonds are issued in Missouri by a *de facto* county court, and are sealed with the seal of the court and signed by the *de facto* president, they can be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.

NOTE.—*Acts of* de facto *officer, when valid.* See *note* to Hussey v. Smith, 99 U. S., XXV., 314.

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2. Whether it can be shown as a defense to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made, was not organized within the time limited by its charter.

3. Whether bonds issued by counties in Missouri during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are invalid if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken.

4. Whether county bonds and coupons issued in the years 1870 and 1871, in payment of subscriptions to railroad companies, were admissible in evidence on the trial of an action against the County for the recovery of the amount due thereon, if not stamped as obligations for the payment of money, under the provisions of the internal revenue laws of the United States, in force at the time of their issue.

5. Whether, in this suit, it was necessary to prove the order of the County Court authorizing the president of the court to sign and the agent to countersign the bonds, there being no plea or answer sworn to denying the execution of the bonds or coupons sued on. [30]

6. Whether testimony was admissible to prove that the plaintiff was a *bona fide* holder and owner of the coupons sued on, there being no averment in the petition to that effect.

There are other questions presented by the assignments of error, but they are not alluded to in the argument and we do not deem them of sufficient importance to require attention.

1. As to the competency of the court.

In no State is it more authoritatively settled than in Missouri that "The acts of an officer *de facto* (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done." In *State* v. *Douglass*, 50 Mo., 596, the Supreme Court of that State said: "Without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right *de jure* was established." To the same effect is *Harbaugh* v. *Winsor*, 38 Mo., 327. This is conclusive. The question here is not whether Dimmick was *de jure* Probate Judge of Ralls County, but whether he was acting under color of right as a justice and president of the County Court. That is averred in the petition and not denied in the answer. His right to the office is one thing; his action while exercising the duties of the office another.

2. As to the organization of the company.

Both this court and the Supreme Court of Missouri have held over and over again that such a defense as was here set up cannot be maintained. *State Bk.* v. *Merch. Bk.*, 10 Mo., 123; *Kayser* v. *Tr. of Bremen*, 16 Mo., 88; *Smith* v. *Clark Co.*, 54 Mo., 58; *St. Louis* v. *Shields*, 62 Mo., 247; *Macon Co.* v. *Shores*, 97 U. S., 277 [XXIV., 890]. [31]

3. As to the vote of the people.

The Supreme Court of Missouri has many times decided, and this court, following such decisions, has always held that the provision in the State Constitution of 1865, article 11, section 14, prohibiting a county from becoming a stockholder in or loaning its credit to a corporation without a vote of the people, was intended as a limitation on future legislation only and did not operate to repeal Enabling Acts in existence when the Constitution took effect. *State* v. *Macon Co.*, 41 Mo., 453; *R. R. Co.* v. *Alderman*, 47 Mo., 349; *State* v. *Sullivan Co. Ct.*, 51 Mo., 522, decided in 1873, in which it was said "It has always been held that the provision of the Constitution, article 11, section 14, was a limitation upon the future power of the Legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted;" *State* v. *Greene Co.*, 54 Mo., 540; *Callaway Co.* v. *Foster*, 93 U. S., 570 [XXIII., 912]; *Scotland Co.* v. *Thomas*, 94 U. S., 688 [XXIV., 219]; *Henry Co.* v. *Nicolay*, 95 U. S., 624 [XXIV., 394]; *Cass Co.* v. *Gillett*, 100 U. S., 592 [XXV., 586]. When all these cases were decided the Act of March 23, 1861, was in force, which provided that it should not be lawful for counties to subscribe to the stock of railroad companies until an election had been held under the provisions of that Act, yet it seems never to have been specially referred to, either by counsel or the court, except once in *Smith* v. *Clark Co.*, 54 Mo., 70, when Napton, *J.*, said: "So that the provisions of the revised Code of 1855, and the amendatory Acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of the prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as their reports show, not to effect the repeal of the privileges contained in special charters."

Such being the condition of the law on this subject down to April, 1878, we do not feel inclined to reconsider our former rulings, and follow the later decisions of the Supreme Court of the State in *State* v. *Garroutte*, 67 Mo., 445, and *State* v. *Dallas Co.*, 72 Mo., 329, where this whole line of cases was substantially overruled. [732]
The bonds involved in this suit were all in the hands of innocent holders when the law of the State was so materially altered by its courts. In our opinion, the rights of the parties to this suit are to be determined by the "law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." *Douglass* v. *Pike Co.*, 101 U. S., 687 [XXV., 971].

4. As to the stamps.

The Act of July 13, 1866, 14 Stat. at L., 141, ch. 184, amending that of June 30, 1864, ch. 173, sec. 154, 13 Stat. at L., 293, provided that all official instruments, documents and papers issued by the officers of the United States Government, or by the officers of any State, county, town or other municipal corporation, should be exempt from taxation. This exempted the class of public securities to which these bonds and coupons belong. It is, indeed, said in a proviso that the intention was only to exempt State, county, town or municipal corporations from taxation while in the exercise of the functions strictly belonging to them in their ordinary gov-

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ernmental and municipal capacity, but that does not, as we think, affect this case. These bonds were issued by this County in its municipal capacity, and for purposes which were declared by law to be municipal.

5. As to the proof of authority from the County Court.

It is conceded that, under the practice in Missouri, unless the execution of the bonds was denied under oath, their execution was admitted. There was no such denial here. Hence it was only necessary to prove such facts connected with the execution as were directly put in issue by the pleadings. The only defense relied on under this branch of the case was the authority of the court to make the order it did. All else was, therefore, admitted. As the presiding judge was necessarily the president of the court, the bonds are not invalid because signed by the president as presiding judge.

6. As to proof of *bona fide* ownership.

Ownership was alleged in the petition. This ownership at the maturity of the coupons and for value, was denied in the answer. This clearly made the evidence not only proper but necessary.

Since all the defenses relied on involved questions of law only, except that as to *bona fide* ownership, and the court correctly decided the [733] legal propositions in favor of the plaintiff, it was not error to instruct the jury to bring in a verdict for the plaintiff if they believed he was the *bona fide* holder and owner of the coupons sued for.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 104; 110 U. S., 687.

PAPER-BAG MACHINE CASES.

THE UNION PAPER-BAG MACHINE COMPANY, WILLIAM H. CHATFIELD AND WILLIAM WOODS, *Appts.*, *v.* MORRIS H. NIXON AND [766] WILLIAM O. ANDERSON.

MORRIS H. NIXON AND WILLIAM O. ANDERSON, *Appts.*, *v.* THE UNION PAPER-BAG MACHINE COMPANY ET AL.

THE UNION PAPER-BAG MACHINE COMPANY, WILLIAM H. CHATFIELD AND WILLIAM WOODS, *Appts.*, *v.* THOMAS NIXON.

THOMAS NIXON, *Appt.*, *v.* THE UNION PAPER-BAG MACHINE COMPANY, WILLIAM H. CHATFIELD AND WILLIAM WOODS.

(See S. C., 15 Otto, 766-772.)

Owner of patented machine, rights of—licensee—suit for infringement—decree for costs.

1. The owner of a patented machine, without any conditions attached to his ownership, may continue the use of his machine during an extended term of the patent, and may also sell it to others to be used during the same period.

2. The exclusive right of a licensee to the use of a patented machine in a certain territory, continues no longer than the term of the original patent.

3. Licensees cannot sue for an infringement. All their rights must be enforced through or in the name of the patentee.

4. Where, on an appeal, the controversy is really as to costs alone, the decree will not be considered.

[Nos. 95, 181, 96, 182.]

Argued Dec. 19, 1881. Decided Mar. 6, 1882.

APPEALS from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Messrs. **George Harding**, *John R. Bennett*, *Francis T. Chambers*, *John E. Hatch* and *Arthur Stern*, for appellants.

Messrs. **E. W. Kittredge, James Moore** and *R. D. Mussey*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 28th of April, 1857, a patent was granted to Charles H. Morgan and Benjamin R. Smith for an invention by Benjamin F. Rice of a "machine for making paper bags." This will hereafter be referred to as the Rice patent. By agreements entered into on the 11th of February and 12th of August, 1859, the owner of this patent executed to Martin Nixon, Thomas Nixon and William H. Chatfield, partners, under the name of Nixon & Chatfield, a license for the exclusive use of the patented machines within certain territory which included the States of Ohio and Indiana. Thomas Nixon, one of the licensees, is one of the parties to these appeals, and upon the dissolution of the firm of Nixon & Chatfield, in the year 1865, his interest in the license passed to and became vested in Chatfield & Woods. On the 6th of March, 1860, a re-issue of this patent was granted to Charles H. Morgan, Leonard Whitney, Jr., and Thurston Priest. Some time about the year 1863, Francis H. Morgan, a brother of Morgan [767] one of the patentees, became the owner of one of the machines covered by this patent, with an unrestricted license for its use. Morgan, the patentee, was for a time a joint owner of the machine with his brother, but he afterwards parted with his interest and Francis H. Morgan became the sole owner. While there is no testimony in the case showing any instrument in writing by which the other patentees united in a license for the use of this machine, we are entirely satisfied that they gave their assent to what was done by Charles H. Morgan, and are in no condition to claim adversely to the license which he undertook to grant.

On the 17th of March, 1863, another patent was issued to Charles H. Morgan for an improvement in paper-bag machines. This will hereafter be referred to as the Morgan patent. Afterwards, Francis H. Morgan became the owner of two machines containing the improvements embraced in this patent, with an unrestricted license for their use. On the 26th of October, 1865, an exclusive license for the use in Philadelphia of machines embraced in both patents was granted to Francis H. Morgan, but there is no testimony showing that his rights in respect to the machines he already owned were confined to that territory, and there is no doubt but that he owned all the machines now in question long before this exclusive license was given.

On the 27th of November, 1865, which was

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after Thomas Nixon had retired from the firm of Nixon & Chatfield, and transferred all his interest in the exclusive license for the Rice patent to the other partners, Francis H. Morgan sold and conveyed to Thomas Nixon the two Morgan machines which he owned, and agreed to furnish on demand all other machines of like pattern and workmanship which Nixon might want. Nixon, on his part, bound himself not to use the machines he got in this way except within the States of Ohio and Indiana, and to pay the owner of the patent a royalty of three cents on every thousand bags made. He also agreed not to use any other machines in the manufacture of bags than such as he procured under this contract.

Afterwards, on the 2d of November, 1866, Nixon wanted another machine and called on Francis H. Morgan to furnish it under his con- [768] tract. Morgan having none of the Morgan machines on hand at the time, offered his Rice machine in the place of the one called for by the contract. This Nixon agreed to accept if he could be released from his obligation not to use any other than Morgan machines within his territory. Morgan, thereupon, stipulated accordingly, and Nixon took the machine.

All these things were done by Francis H. Morgan with the full knowledge and consent of Charles H. Morgan, who was then the sole owner of his own patent and of a half interest in that of Rice. An attempt was made to show the contrary of this, but the testimony leaves no doubt in our minds as to the fact.

Nixon took all the machines he got from Francis H. Morgan to Richmond, Indiana, and either himself or through others carried on the manufacture of bags by their use. On the 21st of April, 1871, the Rice patent was extended for seven years from April 28, 1871, on the application of Roxana Rice, the widow and executrix of the inventor. Mrs. Rice assigned the extended patent to the Union Paper-Bag Machine Company, and that Company, on the 27th of June, 1871, granted to Chatfield & Woods the exclusive right to use machines constructed under the patent in the States of Ohio and Indiana. At the same time the Company granted to the same parties the exclusive right of using within the same territory other machines covered by other patents which it owned, reserving a royalty of four cents on every thousand bags manufactured by any of the machines.

On the 17th of July, 1871, after this assignment, the Bag Company and Chatfield & Woods sued Thomas Nixon, Morris H. Nixon and William Anderson, alleged to be doing business as partners under the name of Nixon & Company, to restrain them from using the Rice machine. The defendants answered, denying the alleged partnership, and averring that the business was carried on by Morris H. Nixon and William Anderson alone, they using the machine which belonged to Thomas Nixon and paying him a stipulated rent therefor. The suit was then discontinued as to Thomas Nixon, and from that time it was prosecuted alone against the other [769] defendants. A new suit of a similar character was, however, begun against Thomas Nixon, and the two were carried on together. In both the suits answers were filed, in effect denying the validity of the patent and the infringement, but on the 31st of May, 1873, decrees were entered in both cases, enjoining the defendants from using the machine, and ordering a reference to a master to state an account of profits and damages.

The accounting was continued before the master until the 14th of June, 1876, when Thomas Nixon paid to the Bag Company the sum of $7,543, and took a receipt therefor, as follows:

"CINCINNATI, June 14, 1876.

Received of Thomas Nixon the sum of seven thousand five hundred and forty-three dollars (7,543.00), money due under the contract of F. H. Morgan with Thomas Nixon, dated November 27th, 1865, and in full for the amount which the said Thomas Nixon reported to be due as royalties under said contract, May 10, 1876.

$7,543.00 Union Paper-Bag Machine Co.,
by EDWIN J. HOWLETT, *Pres.*"

The hearing before the master was continued after this payment was made, and on the 23d of October, 1877, a report was filed, in which the master stated that the period covered by his inquiries was from June 27, 1871, the date of the exclusive license to Chatfield & Woods, to June 9, 1875, the date of the service of the injunction in the case. He also set forth the facts as to the contracts with Francis H. Morgan, and the payment of the royalties thereunder, substantially as they have already been given. He found that the number of bags manufactured by Nixon & Company between the dates above mentioned was 93,500,000, and that the royalty fixed by the Bag Company for the use of all its machines was four cents a thousand.

After the report was filed, the defendants in each of the cases asked and obtained leave to put in a supplemental answer, setting up the contract with Francis H. Morgan, and the payment to and acceptance by the Bag Company of the royalties due thereunder on the 14th of June, 1876. Upon the final hearing, after these answers were in, the court proceeded on the evidence to state the accounts, and decreed that Chatfield & Woods had no right on the pleadings and evidence to any recovery. As to the Bag Company, it was found that it was the [770] owner of the Rice patent; that it had an established license fee for the use of the several patents for improvements in paper-bag machinery, referred to in its licenses to Chatfield & Woods, and others, of four cents a thousand bags; that this license fee included the use of the Rice machine; that the Francis H. Morgan contract operated as a license to Nixon for the use of the Morgan machines, but not of the Rice machine; that 93,500,000 bags had been manufactured by Nixon & Anderson, by the use of all three of the machines; that they had already paid three cents a thousand on their royalty and must now pay one cent a thousand more, amounting in the aggregate to $935, for which a decree was entered against them. From this decree both parties have appealed; the Bag Company and Chatfield & Woods claiming that the defendants were liable to them, not for the license fee, but for the profits they made by the use of the Rice machine, and the defendants that the payment by Thomas Nixon of the royalty reserved under the Francis H. Morgan contract was a full satisfaction of all claims that could be made on them for the use of this machine, as well as those constructed under the Morgan patent.

In the suit against Thomas Nixon the same

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general conclusions were reached as in that against Morris Nixon and Anderson, but a decree for one cent damages only was rendered against him, because he only rented his machines to others to be used, and did not use them himself. From this decree, also, both parties appealed.

Upon the foregoing facts, the first question that presents itself is, whether the use of the Rice machine was included in the royalty fixed by the contract of Francis H. Morgan with Thomas Nixon. If it was, then clearly, so far as the Bag Company is concerned, the acceptance of the stipulated royalty was a satisfaction of all claims for damages. This was substantially conceded on the argument.

The right of an owner of a patented machine, without any conditions attached to his ownership, to continue the use of his machine during an extended term of the patent is well settled. *Bloomer* v. *McQuewan*, 14 How., 550; *Chaffee* v. *Boston Belting Co.*, 22 How., 223 [63 U.S., XVI., 242]; *Mitchell* v. *Hawley*, 16 Wall., 547 [83 U. S., XXI., 323]; *Adams* v. *Burke*, 17 Wall., 455 [84 U. S., XXI., 703]. Consequently, Francis H. Morgan had, by his ownership of the Rice machine, the right to its use during the extended term of the patent. He could also sell it to others to be used in the same way. Power to sell the machine and transfer the accompanying right of use is an incident of unrestricted ownership. The contract of Morgan was to furnish Thomas Nixon with all the Morgan machines he wanted to use in the designated territory at the stipulated price and royalty. When called upon to furnish one of these machines under the contract, he persuaded Nixon to take the Rice machine instead. Under these circumstances, there cannot be a doubt that it was the intention of the parties to put the Rice machine in the place of a Morgan machine under the contract, and that whatever compensation was to be paid to the patentee for the use of the Morgan machine must be paid for the use of the Rice machine. It follows that, so far as the Bag Company is concerned, there should have been no decree against Nixon & Anderson. The payment of the royalty in June, 1876, was in full for the use of the Rice machine as well as the Morgan machines.

[771]

Next, as to Chatfield & Woods. Their exclusive right to the use of the Rice machine continued no longer than the term of the original patent. *Wilson* v. *Rousseau*, 4 How., 646. The Bag Company does not appear ever to have had any interest in the patent before the extension. Chatfield & Woods have never been anything else than licensees. As such they could not sue for an infringement. All their rights must be enforced through or in the name of the patentee. *Littlefield* v. *Perry*, 21 Wall., 223 [88 U. S., XXII., 579.] Their recovery in this case, therefore, must be limited to their rights under the license from the Bag Company. Such was the understanding of the master, for he distinctly states in his report that his inquiries were confined to the period between the date of this license and the service of the injunction which stopped all further use of the machines.

Whatever may have been the effect of the first exclusive license held by Chatfield & Woods upon the right of Nixon to use his Rice machine in Indiana before the end of the original term of the patent, as that license ceased when the term expired, it necessarily follows that during the extended term no questions can arise under that license. After the extended term began, that license did not stand in the way of the use by Nixon of his machine wherever he pleased, and the Bag Company took its title subject to his rights as an unrestricted owner, save in respect to royalties, of one of the patented machines. Chatfield & Woods took their license subject to the same rights in Nixon. They cannot claim as against Nixon more than the Company could convey, and as Nixon was, in legal effect, operating his machine under a valid license superior to theirs, it follows that in this suit there can be no recovery in their behalf. Their remedy, if they have any, is against the Company on their contract for the license, or to secure the benefit of the royalty.

[772]

From what has thus been said it appears that the decree in the suit against Nixon & Anderson, as far as it requires the payment of damages, was wrong. As the payment of the royalty was not made until long after the interlocutory decree sustaining the validity of the patent, and the supplementary answer setting up the special defense was not filed until after the report of the master was in, it was right to charge the costs against them.

So far as the appeal of Thomas Nixon is concerned, the controversy is really as to costs alone. The decree against him will, consequently, not be considered. *Canter* v. *Ins. Co.*, 8 Pet., 307; *Elastic Fabric Co.* v. *Smith*, 100 U. S., 110 [XXV., 547].

The decree in the case against Nixon & Anderson is reversed, with costs, and the cause remanded, with instructions to enter a decree against the defendants for one dollar only and costs of suit. That in the suit against Thomas Nixon alone is affirmed, each party to pay the costs of his own appeal.

Mr. Justice **Matthews** having been of counsel in the court below, took no part in this decision.

True copy. Test.
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 487.

JAMES GREENWOOD, *Appt.*, *v.* UNION FREIGHT RAILROAD COMPANY.

[13]

(See S. C., 15 Otto, 13-24.)

Suit by stockholder—statute impairing obligation of contract—reservation of power to repeal charter—effect of repeal—rights of shareholders—new charter.

*1. Where the Legislature of a State has repealed the charter of a street railroad company and transferred its franchises and track to another, and the corpora-

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Vested rights; how affected by subsequent repeal of statute; vested rights defined.* See *note* to Fletcher v. Peck, 10 U. S. (6 Cranch), 87.

Reserved power to alter, amend or repeal charters. The reservation in state constitution, or in general statute, or in the special Act granting a charter, of power to amend, alter or repeal it is valid. McLaren v. Pennington, 1 Paige, 102; Crease v. Babcock, 40 Mass., 334; English v. N. H. & N. Co., 32 Conn., 243; Com. v. Fayette Co. R. R. Co., 55 Pa., 452; Penna.

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tion refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity who asks an injunction on the ground that the repealing statute impairs the obligation of a contract.

2. Such a statute does impair the obligation of the contract of the charter, unless there is reserved to the Legislature the right to repeal the statute under which the company was organized.

3. In the State of Massachusetts such a reservation becomes part of every Act of incorporation by virtue of the following language in section 41, chapter 68, of the General Statutes to wit: "Every Act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration or repeal at the pleasure of the Legislature." The court here gives a history of the origin of this and similar clauses of reservation in the statutes of the States.

4. The effect of the repeal of an Act of incorporation under such a clause is that the statute no longer exists, and whatever force the law may give to transactions entered into and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

5. The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal, and if the Legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power.

6. If the repeal of the old corporation was within the power of the Massachusetts Legislature it could charter a new one and confer the same powers on it as the former had possessed, and so far as the property or franchises of the old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor.

7. A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States, if it provides for compensation for the property of the extinct corporation so taken by the new one.

[No. 169.]

Argued Dec. 8, 1881. Decided Mar. 13, 1882

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. **George F. Edmunds,** *Edwin B. Smith* and *Alonzo B. Wentworth*, for appellant.

Messrs. **William G. Russell** and **D. E. Ware,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court: [14]

The appellant, Greenwood, a citizen of the State of New York, brings his bill of complaint, in the Circuit Court for the District of Massachusetts, against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the City of Boston, its Mayor and Aldermen by name, and against the Directors of the Marginal Freight Railroad Company, all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an Act of the Legislature of Massachusetts, of the date of April 26, 1867, to build and operate a railroad through various streets in the City of Boston, "With all the privileges and subject to all the duties, restrictions and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line

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Coll. Cases, 80 U. S., XX., 550; Miller v. New York, 82 U. S., XXI., 98: Holyoke W. P. Co. v. Lyman, 82 U. S., XXI., 133.

If the power to alter or amend is not otherwise reserved, it is a question whether it was intended to be reserved in the charter. That the charter shall not be altered except by Act of the Legislature is a sufficient reservation of power. Houston v. Jeff. Coll., 63 Pa. St., 428; State v. Yard, 10 Chic.L. N., 90; Com. v. Bousall, 3 Whart., 559.

If the power is reserved, the Legislature may repeal, alter or modify a charter by a general statute, or it may be done by change in the constitution, and a creditor cannot object, nor is the consent of the corporation necessary. *In re* Lee's Bk., 21 N. Y., 9; Read v. Frankfort Bk., 23 Me., 318; Bangor R. R. Co. v. Smith, 47 Me., 34; Atty-Gen. v. R. R. Co., 35 Wis., 425; Crease v. Babcock, 40 Mass., 334; Mayor v. N., etc., R. R. Co., 109 Mass., 103; Hyatt v. Whipple, 37 Barb., 595; Hyatt v. Esmond, 37 Barb., 601; Perrin v. Oliver, 1 Minn., 202; Butler v. Walker, 80 Ill., 345; State v. Comrs., 38 N. J., 472; Del. R. R. Co. v. Thorp, 5 Har., 454; Stephen v. Smith, 20 Vt., 160; Laren v. Pennington, 1 Paige, 102; Ferguson v. Min., etc., Bk., 3 Sneed, 609; West Wis. Ry. Co. v. Supers. of Trempealeau Co., 93 U. S., XXIII., 814; 35 Wis., 257; Beer Co. v. Mass., 97 U. S., XXIV., 989.

The power to repeal does not confer the power to destroy the executory contracts of the corporation. Curran v. Arkansas, 56 U. S. (15 How.), 304; S. C., 12 Ark., 321.

The power to alter or modify is not exhausted by one alteration. M. & E. R. R. Co. v. Comrs., 37 N. J., 228; People v. Hills, 46 Barb., 340; Proprietors, etc., v. Haskell, 7 Me., 474.

Under reserved power to repeal the State may regulate passenger and freight rates. Shields v. State, 26 Ohio St., 86; Parker v. Metropolitan R. R. Co., 109 Mass., 506; Plank Road Co. v. Reynolds, 3 Wis., 287; Atty-Gen. v. R. R. Co., 35 Wis., 425; State v. Stone, 37 Wis., 204; Hinckley v. Chic., etc., R. R. Co., 38 Wis., 194; Peik v. Chic., etc., R. R. Co., 94 U. S., XXIV., 97; 6 Biss., 177.

Where power is reserved to alter a charter, the State may prescribe the manner of the exercise of such power. *In re* Reciprocity Bk., 22 N. Y., 9; 29 Barb., 369; 17 How. Pr., 323.

Under power to alter the State cannot change the nature of the corporation, nor take away property rights; nor authorize the taking of private property for public use without compensation. Com. v. Essex Co., 79 Mass., 239; Buffalo, etc., R. R. Co. v. Dudley, 14 N. Y., 336; Allen v. McKean, 1 Sumn., 276 White v. R. R. Co., 14 Barb., 559; Troy, etc., R. R. Co. v. Kerr, 17 Barb., 581; Miller v. R. R. Co., 21 Barb., 513.

A charter may be repealed by implication. Union R. R. Co. v. East Tenn. R. R. Co., 14 Ga., 327.

If a general statute reserves the power to alter charters, a charter subsequently granted is subject to this power. Cent. R. R. Co. v. State, 54 Ga., 501; Fort Plain Br. v. Smith, 30 N. Y 44; Suydam v. Moore, 8 Barb., 358; White v. R. R Co., 14 Barb., 559; Hyatt v. McMahon, 25 Barb., 457, Iron City Bk. v. Pittsburgh, 37 Pa. St., 340; State v. Person, 32 N. J., 134; State v. Comrs., 37 N. J., 228; Griffin v. Ky. Ins. Co., 3 Bush., 592.

If the power to repeal a charter depends upon the abuse or misuse of the privileges, it is not necessary that such abuse or misuse be judicially ascertained. Miners' Bk. v. U. S., 1 Iowa, 553; Crease v. Babcock, 40 Mass., 334; Erie, etc., R. R. Co. v. Casey, 26 Pa. St., 287; but see, Flint, etc., v. Woodhull, 25 Mich., 99; Mayor v. Pittsburgh, etc., R. R. Co., 1 Abb., 9.

A State may repeal or alter a charter of a corporation where its support is drawn wholly from the State. Mobile School Com. v. Putnam, 44 Ala., 406; Dart v. Houston, 22 Ga., 506; Bass v. Fontleroy, 11 Tex., 698.

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of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the Legislature of Massachusetts incorporated, by an Act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the Board of Aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of [15] the track of that and any other street railroad company on payment of compensation. This latter Act also repealed the charter of the Marginal Company.

Sections four, six and seven of this Act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Company and, as they are short, they are here given *verbatim*.

"Sec. 4. Said corporation may, within its authorized limits, and for the purposes of this Act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.

Sec. 6. Said corporation shall, within four months from the passage of this Act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

Sec. 7. Chapter one hundred and seventy of the Acts of the year eighteen hundred and sixty-seven, entitled an 'Act to Incorporate the Marginal Freight Railway Company,' and so much of chapter four hundred and sixty-one of the Acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed."

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this Act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the state courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants to prevent [16] these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes* v. *Water-Works Co.* [*ante*, 827], in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the Act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the Act of May 6, 1872, the remaining question to be decided is, whether the features of that Act to which complainant objects in his bill are beyond the power of the Legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two:

1. The repeal of the charter of the Marginal Company.

2. The authority vested in the Union Company to take its track for the use of the latter Company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of [17] the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning Acts of incorporation; or unless it falls within some enactment covered by that part of its own charter, which makes it "Subject to all the duties, restrictions and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in section 41 of chapter 68 of the General Statutes of Massachusetts, in the following language: "Every Act of incorporation passed after the eleventh

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day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration or repeal at the pleasure of the Legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an Act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the Act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the Legislature," is significant and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the [18] Legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the Act of May 6, 1872, stood alone, its validity must be conceded. *Crease* v. *Babcock*, 23 Pick., 334; *R. R. Co.* v. *Casey*, 26 Pa., 287; *Pennsylvania Coll. Cases*, 13 Wall., 190 [80 U. S., XX., 550]; 2 Kent, Com., 306.

It is argued, however, that the Act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate *that* branch or feature of the statute may depend somewhat upon the *effect* of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that Act, whatever may have been the reasons which influenced the Legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the Legislature.

The 41st section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "That no Act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and [19] which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and creditors of such a corporation after the Act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales* v. *Stetson*, 2 Mass., 146, the Supreme Court of that State made the declaration "That the rights legally vested in all corporations cannot be con- [20] trolled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the Legislature in the Act of incorporation." In the case of *Dart. Coll.* v. *Woodward*, 4 Wheat., 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher* v. *Peck* [6 Cranch, 87], and the preceding cases, and held that it applied not

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only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative Acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many Acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration or repeal, except by the consent of the corporate body, and that the general control which the Legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State Legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that *Mr. Justice* Story in his concurring opinion in the *Dartmouth College Case*, suggested that when the Legislature was enacting a charter for a corporation, a provision in the statute reserving to the Legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right [21] would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass., 146.

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal, a case from [*McLaren* v. *Pennington*], 1 Paige, 102, in which the Legislature of New Jersey, when chartering a bank with a capital of $400,000 in 1824, declared by its 17th section that it should be lawful for the Legislature at any time to alter, amend and repeal the same. And Kent, 2 Com., 307, speaking of what is proper in such a clause, cites as an example a charter by the New York Legislature, of the date of February 25, 1822. How long the Legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration and repeal at the pleasure of the Legislature, and such has been the law ever since.

This history of the reservation clause in Acts of incorporation supports our proposition, that whatever right, franchise or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania Coll. Cases*, 13 Wall., 190 [80 U. S., XX., 550]; *Tomlinson* v. *Jessup*, 15 Wall., 454 [82 U. S., XXI., 204]; *R. R. Co.* v. *Maine*, 96 U. S., 499 [XXIV., 836]; *Sinking Fund Cases*, 99 U. S., 700 [XXV., 496]; *R. R. Co.* v. *Georgia*, 98 U. S., 359 [XXV., 185]; *McLaren* v. *Pennington* [*supra*]; *R. R. Co.* v. *Casey*, 26 Pa., 287; *Bank* v. *U. S.*, 1 Greene (Ia.), 552; 2 Kent, Com., 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets or any of the streets of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right and were vested in defendants only by virtue of the repealed charter. [22]

It was, therefore, in the power of the Massachusetts Legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the Legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfill the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later Corporation, whose object was to fulfill a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Section 4 of the Act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that, in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *Bridge Co.* v. *Dix*, 6 How., 507; *Bridge Corp.* v. *Lowell*, 4 Gray., 482; *Water-Power Co.* v. *R. R. Co.*, 23 Pick., 360; *Richmond R. R. Co.* v. *Louisa R. R. Co.*, 13 How., 83.

But it is the 6th section of the Act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the Act, *shall* take the tracks, or any part [23] thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new Company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to

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the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for $15,000, the right to the use of the track of the Commercial Freight Co., and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new Company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed, as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel, that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the 41st section of chapter 68 of the general laws of the State. The latter clause declares *all* Acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is [24] to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

Cited—80 N. C., 291; 45 Am. Rep., 686.

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[41]

REBECCA B. YOUNG, EXTX. of JOHN H. YOUNG, Deceased, *Plff. in Err.*,

v.

AMERICAN STEAMSHIP COMPANY.

(See S. C., 15 Otto, 41-45.)

Shipping fees—federal question.

1. A shipping commissioner who, on shipping seamen for a voyage received the fee allowed, of $2, for each one, is not entitled to charge the same fee for each seamen who, on the return of the vessel from her voyage, reshipped and sailed on the same vessel in succeeding voyages.

2. Whether, if the fees collected by him were illegally exacted, they could be recovered back, it not appearing that any objection was made at the time to their payment, is not a question of Federal law, and the ruling of the State court on this point is final.

[No. 206.]

Argued Jan. 12, 1882. Decided Mar. 13, 1882.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The case is stated by the court.

Mr. **Henry Flanders,** for plaintiff in error.

Mr. **Morton P. Henry,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The defendant in the court below, John H. Young, who died since this case has been pending here, was appointed Shipping Commissioner of the United States at the Port of Philadelphia, in July, 1872; and was continuously in office from that time until the present action was commenced, in March, 1876. The plaintiff in the court below is a Corporation created under the laws of Pennsylvania and, during the period the deceased held his office, was the owner of four steamships sailing under the American flag between the Ports of Philadelphia and Liverpool. The men composing the crews of the steamships were shipped before the commissioner for a voyage from Philadelphia to Liverpool and back; and for every man shipped on each voyage the commissioner received from the Company the sum of $2, the payment of which was demanded by him by virtue of his office.

The total number of men shipped at Philadelphia, on board these steamships, between the [42] dates mentioned, was 6,136; of which number 2,439 reshipped and sailed on the next succeeding voyage of the same steamship on which they had returned to that port. For these the commissioner demanded and received from the Company $4,878, payments being made from time to time, as the bills were presented by him, immediately after the reshipment of the men.

The present action was brought in the Court of Common Pleas of the County of Philadelphia to recover this sum, and was submitted for decision upon an agreed statement of facts. That court held that the payments were voluntary, and that the money, therefore, could not be recovered back. The case being carried to the Supreme Court of the State, the decision of the court of common pleas was reversed, and judgment ordered for the plaintiff for the amount claimed. To review this judgment the case is brought here.

Two questions were presented for consideration to the Supreme Court of the State: 1st, whether the shipping commissioner was entitled to charge a fee of $2 for each seaman who, on the return of a vessel of the Company to Philadelphia, reshipped and sailed on the same vessel in succeeding voyages; and, 2d, whether, if the fees collected by him were illegally exacted, they could be recovered back, it not appearing that any objection was made at the time to their payment. That court decided both questions in favor of the Company; and the same questions are now presented to us.

The Revised Statutes require the several Circuit Courts of the United States, within whose jurisdiction there is a port of entry and of ocean navigation, to appoint a shipping commissioner for it; and empower them to regulate the mode of conducting business in his office; and to exercise full control over it. Sec. 4501. They also require him to take an oath of office, and to give a bond, with sureties, in such sum as the circuit

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judge may prescribe, not less than $5,000, for the faithful discharge of his duties. Sec. 4502. They provide, with certain exceptions, not necessary to be stated in this case, that the master of every vessel bound from a port in the United States to any foreign port, shall, before he proceeds on such voyage, make an agreement, in [43] writing or in print, with every seaman whom he carries to sea as one of the crew, which must contain various particulars relating to the nature and probable duration of the voyage contemplated, the port or country where it is to terminate, the number and description of the crew; the time when the seaman is to be on board to begin work, the capacity in which he is to serve, the wages he is to receive, the provisions with which he is to be furnished, and regulations as to his conduct, and to the fines and punishments to which he may be subjected, and stipulations as to advance and allotment of wages. Sec. 4511. The agreement, except as otherwise specially provided, is to be signed in duplicate in the presence of the commissioner, acknowledged before him, and certified under his hand and official seal, one copy of which is to be retained by him and the other to be delivered to the master of the vessel. Sec. 4512. For each seaman thus shipped the commissioner is allowed a fee of $2.

But the statutes also declare that these provisions as to the duty of the master and the contract with the seamen, shall not apply to masters of vessels in cases where the seamen are, by custom or agreement, entitled to participate in the profits or results of a cruise or voyage, nor to masters of coastwise or lake-going vessels that touch at foreign ports; but that "Seamen may, by agreement, serve on board such vessels a definite time, or, on the return of any vessel to a port in the United States, may reship and sail in the same vessel on another voyage without the payment of additional fees to the shipping commissioner by either the seaman or the master." Sec. 4513.

The solution of the first question presented depends upon the construction given to this last clause. The contention of the commissioner is that the exemption from payment of fees on the reshipment is limited to the reshipment for one other voyage and to that immediately following the one at which the fees were paid. On the other hand, the contention of the Steamship Company is that the exemption applies to a reshipment for all voyages succeeding the first one in regular order. We are of opinion that this latter construction is the correct one.

The legislation of Congress was designed for the protection of seamen in the merchant service; they had previously been the subject of [44] constant imposition and deception. As a class, particularly those serving as common sailors, they are proverbially improvident, and frequently the prey of unscrupulous landsmen. Soon stripped when in port of their hard earnings, they are generally willing to accept employment on almost any terms. Their necessitous condition often compelled them to submit to harsh contracts which placed them completely in the power of masters of vessels. To remedy these evils, the office of shipping commissioner was created; and he is charged with the performance of important duties connected with the shipment and discharge of seamen. Every engagement for their service must be made and signed before him. But when satisfied with the vessel upon which they have served and with the treatment received, they are disposed to continue in the employment of the same owners, they can have no occasion for his services. All that is then required of him is to see that the renewed contract is signed and acknowledged in his presence. The exemption of the reshipment from fees was undoubtedly made, as suggested by the Supreme Court of Pennsylvania, to encourage a more steady and continous service, and to make it for the interest of masters to so treat their crews as to induce them to remain with the vessels. This object requires the extension of the exemption to a reshipment on all voyages succeeding in regular order the one for which fees were paid, equally as to the one next succeeding. Every reshipment must, by its terms, be only for another voyage, not for several voyages. So, upon a strict construction, as well as upon a view of the intention of the exemption, the same result must follow. No reason can be assigned why the exemption should extend to the first reshipment on the same vessel, that will not apply to all subsequent reshipments following continuously.

It is of no weight against this construction of the statutes that it may deprive the commissioner of fees to an extent materially affecting his compensation. Statutes are not to be wrested from their true meaning because a diminution of the fees of an office may result from it.

It follows that we agree with the Supreme Court of the State on the first question presented. Upon the second question, whether the payments were voluntary and, therefore, the money could not be recovered back, we express no [45] opinion; for in any view in which it may be considered, it is not one of federal law. The ruling of the state court on this point is final, so far as we are concerned, in this action.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [97]

v.

WILLIAM G. TEMPLE.

(See S. C., 15 Otto, 97-99.)

Pay of commodore.

A commodore in the United States navy may recover mileage for travel under orders, whether by sea or on land, under the Act of March 3, 1835, c. 27.

[No. 210.]

Argued Mar. 1, 1882. Decided Mar. 13, 1882.

APPEAL from the Court of Claims.

Statement of the case by *Mr. Justice* **Woods:**

This was an action brought in the Court of Claims by the defendant in error, a Commodore in the United States Navy, to recover mileage for travel under orders.

The controversy arises upon the construction of an Act of Congress. The history of the legislation of Congress on the subject of mileage to officers of the navy is as follows: On March 3, 1835, an Act was passed which, after giving

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certain pay, etc., to officers of the navy, declared that they should be entitled to no other compensation, but with an exception thus stated: "Except for traveling expenses while under orders, for which ten cents per mile shall be allowed." 4 Stat. at L., 757, sec. 2.

Afterwards this provision of the law of 1835 was abrogated by a clause in the Act of June 16, 1874, 18 Stat. at L., 72, which was as follows: "That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid, are hereby declared illegal."

[98] On June 20, 1876, however, mileage was restored to officers of the navy, by the Act of that date, 19 Stat. at L., 65, which declared: "And so much of the Act of June 16, 1874 [etc.,] as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, while engaged in public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers so engaged, in lieu of their actual expenses."

This Act was in force when the travel for which defendant in error claims mileage was performed.

It appeared by the findings of the Court of Claims, that the defendant in error traveled under orders, and while engaged in public business, from Washington City, *via* New York City and Rio de Janeiro, to Montevideo, in South America, and thence back to Washington City *via* Rio de Janeiro, Liverpool and New York. The voyages were performed in vessels not the property of the United States. The whole distance traveled was 16,660 miles. The defendant in error applied to the accounting officer of the Treasury for payment of mileage, at the rate of eight cents per mile on the whole distance traveled by him. His demand was refused. But he was allowed eight cents per mile for the distance between the City of Washington and New York, going and returning. For all travel by sea the accounting officer would allow him only his actual expenses.

Upon suit brought, the Court of Claims allowed the defendant in error mileage at the rate of eight cents per mile for the entire distance traveled by him, and rendered judgment therefor, after deducting the money actually paid him. The United States has appealed from this judgment.

Mr. **Samuel F. Phillips,** Solicitor-Gen., for appellant.

Messrs. **Enoch Totten** and *James Lowndes,* for appellee.

Mr. Justice **Woods** delivered the opinion of the court.

The statute and the finding of the Court of Claims leave little room for controversy. The law, as it stood when the travel was performed, was explicit and is not open to construction. [99] We find in it no warrant for the distinction made by the accounting officer of the Treasury between travel by sea and travel on land within the United States, performed by an officer of the navy while engaged on public business. To hold that for one class of travel he should have eight cents per mile, and for the other his actual expenses, is to make the law, and not to construe it. When this travel was performed there was not a line on the statute-book of the United States which made any provision whatever, under any circumstances, for allowing officers of the navy, when engaged on the public business, their actual expenses of travel. The only law ever enacted which made such provision had been expressly repealed by the Act on which the defendant in error based his claim for mileage. This Act declared him entitled, without condition or limitation, to mileage at the rate of eight cents per mile, and is the only law upon the subject.

Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction, for the purpose of either limiting or extending its operation. *Waller* v. *Harris,* 20 Wend., 561; *Pott* v. *Arthur* [*ante,* 909], decided at the present Term. When the language is plain we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision.

The attempt to justify the decision of the accounting officer of the Treasury is based on an alleged practice in conformity therewith, which, it is said, grew up in the Navy Department under the Act of 1835 [4 Stat. at L., 756]. There is no warrant for any such practice, if such there was, in the language of the Act of 1835 any more than in the Act of 1876 [19 Stat. at L., 65]. But even if such a practice could have any influence in settling the meaning of an Act passed forty-one years afterwards, under changed circumstances and conditions, it is sufficient to say that we find no reference to such practice in either the findings or opinion of the Court of Claims, and we cannot assume that it ever existed.

The law on which the defendant in error bases his case is plain and unambiguous. We must give it its natural and obvious meaning, and thus interpreted it leaves the plaintiffs in error no ground to stand on.

The judgment of the Court of Claims must be affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—110 U. S., 219, 221.

GEORGE A. SCOVILL AND THOMAS H. ANNABLE, Assignees in Bankruptcy of the FORT SCOTT COAL AND MINING COMPANY, *Plffs. in Err.,* [143]

v.

NATHANIEL THAYER.

(See S. C., 15 Otto, 143-159.)

Excessive issue of stock—rights of holder—estoppel—payments—void agreement as to stock—suit in equity—rights of assignee in bankruptcy.

*1. When the amount of the capital stock of an incorporated company is limited by its charter, all stock issued in excess of the limit is unauthorized and void.

2. A holder of such unauthorized stock is not entitled to any of the rights, or subject to any of the liabilities, of a holder of authorized stock.

*Head notes by *Mr. Justice* WOODS.

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3. Holders of such unauthorised stock are not estopped to set up its invalidity as a defense to an action in the interest of creditors, brought against them, to recover the balance unpaid thereon, by the fact that they attended the meeting at which it was voted to issue the same, or that they received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorised and unauthorised stock.

4. When the company which has issued stock beyond the limit prescribed by its charter has been adjudicated bankrupt, the holders of the unauthorised stock are not entitled to have money paid thereon, applied as a credit on the unpaid balance due on the authorized stock held by them.

5. Subscribers to the stock of an incorporated company paid twenty per cent on their shares, and it was agreed between them and the company that no further assessments should be made thereon, and certificates for full paid shares were issued to them. The company was adjudicated bankrupt, and it became necessary to assess the unpaid stock to satisfy claims of creditors of the company. Held (1) that the agreement between the company and its stockholders was in equity void as to creditors. (2) That before an action at law could be maintained by the assignees in bankruptcy against a stockholder to recover upon his unpaid subscription of stock, some proceeding in the interest of creditors in a court of competent jurisdiction, to set aside the agreement between the stockholders and the company, and to make an assessment upon such unpaid stock was necessary. (3) That until such order of the court, and assessment or some authorized demand upon the stockholder to pay the balance due on the stock, no cause of action accrued against him in favor of the assignees, and the limitation prescribed by the second section of the Bankrupt Act did not begin to run in his favor.

[No. 227.]

Argued Jan. 27, 1882. Decided Mar. 13, 1882.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Statement of the case by *Mr. Justice* **Woods:**

On November 25, 1870, the Fort Scott Coal and Mining Company was organized as a corporate body, under the general laws of the State of Kansas, with a capital stock of $100,000.

According to the laws of that State, any corporation might increase its capital stock to any amount not exceeding double its authorized capital.

Under the provision of this law the Corporation, on April 19, 1871, increased its capital stock from $100,000 to $200,000. On October 16, 1872, the Corporation attempted, by taking the steps required by law for the lawful increase [144] of stock, to increase its capital stock to $300,000, and on December 27, 1872, to make a further increase of $100,000. The nominal capital was thus raised to the sum of $400,000.

Nathaniel Thayer, the defendant in error, who was a holder of shares in the company, attended by proxy the meetings of the stockholders at which the third and fourth issues of stock were voted. After this attempted increase of the stock the officers and agents of the Company, by advertisements, bill-heads, and verbally, represented that its capital stock was $400,000.

Thayer was the holder of two hundred and eighty-five shares of the first two issues of stock. On two hundred of these shares he had paid to the Company $20 per share, and on the remaining eighty-five he had paid $40 per share. He was also the holder of five hundred and eighty-five shares of the third and fourth issues, upon which he had paid the Company $50 per share. No other payments were ever made by him on his shares of stock.

The other stockholders paid the same amounts on the shares of stock of the several issues held by them respectively. By agreement made at the date of the several issues of stock the amounts paid thereon were credited to the subscribers, and the balance unpaid credited by "discount," and certificates as for full paid shares were delivered to the subscribers, and the stock account between the Company and them balanced by such "discount."

On April 2, 1874, a petition in bankruptcy was filed against said Company in the United States District Court for the District of Kansas, on April 11, the Company was adjudicated a bankrupt, and on April 29, the plaintiffs in error were appointed its assignees. On March 31, 1876, the assignees filed their petition in the bankruptcy court, wherein they prayed for an order of the court directing them to make an assessment and call upon the unpaid stock of the Company for the purpose of paying its debts.

In their petition the assignees represented as follows: "At the date of adjudication in bankruptcy, the affairs of said Company were in a very embarrassed and complicated condition, and much time has been necessarily consumed and considerable expense incurred in opposing [145] claims attempted to be established in said bankrupt court for failures on the part of said Company to comply with contracts made by it. Many fraudulent claims for large amounts have been filed against said bankrupt, requiring time to oppose and defeat, which have been defeated. The litigated claims are now reduced to a small number, not covering more than $10,601.80. The property of the Company on hand at the date of adjudication in bankruptcy has been disposed of as rapidly as seemed conducive to the interests of all concerned. The sale of a portion of the real estate has been delayed, in the hope that the demand for land would increase and your petitioners realize something out of it for the benefit of the creditors. Your petitioners believe, however, that any further delay in the disposal of the bankrupt's property would not be advantageous.

Your petitioners had intended before making this application to have fully closed up the contest over litigated claims, disposed of assets of the Company, and collected all its bills receivable, but find it is impossible to accomplish it without a longer postponement than is convenient or expedient."

The petition further averred that "The amount of the liabilities of the bankrupt over and above the assets is $124,684, while the amount yet due and unpaid on the stock held and owned by said stockholders is $222,650."

By an amendment to their petition, the assignees represented as follows: "That an assessment of seventy-six per cent upon the par value of each share of stock in said Company, if credited with the amount paid each stockholder heretofore, would equalize the burden upon the stockholders, and also bring into the hands of your petitioners a sufficient amount to pay the debts of the Company."

Upon the filing of this petition, the court made an order that all the stockholders of the bankrupt Company show cause on April 21, 1876, why the assessment and call prayed for in said petition should not be made, and that

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the assignees cause a copy of the order to show [146] cause, to be mailed to each stockholder at his usual place of residence and address, and also give notice by publication in the Fort Scott Daily Monitor, for at least ten days before the said April 21, 1876.

By order of the court, the hearing of the rule was postponed to June 10, 1876. R. S. Watson, a stockholder, had in the meantime filed exceptions to the rule, on behalf of himself and all other stockholders desiring to avail themselves thereof. On the date last named, the petition and amended petition of the assignees, and the exceptions thereto, came on for hearing, whereupon the court overruled the exceptions, and decreed that an assessment and call be made upon the stock of the Company of 76 per cent upon which should be credited to each stockholder any sums paid by him on his shares, and that the sum so assessed should be paid to the assignees on or before August 1, 1876, and in default of payment, the assignees were directed to sue for and collect the same.

On July 17, 1876, the assignees made an assessment and call upon the stockholders as authorized by the order and decree of the district court, and gave notice thereof to the stockholders, but before the assessment could be collected, Watson, the stockholder before mentioned, filed with the Circuit Judge a petition for the reversal of the order and decree of the district court authorizing the assessment and call.

It does not appear from the record upon what day this petition was filed. But on December 4, 1876, the decision of the Circuit Judge thereon was transmitted to the district court. The Circuit Judge affirmed the decree of the district court, "With this modification: that the said district court enter an order allowing each stockholder of said bankrupt Company who shall pay the amount of said assessment on his stock in ninety days from this twenty-ninth day of November, 1876, a credit on his or her proportion of the amount so assessed, as was included in said assessment for the purpose of paying the costs of enforcing by suit, the collection of said assessment."

The district court, on December 4, 1876, entered a decree in conformity with the order of the Circuit Judge.

Thayer, the defendant in error, having failed to pay within the time limited by the court, the assessment made upon him on account of his stock, although served with notice to do so, the [147] assignees, on April 9, 1877, brought against him, in the Circuit Court of the United States for the District of Massachusetts, an action at law to recover the sum of $27,160, which was the amount of the assessment on his unpaid stock.

The declaration alleged in substance the facts above recited.

The defendant in error filed two pleas, the first of which was a general denial of the allegations of the declaration, and the second set up the Statute of Limitations of two years, prescribed by section 2 of the Bankrupt Act, and now embodied in the Revised Statutes as section 5057.

The case was submitted to the circuit court upon an agreed statement of facts, a jury having been waived. The court found for the defendant; holding, in an opinion which appears in the record, that the cause of action was barred by the limitation of two years pleaded. Judgment was, therefore, rendered for the defendant. The plaintiffs below having brought the case here by writ of error, insist that the judgment of the circuit court should be reversed, assigning as error the ruling of the court upon the Statute of Limitations and the rendition of the judgment for defendant.

Messrs. **J. E. McKeighan** and **A. A. Ranney**, for plaintiff in error:

The assignees represent in these suits the creditors, and are entitled to use every claim or plea which the creditors could make, were they parties to the record. The increase of the capital stock is a thing done by the stockholders and directors within the Corporation. The creditors take no part in it * * * cannot control or direct it. They are not required to know whether the things which have been done without their knowledge, are sufficient to accomplish what it is pretended has been accomplished or not. The creditors may take that for granted which the Corporation represents has been done. It may be conceded that the general powers of Corporations to make any particular kind of contracts must be taken notice of; but this principle would not reach creditors so as to affect them with notice of the steps taken by the corporation in increasing its stock. The ancestry of the Corporation is presumed to be legitimate.

The doctrine of estoppel is applied in the following cases in favor of assignees.

Payson v. *Stever*, 2 Dill., 428; *Upton* v. *Hensbrough*, 3 Biss., 417.

It is shown in this case, that the defendant voted for the increase of stock, and that the directors made the increase and filed with the Secretary of State the certificate of such increase; that afterwards he received his stock, paying thereon fifty cents on a dollar and receiving certificates for the same; that after the increase, the Company advertised and held itself out as having a capital of $400,000; that it invited and obtained credit on the faith of such holding out; that debts so contracted remained unpaid and have been proven up. It is, therefore, too late for the stockholders who actively participated in so increasing the stock, and who, if its affairs had prospered, would have got the benefit of it on the basis of all their stock, to now plead *ultra vires*. If the increase was, in fact, invalid, it might have been made good by an amendment of their charter or the subsequent ratification by the Legislature. Creditors cannot be placed in a worse position than if that had been done which might have been done. All things are presumed to be correctly done which the corporation assumes to have been done.

Narragansett Bank v. *Atlantic Silk Co.*, 3 Met., 287; *Dooley* v. *Cheshire Guss Co.*, 15 Gray, 494.

The individual members of a corporation cannot set up their own faults or mistakes against creditors.

Ruggles v. *Brock*, 6 Hun, 164-298; *McHose* v. *Wheeler*, 45 Pa., 32; *U. S. Ex. Co.* v. *Meints*, 72 Ill., 296.

Where a stockholder participates in the proceedings for increase of stock, he cannot question the validity of the acts.

Kansas City Hotel Co. v. *Harris*, 51 Mo., 464.

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It is well established, that the State alone can inquire into the validity of acts done by a corporation, since it is the creature of the State. Ang. & Ames on Corp., 518, 636; *Brouwer* v. *Appleby*, 1 Sandf., 168.

It may have been an abuse of power for this company to increase the stock to $400,000, but its consequences must fall upon those who moved the corporation to do it, and not upon the creditor. To hold otherwise, would be to violate every principle of natural equity.

Messrs. **Sidney Bartlett, William G. Russell** and *George Putnam*, for defendant in error:

When a corporation issues what purports to be stock beyond the amount permitted by its charter, such issues are wholly void, and are not stock at all. The holder of certificates of such spurious stock is not a stockholder.

Mech. Bank v. *N. Y. & N. H. R. R. Co.*, 13 N. Y., 599; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 30; Green's Brice's *Ultra Vires*, 112, *n.*; 2 Lindl. Part., 3d ed., 1881; Field, Corp., sec. 144; *Stace & Worth's Case*, L. R., 4 Ch., 682.

The defendant is not estopped to set up the nullity of the supposed stock standing in his name.

2 Lindley Part., 3d ed., 1881; *Alabaster's Case*, L. R., 7 Eq., 278; *Bank of Hindustan* v. *Alison*, L. R., 6 C. P., 54; *Stace & Worth's Case*, L. R., 4 Ch., 682.

The cases of *Chubb* v. *Upton*, 95 U. S., 665 (XXIV., 523); *Pullman* v. *Upton*, 96 U. S., 328 (XXIV., 818); *Upton* v. *Englehart*, 3 Dill., 496; *Upton* v. *Hansbrough*, 10 B. R., 369 (S. C.); 3 Biss., 417; *Upton* v. *Tribilcock*, 91 U. S., 45 (XXIII., 203) decide that the stockholder cannot set up informalities in the issue of stock which the corporation had the power to create; but the grounds of decision have no bearing upon a case like the present, where the creation of the stock was beyond the power of the Corporation.

Mr. Justice **Woods** delivered the opinion of the court:

The averments made in the declaration were substantially supported by the agreed facts, and there should have been judgment thereon for the plaintiffs in error unless, upon the facts as disclosed, they were shown not to be entitled to a recovery on the merits, or unless the Statute of Limitations was a bar to the action.

The defendant in error insists: first, that the third and fourth issues of stock, which were made after the limit had been reached, within which the amount of capital stock of the company was restricted by the laws of Kansas, were absolutely void, and no assessment could be made on them which he was bound to pay; secondly, that the sums voluntarily paid by him upon his void stock, should be applied to the [148] payment of the balance due on his valid stock, and that when so applied they would fully satisfy the assessment thereon; and, thirdly, that in any event the facts sustained the plea of the Statute of Limitations. We shall consider these contentions in the order stated.

The Constitution of Kansas forbids special charters. Art. 12, sec. 1. All corporations in that State are, therefore, organized under general laws. The Fort Scott Coal and Mining Company was organized under the general law of the State, which, with its articles of incorporation, required by the law to be filed with the Secretary of State, constituted its charter. By the articles of incorporation the original stock of the Company was fixed at $100,000. Chapter 23, section 14, of the Statutes of Kansas provides that "Any incorporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital." The second issue increased the stock of the Company to $200,000, which was the limit prescribed by its charter. The question, therefore, is whether the stock of the third and fourth issues, by which the aggregate amount was raised to $400,000, is or is not void.

As a general rule corporations can have and exercise only such powers as are expressly conferred on them by the Act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties. *Fertilizer Co.* v. *Hyde Park*, 97 U. S., 659 [XXIV., 1036]; *Salomons* v. *Laing*, 12 Beav., 339; *R. Co.* v. *Hawkes*, 5 H. L. Cas., 341.

And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void. *Bank* v. *R. R. Co.*, 13 N. Y., 599; *R. R. Co.* v. *Schuyler*, 34 N. Y., 30; *R. Co.* v. *Allerton*, 18 Wall., 233 [85 U. S., XXI., 902]; *Stace & Worth's Case*, L. R., 4 Ch. App., 682, *n.*

In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires*. The stock itself was, therefore, void. It conferred on the holders no rights, and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders and the stock of the third and fourth by another, in a contest be- [149] tween them the latter would have been excluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows, that if the holder of such spurious stock has none of the rights, he cannot be subjected to the liabilities of a holder of genuine stock. His contract to pay for spurious shares is without consideration, and cannot be enforced.

It is insisted, however, that the defendant in error having attended by proxy the meetings at which the increase of the stock of the Company beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the Company by its agents having held itself out as possessing a capital of $400,000, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full.

We think the defendant in error is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. *Upton* v. *Tribilcock*, 91 U.S., 45 [XXIII., 203]; *Chubb* v. *Upton*, 95 U. S., 665 [XXIV., 523]; *Pullman* v. *Upton*, 96 U. S., 328 [XXIV., 818]. But those were cases where the increase of the stock was au-

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thorized by law. The increase itself was legal and within the power of the Corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant.

But here, the Corporation being absolutely without power to increase its stock above a certain limit, no acquiescence of the shareholder can give it validity or bind him or the Corporation. "A distinction must be made between shares which the Company had no power to issue and shares which the Company had power to issue, although not in the manner in which, or upon the terms upon which they have been issued. The holders of shares which the Company has no power to issue, in truth had nothing at all and are not contributors." 2 Lindley, [150] Part., 138; and see *Lathrop* v. *Kneeland*, 46 Barb., 482; *Mackley's Case*, L. R., 1 Ch. D., 247.

In *Stace & Worth's Case*, L. R., 4 Ch., 682, *n.*, it appeared that there was an agreement for the amalgamation of the London Northern Insurance Corporation and the Life Investment Mortgage Insurance Company, the two corporations to be formed into one, under the name of the corporation first mentioned. The corporation was to issue shares in exchange for those held in the company, and the amalgamated board was to consist of the five directors of the corporation, and of seven of the directors of the company, to be selected by themselves. After the amalgamation, Stace and Worth, it was alleged, received and accepted certificates for shares in the corporation in exchange for their shares in the company, and they, with five others, were appointed directors of the corporation. Afterwards, a resolution was passed for voluntarily winding up the corporation, and the names of Stace and Worth were placed upon the list of contributors. An application was made to *Vice-Chancellor* James to have their names removed from the list, who, after hearing the case argued, directed their names to be removed. This was done on the ground that the agreement for amalgamation was beyond the powers of the corporation and, therefore, void. In giving the reasons for his decision *Vice-Chancellor* James said: "It is, however, contended that notwithstanding the agreement itself was *ultra vires* and void, yet there are personal acts and things personally affecting these two gentlemen which render them still liable as shareholders." These were the acceptance of shares by Stace and Worth, the fact that their names appeared on the register of shareholders, and that they had set as directors of the corporation after the attempted amalgamation. But the Vice-chancellor declared: "This was a void agreement with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings and that aggregate of nothings is all that that there is to fix those gentlemen on the list of stockholders."

So in *Zabriskie* v. *R. R. Co.*, 23 How., 381 [64 U. S., XVI., 488], this court, after holding the railroad company to be liable on certain bonds [151] which it was alleged had been indorsed by the directors without lawful authority, added: "This principle does not impugn the doctrine that a Corporation cannot vary from the object of its creation and that persons dealing with a Company must take notice of whatever is contained in the law of its organization."

Upon the principles stated in these authorities, we are of opinion that the defendant in error is not estopped by any acts of his, to assert the invalidity of the stock issued in excess of the limit authorized by the charter, and to deny his liability thereon.

It would seem to follow that if he is not estopped by his own acts, he is not by the acts of the agents of the Fort Scott Coal and Mining Company, in representing the Company, by advertisement, and otherwise, as having a capital of $400,000.

The officers of the Company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the Act of incorporation. *Zabriskie* v. *R. R. Co., ubi supra.* The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the Company. They were bound to know that the law permitted no such increase of its capital stock as the Company had attempted to make, and that any representation that it had been made was false.

As forcibly suggested by counsel for defendant in error, if any creditor has been defrauded by misrepresentation of the real capital of the Company, he has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors who have not suffered from the alleged fraud, to recover of the entire body of stockholders who have taken no part in it.

We are of opinion, therefore, that the defendant in error is not estopped either by his own acts or the acts of the agents and officers of the Company to allege the nullity of the overissue stock, and that he is not liable to an assessment on such void stock.

The next question for our consideration is, whether the defendant in error is entitled to [152] offset against his liability to pay the sum due on his valid stock, the money paid on his void stock.

It is a general rule, that a holder of claims against an insolvent corporation cannot set them off against his liability to assessment on his stock in the corporation, in a suit by an assignee in bankruptcy. *Sawyer* v. *Hoag*, 17 Wall., 610 [84 U. S., XXI., 731]; *Sanger* v. *Upton*, 91 U. S., 56 [XXIII., 220]; *Scammon* v. *Kimball*, 92 U. S., 362 [XXIII., 483]; *Morgan Co.* v. *Allen* [*ante*, 498].

The ground upon which this rule stands, is thus stated by *Mr. Justice* Miller in *Sawyer* v. *Hoag:* "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging in equity to all its creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

The defendant in error seeks to avoid the application of this rule to his case, on the ground that the real capital of the Company was only $200,000, and this constituted the trust fund for

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the security of the debts of the Company; that all the money that had been paid in as capital stock had been paid into that fund, and that the party paying any money to that fund, was entitled to credit upon his dues thereto.

We cannot assent to this view. The defendant in error was as much bound to know the limits of the charter of the Company in which he was a stockholder, as the public, or creditors of the Company. He knew, therefore, that all stock issued beyond the limit fixed by the charter was absolutely void. When he paid in his money on the void stock, he knew that he was not paying it on the valid stock, and he is presumed to have known that it was not a good payment on the valid stock. The Company had no right to apply it on the valid stock, without his direction. He never directed such application, and it remained in the possession of the Company until the rights of the assignees in bankruptcy attached. To say that it was a contribution to the trust fund, devoted to the payment of the creditors of the Company, is an entire misapprehension. It could not be such [153] contribution, unless it were a payment on the stock of the Company, and this we have seen was not the case. No call had been made by the Company for payment on the valid stock, to which the amounts paid on the void stock could be said to apply. No call could have been made by the Company under its agreement with the stockholders, unless to pay its creditors, and it does not appear that when the payments were made the Company had any creditors. It was a voluntary payment for the benefit of the Company, and tended to increase the value of the authorized stock, In that way the stockholder got the benefit of it. There is no rule of law or equity which entitles him, in a contest between himself and a creditor of the Company, either to receive a credit for it on his unpaid stock, or to have it repaid to him *pro rata* out of the assets of the Company. We are of opinion, therefore, that it could not be offset against the money due on the valid stock held by him.

We are next to consider whether, upon the facts as disclosed by the record, the defense of the Statute of Limitations should have been sustained. The precise question with which we have to deal is, when would this action at law, brought by the assignees of the bankrupt Company against a stockholder to recover a part of the balance due on his stock, be barred by the statute?

This will depend on the answer to the question, when did the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? *Wilcox* v. *Plummer*. 4 Pet., 172; *Amy* v. *Dubuque*, 98 U. S., 470 [XXV., 228].

The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the Company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the Company this was a perfectly valid agreement. It was not forbidden by the charter of the Company or by any law or public policy, and as between the Company and its stockholders was just as binding as if it had been expressly authorized by the charter.

If the Company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied "by discount," according to their contract the stockholders could have successfully resisted such a demand. No suit could have been maintained by the Company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the Company. [154]

In fact, it has been held in recent English cases that not only is the Company, but its creditors also, bound by such a contract. *Waterhouse* v. *Jamieson*, L. R., 2 H. L., sec. 29; *Currie's case*, 3 De G., J. & S., 367; *Carling, H. & W. cases*, L. R., 1 Ch. Div., 115.

But the doctrine of this court is, that such a contract, though binding on the Company, is a fraud in law on its creditors, which they could set aside; that when their rights intervene, and to satisfy their claims, the stockholders could be required to pay their stock in full. *Sawyer* v. *Hoag*, 17 Wall., 610 [84 U. S., XXI., 731]; *New Albany* v. *Burke*, 11 Wall., 96 [78 U. S., XX., 155]; *Burke* v. *Smith*, 16 Wall., 390 [83 U. S., XXI., 361].

The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood* v. *Dummer*, 3 Mason, 308; *Mumma* v. *Potomac Co.*, 8 Pet., 286; *Ogilvie* v. *Ins. Co.*, 22 How., 387 [63 U. S., XVI., 351]; *Sawyer* v. *Hoag*, *ubi supra*. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance, require it to be paid.

In this case, the managers and agents of the bankrupt Company had in effect represented to the public that all its capital stock had been subscribed for and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the Company and its stockholders was this, namely: that the stockholders should pay, say, for example, $20 per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the Company, and when the necessity arose, and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required. [155]

When the Company was adjudicated a bankrupt, the assignees were bound by this contract, thus equitably construed. Their duty was to collect a sufficient sum upon the unpaid stock which, with the other assets of the Company, would be sufficient to satisfy the Company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For if in a bankruptcy proceeding any surplus remained after payment of debts. it would go to the Company, and not to the stockholders. And we have seen the Company in this case would have no right to any surplus.

The question for solution is, therefore, when, under the facts of this case, did the cause of

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action accrue against the defendant in error? Certainly not until it became his duty to pay, according to the terms of his contract, or according to law.

It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. *Curry* v. *Woodward*, 53 Ala., 371; *Robinson* v. *Bk.*, 18 Ga., 65; *Ward* v. *Mfg. Co.*, 16 Conn., 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. *Van Hook* v. *Whitlock*, 3 Paige, 409; *Salisbury* v. *Black*, 6 Har. & J., 293; *Sinkler* v. *Turnpike Co.*, 8 Pa., 149; *Walter* v. *Walter*, 1 Whart., 29.; *Quigg* v. *Kittredge*, 18 N. H., 137; *Nimmo* v. *Walker*, 14 La. Ann., 589.

In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant in error owed the [156] creditors nothing, and he owed the Company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the Company his obligation was to pay to the assignees, upon demand, such amount upon his unpaid stock as would be sufficient, with the other assets of the Company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the Company and the stockholder to the effect that the latter should not be required to make any further payments on his stock, should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was, in effect, a proceeding to accomplish two purposes: first, to set aside the contract between the Company and the stockholder; and, second, to fix the amount which the stockholder should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

It appears from the petition of the assignees, plaintiffs in error, for an assessment upon the stock of the bankrupt Company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the court and the stockholders required to pay it, the action was brought long before the limitation of the statute could bar it.

All the delay which has occurred has been [157] caused by the proceedings of the assignees, taken for the benefit of the stockholders, in order that they might not be subjected to unnecessary and onerous exactions. The lapse of time between the filing of the petition for the assessment and the decree of the bankruptcy court thereon is chargeable to continuances made by order of the court and to the opposition of the stockholder referred to. It does not lie in the mouth of defendant in error to say that while the steps necessary to fix his liability and limit its amount were being taken, the bar of the statute has intervened and cut off his liability altogether.

The cases cited by the defendant in error to sustain his contention that the cause of action accrued to the assignees in bankruptcy at the time of their appointment, are clearly distinguishable from this. In *Terry* v. *Tubman*, 92 U. S., 156 [XXIII., 537], the suit was by a billholder of an insolvent bank against a stockholder to enforce the individual liability of the latter to pay the bills of the bank held by the former. The court decided that the case was not so much like that of the guaranty of the collection of a debt, where a previous proceeding against the principal is implied, as it was like a guaranty of payment where resort may be had at once to the guarantor, without a previous proceeding against the principal. The conclusion of the court, therefore, was that the cause of action in favor of the billholder arose against the stockholder when the bank ceased to redeem its notes and became notoriously and continuously insolvent. It is clear that this authority has no application to the question in hand.

The case of *Terry* v. *Anderson*, 95 U. S., 628 [XXIV., 365], also relied on by defendant in error, was a suit in equity to enforce the individual liability of the stockholders of a bank, and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the court held that the Statute of Limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

In the cases of *Baker* v. *Bank*, 9 Met., 182, and *Com.* v. *Bank*, 8 Allen, 42, also relied on by de- [158] fendant in error, it appeared that upon suspension of payment by the banks there was a present and unconditional liability of their stockholders, which the court held was barred by the limitation of six years. In the case of *Baker* v. *Bank*, the court said "The demand sought to be enforced in this suit was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock, an action accrued to the bank, according to the construction of the 30th section, R. S., ch. 86,

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which is contended for by plaintiff's counsel, to recover the sum from the stockholders respectively, equal to each one's share of stock. The statute, therefore, began to run in strictness immediately on the loss of capital stock, and certainly when the bank stopped payment, and after the lapse of six years from that time the debt was barred."

But in the present case, as we have seen, as between the Company and its stockholders there was no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the necessity for the payment had been ascertained, and an authorized demand of payment made.

It is said by defendant in error, that to hold that the suit to recover the sums due on the stock held by him is not barred, would defeat the policy of the Bankrupt Act, which is a speedy settlement of the bankrupt's estate, and the equitable distribution of his assets among the creditors.

Unquestionably, a prompt administration of the bankrupt's assets was one of the ends which the Bankrupt Act had in view; but this policy must be held to be subordinate to a just regard for the rights of both the creditors and debtors of the bankrupt estate. The debtor cannot be forced to pay before his contract requires it, merely because the assignee may be in haste to close up the estate. If his obligation were evidenced by a promissory note due at a future day he could not be compelled to pay it before maturity in order that the bankrupt estate might be speedily settled. So if some act must be done [159] by the assignee, such as a demand of payment before his liability is fixed, he cannot be compelled to pay until the prerequisites have been performed. In short, until an unconditional liability to pay something is fastened on the debtor, no action can be maintained against him, and the Statute of Limitations does not begin to run in his favor. The suggestion that the assignee may postpone indefinitely the necessary steps to fix the liability of the debtor and thus defeat the policy of the law, does not answer the proposition that the debtor cannot be sued until a cause of action has accrued against him. It is presumed that the assignee will do his duty. If he fails to do it, he is subject to the order of the bankruptcy court, which, at the instance of those interested, can compel him to act.

Our opinion is, therefore, that this action at law, prosecuted by the plaintiffs in error, assignees in bankruptcy of the Fort Scott Coal and Mining Company, against the defendant in error, to recover from him the balance due on his unpaid valid stock in said Company, was not barred by the limitation of two years prescribed by the Bankrupt Act.

For the error in holding that the action was barred, the judgment of the Circuit Court must be reversed and the cause remanded, with directions to award a new trial.

Dissenting, *Mr. Justice* **Field** and *Mr. Justice* **Gray.**

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Cited—20 N. W. Rep., 768; 95 N.Y., 310; 79 Mo., 160; 133 Mass., 527.

See 15 OTTO.

CHARLES T. ROOT, Executor of THOMAS SAYLES, Deceased, *Appt.*, [189]

v.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

(See S. C., 15 Otto, 189-217.)

Relief in equity—infringement of patent—bill, when sustained—action at law.

1. Equity cannot give relief when there is a plain, adequate and complete remedy at law.
2. A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained.
3. Such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court.
4. In order to sustain an action for such cause in equity, there must be circumstances which would render an action at law for the recovery of damages an inadequate remedy for the wrongs complained of.
5. The authorities on these principles cited and fully examined.

[No. 176.]

Argued Dec. 16, 1881. Decided Mar. 13, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. F. H. Kales and **Albert H. Walker**, for appellant.

Mr. **George Payson**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellant filed his bill in the court below on December 9, 1878, as assignee of the letters patent originally granted to Henry Tanner for an improvement in railroad car-brakes, dated July 6, 1852, and which, on July 5, 1866, were renewed and extended for the additional term of seven years, which expired July 6, 1878. It is averred in the bill that by virtue of the assignments to him, the complainant was invested with all rights of action for infringements of the patent which had occurred, and particularly those of which it was alleged the defendant had been guilty from August 6, 1869, to July [190] 6, 1873; having, as is averred, during that period, used upon its railroad cars the patented brakes, but how many, the bill states, the complainant is ignorant and cannot set forth, but avers that the number so used was large, and that defendant had derived, received and realized great gains and profits therefrom, but to what amount he is ignorant and cannot set forth.

The prayer of the bill is, that the defendant may be compelled to account for and pay to the complainant all the gains, profits and savings which it derived, received or realized from or by reason of the use of said brakes.

To this bill a general demurrer was filed, alleging, as grounds thereof, that the bill does not contain any matter of equity on which the court could grant any relief; and that the complainant is not entitled to the relief prayed for, because he had a plain, adequate and complete remedy at law, and also because it appeared on the face of the bill that the causes of complaint

NOTE.—*Damages for infringement of patents; treble damages.* See *note* to Hogg v. Emerson, 52 U. S. (11 How.), 587.

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were barred by the Statutes of Limitation both of the United States, and of the State of Illinois.

This demurrer was sustained and the bill dismissed by the decree of the circuit court, now brought here for review by this appeal.

The propositions mainly relied upon by the appellee in support of the decree, are:

First. That after the expiration of a patent, equity has no jurisdiction to entertain a bill, merely for an account and the recovery of the profits of an infringer, during its existence, the remedy being at law for damages; and,

Second. That, even if in certain cases, such a jurisdiction exists, the present does not fall within it.

On the other hand, it is contended on the part of the appellant that, in cases for the enforcement of the rights of patentees, resort may be had, as matter of right, to a court of equity, as a distinct head of its jurisdiction, for the mere purpose of establishing an infringement and ascertaining and recovering the profits of the infringer, upon the independent equity that he is for that purpose, a trustee of his gains for the use of the true owner of the patent, and liable to account as such. [191]

In support of this contention, we are referred by counsel for the appellant to numerous decisions of the circuit courts, many of which, it is claimed, are directly upon the point, and to several cases in this court, in which, it is alleged, the same doctrine is either virtually decided or assumed; which, it is further argued, though not supported by the modern decisions of the English chancery, is found in its earlier precedents.

An examination of the practice and opinions of the circuit courts, undoubtedly, shows much diversity, incapable of reconciliation, and makes it necessary, as far as it can be done, by a deliberate judgment of this court, to remove the question out of its present uncertainty, by a settlement upon some basis of principle, in harmony with our system of equity jurisprudence, developed and modified by legislation. To effect this satisfactorily and intelligently, it will be necessary to review the course of legislation, and judicial decision in this court, so far as it bears upon the question, from the beginning.

Prior to the passage of the Patent Act of 1819, 3 Stat. at L., 481, Congress had passed three laws, in execution of the power conferred by the Constitution itself, and in furtherance of the policy thereby indicated, to secure to inventors an exclusive right of property in their inventions. The first of them, the Act of 1790, 1 Stat. at L., 109, gave as a remedy for its violation, an action at law upon the case for damages, and forfeited the infringing article. The next was the Act of 1793, 1 Stat. at L., 318, which fixed the rule and measure of damages recoverable in an action at law upon the Act at three times the price at which the patentee had usually sold or licensed to other persons the use of the invention. This was changed by the Act of 1800, 2 Stat. at L., 37, to three times the actual damage sustained by the patentee by reason of the infringement. By neither of these Acts, however, was any jurisdiction conferred upon the courts of the United States in equity. To vest such jurisdiction by reason of the subject-matter, as a case arising under the laws of the United States, to be exercised in controversies between parties, without regard to difference of citizenship, it was held by *Mr. Justice* Livingston, in the case of *Livingston* v. *Van Ingen*, 1 Paine, 45, required the express authority of an Act of Congress; and the parties in that case not being citizens of New York, the bill was dismissed. The controversy was thereupon renewed in the courts of that State; and the Chancellor having refused the injunction asked for, it was brought by appeal into the court for the correction of errors. 9 Johns., 507. It was there objected that the right in question rested upon statute alone, which prescribed remedies at law for its violation, which, it must be deemed, were intended to be exclusive. But the decision affirmed the jurisdiction. "The principle is," said *Ch. J.* Kent, p. 587, "that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed until the opponent has fairly tried them at law and overthrown their pretension." The same learned Judge refers also to the practice of the Federal Courts in granting injunctions under the patent law, mentioning two instances, one, the case of *Morse* v. *Reid*, an injunction bill filed in 1796 to restrain the invasion of a copyright; the other, *Whitney* v. *Fort*, in which an injunction was granted to restrain the violation of the patent for the cotton-gin. Of course, in those cases, the jurisdiction of the court depended on the citizenship of the parties. [192]

Congress then passed the Act of February 15, 1819 [3 Stat. at L., 481], which enacted "That the Circuit Courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors secured to them by any law of the United States, on such terms and conditions as the said courts may deem fit and reasonable."

In the case of *Sullivan* v. *Redfield*, 1 Paine, 441, which was decided in 1825, *Mr. Justice* Thompson, who, in the *Livingston Case*, had sat as one of the judges of the state court, had occasion to consider the nature of the equity jurisdiction in patent suits. "The equity jurisdiction," he said, "exercised by the court over patents for inventions is merely in aid of the common law, and in order to give more complete effect to the provisions of the statute under which the patent is granted." And in answer to the argument that the Act of 1819 gave a peremptory right to an equitable remedy by virtue of the patent itself, he said: "This Act does not enlarge or alter the powers of the court over the subject-matter of the bill or the cause of action. It only extends its jurisdiction to parties not before falling within it. Before this Act it had been held that a citizen of one State could not obtain an injunction in the circuit court for a violation of a patent-right against a citizen of the same State, as no Act of Congress authorized such suit. This Act removed that [193]

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objection and gave the jurisdiction, although the parties were citizens of the same State. But in the exercise of the jurisdiction in all cases of granting injunctions to prevent the violation of patent-rights, the court is to proceed according to the course and principles of courts of equity in such cases. So that the questions presented in the present case are precisely where they would have been without this Act."

The substance of the Act of 1819 was incorporated into the 17th section of the Patent Act of July 4, 1836, 5 Stat. at L., 117, so far as it related to inventors, but remained in force, after the passage of the latter Act, so far as it gave cognizance to the courts of the United States of cases of copyright. It was under that provision of the Act of 1819 that the case of *Stevens* v. *Gladding*, 17 How., 447 [58 U. S., XV., 155], arose and was decided. That was a bill for an injunction to restrain the violation of a copyright, and prayed for the recovery of the penalties given by the 7th section of the Act of February 3, 1831 [4 Stat. at L., 436], and for general relief. *Mr. Justice* Curtis, delivering the opinion of the court, said: "There is nothing in this Act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must, therefore, be rejected. The remaining question is, whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have [194] the defendants stated one in their answer; but the bill does pray for general relief. The right to an account of profits is incident to the right to injunction in copy and patent-right cases," citing *Colburn* v. *Simms*, 2 Hare, 554; 3 Dan. Ch. Pr., 1797. "And this court has held in *Watts* v. *Waddle*, 6 Pet., 389, that where the bill states a case proper for an account, one may be ordered under the prayer for general relief."

The 17th section of the Act of 1836, differs from the Act of 1819 in one other particular only. It makes the jurisdiction in patent causes of the courts of the United States, exclusive.

It was under the Act of 1836 that the question arose for the first time in *Livingston* v. *Woodworth*, 15 How., 546, as to the rule for computing the profits of an infringer, upon a decree for such an account. The bill was for an injunction and account. The validity of the patent, and the fact of infringement were both admitted by the defendant, who consented to a decree requiring him to account for and pay over the gains and profits made by him, during the infringement, in accordance with the prayer of the bill. The decree confirmed the report of the master, who awarded not actual gains and profits, but such as he estimated the defendant might have made by due diligence. It was argued, in support of the decree, that where the court has jurisdiction to give the principal relief sought, it will make a complete decree, and give compensation for the past injury, as in bills for specific performance and injunction bills for waste; and that it was a correct rule to hold the party accountable, as an involuntary trustee, for what the patentee might have realized by the same exercise of the right, as a court of equity sometimes forces the character of a trustee upon an intruder or wrong-doer, or one in possession under color of right, or who takes rents or profits belonging to another, or might have taken them, as in cases of mortgagees; but it was admitted that the case was of first impression. The decree, upon this point, was reversed. The court said (p. 559): "We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts. * * * If the appellees, the plaintiffs below, had sustained an injury to their legal rights, the courts of law were open to them for redress, and in these courts they [195] might, according to a practice, which, however doubtful, in point of essential right, is now too inveterate to be called in question, have claimed, not compensation merely, but vengeance for such injury as they could show they have sustained. But before a tribunal which refuses to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which, *ex æquo et bono* is theirs, and nothing beyond this." The account was, therefore, restricted to the actual gains and profits of the appellants during the time their machine was in operation.

This rule in relation to the profits recoverable in such suits was followed in *Dean* v. *Mason*, 20 How., 198 [61 U. S., XV., 876], which was a case of a bill for an injunction and account, in which a decree *pro confesso* had been taken. The final decree was entered, on the report of the master, for the estimated amount of profits which the defendant with reasonable diligence might have realized; not what, in fact, he did realize. This was held to be erroneous. The court said: "The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general is the damage done to the owner of the patent. It takes away the motive of the infringer of patented rights by requiring him to pay the profits of his labor to the owner of the patent. Generally, this is sufficient to protect the rights of the owner; but where the wrong has been done, under aggravated circumstances, the court has the power under the statute to punish it adequately by an increase of the damages."

The important case of *Seymour* v. *McCormick*, 16 How., 480, was decided in 1853. That was an action at law. The court below instructed the jury that the actual damages to which the plaintiff was entitled, for an infringement of a patent for an improvement in a machine, might be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights, and that the same rule applied whether the patent covered an entire machine or merely [196] an improvement on a machine. This instruction, this court held to be erroneous, and reversed the judgment on that account. *Mr. Justice* Grier, in delivering the opinion of the court, referred to the rule of damages, prescribed by the Acts of Congress, previously in force, stating that "Experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits;" and that it was to obviate this that the Patent

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Act of 1836 confined the jury to the assessment of actual damages, leaving it to the discretion of the court to inflict punitive damages to the extent of trebling the verdict. He then pointed out that "It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted;" that a man who invents or discovers a new composition of matter, or an entire new machine, may find his profit to consist in a close monopoly, the patentee being himself able to supply the whole demand at his own price, in which cases "The profit of the infringer may be the only criterion of the actual damage of the patentee;" that "One who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement; and where the profit of the patentee consisted neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Stimpson's patent for a turn-out in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damages to the amount of the profits of his railroad, nor could the actual damages of the patentee be measured by any known ratio of the profits of the road. * * * It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact." Accordingly it was held in *New York* v. *Ransom*, 23 How., 487 [64 U.S., XVI., 515], where the rule in *Seymour* v. *McCormick*, *supra*, was expressly approved, that in an action at law, if the plaintiff rested his case, after proof of infringement merely, he was entitled only to nominal damages. It was also applied in *Jones* v. *Morehead*, 1 Wall., 155 [68 U. S., XVII., 662], which was a bill in equity for an injunction and an account, where a decree for a large sum as profits had been rendered against the defendant, upon an entire machine, in respect to which it appeared as matter of fact, that the defendants had not infringed the patent sued on, but had admitted to the contrary in the answer. The court construed this admission by applying it to the smallest number of patented articles and to the use of any part of the patent found to be valid, and reversing the decree ordered one to be entered for a "nominal sum of one dollar for profits."

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In the case of the *Rubber Co.* v. *Goodyear*, 9 Wall., 788 [76 U. S., XIX., 566], which was a bill for an injunction and account, a decree for a large sum was rendered in favor of the complainants, which was affirmed on appeal. "The rule," said *Mr. Justice* Swayne, delivering the opinion of the court, is "founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty and invite to aggression. The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume; and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender."

The case of *Mowry* v. *Whitney*, 14 Wall., 620 [81 U. S., XX., 860], was also a bill in equity for an injunction and account. A decree was rendered in favor of the complainant for all the profits on the manufactured article, instead of upon the patented process of manufacture, with interest added. On appeal, this court reversed the decree on that point, saying: "The question to be determined in this case is: What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. * * * That advantage is the measure of profits." On the question of interest, *Mr. Justice* Strong, speaking for the court, said: "We add only that, in our opinion, the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance."

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In the case of *Packet Co.* v. *Sickles*, 19 Wall., 611 [86 U. S., XXII., 203], which was an action at law, the rule established in *Seymour* v. *McCormick*, *supra*, was reiterated, as "The established criterion of damages in cases to which it was applicable." "In cases where there is no established patent or license fee in the case, or even an approximation to it, general evidence must necessarily be resorted to," as was said by the court in the case of *Suffolk Co.* v. *Hayden*, 3 Wall., 315 [70 U. S., XVIII., 56]. "And what evidence," said *Mr. Justice* Nelson, in that case, p. 320, "could be more appropriate and pertinent, than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or in other words, the loss to the patentee or owner by the piracy instead of the purchase of the use of the invention." He added that "A recovery does not vest the infringer with the right to continue the use, as the consequence of it may be an injunction restraining the defendant from further use of it."

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In *Packet Co.* v. *Sickles*, *supra*, *Mr. Justice* Miller said: "The rule in suits in equity, of ascertaining by a reference to a master the profits

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which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the Chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infringer to the patentee, has produced results calculated to suggest distrust of its universal application, even in courts of equity."

The doctrine of this case was reiterated in *Burdell* v. *Denig*, 92 U. S., 716 [XXIII., 764], where *Mr. Justice* Miller, again delivering the opinion of the court, said:

"Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies universally and mainly to cases in equity, and is based on the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes; a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and *employés*. On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law. No doubt, in the absence of satisfactory evidence of either class, in the forum to which it is most appropriate, the other may be resorted to, as one of the elements on which the damages or the compensation may be ascertained."

The case of *Littlefield* v. *Perry*, 21 Wall., 205 [88 U. S., XXII., 577], was one where the patentee, by force of an agreement, held the legal title to the patent in trust for the complainant, in violation of which he was making use of his legal rights. It was held upon a bill filed for an injunction and account, that it was a case under the patent laws, and the defendant was required to account for the profits he had made, [200] according to the rule in *Mowry* v. *Whitney*, *supra*. The *Chief Justice* said, p. 230: "Profits actually realized are usually, in a case like this, the measure of unliquidated damages. Circumstances may, however, arise which would justify the addition of interest in order to give complete indemnity for losses sustained by willful infringements."

On July 8, 1870, Congress passed the Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights, 16 Stat. at L., 198. The 59th section renewed the provision previously in force, that damages for infringement might be recovered by action on the case, and that whenever, in any such action, a verdict shall be rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of the verdict. The 55th section is as follows:

"That all actions, suits, controversies and cases arising under the patent laws of the United States shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any district court having the power and jurisdiction of a circuit court, or by the Supreme Court of the District of Columbia, or of any Territory; and the court shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions, according to the course and principles of courts of equity to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainants shall be entitled to recover in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction; and the court shall have the same powers to increase the same in its discretion that are given by this Act to increase the damages found by verdicts in actions upon the case; but all actions shall be brought during the term for which the [201] letters patent shall be granted or extended, or within six years after the expiration thereof."

These provisions are substantially carried into the Revised Statutes, section 59 of the Act of 1870 being section 4919 of the latter, and section 55 corresponding to section 4921, R. S., except as to the provision in respect to the limitation upon the right to sue, which is not found in the Revised Statutes. But the rights of the parties in the present suit arose while the Act of 1870 was in force, and are determinable under it.

In the case of *Birdsall* v. *Coolidge*, 93 U. S., 64 [XXIII., 802], it is declared, in reference to the effect of the Act of 1870, that "Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent;" in which event the provision is, that the complainant "shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby."

Mr. Justice Clifford, in the opinion in this case, quotes a passage, slightly altered, from Curtis on Patents, section 341 *a*, 4th ed., p. 461, which, taken by itself, might seem to imply that prior to the Act of 1870, the owner of a patent had the election to resort to a court of equity for the recovery of profits, or a court of law for damages, irrespective of any other relief of an equitable character; but the language of the passage is to be restrained to mean merely that the option existed to sue at law for past infringement, or seek equitable relief by way of prevention, the damages or profits following, as either jurisdiction is resorted to, each according to its kind. For if this be not so, it follows that since the passage of the Act of 1870, an owner of a patent may recover, in a suit in equity, profits and damages in all cases, according to the rule above stated, without seeking any other relief whatever, the effect of which would be to give two remedies, one in equity, the other at law, merely for the recovery of damages for an injury to a legal right, an anomaly not to be found in any other branch of our jurisprudence; and manifestly, upon such a construction, the action at law would soon become obsolete, as completely as if it had been abolished by legislation. The whole force of the change in the statute

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consists in conferring upon courts of equity, in the exercise of their jurisdiction in administering the relief, which they are accustomed and authorized to give, and which is appropriate to their forms of procedure, the power not merely to give that measure of compensation for the past, which consists in the profits of the infringer, but to supplement it, when necessary, with the full amount of damage suffered by the complainant, and which, if he had sued for that alone, he would have recovered in another forum, with power to increase the amount of the actual damages, as in courts of law. But as the account of profits, previously, was the incident of [202] the suit, and not its object, so now the power to award damages and to multiply them is added as an incident to the right to an account.

But the difference between the state of the law before and after the Act of 1870, finds its best illustration in a comparison between two cases, both of which were decided at the October Term, 1877, *Elizabeth* v. *Pavement Co.*, 97 U. S., 126 [XXIV., 1000], and *Marsh* v. *Seymour*, 97 U. S., 348 [XXIV., 963].

In the former the bill was filed before the passage of the Act, but prayed, besides an injunction, for both damages and profits. It was held that the court below had rightly decided that a decree for profits alone could be rendered, inasmuch as the jurisdiction of courts of equity to decree damages, as distinct from profits, was first conferred by the statute. *Mr. Justice* Bradley, delivering the opinion of the court, remarking that the general question of the profits recoverable in equity by a patentee, was surrounded with many difficulties, which the courts had not yet succeeded in overcoming, said:

"But one thing may be affirmed with reasonable confidence, that, if an infringer of a patent has realized no profit from the use of an invention, he cannot be called upon to respond for profits; the patentee, in such case, is left to his remedy for damages. It is, also, clear, that a patentee is entitled to recover the profits that have been actually realized from the use of the invention, although from other causes the general business of the defendant, in which the invention is employed, may not have resulted in profits, as when it is shown that the use of his invention produced a definite saving in the process of manufacture. *Mowry* v. *Whitney*, 14 Wall., 620 [81 U. S., XX., 860]; *Cawood Patent*, 94 U. S., 695 [XXIV., 238]. On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits none can be recovered. The same result would seem [203] to follow where it is impossible to show the profitable effect of using the invention, upon the business results of the party infringing. It may be added, that, where no profits are shown to have accrued, a court of equity cannot give a decree for profits by way of damages, or as a punishment for the infringement. *Livingston* v. *Woodworth*, 15 How., 559. But when the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits, if he elects that remedy. And in such a case, the defendant will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions. *Rubber Co.* v. *Goodyear*, 9 Wall., 788" [76 U. S., XIX., 566]. And these general propositions, he added, will hardly admit of dispute.

Accordingly, in that case, the bill was dismissed as to the City of Elizabeth, which had infringed, because it appeared that it had made no profit from the use of the patented improvement, while a decree was rendered against the contractor, who had laid the pavement which was the subject of the patent, because he was shown to have made profits from the infringement. The municipal corporation, of course, remained liable to respond in damages in an action at law, for any loss which the plaintiff could have established by proof.

The cases of *Marsh* v. *Seymour*, *supra*, arose under the Act of 1870, and were bills for injunction and account. Decrees were rendered in favor of the complainant, and a reference ordered to a master to state an account of profits. In both cases, the respondents showing that they had made no profits by reason of the use of the invention, the complainant waived his claim for a recovery on that account, and decrees were rendered for damages on the basis of a license fee for the infringing machines which had been sold, and nominal damages for those manufactured but not sold. These decrees were affirmed, the court saying, *Mr. Justice* Clifford delivering its opinion, that "Damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits, as in the case before the court."

In the case of *Parks* v. *Booth* [*ante*, 54], which was a suit in equity for an injunction, and an account [204] of profits and damages, under the Act of 1870, a decree was rendered in favor of the complainant, and for profits and damages as found by a master. Under the head of damages there was included items for expenses of conducting the suit, being counsel fees, compensation for the complainant's time, and interest on the profits. The decree was modified on appeal, by striking out all these allowances, except that for the complainant's time, lost in attending to the suit. Interest on profits was disallowed on the authority of *Silsby* v. *Foote*, 20 How., 386 [61 U. S., XV., 955], on the ground that profits in such a case are to be regarded in the light of unliquidated damages. No injunction was decreed, as the term of the patent had expired. It does not appear from the report of the case when the suit was begun, but a reference to the original record shows that the bill was filed in April, 1871, before the expiration of the term of the patent.

The case of *Hendrie* v. *Sayles*, 98 U. S., 546 [XXV., 176], was a bill in equity for an account of profits, filed after the expiration of the patent, the same patent on which the present suit is founded. It was decided upon a single point raised on demurrer to the bill, the question of jurisdiction not being noticed either by counsel or court. A decree for the complainant was affirmed on appeal.

This appears to be the only case of the kind, until the present, that found its way into this court.

The case of *Eureka Co.* v. *Bailey Co.*, 11 Wall., 488 [78 U. S., XX., 209], is no exception to this remark; although in respect to it the observation has been made, that the injunction prayed for in that case was incidental to the account and

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not *vice versa*. That, however, is a misconception; for, unless upon the ground of a difference of citizenship, the court would not have had jurisdiction to entertain the bill in that case, if it had not prayed for an injunction. For the mere purpose of enforcing the contract for the royalty, it was not a case arising under the patent laws, so as to give jurisdiction to the courts of the United States. It was because the defendant was guilty of an infringement of the complainant's patent that he was suable in equity in these courts, and to restrain that, an injunction was asked until he should pay what he had prom-
[205] ised. The object of the suit doubtless was to collect the royalty, but it was sought by means of and, therefore, as an incident to the jurisdiction of the court, invoked for the purpose of enjoining the continuance of what, until the royalty was acknowledged and paid, was found to be an infringement.

All the Acts of Congress relating to patents, prior to that of 1870, contained provisions specifying the special defenses which might be made in an action at law for an infringement, under the plea of the general issue, notice thereof having been previously given. The 61st section of the Act of 1870 enumerates the several special matters thus authorized to be proved, and adds, for the first time in the history of this legislation, the clause that "The like defenses may be pleaded in any suit in equity for relief against an alleged infringement, and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect."

The plain and obvious purpose of this provision is, to furnish appropriate modes in equity pleading for the trial of all issues, both of fact and law, relating both to the alleged infringement and the validity of the patent, without the necessity of framing special issues out of chancery for trial by jury, or sending the parties to a court of law for the trial of an action in that forum, in order to determine their legal right. It proceeds upon the idea that the court of equity having acquired jurisdiction, for the purpose of administering the equitable relief sought by the bill, may determine directly and for itself, in the same proceeding, all questions incidental to the exercise of its jurisdiction, notwithstanding they may be questions affecting legal rights and legal titles.

Although this was the first statutory authority for the practice, it was rather a recognition of what had already been established than its introduction; for the practice had, in fact, originated long before, and was based upon well known principles of equity jurisprudence. Whatever question may have existed in reference to it previously, was settled in the courts of the United States by the decision in *Goodyear* v. *Day*, 2 Wall., Jr., 283, a case argued by Webster and Choate, and decided by *Mr. Justice* Grier in 1852. That learned Judge, on that occasion, said: "It is true that in England the
[206] Chancellor will generally not grant a final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal; it is a practice founded more on convenience than necessity. It always rests on the sound discretion of the court. A trial at law is ordered by a Chancellor to inform his conscience; not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact or of legal titles."

See, also, *Orr* v. *Merrill*, 1 Wood. & M., 376.

The distinction in the nature of the two proceedings, of an action at law and a suit in equity, is plainly pointed out in this section of the statute, the former as being an action for an infringement, the latter as a suit for relief against an alleged infringement. And while upon the words used in the 55th section of the Act, it may be, that the jurisdiction in equity which is thereby conferred is not exhausted by the power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent; yet, the statute immediately says, that it is upon a decree being rendered in any *such* case for an infringement—as though that was the only one—that the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.

It is impossible, we think, to maintain the claim that the language of this Act, similar in that respect to the previous Acts of 1819 and 1836, conferring jurisdiction in patent cases in equity as well as at law, was meant to obliterate the distinctions between these two jurisdictions, or even to confuse the boundaries between them, as it is alleged was done by the decision in the case of *Nevins* v. *Johnson*, 8 Blatchf., 80, and perhaps in other subsequent circuit court decisions. Indeed, it is the settled doctrine of this court that this distinction of jurisdiction, between law and equity, is constitutional, to the extent to which the 7th Amendment forbids any infringement of the right of trial by jury, as fixed by the common law. And the doctrine applies in patent cases as well as others. This court said in *Parsons* v. *Bedford*, 3 Pet., 446, speaking of the meaning intended by the framers of that amendment, that "By common [207]
law they meant what the Constitution denominated, in the 3d article, LAW, not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered." The rule was repeated in *Fenn* v. *Holme*, 21 How., 484 [62 U. S., XVI., 199], in this language: "In every instance in which this court has expounded the phrases, proceedings at the common law, and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery in England."

It becomes necessary, therefore, to consider what support there is in the general doctrines of equity for the contention of the appellant.

It is the fundamental characteristic and limit of the jurisdiction in equity that it cannot give

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relief when there is a plain and adequate and complete remedy at law; and hence it had no original, independent and inherent power to afford redress for breaches of contract or torts, by awarding damages; for to do that was the very office of proceedings at law. When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid multiplicity of suits and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but requiring an account of profits, on the ground that if any had been made, it was equitable to require the wrong-doer to refund them, as it would be inequitable that he should make a profit out of his own wrong. As was said by *Vice-Chancellor* Wigram in *Coburn* v. *Simms*, 2 Hare, 543, "The court does not by an account accurately measure the dam-
[208] age sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book," but, "as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged."

Whether a bill for an account of profits against a wrong-doer would lie, independently of other equitable grounds for the intervention of the court, is a question, as was said by *Lord Chancellor* Brougham in *Parrott* v. *Palmer*, 3 Myl. & K., 640, "Which has been oftentimes agitated and has, perhaps, never received a clear and a general decision; that is to say, a distinct judgment on the general proposition, with its limitations." He concluded that, "From the whole it may be collected that, although as to timber there exists considerable discrepancy, yet the sound rule is to make the account the incident and not the principal, where there is a remedy at law; but that mines are to be otherwise considered, and that as to them, the party may have an account even in cases where no injunction would lie."

The supposed exception in cases of mines seems to rest upon a *dictum* of *Lord* Hardwicke in *Jesus Col.* v. *Bloom*, 3 Atk., 262, that "It was a sort of trade;" but the reference is to the case of *Bishop of Winchester* v. *Knight*, 1 P. Wms., 406, where the bill prayed for an account of ore dug by the ancestor of the defendant, in respect to which the argument was, that being a personal tort, it died with the person. The decision was that the plaintiff was not entitled, but on this point the Lord Chancellor said: "It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime and dies, that in this case I would be without remedy. It is true as to the trespass of breaking up meadow or ancient pasture ground, it dies with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer it." It
[209] is plain from these observations that the assumed ground of the equity jurisdiction was the absence of any remedy at law. *Powell* v. *Aiken*, 4 Kay & J., 343. It is now clearly established in the English chancery "That a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as an incident to an injunction, and that when the plaintiff has no right to an injunction he has no right to an account, and his remedy is at law alone." Per Sir Wm. M. James, L. J., in *Higginbotham* v. *Hawkins*, L. R., 7 Ch. App., 679.

The same rule is applied by the modern decisions in cases of mines, where, as incident to the relief sought by a bill, an account is asked of profits against trespassers. It appears that as to the mode of assessing compensation, in such suits, to an owner of coal which has been improperly worked by the owner of an adjoining mine, a different principle is applicable when the coal is taken inadvertently, or under a *bona fide* belief of title, and when it is taken fraudulently, with knowledge of the wrong. In cases of the latter description, at law, the strict rule of damages laid down in *Martin* v. *Porter*, 5 Mees. & W., 351, was to charge the value of the coal without allowing any of the expenses of getting it; but in those of the former description, a milder rule was applied in *Morgan* v. *Powell*, 3 Q. B., 278, and *Wood* v. *Morewood*, 3 Q. B., 440, which was to give to the plaintiff the fair value of the coals as if the coal field had been purchased from him by the defendant. This distinction was adopted and the latter rule applied in equity, by *Vice-Chancellor* Malins in *Hilton* v. *Woods*, L. R., 4 Eq., 432, and by *Lord Chancellor* Hatherley in *Jegon* v. *Vivian*, L. R., 6 Ch. App., 742, the latter remarking that "this court never allows a man to make profit by a wrong." This rule was adopted in *Iron Co.* v. *Iron Works*, 102 Mass., 86.

The same rule applies in England in patent and copyright cases. The *Vice-Chancellor* Page Wood, in *Smith* v. *R. Co.*, Kay, 415, said: "The true ground of relief in these cases is laid down in *Bailey* v. *Taylor*, 1 Russ. & M., 75, where Sir J. Leach, M. R., says: 'The court has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his [210]
remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.' Unless that primary right to an injunction exists, this court has no jurisdiction with reference to a mere question of damages." The *Vice-Chancellor* further observed that, as had often been stated by *Lord* Eldon, as the object of the court in interfering by injunction was the prevention of a multiplicity of suits, which might be rendered necessary by continued infringements of the patent, he was at loss to see how the jurisdiction could attach, or the relief by injunction be arrived at, after the expiration of the patent, unless a case were made out, of a numerous series of past infringements, from which the parties were still deriving advantage. He then referred to *Crossley* v. *Beverly*, Web., Pat. Cas., 119, as a case where there was a specific ground for that relief, that the defendants had been manufacturing the patented articles, secretly and fraudulently, for the purpose of pouring into the market the articles so manufactured directly the patent should

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have expired. In that case the bill was filed before the expiration of the patent, and the right to sue having been thus acquired, the court extended it to restrain using the articles so manufactured after the patent had expired. "Such a case," continues the *Vice-Chancellor*, "of a fraudulent attempt to evade the patent might occur, as would enable the court to restrain the use of articles made in infringement of the patent and kept back until it expired, even after its expiration, and the plaintiff having thus obtained a right to the injunction, the right to an account would follow."

In the case of *Price's Pat. Candle Co.* v. *Bauwen's Co.*, 4 Kay & J., 727, the bill was dismissed, because the patent having expired *pendente lite*, the relief by injunction could not be granted at the hearing; but in *Davenport* v. *Rylands*, L. R., 1 Eq. Cas., 302, the same judge retained the bill, under similar circumstances, for the purposes of an inquiry as to damages, because the Act of 21 and 22 Vict., ch. 27, commonly called Cairn's Act, passed after the former decision, had altered the rule. That statute declared that in all cases in which the court has jurisdiction *to entertain an application* for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the same court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct; a provision which no doubt suggested the like extension of the jurisdiction of the court in patent cases, contained in our Patent Act of 1870. But even after the passage of Cairn's Act, it was decided by *Vice-Chancellor* Sir Wm. M. James, in *Betts* v. *Gallais*, L. R., 10 Eq. Cas., 392, that the court would not entertain a bill for the mere purposes of giving relief in damages for the infringement of a patent, when the bill had been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction. He characterized it as "A mere device to transfer a plain jurisdiction to award damages from the court to which that jurisdiction properly belongs, to this court."

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Mr. Kerr, in his treatise on Injunctions, 41, summarizes the result of many decisions, which he cites, under this statute, as follows:

"The statute did not transfer to the court the general jurisdiction of common law by way of damages, or extend its jurisdiction to cases where previously to the statute it had no jurisdiction, or could not consistently with its rules and principles, have interfered. The statute merely empowered the court to give damages in cases involving elements or ingredients of an equitable character. If the case as presented to the court was an equitable one, so that the subject-matter of the application is properly cognizable in equity, the court had jurisdiction under the statute to entertain the question of damages. If, on the other hand, the plaintiff had no equitable right at the time of bringing the action, so that the matter has been improperly brought into equity, the statute had no application. Damages may be awarded under the statute if it appear that at the time of bringing the action there was an equitable case, although the case for an injunction fails, or although an injunction is not competent from circumstances which have occurred since the filing of the bill."

It will be observed that the British Statute does not touch the question of the account of profits by an infringer, leaving that as it stood before the passage of the Act. The unavoidable inference is that damages can only be given, under the Act, in cases in which an account might be decreed; and that the patentee must, as it was expressly decided by the House of Lords, in *De Vitre* v. *Betts*, L. R., 6 H. L., 321, in all cases when he has a decree, elect whether he will have an account of profits or an inquiry as to damages, and cannot have both. Under the Act of Congress of 1870, he may recover damages in addition to the profits to be accounted for by the defendant; but as the recovery is limited by the Act to the actual damages, it is manifest that the recovery of damages and profits is not intended to be double, but that when necessary the damages are to supplement that loss of the complainant which the profits found to have been received are insufficient to compensate, subject to the power of the court as to their increase, as in case of verdicts.

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This firm and indisputable doctrine of the English chancery has been recognized and declared by this court, in *Hipp* v. *Babin*, 19 How., 271 [60 U. S., XV., 633], to be part of the system of equity jurisprudence administered by the courts of the United States, founded not only upon the legislative declaration in the Judiciary Act of 1789 [1 Stat. at L., 73], "That suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law," but also upon the intrinsic distinctions between the different jurisdictions of law and equity. In delivering the opinion of the court in that case, *Mr. Justice* Campbell remarked that "The practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule, or is modified by local circumstances or local convenience;" and cited the instances in which "This court has denied relief in cases in equity, where the remedy at law has been plain, adequate and complete, though the question was not raised by the defendants in their pleadings nor suggested by the counsel in their arguments." He then adds: "And the result of the argument is, that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." It was contended in that case that, notwithstanding this general principle, the bill ought to be maintained, because the complainants, being minors, were authorized to call upon the defendants, who had intruded into possession of their lands, for an account as guardians, and that the court of chancery was better fitted to take an account for rents, profits and improvements, and might decide the question of title as incidental to the account.

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In reply to these points, *Mr. Justice* Campbell remarked that, "There are precedents in which the right of an infant to treat a person

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who enters upon his estate with notice of his title, as guardian or bailiff, and to exact an account in equity for the profits for the whole period of his occupancy, is recognized." "But," he added, "in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown." Nor can the court retain the bill under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause. But when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title, and to adjust the account."

These principles were announced in a case for the recovery of the possession of real estate held adversely, but they are of general application, [214] and embrace, as well, the case of torts to personalty, and infringements of patent and copyrights.

The distinct ground upon which the opposite view is presented to us in argument is, that the infringer of a patent-right is, by construction of law, a trustee of the profits derived from his wrong, for the patentee, and that a court of equity, in the exercise of its acknowledged jurisdiction over trusts and trustees, will require him to account as trustee, without reference to any other relief. And in support of this contention we are referred to passages in the judgments of this court in the cases of *Packet Co.* v. *Sickles*, 19 Wall., 611 [86 U. S., XXII., 203]; *Burdell* v. *Denig*, 92 U. S., 720 [XXIII., 766], and *Birdsall* v. *Cooledge*, 93 U. S., 68 [XXIII., 804], all of which have been already cited in this opinion.

But the inference sought to be drawn from the expressions referred to is not warranted. It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account of the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer, by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. That would be a *reductio ad absurdum*, and if accepted, would extend the jurisdiction of equity to every case of tort, where the wrong-doer had realized a pecuniary profit from his wrong. All that was meant in the opinions referred to, was to declare according to what rule of computation and measurement the compensation of a complainant would be ascertained in a court of equity, which having acquired jurisdiction upon some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action. The rule adopted was that which the court, in fact, applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage; that is to require them to refund the [215] amount of profit which they have actually realized. This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity, to award damages in the sense in which the law gives them, but a substitute for damages, at the election of the complainant, for the purpose of preventing multiplicity of suits. And the particular rule was formulated, as will be seen by reference to the cases already referred to, out of tenderness to defendants in order to mitigate the severity of the punishment to which they might be subjected in an action at law for damages, and because it was thought more equitable merely to deprive them of the actual profits arising from their wrong, than to make no allowances, in estimating damages, for the cost and expense of the business in the prosecution of which they had violated the rights of the complainant. The same reason operated in the establishment of the similar rule acted upon in the cases of *Hilton* v. *Woods*, L. R., 4 Eq., 432, and *Jagon* v. *Vivian*, L. R., 6 Ch. App., 742, already cited in a previous part of this opinion. The rule itself is reasonable and just, though sometimes perverted and abused. It has been constantly acted upon by the courts. But it is a rule of administration and not of jurisdiction; and although the creature of equity, it is recognized as well at law, as one of the measures, though not the limit, for the recovery of damages.

The case is not within the principle, according to which, in certain circumstances, a court of equity decrees a wrong-doer to be a trustee *de son tort*, and exerts its jurisdiction over him in that character. Where a defendant has wrongfully intermeddled with property already impressed with a trust, he may be required as a trustee to account for it, as was done in the case of *People* v. *Houghtaling*, 7 Cal., 348, because trust property may be followed, wherever it can be traced, into whosesoever possession it comes, except that of a *bona fide* purchaser without notice. It is the character of the property, and not the wrong done in converting or withholding it, that constitutes the wrong-doer a trustee.

Our conclusion is, that a bill in equity for a naked account of profits and damages against an infringer of a patent, cannot be sustained; [216] that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is, to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but, that grounds

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of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule.

The case of *Garth* v. *Cotton*, 1 Dick., 183, furnishes an interesting and curious illustration of one of the excepted cases. In that case *Lord* Hardwicke sustained a bill in equity, in a case of waste, for an account of timber felled and sold, where there could be no injunction, in favor of a complainant unborn at the time of its commission, whose estate was a contingent remainder, supported by a limitation to trustees to preserve it, the defendant being the owner of a prior term of years, and the ultimate remainder-man in fee. The Lord Chancellor proceeded on the ground of collusion between the defendants and a nominal or imputed breach of trust on the part of the trustees to preserve the contingent remainder in permitting the wrong; and distinguished the case from *Jesus College* v. *Bloom*, 3 Atk., 262, particularly on the ground that the complainant could have no remedy at law. Another instance of an exception is mentioned by *Vice-Chancellor* Page Wood in the extract from his judgment in the case of *Smith* v. *R. Co.*, Kay, 415, contained in a previous part of this opinion.

It does not appear from the allegations of the bill in the present case, that there are any circumstances which would render an action at [217] law for the recovery of damages an inadequate remedy for the wrongs complained of; and, as no ground for equitable relief is presented, we are of opinion that the Circuit Court did not err in sustaining the demurrer and dismissing the bill. *Its decree is, therefore, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 675; 109 U. S., 494; 112 U. S., 487.

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[244]

UNITED STATES, *Appt.*,
v.
RICHARD W. TYLER.

(See S. C., 15 Otto, 244-246.)

Pay of retired army officers—increased pay.

*1. Army officers retired from active service with reduced pay, are still in the service, and are entitled to the increased pay which the law allows for every five years' service while in that condition, as well as when in active service.

2. The ten *per centum* increase of pay which the statute allows for every period of five years, is to be computed on the sum primarily fixed as salary per annum, with the increase for each five years previously earned added to that sum when its increase for any new period of five years is to be computed.

[No. 1075.]

Argued Jan. 20, 1882. Decided Mar. 13, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. **Samuel F. Phillips**, *Solicitor-Gen.*, and *George C. Wing*, for appellant.

Messrs. **Robert B. Warden** and **Richard W. Tyler**, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Court of Claims, and the question to be decided is, whether the appellee, who, on the 15th day of December, 1870, was retired from the Army of the United States with the rank of captain, on account of wounds received in battle, is entitled to the benefit of the statute which increases the pay of officers by ten per cent for every period of five years' service.

The law for this increased compensation is thus expressed in the Revised Statutes:

"Sec. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten *per centum*, of their current yearly pay for each term of five years' service.

Sec. 1263. The total amount of such increase for length of service shall in no case exceed forty *per centum* of their current yearly pay of the grade as prescribed by law."

These sections are taken from the Act of July 15, 1870 [16 Stat. at L., 315], and constituted the law on that subject when the appellee was retired, and their proper construction is the measure of his rights in this controversy. Section 1276 of the Revised Statutes was section 24 of the same statute, and is in the following language: "Officers retired from active service shall [245] receive seventy-five *per centum* of the pay of the rank upon which they are retired."

Section 1275 provides that "Officers wholly retired from the service shall be entitled to receive upon their retirement one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement."

There is, therefore, a manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service.

In the latter case, such reward or compensation as Congress thought proper to bestow, namely: one year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended. In the former case the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only.

The question is, therefore, whether an officer thus situated is in the service, within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years.

The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall

*Head notes by *Mr. Justice* MILLER.

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be based upon any absolute incapacity for further service. It may be based upon age, which being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

The provisions of the statutes, and the uniform treatment of these officers, is conformable to this view, and necessarily implies, that while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit.

Section 1094 of the Revision designates specifically, by a catalogue of twenty-eight items, of what the army of the United States consists, [246] and the twenty-seventh item of this enumeration is "The officers of the army on the retired list."

They are then by law a part of the army.

Section 1256 enacts that "Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the Rules and Articles of War, and to trial by general court-martial for any breach thereof."

Section 1259 declares that they may be assigned to duty at the Soldier's Home; and section 1260, that they may be detailed to serve as professors in any college.

It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute 25 per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten *per centum* for each five years' service, applies to the years so passed in the service after retirement as well as before.

We also hold that the words "current yearly pay," in section 1262, require that, when the increased pay for any period of five years is to commence, the ten *per centum* must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent previously earned for periods of five years, constitute the current yearly pay on which said ten *per centum* is to be calculated.

The judgment of the Court of Claims is affirmed.

True copy. Test,
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 7; 113 U. S., 315.

AUGUSTUS H. BURLEY, Assignee in Bankruptcy of DAVID KRIEGH, *Appt.*, [247]

v.

JAMES L. FLINT, EXI. of THOMPSON J. S. FLINT, Deceased.

(See 15 Otto, 247-249.)

Action to redeem—offer to redeem.

1. Where a decree was made foreclosing a mortgage and expressly cutting off all right of redemption, an action to reverse so much of the decree as forecloses the statutory right to redeem, cannot be maintained after the time to redeem has passed, if complainant has made no offer to redeem.

2. The party seeking to redeem under a decree and sale, can do so by making the offer within the time prescribed by the statute, and cannot do so afterwards.

[No. 544.]

Submitted Jan. 4, 1882. Decided Mar. 13, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **Francis H. Kales**, for appellant.

Messrs. **E. B. McCagg** and *W. I. Culver*, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

Flint, the appellee, obtained in the Circuit Court of the Northern District of Illinois, on the 19th of October, 1877, a decree foreclosing a mortgage against Kriegh, the mortgagor, Burley, his assignee in bankruptcy, and others. The decree ordered a sale according to the usual course and practice of the court, which, in the case of *Brine* v. *Ins. Co.*, 96 U. S., 627 [XXIV., 858], we held to mean a sale without any right of redemption. Such a sale was made to Flint, and an order of confirmation, and for a deed, and for delivery of possession, and expressly cutting off all right of redemption, was entered by the court on the 13th day of March, 1878, with a further decree against the assignee for payment, out of assets *pro rata*, of a balance not satisfied by the sale.

On the 17th day of October, 1879, Burley, the assignee, filed in the same court, but without leave, a bill of review, seeking to reverse so much of the former decrees of the court as denied the statutory right of redemption given by the laws of Illinois in regard to the land sold under such decrees.

A hearing was had on a motion to dismiss this bill, which, by consent of counsel, as the record states, was to be treated also as a demurrer, and the court dismissed the bill, from which order this appeal is prosecuted.

The appellant, in his bill, does not seek to reverse the order of sale to satisfy the amount found due to Flint, nor does he ask that the sale made under that order be set aside and a [248] new sale ordered. Nor does he make any offer to redeem, by payment of the amount found by the court to be due on the original mortgage. Nor does he offer to pay the amount bid at the sale by Flint, the mortgagee, or tender any sum in court as assurance that he will do so. He simply and purely asks that so much of the decree as forecloses this statutory right to redeem may be reviewed and reversed.

What will such an order avail him? The de-

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cree and the sale under it will still stand good. The time within which defendant can redeem by the Statute of Illinois has long since passed, and he has made no offer to redeem. The sale was made prior to the 23d February, 1878, the date of the master's report, and the present bill filed October 17, 1879, twenty months afterwards, and at a time when, by the statute, both the defendant and his judgment creditors had ceased to have any right of redemption.

If appellant had appealed from the original decree to this court his remedy was plain, and the decree would have been reversed. The same result would probably have followed an appeal from the order confirming the sale and cutting off the right to redeem. He did not see proper to follow such a course, but seeks by this bill of review to let the original decree stand, to let the sale stand, but to have a declaration of the court that the order foreclosing the statutory right of redemption be reversed.

How can this avail him since his time for redemption was passed before he filed his bill? It would be of no use to him unless the court should go further and make a decree that he *now* has the right to redeem in the same manner as if he had tendered the money within the twelve or the fifteen months which the law allowed for that purpose.

We do not think the court should decree that he may now redeem on payment of the sum bid and interest. If he designed to avail himself of the right of redemption purely statutory, he should bring himself within the terms of the statute.

Such is the view of a case precisely similar taken by the Supreme Court of Illinois.

[249] That court in the case of *Suitterlin* v. *Ins. Co.*, 90 Ill., 483, while recognizing the doctrine of the case of *Brine* v. *Ins. Co.*, holds that the party seeking to redeem under such a decree and sale as the one before us, can do so only by making the offer within the time prescribed by the statute, and cannot do so afterwards. *We concur in that view, and affirm the decree of the Circuit Court in this case.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 164.

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[253] THE GOULDS MANUFACTURING COMPANY, *Appt.*,

v.

JOHN P. COWING ET AL.

(See S. C., 15 Otto, 253-258.)

Profits recoverable for infringement of patent—measure of damages.

1. In a suit for the infringement of a patent, the rule, as to the profits to be recovered, is to determine what advantage the defendant derived from using the complainant's invention over what he had in using other processes then open to the public.

2. The fruits of the advantage defendant gained by his infringement, is the measure of the profits to be recovered.

3. Where the market was limited to a particular locality, and was unusually limited in demand, the plaintiff's damages are to be measured by the defendant's profits derived from his business in that special and limited market.

[No. 151.]

Argued Nov. 28, 1881. Decided Mar. 13, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **William F. Cogswell**, for appellant.

Mr. **Elisha Foote**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The only questions raised on this appeal relate to the amount the appellant is entitled to recover for the infringement of a patent for an improvement in pumps "specially designed for drawing off the gas from oil wells and conducting the same to the furnace of the engine." The validity of the patent and the infringement are not disputed here.

After the patent and infringement were established below, the case was sent to a master to ascertain the damages.

The master reported that 298 pumps had been manufactured and sold by the defendants, the appellees, out of which a net profit of $47.71 on each pump had been realized, that being the difference between the cost of the material and labor used in making a pump and the price at which it was sold. Upon this report the court ruled, that as the patent was only for an improvement on an old pump, the profits for which the defendants were accountable must be confined to such as were realized from the manufacture of the patented improvement, and not from the whole pump as improved. For this reason a new reference was ordered to state the account on the proper basis.

The second report was, in its result, substantially the same as the first. The number of [254] pumps made and sold was the same, and the profit on each pump estimated to be $46.46. The mode of calculating the profits was also the same, that is to say, on the second reference as on the first, the defendants were charged with the price at which they sold the pump as a whole, and credited only with the cost of labor and material used in the manufacture. The master on the second reference, however, reported further, as follows:

"I find, as further facts from the evidence, that the plaintiffs' pump, with their patented improvement, which they had introduced into the market, virtually controlled the market, and had superseded all the other pumps then in use for pumping gas, and the others were literally driven out of the market, as they could not be sold at the places where the plaintiffs' pump had been introduced. The defendants went into the very market where the plaintiffs' pumps had been introduced, and where they had sold and where plaintiffs were then supplying most of their pumps, and the defendants, in fact, went and employed Wenson, the former agent of the plaintiffs, to sell the pumps for them, and he, from being the plaintiffs' agent in the locality, made very ready sale of the same pumps for the defendants; and had not the defendants interfered in urging the pumps which they had manufactured upon this local market, the plaintiffs would certainly have had the whole market to themselves, and would, beyond doubt, have secured orders and supplied the demand of the market for the same number of pumps more

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than they did sell, as the defendants furnished, to wit: 298 pumps. The plaintiffs were, by their agent, in the field furnishing pumps in those oil regions, and would have supplied the market demand had not the defendants intervened, and supplied to the market these 298 pumps."

This finding as to the facts is, in its general effect, supported by the evidence. Notwithstanding this, however, the court, still adhering to its holding as to the rule of estimating profits, set aside the report, and inasmuch as the appellant had, on the second reference, failed to show what had been realized upon the principles of accounting prescribed, a final decree was entered in its favor for nominal damages only and costs. From that decree this appeal was taken by the complainant below.

[255] The rule applicable to this class of cases was well stated by *Mr. Justice* Strong, speaking for the whole court, in *Mowry* v. *Whitney*, 14 Wall., 620 [81 U. S., XX., 860]. The subject-matter of that suit was a patent for an improvement in the process of manufacturing car wheels, and in respect to the profits resulting to an infringer from the use of the patented process, it was said, p. 651: "The question to be determined * * * is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits." It does not necessarily follow from this that where the patent is for one of the constituent parts and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses, can be made, which will be valuable in the market and salable, then, as was further said in *Mowry* v. *Whitney*, p. 651, the inquiry is "What was the advantage in cost, in skill required, in convenience of operation or marketability" gained by the use of the patented improvement. If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such, we think, is this case. Pumps for all ordinary and many extraordinary uses, were very old, but in the new developments of business something was wanted to take the gas from the casing of an oil well and conduct it safely to the furnace of the engine. "With that special purpose in view," this inventor took the well known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to the value of the old pump, but for the [256] new and special purpose in view, the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use, except in the oil producing regions of Pennsylvania and Canada. The demand was limited as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellant kept the control of its monopoly under the patent, it alone had the advantage of this market. Unless the appellees got the improved pump, they could not become competitors in that field, and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were, therefore, necessarily the profits they made on the entire sale.

This is an exceptional case. A limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellant had, could easily and with reasonable promptness fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances, it is easy to see that what has been the appellees' gain in this business must necessarily have been the appellant's loss and, consequently, the appellant's damages are to be measured by the appellees' profits derived from their business in that special and limited market. This, as it seems to us, is the logical result of the rule which has been stated. By infringing on the appellant's rights, the appellees obtained the advantage of the increased marketability of their pumps. The action of the court below, therefore, limiting the field of inquiry as to damages, cannot be sustained.

"We cannot agree with the master, however, in his estimate of the profits made by the appellees from what they have done. He finds that the pumps sold in the market for $80 each, [257] while the cost of manufacturing them was only $33.54. It is true there is some evidence to show that pumps could be made for the sum named, but it is clear to our minds that many things were excluded from the estimate which ought to have been included. All the material and labor of men may have been taken into account, but there is nothing for the use of tools, machinery, power and other facilities employed in the manufacture, and nothing for wastage and expenses of marketing. One of the appellees is reported as testifying that his firm made the pumps for $31.37 each, but this must be an error, because he at the same time stated he could not say there that was any profit at all at the prices for which sales were made. Clearly, this could not be, if what only cost the sum named was sold for $80. Annexed to the statement of the testimony of this witness is a detailed estimate of the cost of manufacture, which, without any allowance for general expenses, made the cost of a single pump $61.69. The appellant furnishes some evidence to contradict this estimate, but the bare fact that the pump when finished brought, as is claimed, at the shop, $80, shows that the cost must have been much more than the master has reported. Down to the time of this patent the market had been supplied with some device to accomplish what this improvement did. The change in

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the old pump was not an expensive one. The valves were put outside of the side chambers instead of inside, and the joints had to be carefully fitted. If the old pump only cost as much as is claimed for the new, we cannot believe it would have commanded in the market any such price as the new sold for. We must conclude, therefore, that the cost of production has been much underestimated by the master. The testimony as reported is very unsatisfactory, and we are strongly inclined to think all has not been sent here which was presented. The attention of the parties was evidently directed much more to the rule of estimating the profits, than to the detail of the expense of manufacture and sale Had there not already been two references we should be inclined to order another. As it is, we have made the best estimate we can from the material furnished in the record, and conclude that a reasonable allowance for profits will be $15 on each pump, or $4,470 in all.

[258] *The decree is reversed and the cause remanded, with instructions to sustain the fifth exception to the report of the master and enter a decree against the appellees for $4,470 and costs.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 445.

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[262] ADOLPHUS BRANDIES ET AL., *Appts.*,
v.
JOHN COCHRANE ET AL.

(See S. C., 15 Otto, 262.)

Allowance of appeal.

A circuit judge, by taking security on an appeal and signing the citation, allows an appeal. No formal order of allowance is necessary.

[No. 1043.]

Submitted Feb. 28, 1882. Decided Mar. 13, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss.

The case is sufficiently stated by the court.

Messrs. B. R. Forman and **John S. Monk,** for appellants.

Mr. **Edwin F. Bayley,** for appellees in support of motion.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss because the appeal was not taken within two years after the entry of the decree.

It appears from the record that the decree was entered on the 2d of August, 1879, and on the same day the complainants prayed an appeal, which was allowed upon their giving bond according to law. No bond was ever given under this allowance, and the case was not docketed here at the October Term, 1879. On the first of August, 1881, the Circuit Judge approved a bond for an appeal from the decree and signed a citation. The bond was on the same day filed with the clerk, and the citation served on the 18th of August. On the 8th of October the circuit court entered an order allowing the appeal *nunc pro tunc* as of August 1. The case was regularly docketed in this court on the 13th of October.

The motion is denied. The Circuit Judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary. *Sage* v. *R. R. Co.*, 96 U. S., 714 [XXIV., 643]; *Draper* v. *Davis* [*ante*, 122]. The appeal was, therefore, taken in time. The order of October 8th was not required to give it effect.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

D. M. RUSSELL ET AL., *Appt.*, [303]
v.
JEPTHA W. STANSELL, Surviving Partner of PARTEE & STANSELL.

(See S. C., 15 Otto, 303, 304.)

Jurisdictional amount.

Distinct and separate interests cannot be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal.

[No. 929.]

Submitted Feb. 28, 1882. Decided Mar. 13, 1882.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

On motion to dismiss.

The case is sufficiently stated by the court.

Mr. **H. T. Ellett,** for appellee, for motion.

Mr. Henry Craft, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

Stansell, the appellee, obtained a decree in the Circuit Court of the United States for the Northern District of Mississippi, in June, 1879, against the Levee Board of Mississippi, District No. 1, for $71,623.67. This decree being unsatisfied, Stansell instituted summary proceedings in the same court, under the provisions of the statute creating the Levee Board, to obtain an assessment and collection of the charge which was imposed on the lands in the district for its payment. On the 7th of February, 1880, the court entered an order, which resulted in an assessment by commissioners appointed for that purpose. In this order it was provided that any person conceiving himself aggrieved by the action of the commissioners might, by petition to the court, present his grievance and obtain such redress as he should fairly be entitled to. On the 1st of February, 1881, D. M. Russell, W. H. Stovall and H. P. Reid appeared, and as individuals and members of an executive committee appointed at a mass meeting of the several owners of the lands charged with the payment of the assessment, asked an injunction against the collection of the assessment that had been made, setting forth in their petition why the proceedings were illegal and unjust. The amount with which the petitioners, as individuals, were

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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severally charged was as follows: Russell $7.58, Stovall $205.14, and Reid, who was assessed only as an agent or attorney, $229.29. No single individual among all the parties represented [304] by the committee could in any event be made liable for an amount exceeding $2,500. On the presentation of the petition the court granted a preliminary injunction, but on final hearing that injunction was dissolved and the petition dismissed. From the last order this appeal was taken, which the appellee now moves to dismiss because the amount in dispute between him and any one of the several persons charged with the payment of the assessment is less than $5,000.

This motion is granted. While the appellants, and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body. The proceeding on the part of the appellee was to require each of the several land owners in the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount from which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily be to prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in *Paving Co.* v. *Mulford*, 100 U. S., 148 [XXV., 591]; *Seaver* v. *Bigelows*, 5 Wall., 208 [72 U. S., XVIII., 595]; *Rich* v. *Lambert*, 12 How., 347; *Stratton* v. *Jarvis*, 8 Pet., 4, and *Oliver* v. *Alexander*, 6 Pet., 143, such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal. Although the amount due the appellee from the levee district exceeds $5,000, his claim on the several owners of property is only for the sum assessed against them respectively. Any owner can relieve himself and his property from all further liability for the district, by paying his part of the assessment.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 6, 582.

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[355]

AMELIA BENNECKE, *Plff. in Err.*,

v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(See S. C., 15 Otto, 355-362.)

Waiver of stipulation—ratification by principal—forfeiture of insurance policy.

1. A waiver of a stipulation in an agreement must, to be effectual not only be made intentionally, but with knowledge of the circumstances. This is the rule not only where there is a direct and precise agreement to waive the stipulation, but also where it is sought to deduce a waiver from the conduct of the party.

2. The ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts.

3. A forfeiture of a life insurance policy is not waived by the act of agents not authorized to waive its conditions in receiving, retaining and receipting for money for a permit for the assured to reside and travel within limits prohibited by the terms of his policy, he being dead at the time and the party paying the money, the agents and the company ignorant of the fact.

[No. 1187.]

Submitted Jan. 12, 1882. Decided Mar. 13, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Statement of the case by *Mr. Justice* **Woods:**

This was an action of *assumpsit* brought by Amelia Bennecke, plaintiff in error, who was also plaintiff in the court below, to recover of the Connecticut Mutual Life Insurance Company the sum of $2,000 upon a policy of life insurance.

The parties having waived a jury, the issues both of fact and law were submitted to the court, which made a special finding, from which the following facts appeared:

On January 29, 1878, Adolphe Bennecke procured from the Connecticut Mutual Life Insurance Company, through John Ansley, its agent at Bloomington, Illinois, a policy of insurance on his life for $2,000, for the benefit of Amelia Bennecke, his wife. It was an ordinary life policy, and contained, among other condi- [356] tions, the following:

"3d. That the said insured is under this policy freely permitted to reside in any civilized abode in the western hemisphere, lying north of the thirty-second parallel of north latitude in the United States, and lying south of said thirty-second parallel, excepting from the first day of July to the first day of November, and in the eastern hemisphere lying north of the forty-second parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich, and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits, but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits without the consent of this Company previously given in writing in each or either of the foregoing cases, then this policy shall become and be null and void.

"4th. That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect to the same shall be forfeited to the Company."

After the signatures of the secretary and vice-president of the Company, and on the margin at the bottom of the policy appears the following:

☞ "Agents of the Company have no authority to make, alter or change any condition of the policy, nor to wave forfeiture thereof."

The annual premium of $46.24 required by the terms of the policy was duly and fully paid.

Bennecke left his home at Bloomington, Illinois, on September 26, 1878, and went to New Orleans, Louisiana, which is south of the 32d parallel of latitude, without the consent of the Insurance Company first obtained. He re-

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mained there until October 15, 1878, when he died at the hospital of Hotel Dieu, in that city, of yellow fever.

Ansley had been agent of the Connecticut Mutual Life Insurance Company, at Bloomington, Illinois, from 1863, up to and including October, 1878. On October 16, 1878, he first heard that Bennecke had gone to New Orleans. On October 17, Ansley called on Haker, the assured's brother-in-law, told him that he had heard that Bennecke was then in New Orleans, that on account of this violation of the condition of the policy his insurance was forfeited, [357] that a southern permit costing $20 should be paid for, and advised him to pay it for Bennecke. Haker at first said he knew nothing about it and refused to pay the $20. He then said he would look into the matter. The same day, after a consultation with Mrs. Bennecke, Haker went to Ansley's office, and paid him $20, and took from him a receipt as follows:

"AGENCY AT BLOOMINGTON, ILL.,
$20. Oct. 17, 1878.

"Received from Christ. Haker, twenty dollars, being the amount required for a southern permit on policy of Adolph Bennecke in the Connecticut Mutual Life Insurance Company, of Hartford, Conn., No. 52,242.

Amount of policy $2,000.

JOHN ANSLEY, *Agent.*"

At the time of taking this receipt, neither Haker nor Ansley, nor Bennecke's wife or friends, knew that Bennecke was dead.

On receiving the $20 from Haker Ansley forwarded the money to Stearns, Dickinson & Co., the state agents of the Insurance Company, at Chicago, Illinois, and they acknowledged the receipt of the money by letter.

Ten Dollars per thousand was the customary price fixed by the Company as the extra premium for a permit to go south of the thirty-second parallel between the first of July and the first of November. Ansley recollected having received money for three or four such permits, possibly more, at that rate. In such cases he simply received the money for the permits, forwarded it to the state agents of the Insurance Company, at Chicago, and requested them to get permits from the Insurance Company at Hartford, Connecticut, and send them to him for delivery. The letter in which he inclosed the $20 received from Haker, to the agency at Chicago, was as follows:

AGENCY AT BLOOMINGTON, Oct. 17, 1878.
Messrs. STEARNS, DICKINSON & Co.

GENTS: Herein please find draft for $20, less ex., for which please get and send me a southern permit for A. Bennecke, insured by policy 52242; amount $2,000. He went to New Orleans about ten days ago, and will probably remain there during the balance of the month. Please give this immediate attention, and get permit here as soon as possible. This $20 paid this day. Yours, truly,

JOHN ANSLEY."

Ansley never received a permit from the Insurance Company for Bennecke. On the 6th of [358] November, 1878, Ansley having become satisfied that Bennecke was dead at the time the $20 was paid him for the permit, of his own motion took $20 of other money belonging to the company and tendered it to Haker, stating that Bennecke was dead at the time the money was paid as a reason for tendering the money to him. Haker refused to receive the money. Ansley had no authority to issue policies of insurance on the Company, but after the policies were issued he turned them over to the parties on payment of the premium. Ansley received no word from the Company or state agents about Bennecke's death up to the time he tendered the money back to Haker. On the 26th of October he addressed a letter to the state agents of the Insurance Company, at Chicago, in which he informed them that Bennecke had died on October 17, in New Orleans, of yellow fever. From all that appears this was the first information received by them of Bennecke's death.

Ansley knew what was the price required for a permit, and had never applied for one without getting it. But he never applied for one when yellow fever was prevailing in the forbidden region. Proofs of loss, dated the 6th of December, 1878, were furnished the Insurance Company. The defendant Company on the trial offered to return the money received by Ansley for the permit.

Suit on the policy was begun in the Circuit Court of McLean County on the 18th day of April, 1878, by a declaration on the policy of the insurance. Defendant filed a plea of the general issue only. On the petition of the defendant the case was transferred to the Circuit Court of the United States for the Southern District of Illinois. It was admitted by the Insurance Company that there was no other defense in the case than what arose from the forfeiture of the policy, by reason of the fact that Bennecke had gone south of the thirty-second parallel of latitude, between the first of July and the first of November, without the consent of the Company previously given in writing; and on the foregoing facts it occurred as a question whether the forfeiture had been waived by the Company, on which question the Judges were opposed, and the presiding Judge being of opinion that the forfeiture had not been waived, judgment was entered for the defendant.

Whereupon, and on motion of the defendant, [359] by its counsel, it was ordered that the state of the pleadings, and the facts found, and the question on which the Judges differed, be certified according to the request of the defendant, and the law in that case made and provided, to this court to be finally decided.

The cause has accordingly been brought to this court by certificate of division of opinion and writ of error.

Messrs. Rowell & Hamilton and **William A. McKenney**, for plaintiff in error.

Mr. **Edward S. Isham**, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

It is not disputed by plaintiff in error that upon the facts found the policy of insurance had been forfeited. It is not insisted that there was any formal waiver of the forfeiture by any agent of the defendant in error, or that any permit was ever issued by the Company to Bennecke, from which such waiver could be inferred.

But plaintiff in error contends that the receipt by Ansley, the agent of the Insurance Company at Bloomington, on October 17, after the for-

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feiture of the policy, of the sum usually charged for a permit to reside south of the thirty-second parallel between the first of July and the first of November, the sending of the money by him on the same day to the agents of the Company at Chicago, its receipt by them, and the fact that they never returned the money to the person by whom it was paid, are sufficient to establish a waiver by the Company of the forfeiture of the policy.

It does not appear from the findings of fact made by the court that either Ansley, the agent at Bloomington, or Stearns, Dickinson & Co., the agents at Chicago, had any direct authority to waive a forfeiture. But, even if it were shown that they had such authority, and had waived the forfeiture, or that the Company itself had waived it, the waiver would not, under the circumstances of this case, be binding on the Company.

A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding. *Darnley* (Earl) v. *R. Co.*, L. R., 2 H. L., 43. [360]

The same rule applies to the ratification by the principal, of the unauthorized acts of his agent.

"It is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent." *Combs* v. *Scott*, 12 Allen, 496.

And it has been declared by this court that "No doctrine is better settled, both upon principle and authority, than this; that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud." *Owings* v. *Hull*, 9 Pet., 607; see, also, *Diehl* v. *Ins. Co.*, 58 Pa., 452; *Bevin* v. *Ins. Co.*, 23 Conn., 244; *Viall* v. *Ins. Co.*, 19 Barb., 440.

There is no pretense in this case that the Insurance Company was advised of the material facts, when its supposed waiver and ratification of the acts of its agent took place. The contention of the plaintiff in error is, that the Insurance Company waived a forfeiture of the policy when it was totally ignorant that any forfeiture existed. And the waiver of the forfeiture is deduced from a permit which is itself deduced from the fact that an agent, himself ignorant of the material facts, agreed to apply to the Company for the permit, and received and forwarded the money to pay for it.

The very purpose for which a permit was asked shows that both parties were ignorant of the facts which it was necessary the Company and its agents should understand before any effect could be given to its alleged waiver of the forfeiture. Permission was asked that Bennecke might reside and travel south of a certain parallel. This implied that he was living and able to travel. But the findings show he was dead when the permit was applied for. If the Company had given him a formal permit in writing to reside and travel south of the thirty-second parallel, he being dead at the time, and the Company ignorant of the fact, it would be a complete *non sequitur* to hold that this amounted to a waiver of a forfeiture of the policy unknown to the Company, and consequent upon his doing the act for which a permit was asked, and which was in violation of a condition of the policy. [361]

The case may be thus stated: The right of the plaintiff in error to a recovery rests on a waiver by the Insurance Company of the forfeiture of the policy. But there has been no direct waiver. The waiver is deduced from the permit. But there has been no formal permit. The permit is inferred from the fact that Ansley, a local agent, who had no knowledge of the death of Bennecke, applied for a permit to other agents who were also ignorant of the death of Bennecke, and remitted to them the money therefor, which they retained, but which Ansley tendered back, using for the tender other moneys of the Company; the Company itself, the principal of these agents, being all the time ignorant that Bennecke had forfeited his policy by a violation of its conditions, or that he had died in consequence of such violation, or that after his death, a permit to allow him to reside and travel in the forbidden region had been applied for, or that any money had been handed to its agent to be paid over as the consideration for such permit.

The case of the plaintiff in error is not aided by the facts found by the court in relation to the retention by the agents of the Company of the money paid for the permit. It is unnecessary to decide what inference might be drawn if the Company or its agents, with full knowledge of the death of Bennecke, had retained the money and never tendered it back. It does not appear that Ansley was informed of the death of Bennecke until October 26. On November 6, eleven days thereafter, he tendered back to Haker the money advanced by him to pay for the permit. Under the circumstances of this case, we do not think this lapse of time sufficient to show that Ansley intended to waive the forfeiture of the policy, even if he had been clothed with authority to do so. [362]

If the Company was bound by the act of Ansley in receiving the money for the permit, it was entitled to the benefit of his act in tendering it back. One tender was sufficient. That made by Ansley was never disavowed by the Company. On the contrary, the Company renewed it upon the trial of the cause in the circuit court.

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Under the circumstances of this case, the contention that the Insurance Company waived the forfeiture of the policy is without support.

The judgment entered in the Circuit Court in favor of the defendant, in accordance with the opinion of the presiding Justice, was, therefore, right, and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[739] CHARLES E. LEWIS, *Plff. in Err.*,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR.

(See S. C., 15 Otto, 739-751.)

Kansas bonds—estoppel—certificate of auditor.

1. Bonds executed under the Kansas Act of 1872, could be registered and issued, when the subscription was payable immediately and without conditions, without their being in the first instance delivered to the Treasurer of State, and by him delivered to the party entitled thereto.

2. Where such bonds do not, upon their face indicate that they were delivered upon the performance of certain conditions, but are made payable, unconditionally, the county is *estopped*, as against a *bona fide* purchaser, to deny that they are of the class which might have been delivered at once, and without going through the hands of the State Treasurer, to the Auditor of State, and being registered and certified as regularly and legally issued.

3. In such a case, the action and certificate of the Auditor of the State must be deemed conclusive evidence, as between the county and a *bona fide* purchaser, that the bonds were regularly and legally issued and, therefore, negotiable, in the fullest sense of that word.

[No. 819.]

Submitted Jan. 11, 1882. Decided Mar. 13, 1882.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

Statement of the case, by *Mr. Justice* **Harlan:**

At an election duly called and held on the 27th day of August, 1873, in the County of Barbour, State of Kansas, the qualified voters of that County gave their sanction to a donation of $100,000 in bonds of the County to aid in the construction of the Nebraska, Kansas and Southwestern Railroad. By the terms of the proposition voted on, the bonds were to be placed in the hands of the State Treasurer, in escrow, one half deliverable when the proposed road was constructed to Medicine Lodge, and the remainder when completed through the County. A few days after the election the bonds were [744] signed, sealed and duly attested by the proper officers of the County, in conformity with the order of its Board of Commissioners. They are dated September 1, 1873, and payable to the railroad company, or bearer, with interest, semi-annually, at the rate of ten per cent per annum, both the principal and interest payable at the National Park Bank in the City of New York. Each one is signed by the chairman of the Board of County Commissioners, is attested by the county clerk, and purports, upon its face, to be "one of a series of one hundred bonds of $1,000 each, all of like tenor and date, * * * issued for the purpose of aiding in the construction of the Nebraska, Kansas and Southwestern Railroad, through said Barbour County, in the State of Kansas, under, and in pursuance of an Act of the Legislature of the State of Kansas, entitled 'An Act to Authorize Counties, Incorporated Cities and Municipal Townships to Issue Bonds for the Purpose of Building Bridges, Aiding in the Construction of Railroads, Water-power, or Other Works of Internal Improvements, and Providing for the Registration of Such Bonds, the Registration of Other Bonds, and the Repealing of all Laws in Conflict Therewith,' approved March 2, 1872."

There is nothing upon the face of the bonds indicating that the donation was otherwise than absolute and unconditional.

They were left by the county officers with one Hutchinson, to be deposited with the Treasurer of State, as required by the terms of the proposition upon which the people voted. They were, however, never so deposited, but by Hutchinson were procured to be registered by the Auditor of State, and then fraudulently put in circulation.

An indorsement was made upon each bond by the State Auditor as follows:

"STATE OF KANSAS, *ss:*

I, D. W. Wilder, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

In witness whereof, I have hereunto set my hand and affixed my seal of office, at Topeka, this 19th day of November, 1873.

D. W. WILDER, *Auditor.*"

The plaintiff in error, who was plaintiff below, [745] became the holder of the bonds and coupons by purchase before the maturity of any of the coupons, and (according to our interpretation of the facts specifically found) without notice of any fraud in their execution or issue, unless, as claimed by the defendant in error, such notice was furnished by the terms of the Act under which they purport to have been issued.

The present action was brought to recover the coupons due September 1, 1875, March 1, 1876, and September 1, 1876. The defense is placed upon the ground that the bonds were issued in plain violation of the Act of 1872, and that all persons, whether purchasers in good faith or not, were required to take notice of the fact that they were not binding obligations of the County. Before adverting to the specific grounds, upon which their validity, as against the County, is questioned—which grounds were sustained by the court below—it is necessary to examine, with some particularity, the provisions of the Act of 1872, and ascertain its general scope and purpose. Laws of Kansas, 1872, p. 110.

The 1st section provides that the board of county commissioners of any county, the mayor and common council of any incorporated city, and the trustee, clerk and treasurer of any municipal township in the State, may issue the bonds of such county, city or township, in any sum necessary, not greater than ten per cent, inclusive of all other bonded indebtedness, of the taxable property of such county, city or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement. But it is

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declared in the same section that all counties may, in addition to the amount therein authorized, issue bonds not exceeding $100,000.

The 2d section provides that the bonds, so issued, should be payable at such place in the City of New York, as the officers issuing the same might direct, in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten *per centum* per annum, "all in the discretion of the officers issuing the same," the interest to be payable semi-annually, and evidenced by coupons attached; such bonds, if issued by a county, to be signed by the chairman of the board of county commissioners, and attested by the county clerk.

The 3d section declares that, before any bonds are issued, the same shall be ordered by a vote of the qualified electors of the municipality.

The 8th section provides, among other things, that if the proposition voted for be to aid in the construction of a railroad (either by donation thereto or the taking of stock therein), or other work of internal improvement, that the proper officers of the municipality shall at once subscribe upon the books of the railroad company, "specifically setting forth the conditions upon which such subscription is made, the amount of such donation thereto, stock taken therein, or bonds voted therefor."

The 11th section, upon the construction of which the case turned in the court below, is in these words:

741] "That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge or other work of internal improvement, either by donation thereto or the taking of stock therein, then upon the subscription being made, as hereinbefore provided, the officers of such county, city or township [shall thereupon issue the bonds of such county, city or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original or a copy of the subscription, setting forth its terms in full, to the Treasurer of State, which said bonds shall be held by the said Treasurer of State, in escrow, until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be, in all things, fully complied with, that upon the conditions of said subscription being in all things fully complied with, then the Treasurer of State shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided; *Provided*, That such bonds shall not bear interest or be negotiable until after the delivery and registration thereof; *And provided further*, That in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the Treasurer of State canceled, and redelivered to the county, city or township issuing the bonds; *And provided further*, That this section shall not apply, where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same."

The 12th section makes it the duty of the municipality issuing the bonds to register the same in a book kept for that purpose, showing the date, amount, maturity and rate of interest; and, if to aid in the construction of a railroad or other work of internal improvement, of what railroad or other work of internal improvement, and whether the same be a donation or for stock therein; and at the same time transmit to the Auditor of State a certified statement, attested by the clerk, under the corporate seal of the municipality, of the number, amount, character of the bonds, to whom and for what purpose issued.

The 13th section declares it to be the duty of the clerk of each county, city or township in the State, within sixty days after the Act took effect, and thereafter on the first day of January and July of each year, and at such other times as the Auditor may request, to transmit to that officer a certified, full and complete statement of the bonded indebtedness of every description of said municipality, particularly setting forth the nature of such bonds, and for what they were issued. From such statement the auditor is required to make a faithful record of the bonded indebtedness of the several counties, cities and townships of the State, noting therein all bonds subsequently issued, paid or canceled, as the same may be reported to him. [742]

The 14th section has an important bearing upon the case, and is in these words:

"Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the Auditor of State for registration, and the Auditor shall, *upon being satisfied that such bonds have been issued according to the provisions of this Act*, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and *shall under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued*, that the signatures thereto are genuine, and *that such bonds have been registered in his office according to law*, for which registration and certificate, the Auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof."

The remaining sections, among some things of an unimportant character, provide that the Auditor shall annually ascertain the amount accrued and to accrue before the tax of the succeeding year shall be levied and collected (for the final redemption of the same), upon all bonds registered in his office, and certify the amount thereof to the clerk of the county in which the bonds are issued; that the clerk of the county shall thereupon proceed to ascertain the amount of tax, necessary to pay the interest and create a sinking fund in compliance with the Auditor's certificate; that the county treasurer shall, at the time of his annual settlements with the State Treasurer, pay over to the latter moneys collected under the Act, take duplicate receipts therefor, one copy of which shall be filed with the Auditor of State; that the State Treasurer out of the moneys so received shall pay off the interest accrued upon such registered bonds, taking up the interest coupons, which shall be canceled and filed with the Auditor of State; that the moneys thus collected and remaining in the hands of the State Treasurer, after the payment of the interest accrued, except that accruing for the current year, shall [743]

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be retained as a sinking fund for the final redemption of the bonds; that when any registered bonds mature, the same shall be paid by the State Treasurer out of any money in his hands for that purpose and, when paid, canceled and filed with the Auditor, who shall enter satisfaction in the record of registration; that the Treasurer and Auditor of State shall annually publish a detailed statement of the business transacted by them under the Act during the preceding year; and, that the State shall be deemed the custodian only of the taxes so collected and credited to such municipality, in no manner liable on account of such bond; but the tax and funds so collected to be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds until fully satisfied, the State Treasurer to be liable on his official bond for the faithful disbursement of all moneys so collected or received by him.

This summary of the provisions of the Act is sufficient to show the relations which the officers of the State, particularly the State Auditor, held to such municipalities as undertook to aid in the construction of railroads, by donation or by subscription of stock.

Messrs. **James Grant** & *Whit. M. Grant*, for plaintiff in error.

Messrs. **Edward Stillings, Thomas P. Fenlon & A. M. F. Randolph,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

We have carefully considered the reasons upon which the Judge of the Circuit Court based the conclusion, that the County was not liable upon the bonds even in the hands of a *bona fide* purchaser for value. Its opinion seems to proceed upon these grounds; that the Act of 1872 imposed, as a condition precedent as well to the bonds bearing interest as to their negotiability, that they should pass through the hands of the State Treasurer, he alone being invested with authority to determine when they should be delivered to the parties entitled thereto, for the purpose of registration; that the requirement of such condition was manifest from the statute, of the terms of which all were bound to take notice; that although the bond, on its face, disclosed no conditions whatever for their delivery, the purchaser should have ascertained whether, prior to registration, they had, in the first instance, been deposited with the State Treasurer in escrow, and that he could not take the certificate of the Auditor as conclusive evidence that the statute had been pursued; that as the bonds were not placed in the hands of the Treasurer, they never had the quality of negotiability, and could not, therefore, have been rightfully registered, nor their regularity and legality certified by the Auditor under his seal of office; and since the conditions affixed by the popular vote had never been performed by the construction of the proposed road, the bonds did not constitute valid obligations of the county. [746]

We are unable to concur in some of the views expressed by the learned Judge, and not at all in the conclusion that the bonds were not enforceable against the county. The fundamental proposition upon which that conclusion seems to rest, is, that a bond, executed under the Act of 1872, could not, consistently with the purpose and language of the statute, be registered and issued, even when the subscription was payable immediately and without conditions, unless, in the first instance, it be delivered to the Treasurer of State, and is by him delivered to the parties entitled thereto. This interpretation of the statute is not, we think, justified by any fair construction of its provisions. Under some circumstances, distinctly disclosed upon the face of the Act, it is not at all necessary that the bonds be delivered to the Treasurer in order that they may be registered and become the valid obligations of the municipality, in whose name they are issued. The last proviso of the 11th section expressly declares that that *section*, the only one which refers to the custody of the bonds by the State Treasurer, "Shall *not apply* when the people have named some party as trustee in their vote upon the proposition, and the contractor [that is, as we suppose, the railroad company proposing to do the work of construction] may thereafter agree to the same." If the people on one side, and the railroad company on the other, agree upon a trustee to hold the bonds until certain contingencies happen, or until certain terms or conditions are performed, in such case, the statute explicitly declares the 11th section shall not apply. Again; suppose the people had voted—as, it would seem, that under sections one, two and three, they might have done—for a donation, or in favor of a subscription of stock, to be paid in bonds, deliverable at once, without any conditions or terms whatever. Could it be claimed that bonds of that kind must, of necessity, have been delivered to the Treasurer of State? If so, for what purpose could he have received them? What ends could have been subserved by his custody of them, when to their delivery no conditions were attached? When should he, in such case, have delivered them to the parties entitled thereto? If, in the case supposed, the railroad company, under the agreement with the County, and under the vote of the people, became entitled, at once, to the bonds for the purpose of having them registered, and the required certificate of the Auditor indorsed thereon, it cannot be that the Legislature intended the parties to perform the idle ceremony of passing them through the hands of the Treasurer, to be by him immediately surrendered to the proper parties. That officer, in the case put, has no duty to perform, such as the Act imposes when conditions are attached to a subscription. For these reasons, we are of opinion that the 11th section, in so far as it requires a delivery of bonds to the State Treasurer, has no application except in cases where, to the subscription, whether of donation or of stock, are annexed conditions to be complied with before that officer may rightfully surrender the bonds intrusted to him. The object of that section is to prescribe a mode in which the people of a county may, if they pursue the statute, be protected, in some degree, against a premature delivery of county bonds by local officers in advance of the performance of conditions imposed by popular vote. [747]

If we are correct in this interpretation of the statute, it follows that the purchaser of these bonds was not informed, by the statute, that they belonged to that class which were impera-

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tively required to be deposited, in the first instance, with the State Treasurer, and by him held until the conditions upon which they were to be delivered were fully performed.

But it remains for us to consider the important practical question as to the rights of the parties, in view of the admitted fact in this case, that the proposition approved by popular vote did, in terms, provide for the ultimate delivery of the bonds only upon certain conditions—bonds, therefore, which ought to have been, but were not, delivered by the county officers to the State Treasurer, to be held until the prescribed conditions were performed. The determination of this question, so far as it involves the good faith and diligence of the parties, is somewhat complicated by the absence of any finding as to whether the subscription was, in fact, made on the books of the company, "specifically setting forth the conditions" upon which it was made (sec. 9); or whether the original or a copy of the subscription was in fact; delivered or even transmitted to the Treasurer of State (sec. 11); or whether the officers of the county themselves made a record of the bonds in a book kept for that purpose (sec. 12); or whether they transmitted to the State Auditor a certified statement, [748] attested by the county clerk, "of the number, amount, and character of the bonds so issued, to whom issued, and for what purpose" (sec. 12). We cannot, therefore, certainly know what facts would have been ascertained by the purchaser, had he resorted to all those sources of information—an investigation upon which, for reasons hereafter to be stated, he was not required to enter. We have in the special finding only the fact that the County, under the order of the Board of Commissioners, executed bonds payable to the railroad company *or bearer*, and purporting to have been issued under and *in pursuance of* the Act of 1872; and that the bonds were left by the county officers with Hutchinson for delivery to the State Treasurer, when the statute required the county authorities themselves to deliver the bonds to that officer.

Now, it is to be observed that the bonds do not, upon their face, indicate that they were deliverable upon the performance of certain conditions. They are made payable, unconditionally, to bearer, at a designated place and at a specified time. By the act of the county officers, intrusting the bonds to one upon whom no official responsibility rested, that individual was enabled to represent himself to the Auditor as presumptively the owner, because the bearer, of the bonds. But these facts, it is insisted, are of no consequence in view of the statutory provision, declaring, in effect, that bonds, of the kind here in suit, "shall not bear interest or be negotiable" until after their delivery by the State Treasurer to the parties entitled thereto. Whatever force might be conceded to this argument, looking alone to the requirements of the 11th section of the Act, we are of opinion that more consequence is to be attached to the action of the Auditor of State, under the 14th section, than seems to have been done by the court below. The presumption is that the Legislature, while aiming to guard local communities against the fraudulent conduct of their officers, intended also to afford, in some degree, protection to those becoming, in good faith purchasers of municipal securities which those officers were authorized to execute, and which they might put into circulation, or negligently permit to get into circulation. Hence, as we think, the requirement as to the registration of bonds issued under the Act, and the duty of the State Auditor, upon registration, to attest their regularity and legality by a certificate, under his seal of office. [749]

The State Treasurer may improperly surrender bonds deposited with him, for delivery only upon the performance of specified conditions. But such delivery would not constitute them binding obligations upon the municipality, in whose name they are executed. The holder is under a necessity, by the statute, to do something more. He is required to present them for registration to another officer, the Auditor of the State, in whose office was, if the county authorities obeyed the statute, kept a record of the number, amount and character of the bonds, to whom issued and for what purpose. And that officer is not under a duty to admit the bonds to registration, simply because asked to do so, and without making inquiry as to their regularity and legality. Unless satisfied that they are issued in accordance with the provisions of the Act he is bound to deny the application for registration. But, if satisfied that the provisions of the State have been pursued, he is required to register the bonds, and certify, upon each one, under his seal of office, that it has been regularly and legally issued. To him, therefore, is committed, by the State, the important function of finally determining whether the law has been, in all respects, obeyed and, consequently, whether the bonds have been regularly and legally issued. His determination, necessarily, involves an investigation as to every fact essential to their validity Purchasers in good faith, although required to know what the statute contained, are not bound, under such circumstances as are here disclosed, to go behind the Auditor's certificate, and find out whether that officer has ascertained all the facts, or whether he has correctly and honestly passed upon the questions arising upon an application for registration. The investigation which the statute authorized the Auditor to make, involved the inquiry whether the bonds were of the class which should have passed through the hands of the Treasurer, and, also, whether the conditions, upon which they were deliverable, had been performed. Purchasers have the right to assume, having no notice to the contrary, that he has, in these respects, discharged his duty. The registration Acts, in some of the States, while imposing like duties upon State Auditors, and requiring them (when the facts justified them in so doing) to certify, upon municipal bonds, [750] that they have been issued in compliance with law, expressly declare such certificates to be *prima facie* evidence only of the facts stated, and shall not prevent proof to the contrary in any suit involving the validity of the bonds, or the power and authority of the municipality, in whose name they are executed, to issue them. *Anthony* v. *Jasper Co.*, 101 U. S., 694 [XXV., 1006]. But the statute in question contains no such provision. The Legislature of Kansas confers upon the Auditor of State full authority to ascertain and determine whether bonds presented for registration have been issued in ac-

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cordance with the statute and, if satisfied such is the fact, it is made his duty to certify upon the bonds, that they have been regularly and legally issued. Had it appeared upon the face of these bonds that they were deliverable upon certain terms and, therefore, belonged to the class which should pass through the hands of the State Treasurer, and if the purchaser, in such a case, be held to have taken the bonds subject to the statutory requirement that they were not negotiable unless they had been, in the first instance, actually delivered by or in behalf of the county officers, to the State Treasurer, and by the latter surrendered to the proper parties, it is clear no such condition can be attached to the purchase by appellant. For, the bonds here in suit, do not disclose the conditional nature of the subscription, nor that they belonged to the class which, as a condition precedent to their negotiability, must have been delivered to the State Treasurer. That these facts were not disclosed upon the face of the bonds is the fault of the County, and it is estopped, as against a *bona fide* purchaser, to deny that they were of the class which might have been delivered, at once, and without going through the hands of the State Treasurer, to the Auditor of State, and been by him registered and certified as regular and legally issued. In such a case, at least, the action and certificate of the Auditor of State must be deemed conclusive evidence, as between the county and a *bona fide* purchaser, that the bonds were regularly and legally issued and, therefore, negotiable, in the fullest sense of that word. If such be not the construction of the registration Act, it is difficult to perceive of what practical value is such certificate, or what the Legislature intended by the requirement that the Auditor [731] should, after examination into the facts, attest the regularity and legality of the bonds. If the determination of that officer, in this case operates hardly upon the people of the County, the result must be attributed to the legislation in question as well as to the negligence of the state and county officers. What we have said is in harmony with the settled doctrines of this court upon the subject of negotiable securities issued by municipal corporations, as announced in numerous cases with which the profession is familiar, and which need not be here cited.

There are other questions in the case. But they are of minor importance, and it seems to be unnecessary to consider them.

Judgment reversed and cause remanded, with directions to enter a judgment in favor of the plaintiff below.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited- 110 U. S., 171, 172.

CONTINENTAL BANK NOTE COMPANY OF THE CITY OF NEW YORK, *Appt.*,

v.

UNITED STATES.

Government contract—construction of—duration—effect on title—loss, how compensated.

See 15 OTTO. 154 US 671

1. Where one contracted to furnish the Postoffice Department with adhesive stamps, and to keep on hand a sufficient quantity to meet all its orders, to be paid for on delivery; held, that the United States were under no obligation to pay until there had been a requisition by the department, and a delivery in conformity therewith.
2. The contract being limited to a fixed period; held, that the United States were not bound to order nor the appellant to deliver, after the end of that time.
3. The stock on hand, although manufactured and stored under the supervision of an agent of the department, remained the property of the contractor until delivered.
4. If loss occurred by the failure of the United States to call for the whole stock on hand before the end of the term, it was compensated for in the payment for whant was delivered.

[No. 216.]

Argued Mar. 7, 1882. Decided Mar. 20, 1882.

APPEAL from the Court of Claims.

The case is sufficiently stated by the court. See, also, 14 Ct. Cl., 74.

Messrs. **John R. Dos Passos** and *William McMichael* for appellant.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The appellant by its several contracts sued on was bound to furnish the Postoffice Department all the adhesive postage-stamps that might be required during a period ending on the 30th day of April, 1877. As part of the several contracts, also, it bound itself to keep on hand at all times a stock of the several denominations of stamps, sufficient to meet all the orders of the department, and to provide against any and all contingencies likely to occur, so that each and every order might be promptly filled. For this the United States agreed to pay at the stipulated prices for all stamps delivered, and by express stipulation this was to be "full compensation for everything required to be done or furnished under" the contracts. Deliveries were to be made at the postoffice in New York, or the department in Washington. From this it is apparent there was no liability on the part of the United States to pay until: 1, there had been a requisition by the department; and 2, a delivery in conformity with what was required. The contracts were limited to a fixed period. The United States were neither bound to order, nor the appellant to deliver after the end of the term. Although the stock on hand was manufactured and stored under the supervision of an agent of the department, it remained the property of the appellant until delivered under the contracts. The inspection and supervision of the agent during the manufacture and storage were to guard against losses and frauds, and to insure promptness in delivery. The ownership was not changed until the delivery which the contracts provided for was complete. If loss occurred by reason of the failure of the United States to call for the whole stock on hand before the end of the term, it was compensated for in the payment for what was delivered. Such was the express agreement of the parties.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[7] REUBEN T. POLLARD AND STEPHEN PETTUS, Partners as POLLARD, PETTUS & Co., *Plfs. in Err.*,

v.

H. J. VINTON.

(See S. C., 15 Otto, 7-12.)

Bill of lading, its effect—authority to give, for goods not received—rights of assignee.

*1. The legal character and effect of a bill of lading stated in reference to its negotiable quality.

2. Neither the master of a vessel nor the shipping agents of steamboats on the rivers of the interior, at points where they receive and deliver cargo, have authority to bind the vessel or its owners by giving a bill of lading for goods or cargo not received for shipment.

3. Such a bill of lading being outside of the power conferred by the agent's authority, is void in the hands of a person who may have afterwards, in good faith, taken it and advanced money on it.

[No. 140.]

Argued Dec. 21, 1881. Decided Mar. 20, 1882.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Messrs. **E. Ellery Anderson** and *Thomas W. Bullitt*, for plaintiffs in error:

1. Cobb & Co. were the general agents of the defendants in error, in the business of signing and issuing bills of lading.

See Story, Agen., Sec. 17; Sm. Merc. L., 59; *Butler* v. *Maples*, 9 Wall., 766 (76 U. S., XIX., 822).

2. The acts and declarations of a general agent are binding on his principal, if within the scope of his authority, although by those acts he violates private instructions.

North River Bank v. *Aymar*, 3 Hill, 262; *Walsh* v. *Hartford Fire Ins. Co.*, 73 N.Y., 5; *Merchants' Bank* v. *State Bank*, 10 Wall., 604 (77 U.S., XIX., 1008); *P. & R. R. R. Co.* v. *Derby*, 14 How., 468; Story, Agen., sec., 126, 127, 452; *Dougherty* v. *Wells*, 7 Nev., 368.

3. The act of a general agent is within the scope of the authority conferred, when acts confessedly authorized being compared with the act which is questioned, the appearance of the two acts cannot be distinguished.

N. Y. & N. H.R.R. Co. v. *Schuyler*, 34 N.Y., 30; *Mechanics' Bank* v. *N. Y. & N. H. R. R. Co.*, 13 N.Y., 599; *Farmers' & M. Bank* v. *Butchers' & Drovers' Bank*, 16 N.Y., 142; *Griswold* v. *Haven*, 25 N.Y., 598; *Tome* v. *Parkersburg R.R. Co.*, 39 Md., 36.

4. There has been no final adjudication by this court of the question presented on this appeal.

In the following cases it has been held that carriers are responsible to *bona fide* holders for valuable consideration of bills of lading issued by their freight agent, in the form usually adopted by them, although at the time of their issue no goods had been received by the carrier.

Armour v. *Mich. Cent. R. R. Co.*, 65 N.Y., 111; *Sioux City & P. R. R. Co.* v. *First Nat. Bk.*, 10 Neb., 556; *Wichita Sav. Bank* v. *A., T. & S.F. R. R. Co.*, 20 Kan., 519; see also, *Relyea* v. *N. H. R. M. Co.*, 42 Conn., 579; *McNeil* v. *Hill*, 1 Woolw., 96; *Bradstreet* v. *Heran*, 2 Blatchf., 116; *Farmers' & Mechanics' Bank* v. *Erie Ry. Co.*, 72 N.Y., 188.

5. The ceaseless movement of the various products of agriculture and of manufacture, and the enormous increase in the number and volume of mercantile transactions, in all of which the bill of lading performs an indispensable and useful office, entitle that instrument to the full protection of every rule of law which can increase the faith and credit to be given to it.

6. There is no force in the objection that the plaintiffs in error acquired no greater right than their assignor against the defendant. The injury done by the defendant to the plaintiffs in error is caused by the false statement contained in the bill of lading, and it is well settled law, that a principal will be responsible for his agent's misrepresentations, not only to the person to whom such misrepresentation is made, but also to any other person who may be injured thereby, provided such injury result from the ordinary and natural use of the instrument containing the misrepresentation.

Eaton, etc. Co. v. *Avery*, 83 N. Y., 31; *Morgan* v. *Skiddy*, 62 N.Y., 319; *Bruff* v. *Mali*, 36 N.Y., 200; *Thomas* v. *Winchester*, 6 N. Y., 397; *N.Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N.Y., 60.

The objection that the bill is not negotiable, is hardly consistent with the decisions relating thereto.

The Vaughan v. *The Telegraph*, 14 Wall., 258 (81 U. S., XX., 807); *Merchants' Bank* v. *Union R. R. & Trans. Co.*, 69 N. Y., 373; *Mears* v. *Waples*, 3 Hous. (Del.), 581; 2 Dan. Neg. Inst., sec. 1727; *Moore* v. *Metropolitan Nat. Bk.*, 55 N. Y., 41: *Armour* v. *Mich. Cent. R.R. Co.*, 65 N.Y., 111.

Messrs. **B. H. Bristow** and *Augustus E. Willson*, for defendant in error:

1. Bills of lading issued by a shipping agent do not bind his principal, unless issued for goods actually received.

This principle has usually come up for application on bills of lading wrongfully issued by the master; but his authority in this respect does not differ from that of other shipping agents.

Jessel v. *Bath*, L. R. 2 Ex., 267; *Dean* v. *King*, 22 Ohio St., 136; *Balt. & O. R. R. Co.* v. *Wilkens*, 44 Md., 11; *Robinson* v. *Memphis &c., R. R. Co.*, 9 Fed. Rep., 129; *Hickox* v. *Buckingham*, 18 How., 182-191 (59 U. S., XV., 341-345).

The last of the above cases is the leading American case on this subject. The rule there laid down has been generally followed.

See, *Sears* v. *Wingate*, 3 Allen, 103; *2d Nat. Bk.* v. *Wulbridge*, 19 Ohio St., 419; *Dean* v. *King*, 22 Ohio St., 136; *Fellows* v. *Steamer Powell*, 16 La. Ann., 316; *Hunt* v. *Miss. Cent. R. Co.*, 29 La. Ann., 446; *Louisiana Bk.* v. *Laveille*, 52 Mo., 380; *B. & O. R. R. Co.* v. *Wilkens*, 44 Md., 11.

The rule has been regarded as finally settled in the Federal court.

Bulkley v. *Naumkeag &c. Co.*, 24 How., 386, 393 (65 U.S., XVI., 599, 602); *The Delaware*, 14 Wall., 579, 602 (81 U. S., XX., 779, 783); *The Loon*, 7 Blatchf., 246; *The Joseph Grant*, 1 Biss., 193; *The Bark Edwin*, 1 Sprague, 477.

It was settled in the same way in England before *Schooner Freeman* v. *Buckingham*, and has not since been disturbed.

Grant v. *Norway*, 10 C. B., 665; *Coleman* v. *Riches*, 16 C.B., 104; *Hubbersty* v. *Ward*, 8 Exch., 330; *Jessel* v. *Bath*, L. R., 2 Exch., 267; *Brown*

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Negotiability and transfer of bill of lading; effect of transfer.* See *note* to Shaw v. Nat. Bank, 101 U. S., XXV., 892.

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v. *The Powell Duffryn Coal Co.*, L. R., 10 C. P., 562; so in Scotland; *McLean* v. *Fleming*, L.R., 2 Sc. App., 128.

2. Whether or not the plaintiff is a *bona fide* assignee for value is immaterial.

(*a*) This was directly held in all the cases cited under the first point, and is, therefore, law, even were it an exception to a general rule.

(*b*) But a bill of lading is not negotiable, and its holder can give by transfer no better title than his own.

Benj. Sales, sec. 864; 1 Smith L.C. (Notes to *Lickbarrow* v. *Mason*), 7 Am. ed., 1192, 1201; *Dows* v. *Perrin*, 16 N. Y., 325; *Stollenwerck* v. *Thacher*, 115 Mass., 224; *Shaw* v. *Railroad Co.*, 101 U. S., 557 (XXV., 892).

In this case the assignor, having taken the simulated bill without consideration, held it by no valid title.

(*c*) And even negotiable paper, if issued by an agent without authority, is no more than a forgery in the hands of a *bona fide* holder.

1 Dan. Neg. Inst., sec. 809; *Lowell &c. Bank* v. *Inhabitants of Winchester*, 8 Allen, 109; *The Floyd Acceptances*, 7 Wall., 666, 676 (74 U. S., XIX., 169, 173).

3. This is not a proper case for the application of the maxim, that where one of two innocent parties must suffer by the misrepresentations of a third, "It is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser."

(*a*) The misrepresentations relied on by the plaintiffs, were not those of the agent.

(*b*) The agent's misrepresentations, were not made to the plaintiffs, and they have no greater rights than their assignors.

Farmers' & M. Bk. v. *Butchers' & D. Bk.*, 16 N. Y., 125, 140; *Griswold* v. *Haven*, 25 N. Y., 595, 604.

(*c*) No authority, past or present, for or ratification of the misrepresentations, can be imputed to the principals.

The misrepresentations were not made in the course of business, or for the principal's benefit.

See, *Lowell Five Cent Savings Bank* v. *Inhab. of Winchester*, 8 Allen, 109.

The plaintiff had no business to rely on the agent's representations.

B. & O. R. R. Co. v. *Wilkins*, 44 Md., 11

Mr. Justice **Miller** delivered the opinion of the court:

The defendant in error, who was also defendant below, was the owner of a steamboat running between the Cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams & Co. at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for $5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs. [8]

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, *all* inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

To these elementary truths the reply is, that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment.

It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading. [9]

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the ship-owner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence:

"During the month of December, 1873" (the

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date of the bill of lading), "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, *with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat, Ben. Franklin.*"

This authority to execute and deliver bills of lading has two limitations, namely: they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying and the agents of defendant had no authority to make one.

They had no authority to *sell* cotton and contract for delivery. They had no authority to *sell* bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them, who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but [10] such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of *The Freeman* v. *Buckingham*, 18 How., 182 [59 U. S., XV., 341].

In that case the schooner was libeled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libelants, who resided in the City of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libelants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner, of the vessel could be bound by the acts of the master, appointed by one to whom he had confided the control of the vessel, and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfully bind a vessel or its owner.

The court in further discussing the question says: "Even if the master had been appointed by the claimant, a willful fraud committed by him on third persons by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with [11] the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading, than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

And the court cites as settling the law in this way in England, the cases of *Grant* v. *Norway*, 2 Eng. L. & Eq., 337 [10 C. B., 665]; *Hubbersty* v. *Ward*, 18 Eng. L. & Eq., 551 [8 Exch., 330]; and *Coleman* v. *Riches*, 29 Eng. L. & Eq., 323 [16 C. B., 104]. Also, *Walter* v. *Brewer*, 11 Mass., 99; see, also, *McLean* v. *Fleming*, L. R., 2 H. of L., 128; Macl., L. of Merch. Ship., 368, 369.

It seems clear that the authority of E. D. Cobb & Co., as shipping agents, cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very question of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to [12] give them more special notice.

The case of *R. R. Co.* v. *Schuyler*, 34 N. Y., 65, is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *pure agency*, and depends solely on the power confided to the agent.

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In the other case *the officer is the corporation* for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents and are to be treated as the agents of the corporation or of the corporators, it is also true, that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think the case of the *R. R. Co.* v. *Schuyler* presents a rule for this case.

The judgment of the Circuit Court is affirmed.

Pollard et al., v. *U. S. Mail Line Company. No. 141.*

This case is identical with that of the *same plaintiffs* v. *Vinton*, just decided. The bill of exceptions being identical, except in the name of the defendant and the steamboat owned by it.

The judgment is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—33 Hun, 593.

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[24] NATIONAL STEAM NAVIGATION COMPANY (Limited), *Appt.*,

v.

JOSEPH W. DYER ET AL.

AND

JOSEPH W. DYER ET AL., *Appts.*,

v.

NATIONAL STEAM NAVIGATION COMPANY (Limited).

(See S. C., "*The Scotland*," 15 Otto, 24-36.)

Act of March 3, 1851—limited liability—maritime law, how far operative—law of collision—ship-owners pleading statute—form of decree—surrender of ship—rule of damages for goods lost—market value.

*1. The Limited Liability Act of 1851, reproduced in the Revised Statutes in sections 4282, etc., applies to owners of foreign as well as domestic vessels; and to acts done on the high seas as well as in waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or perhaps of two foreign nations having the same maritime law.

2. The maritime law of the United States, as found in the statute, is the same as the general maritime law of Europe, and is different from that of Great Britain in this, that the former gauges the liability by the value of the ship and freight after the loss or injury, and the latter by their value before the loss or injury, not exceeding £15 per ton.

3. The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. The principles laid down on this subject in Norwich Co. v. Wright, 13 Wall., 104 [80 U. S., XX., 585], and in The Lottawanna, 21 Wall., 558 [88 U. S., XXII., 654], re-asserted and affirmed.

4. The courts of every country will administer justice according to its laws, unless a different law be shown to apply; and this rule applies to transactions taking place on the high seas. If a collision occur on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws, unless the two colliding ships belong to the same foreign country, or, perhaps, to different countries using the same law, when they will be governed by the laws of the country to which they belong.

5. Ship-owners may avail themselves of the defense of limited responsibility by answer or plea as well as by the form of proceeding prescribed by the rules of this court, at least so far as to obtain protection against the libelants or plaintiffs in the suit. Those rules were not intended to restrict them, but to aid them in bringing into concourse those having claims against them arising from the acts of the master or crew.

6. If the owners plead the statute, a decree may be made requiring them to pay into court the limited amount for which they are liable, and distributing said amount *pro rata* amongst the parties claiming damages. Such a proceeding in a court of admiralty would be an "appropriate proceeding" under the statute.

7. It is not necessary that ship-owners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity and, if found in, or confessing, fault, may abide a decree against them for the value of ship and freight as found by the proofs.

8. The rule of damages, in case of goods lost or destroyed on the high seas by the fault of those in charge, is the price or value of the goods at the place of shipment, with all charges of lading, insurance and transportation and interest at six per cent per annum, but without any allowance for anticipated profits.

9. When the goods have no market value at the place of shipment, resort may be had to other means of ascertaining their actual value, such as the price which they usually bring at the port of destination, with a fair deduction for profits and charges.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Collision; measure of damages for.* See *note* to Smith v. Condry, 42 U. S. (1 How.), 28.

Methods of proving market price. See *note* to Fennerstein v. U. S., 70 U. S., XVIII., 121.

[Nos 40, 43.]

Argued Apr. 19, 1881. Decided Mar. 20, 1882.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

The case is stated by the court.

Messrs. **William Allen Butler,** *Thomas E. Stillman* and *John Chetwood*, for National Steam Nav. Co., respondent.

Messrs. **James C. Carter,** *H. J. Scudder* and *J. H. Choate*, for libelants.

Messrs. **Benedict,** *Taft & Benedict* for Rollins, libelant.

Mr. Everett P. Wheeler, by leave of court, filed a brief in behalf of interested parties on the question of the limitation of liability of owners of vessels.

Mr. Justice **Bradley** delivered the opinion of the court:

The steamship Scotland, belonging to the National Steam Navigation Company, a Corporation of Great Britain, sailed from New York for Liverpool on the 1st of December, 1866, with freight and passengers; and after reaching the high sea, opposite Fire Island light, ran into the American ship Kate Dyer, bound from Callao, in the Republic of Peru to New York, laden with a cargo of guano. The Kate Dyer immediately sank and ship and cargo were totally lost. The steamship suffered so severely from the collision that she put back, but was unable to get further than the middle ground outside and south of Sandy Hook, where she also sank and became a total loss, with the exception of some stripping of ship's material, consisting of anchors, chains, rigging and cabin furniture got from her by the Coast Wrecking Company before she went down. Libels *in personam* were filed in the District Court [25]

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for the Eastern District of New York against the Steam Navigation Company by the owners of the Kate Dyer the Peruvian Government, owner of her cargo, and by a passenger and some of the crew who lost certain effects by the sinking of the ship. Personal service of process not being obtainable, the marshal attached another vessel belonging to the Steamship Company, lying in the Port of New York, which was duly claimed and released on stipulation, and the Steamship Company appeared and responded to the libel. The answer admitted the collision, but denied that The Scotland was in fault, and further alleged as follows: "Respondents further answering say, that said steamer Scotland was by said collision sunk and destroyed, and that there is no liability *in personam* against these respondents for said loss of the Kate Dyer." Proofs being taken, the district court rendered a decree in favor of the libelants, which, on appeal to the circuit court, was substantially affirmed. The owners of the Kate Dyer were awarded $56,000 with interest; the owners of the cargo, $57,375 with interest; and the passengers and crew upwards of $11,000 with interest.

[26]

On the trial in the circuit court, the respondents, besides contesting the question of fault and general liability, again insisted upon the benefit of the limited liability law, and proposed for adoption by the court a certain finding of fact and conclusion of law looking to that end. The finding of fact was substantially adopted by the court as follows:

"The steamer was, by reason of the said collision and in consequence thereof, so injured that although at once put about, she could only reach the 'outer middle,' so called, on the west side of the channel south of Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging and cabin furniture, of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up. The passage money paid in advance by the passengers was $1,703.65; of this $225 was refunded to such of them as could not wait to be transported by the respondents in another vessel of their line; the remaining passengers were forwarded by The Queen and the expense charged to The Scotland. Irrespective of the carriage of the passengers by The Queen, the respondents paid return money as above, $225, and the expenses of bringing the passengers to New York, and taking care of them before they were reshipped, $566.83, in all $791.83; the balance of the passage money, $911.82, was credited to The Queen and charged to The Scotland."

[27]

The conclusion of law proposed and insisted on by the respondents as legitimately arising upon this fact was as follows, to wit:

"The liability of the respondents, as owners of the said steamship Scotland, did not extend beyond the value of their interest in the vessel and her pending freight at the time of the collision; and the vessel having been lost by the collision, and no freight or passage money earned, the respondents are thereby discharged from any liability on account thereof."

The circuit court, as before stated, refused any relief grounded on the limited liability law, but made a decree against the respondents for the total amount of damages sustained by the various parties in interest. To this conclusion the respondents excepted.

Both parties appealed from the decree, and the case is now before us for review. The appeal of the libelants was based on what they supposed to be an erroneous conclusion of the court, in reference to the allowance of interest; and the estimation of the value of the cargo.

The principal question raised and argued on this appeal is, whether the Steamship Company is entitled to the benefit of a limited responsibility equal to the value of the steamship and freight after the collision occurred; a liability which, in this case, as the vessel and freight were a total loss, would only amount to the value of the articles saved by the wrecking company. It is contended by the Company that it is entitled to the benefit of such limitation either under the general maritime law, or under the Act of Congress of 1851 [9 Stat. at L., 635]. On the other side, it is contended that the general maritime law on this subject, if there be any, is not in force in this country; and that the benefit of the Act of Congress cannot be claimed by foreign vessels. It is further contended by the libelants that the Steamship Company, even if it might have had the benefit of the rule, failed to take the proper steps for obtaining it; first, in not filing a petition according to the rules of this court; and secondly, in not surrendering the property recovered from the wreck, or its proceeds.

[28]

In the case of the *Norwich Co.* v. *Wright*, 13 Wall., 116 [80 U. S., XX., 589], we had occasion to state, that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. This rule is laid down in several places in the ancient Code called the *Consolato del Mare* and in many other authorities which are quoted and commented upon by *Judge* Ware in the case of *The Rebecca*, 1 Ware, 188; and it is specifically formulated in various national ordinances and codes, amongst others, in the Marine Ordinance of Louis XIV., adopted in 1681. Emerigon, in his treatise on Contracts "*a la* Grosse," says: "The owners of the ship are bound *in solidum* by everything which the captain does in the course of the voyage for the promotion of the voyage. * * But this action *in solidum* does not exist against the owners further than according to the interest which they have in the body of the ship; hence, if the ship perish, or if they abandon their interest, they are no longer liable for anything. It is thus that the maritime laws of the Middle Age have directed; such is the law which is observed in the North; and such is the regulation of our own ordinance;" and he refers to the *Consolato* and other authorities. The text of the French ordinance, which is regarded as merely formulating the old customary law, is as follows: "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

But whilst this is the rule of the general maritime law of Europe, it was not received as law in England, nor in this country, until made so by statute. The English statutes, indeed, have

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not yet adopted, to its full extent, the maritime law on this subject. They make the owners responsible to the value of ship and freight at the time of the injury, that is, immediately before the injury, although the ship be destroyed [29] or injured by the same act, or afterwards in the same voyage; whilst our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port, and the freight actually earned; and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be, and, without such surrender, subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster.

But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawanna*, 21 Wall., 558 [88 U. S., XXII., 654], the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. Then, does it govern the present case?

In administering justice between parties it is essential to know by what law or code or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, *prima facie*, determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their [30] Nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different Nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would properly furnish the rule of decision. In all other cases, each Nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.

The Act of Congress creating a limited responsibility of ship-owners in certain cases, first passed March 3, 1851 [9 Stat. at L., 635], and reproduced in sections 4282–4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that "The liability of the owner of any vessel for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall, in no case, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the *employés*, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. [31] Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, "Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master." Jure B. & P., lib. II., ch XI., sec. 13.

But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor.

English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which, in generality of terms, were similar to our own, did not apply to foreign ships. See, *The Nostra Signora de los Dolores*, 1 Dod., 297; *The Carl Johan* [cited in *The Dundee*], 1 Hagg., 113; *The Girolamo*, 3 Hagg., 186; *The Zollverein*, 1 Swab., 96; *Cope* v. *Doherty*, 4 Kay. & J., 367, *S. C.*, 4 Jur. (N. S.), 451 [2 DeG. & J., 614]; *S. C.* on App., 4 Jur. (N. S.),

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391; *S. C.*, 4 Jur. (N. S.), 699; *The Gen. I. S. C. Co.* v. *Schurmans*, 1 J. & Hem., 193; *The Wild Ranger*, 1 Lush., 558, 9 Jur. (N. S.), 134. We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British Legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign States, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No Nation has any such right. Each Nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can [32] complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged; and this they cannot do except where both parties belong to the same foreign Nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different Nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty.

The English courts say that, as foreigners are not subject to their law, nor entitled to its benefits, they will resort to the general law of general liability when foreigners are litigants before them. Where do they find such general law? In the law of nature, or the civil or common law? Is not the maritime law, as their own Legislature or national authority has adopted it, as imperative as either of these? Does it not, in the British judicial conscience, stand for the law of nature, or general justice? As for the civil and common laws, they are only municipal laws where they have the force of laws at all. The better grounds for the English decisions seem to be the peculiar terms of the Acts of Parliament on the subject, and the supposed policy of those Acts, as being intended for the encouragement of the British marine. From these considerations, as grounds of construction, the conclusion may have been properly deduced, that the law was intended to be confined to British ships. The question, it is true, has ceased to be of practical importance in England, since the Act of 1862, 25 and 26 Vict., ch. 63, by which the owners of any ship, British or foreign, are not to be answerable, without their actual fault or privity, for any loss or damage to person or property, to an amount exceeding £15 per ton of the ship's registered tonnage, or its equivalent, in case of foreign ships. But the former English decisions are thought to have a bearing on our law, because the Acts of Parliament to which they related, in their principal clauses, were conceived in the same broad and general terms as our Act of Congress. Some of the clauses of the British Acts, however, relat- [33] ing to registered tonnage and other particulars, admitted only a special application to British ships; and perhaps these clauses did require a restricted construction of the whole Acts to such ships.

But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of ship-owners. And public policy, in our view, requires that the rules of the maritime law as accepted by the United States, should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicil. We think they should not be restricted by construction. Our opinion, therefore, is that in this case, the National Steamship Company was entitled to the benefit of the law of limited responsibility.

But it is objected that the appellants did not properly, and in due time, claim the benefit of the law. Under this head, it is strenuously contended, that the appellants did not comply with the rules of this court adopted in December Term, 1871. Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit of the law, but to aid them. Some form of proceeding was necessary to enable ship-owners to bring into concourse the various parties claiming damages against them, for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the law of limited responsibility; and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defense by way of answer to a libel, or plea to an action, if the ship-owers should deem such [34] a mode of pleading adequate to their protection. It is obvious that in a case, like the present, where all the parties injured are represented as libelants or interveners in the cause, an answer setting up the defense of limited responsibility, is fully adequate to give the ship-owners all the protection which they need.

But, it is objected that they did not follow the statute, by giving up and conveying to a trustee, the strippings of the wreck and the pending freight. It is sufficient to say, that the law does not require this. It contains two distinct and independent provisions on the subject. One is, that the ship-owners shall be liable only to the value of the ship and freight; the other is, that they may be discharged altogether by surrendering the ship and freight. If they failed to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief. The primary enactment, in section 4283, R. S., is, that the liability of the owner for any loss or damage without his privity or knowledge, shall, in no case exceed the amount or value of his interest in the vessel and her freight, then pending. Two modes for carrying out this law are then prescribed, one in section 4284, and the

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other in section 4285. By section 4284, a *pro rata* recovery against the ship-owner is given to the various parties injured "in proportion to their respective losses;" and it is added: "For that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto."

The other mode of attaining the benefit of the law is prescribed by section 4285, which declares, that "It shall be deemed a sufficient compliance on the part of such owner, with the requirements of this title, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, etc., from and after which transfer all claims and proceedings against the owner shall cease." This last proceeding the respondents did not see [35] fit to adopt; but that does not deprive them of the benefit of the preceding section.

As to the form of proceeding necessary to give the respondents the benefit of section 4254, which declares that either party "May take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable," what more "appropriate proceeding" could be taken for this purpose, where all the parties are before a court of admiralty, and where the ship-owners plead their exemption under the statute, than to give a decree against them for the amount of their liability, and to distribute the sum amongst the parties entitled to it?

It seems to us that no additional rules are necessary to attain the object of the law in the case. It is plain enough to execute itself. If there are parties, not represented in the suit, who have claims for damages, it is the respondents' fault for not bringing them in, as they might have done after the Rules of 1871 were adopted, by pursuing the remedy pointed out in those rules. But, as to the actual libelants and interveners in the suit, there is no reason in the world, why the respondents should not be decreed to pay the value of the ship's strippings and remnants into court, nor why such amount should not be distributed *pro rata* amongst the claimants.

We think that this should have been done. If any further inquiries are necessary to be made, in order to ascertain the proper amount to be paid by the respondents, as depending upon the value of the articles saved, including freight or passage money realized, the court below can institute them in a proper way.

The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the circuit court. The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest; but without any allowance for anticipated profits. When, as in this case, the goods have no ascertainable market value, at the place of shipment, the guano being a natural deposit owned by the Peruvian Government, indirect means must be resorted to for the purpose of ascertaining the real value at that place. The circuit court had the evidence of an experienced merchant on this subject, who based his estimate upon the price for which the goods were [36] usually sold in New York, with a fair deduction for profits and expenses of every kind. Under the circumstances of the case we do not see that any juster method could have been adopted. The rate of interest allowed, six per cent per annum, was the proper rate in such a case. See, *The Vaughan and Telegraph*, 14 Wall., 258 [81 U. S., XX., 807]; *Murray* v. *Charming Betsey*, 2 Cranch, 64; *The Anna Maria*, 2 Wheat., 327; *The Amiable Nancy*, 3 Wheat., 546; *Smith* v. *Condry*, 1 How., 28; *Williamson* v. *Barrett*, 13 How., 101.

In conclusion, our decision is, that as no error has been shown in any part of the decree below except on the question of limited responsibility, *the same is, in all respects, affirmed with that exception;* and for the error in that respect, *the decree of the Circuit Court must be reversed, so far as it condemns the respondents to pay the whole amount of damage sustained by the libelants and interveners; and the cause must be remanded, with instructions to modify the decree and take such further proceedings as may be necessary to carry out the principles laid down in this opinion.*

As to the costs of the litigation up to the time the appeal was taken to this court, the decree of the Circuit Court will not be disturbed, inasmuch as the respondents did not place themselves alone on the defense of limited responsibility, but contested the question of fault and any liability whatever, which was found against them.

As to the costs of this appeal, we think that no costs should be decreed to either party against the other. The question before the Circuit Court was a new one, upon which there was wide room for difference of opinion; and neither court nor parties had any precedents to guide or direct them as to the mode of proceeding. *Therefore, each party will be decreed to pay their own costs on this appeal.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 369, 370.

UNITED STATES, *Appt.*, [37]

v.

THE DIX ISLAND GRANITE COMPANY.

(See S. C., 15 Otto, 37-41.)

Construction of contract.

Where one contracted to deliver granite for the construction of a building by the United States, and the latter stipulated to pay "the sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet;" held, that as to stones whose dimensions exceed twenty cubic feet, the mode of ascertaining the price is to add to the sixty-five cents as many cents as there are cubic feet in the stone, and this sum will constitute the price per cubic foot.

[No. 211.]

Argued Mar. 2, 1882. Decided Mar. 20, 1882.

APPEAL from the Court of Claims.

Statement of the case by *Mr. Justice* **Field:**

The Dix Island Granite Company, a Corpo-

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ration created under the laws of New York, is the owner of quarries of granite on an island off the coast of Maine, called Dix Island; and on the 1st of September, 1869, it entered into a contract with the United States to supply granite for the construction of a building for a postoffice in the City of New York. By it the Company agreed to deliver, at the site of the building, all such stone as might be required for its construction, "wrought and dressed in such manner and style of workmanship" as might be directed by the United States; and the latter stipulated to pay for the stone delivered "The sum of sixty-five cents per cubic foot for all stones, when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet."

Under the contract, the Company delivered at the site of the postoffice building, in the City of New York, 456,544 cubic feet of granite, of which quantity 353,728 cubic feet were in stones the quarried dimensions of which severally exceeded twenty cubic feet. In the settlement of the account of the Company, the parties disagreed in their interpretation of the last clause, as to the price stipulated per cubic foot of stones, the general dimensions of which exceeded twenty feet. The Treasury Department construed the clause as allowing for each cubic foot of the stone sixty-five cents, and one cent additional for every cubic foot exceeding twenty, thus: if the stone contained twenty-one cubic feet, the price for each cubic foot of the entire stone was to be sixty-six cents; if it contained twenty-two cubic feet, the price for each was to be sixty-seven cents, and so on, increasing the price one cent for each additional cubic foot. On the other hand, the Company construed the clause as allowing for each cubic foot of the stone sixty-five cents, and one cent additional for every cubic foot of the entire stone; thus: if the stone contained twenty-one cubic feet, [38] the price was to be sixty-five cents plus twenty-one cents, that is eighty-six cents a cubic foot of the entire stone; if it contained twenty-two cubic feet, the price was to be eighty-seven cents, and so on, adding to the sixty-five cents one cent for each cubic foot of the entire stone. The difference in the amounts resulting from the two interpretations as to the price of the granite delivered was $70,745.74.

The amount allowed by the department was paid on account, the question of the construction of the clause being reserved for judicial decision. The Company, thereupon, brought the present action in the Court of Claims for the difference. Other demands were also included in the action; but as they were disallowed, and the Company has not appealed, no reference need be made to them. For the difference in the price of the stone, mentioned above, the Company recovered judgment, and the case is brought here for review.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for appellant.

Messrs. **Enoch Totten** and *Benjamin F. Butler*, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

The clause of the contract in question, upon the interpretation of which the determination of this case must depend, divides the stones to be delivered into two classes: those whose dimensions do not exceed twenty cubic feet, and those whose dimensions do exceed that number of cubic feet. For those of the first class the price is fixed at sixty-five cents a cubic foot. For those of the second class the price per cubic foot is fluctuating, increasing with the size of the stone; but the mode of ascertaining this price is prescribed. It is to add to the sixty-five cents as many cents as there are cubic feet in the stone; and this sum will constitute the price per cubic foot. The last clause must, therefore, be read as if the words "per cubic foot" were inserted in it; thus "one cent additional [per cubic foot] for every cubic foot" of the larger stones, that is, for the whole number of such feet in the stone. It will serve to remove doubt as to the meaning of the clause if we look at it with the insertion of these words, after eliminating the provision as to the smaller stones. [39] It will then read thus: "The party of the first part hereby covenants and agrees to pay * * * the sum of sixty-five cents per cubic foot for all stones * * * and one cent additional [per cubic foot] for every cubic foot" of the stones; that is sixty-five cents for each cubic foot plus one cent for every cubic foot in the stone. This is the interpretation for which the claimant contends; and it appears to us to be the only one permissible from the language used. The interpretation adopted by the Treasury Department requires the interpolation of terms excepting from the computation the first twenty feet; and this exception is inconsistent with the provision that for "every cubic foot" of the larger stones an additional price is to be paid.

Nor is there anything unreasonable in the increased price for the larger stones required by this interpretation. Every contract must be considered with reference to the subject in respect to which it is made, and its language construed accordingly. It was stated by counsel on the argument, and the fact is a matter of common knowledge, that with builders, material men and architects, the value and, consequently, the price, of dressed building stone, per cubic foot, is determined by the size of the stone, and that this value cumulates with the size; thus: the value of a cubic foot of granite in a small block, weighing a single ton, for example, is much less than the value of a cubic foot in a larger block weighing several tons. The difficulty of preparing and moving blocks weighing several tons is very much greater than that of preparing and moving an equal quantity of stone in small blocks; and the expense of time and labor must, of course, be proportionately greater.

The contract compelled the Company to furnish "all such stone" as might be required in the construction of the postoffice building. It left the size of the blocks to the direction of the United States. They might have called for blocks equal in size to some of those furnished for the building of the Treasury Department, [40] which are said to contain 563 cubic feet, and to weigh forty-seven tons. The dressing and transportation of a stone of such a size would have been very much greater than the dressing and transportation of forty-seven blocks, each of a single ton. We do not, therefore, appre-

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ciate the force of the objection urged by the Government, to the construction for which the claimant insists, that instead of allowing a rate gradually increasing beyond the twenty feet dimension, it requires, to quote the language of counsel, "a sudden leap at one point" when the dimensions of the stone pass the twenty cubic feet limit. Had the Government called for blocks, all of one hundred or more cubic feet, as it might have done, the change would have been as much against the interest of the claimant as the supposed benefit to him by the change in price at the point mentioned. The reason suggested, and we cannot say that it is not a good one, for having a fixed price for blocks, not exceeding twenty cubic feet, is that blocks of that size and weight could be handled by a known power, for which provision was made; but for moving stones of a larger size special arrangements would be required, depending upon their dimensions and weight. It may well be, that at the point where stones can be readily handled, and beyond which special arrangements are required to move them, a great change should be made in the price. The Company may have been indifferent as to their weight and size under a specified figure, and yet been unwilling to furnish any of a larger size without a greatly increased price.

There are many articles in commerce whose value is greatly increased by a small augmentation in size, and they are, consequently, sold at a cumulative price, as their dimensions are enlarged. Plate glass is one of them. Diamonds are another. Such increased value arises either from the greater rarity of the article of the larger size, or the greater difficulty in its production or transportation. The cumulative character of the price in the present case is not exceptional, for the reasons mentioned, that the difficulty and expense of moving the blocks increase with their size. It is stated in the able opinion of one of the Justices of the Court of Claims, that the price of similar stones bought by the government for the building of the Treasury Department was seventy cents per foot for those of ten feet, eighty cents for those of twenty feet, ninety cents for those of thirty feet, and so on; in other words, that there was a cumulative price for every additional cubic foot of the stone.

Applying the contract to the subject to which it relates, we think that the interpretation placed by the Company upon the clause as to the price, was correct. *The judgment of the Court of Claims must, therefore, be affirmed, and it is so ordered.*

[41] *Mr. Justice* **Miller**—The *Chief Justice, Mr. Justice* **Harlan** and myself dissent from the judgment and opinion in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[52] WILLIAM HENRY SMITH, COLLECTOR of the Port of CHICAGO, *Plff. in Err.*,
v.
MARSHAL FIELD ET AL.

(See S. C. 15 Otto, 52-54.)

Jury question—instruction to jury.

1. In an action to recover back duties on goods imported, as illegally exacted, it was proper for the court to leave it to the jury to determine whether the goods imported were such as were meant and described in the statute imposing the duty.

2. Where a special instruction to the jury asked was substantially a repetition of that given, the court may refuse to give it.

[No. 213.]

Submitted Mar. 3, 1882. Decided Mar. 20, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **John H. Thompson, Edward S. Isham** and **Edwin B. Smith,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

In 1878 the defendant in the court below was Collector of Customs for the Port of Chicago; and this action is brought to recover from him the amount of certain duties, alleged to have been illegally imposed in that year upon goods of the plaintiffs. It appears that the plaintiffs imported into the United States from France certain articles invoiced as "white linen torchon laces and insertings;" that they were brought by steamship to New York, thence transported to Chicago under internal transportation bonds, and there entered; that the defendant, as Collector, decided that the goods were subject to a duty of forty per cent *ad valorem*, under schedule C of section 2504 of the Revised Statutes, as a manufacture of flax, or of which flax was the component material of chief value, "not otherwise provided for;" and exacted that duty. The plaintiffs claimed that the goods were subject to a duty of only thirty per cent *ad valorem* as "thread lace and insertings," which is the amount prescribed in the same schedule for articles of that kind. They paid the difference, ten per cent, under protest, and brought this action to recover back the amount.

On the trial, the chief point in controversy [53] was, whether the laces in question were embraced in the description of "thread laces" in the schedule, for, if so, the duties upon them were fixed at thirty per cent *ad valorem*, and they were not subject to the duty exacted, of forty per cent as a manufacture of flax, or of which flax was a component part of chief value "not otherwise provided for."

The evidence produced by plaintiffs tended to show that the terms "thread lace and insertings," as used and understood among commercial men of the country, included all laces made of thread on a cushion, with bobbins moved by hand, in distinction from laces made by machinery or with needles; that they have a special name attached to them, such as point lace, torchon lace, Smyrna lace, and the like, by which their style and kind are indicated; and that torchon laces, though a very old kind, and not imported to any considerable extent until within a few years past, were generally known as thread laces, and were such in fact.

The evidence produced by the defendant tended to show that there was a class of laces known to commerce, and to dealers, as thread laces, made by hand on cushions with bobbins, and more particularly designated as English,

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French or German laces, which were supposed to be made of linen thread, but which were in fact composed chiefly of a fine cotton thread, with only one large linen thread running through the pattern to mark the figures; that torchon laces were not known as "thread laces," but only by their special designation; and that torchon and Smyrna laces and some Saxony laces were all that were made of linen thread by hand on cushions with bobbins.

The court left it to the jury to determine whether the torchon lace imported by the plaintiffs was "thread lace,' such as is meant and described in the statute; and instructed them that if it did not come under that general designation, they should find for the defendant; that it made no difference whether the lace was known to commerce at the time the law was enacted that, if brought into use afterwards, and yet came under the general designation of "thread lace," the government must accept the duty imposed by the law upon that article.

[54] The defendant requested a special instruction, that if the jury believed from the evidence that the torchon lace did not come within the class known as thread lace, designated and intended as such by the statute when it was enacted they should find that it was not a thread lace. This instruction the court refused to add to that already given, and an exception was taken. The jury found for the plaintiffs, and the case is brought here for review.

The record does not disclose any error. The instruction of the court was correct. The special instruction asked was substantially a repetition of that given, and, therefore, unnecessary; there was evidence upon which the jury could find its verdict, and no legal reason is shown why it should be disturbed. *The judgment is, therefore, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[60] MOSES TAYLOR, *Plff. in Err.*,

v.

CITY OF YPSILANTI.

(See S. C., 15 Otto, 60-73.)

Conditional donation of bonds to a railroad—construction of law.

1. Under the Michigan Statute of March 22, 1869, the donation by a city of its bonds to aid in the construction of a railroad, may be upon such conditions as are prescribed by popular vote, and a condition so prescribed that the citizens of such city should receive such bonds to an amount equal to the stock they might subscribe and pay for (not exceeding the amount of the bonds donated), is valid.

2. This court reiterates the rule that the rights of the parties to suits on municipal bonds are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper, and cannot be impaired by a subsequent altered construction of the law.

[No. 153.]

Argued Nov. 29, 1881. Decided Mar. 21, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated by the court.

Messrs. Elijah W. Meddaugh & **George F. Edmunds,** and *Ashley Pond,* for plaintiff in error.

Mr. **Hiram J. Beakes,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by Taylor, a citizen of New York, to recover from the City of Ypsilanti, a municipal corporation of Michigan, the amount of certain coupons of bonds issued by that City in aid of the construction of the Detroit, Hillsdale and Indiana Railroad At the conclusion of the evidence the jury being so instructed, returned a verdict in behalf of the City, upon which judgment was entered [61]

The bonds purport to have been issued under the authority of a general statute approved March 22, 1869, declaring it to be lawful within prescribed limits as to amount for any city or township—a majority of its electors voting, at a meeting called for that purpose, assenting—to pledge its aid, 'by loan or donation, with or without conditions," in the construction of any railroad by a corporation organized under the laws of Michigan. The electors voted aid to the extent of $50,000 in bonds of the City, upon condition that the company should have and continue the eastern terminus of its road in the City, or connect, within its limits, with the Michigan Central Railroad; and upon the further condition, that if any citizen of Ypsilanti should subscribe and pay for any share in the stock of the Company, the latter "Shall deliver to the persons so subscribing and paying for such share the bond or bonds of said City equal to the amount so subscribed and paid for, not exceeding in all the amount of bonds issued by said City to said railroad company; and that citizens of said City shall have the right to subscribe to the stock of said railroad company to an amount not exceeding $50,000 for thirty days after such aid shall have been voted." Upon each bond appears a declaration, under the official signature of the mayor and clerk of the City, setting forth the conditions attached by the popular vote to the issue and delivery of the bonds.

In support of the judgment, it is contended that the City, in giving aid to the construction of a railroad, was restricted to the specific modes—loan or donation—designated in the statute; that this transaction was neither a loan nor a donation; that it is essential to a donation that it should not be made for a valuable consideration, or in execution of a contract embracing reciprocal obligations, since, in a legal sense, it implies an act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without any consideration; and, consequently, the City was without power to issue bonds upon conditions such as those imposed by the electors. The conditions, it is argued, are inconsistent with any correct idea of donation and, conse-

NOTE.—*Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws; power of state courts to construe their own statutes.* See *note* to Jackson v. Lamphire, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions, except when specially authorized to by statute. See *note* to Commercial Bk. v. Buckingham, 46 U. S. (5 How.), 317.

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quently. the bonds based thereon must be held to have been unauthorized by law, and to be invalid as obligations of the City.

[62] In this conclusion we are unable to concur. The argument of counsel fails to give proper effect to material portions of the statute. Power was conferred, not simply to make a loan or donation, but to make a loan or donation "with or without conditions." The statute is silent as to the nature of the conditions with which the loan or donation might be accompanied. It was, in our opinion, a legitimate exertion of that power to secure, in connection with a corporate donation, such advantages or special privileges for the people of the municipality, not inconsistent with public policy, as the railroad company was willing to concede. The requirement that the company should have and continue the eastern terminus of its road in the City, or connect, within its limits, with the Michigan Central Railroad, inured to the benefit of the mass of the population interested in the growth and prosperity of the City, while the stipulation that citizens of Ypsilanti should be entitled, for a limited period, thirty days, to receive the City's bonds to an amount equal to the stock they might subscribe and pay for, not exceeding the amount of the bonds donated, was of value to such persons only as chose to avail themselves of the privilege thus secured. If the transaction has any element of bounty to individual citizens, and was not, for that reason, a donation, within the technical meaning of that word, it is quite sufficient to say that it is within the express statutory authority to attach conditions to any donation which the people might sanction. We are, therefore, of opinion that the donation by the City of its bonds, upon the condition prescribed by popular vote, was within the terms of the statute.

This brings us to the consideration of the proposition advanced in behalf of the City, that the Act of March 22, 1869, is repugnant to the Constitution of Michigan, as expounded by its highest judicial tribunal in *People* v. *State*, 20 Mich., 452; *Bay City* v. *State Treasurer*, 23 Mich., 499, and several other cases decided, in the same court, at a subsequent period. These adjudica-
[63] tions, it is claimed, constitute the law of this case, and should be followed, as of obligation, without reference to the time when they were made, or to any opinion we may entertain as to the soundness of the principles announced.

The specific provisions of the State Constitution which, it is supposed, establish the invalidity of the Act in question, are sections 6, 8 and 9 of article 14, which declares that "The credit of the State shall not be granted to or in aid of any person, association or corporation," sec. 6; that "The State shall not subscribe to or be interested in the stock of any company, association or corporation," sec. 8; and that "The State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work except in the expenditure of grants to the State of land or other property;" sec. 9; and section 32 of article 6, which declares that "No person shall be * * * deprived of life, liberty or property without due process of law." These sections constitute a part of the Constitution of 1850, which is still the fundamental law of the State.

It is not to be questioned that the Supreme Court of Michigan, in the cases cited, has ruled that it was beyond the constitutional power of the Legislature to grant to a municpal corporation authority to pledge its credit, or issue bonds, in aid of the construction of railroads by corporations organized. owned and managed by private persons. Before examining the particular grounds upon which those decisions rest, it is necessary that we should ascertain what was, at the date of the passage of the Act of March 22, 1869, the law of Michigan, declared and acted upon by the several departments of its government, upon the general subject of the relations between railroad corporations and the public. The earliest case, to which our attention has been called, is *Swan* v. *Williams*, 2 Mich., 427, determined in 1852. The question there was as to the constitutional validity of an Act incorporating a railroad company, in so far as it authorized the appropriation of private property for the location, construction and operation of the road authorized by its charter. Its validity was assailed chiefly upon the ground that property, so appropriated, is taken for the private profit and advantage of the corporators, in no sense, for public purposes. But the state court declined to accede to that view. It held that counties, towns, cities and villages are political or municipal corporations which, from their nature, are subject to the unlimited control of the Legislature; that corporations, such as banking, insurance, manufacturing and trading companies were private corporations, the private advantage of the corporators being the ultimate as well as the immediate object of their creation, and the resulting benefits to the public being merely in- [64]
cidental; and that turnpike, bridge, canal and railroad companies are more properly styled public corporations, since, in their creation, public duties and public interests are involved, the discharge of those duties and the attainment of those interests being the primary object to be worked out through the powers delegated to them. The very existence of the latter, said the court, was based as well upon the delegation to them of the sovereign power to take private property for public use, as upon the continued exercise of that power in the use of property for the purposes for which it was condemned; that such corporations are the means employed to carry into execution a given power; that the character of a corporation is determined not so much by the object sought by it, as by that designed by the Legislature; that if that object be the public interest, to be secured by the exercise of powers, delegated for that purpose, which would otherwise repose in the State, the corporation is public, although private interests may be incidentally promoted; that such a corporation is essentially "The trustee of the government for the promotion of the objects desired, a mere agent to which authority is delegated to work out the public interest through the means provided for that purpose and broadly distinguished from one created for the attainment of no public end, and from which no benefit accrues to the community, except such as results incidentally, and not necessarily, from its operations.' That there might be no doubt as to the scope of the decision, *Mr. Justice* Martin, speaking for the whole court, further said "Nor can it be said that the property when taken is not used by the public, but by the corpo-

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rators for their own profit and advantage. It is unquestionably true that these enterprises may be and probably always are, undertaken with a view to private emolument on the part of the corporators, but it is, nevertheless, true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the services. If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private medium, or by delegated authority; yet all past history tells us that gov- [65] ernments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. * * * The purpose designed by the government in the construction of these roads is the *use* of the public, the expeditious communication from point to point, and not revenue."

In 1859 the Legislature of Michigan passed an Act providing for the payment from the State treasury of a certain sum, by way of bounty, for every bushel of salt manufactured by any individual, company, or corporation from water obtained by boring in Michigan, and exempting from taxation property used for such purposes. Laws Mich., 1859, p. 551. That law was subsequently amended, and in *People* v. *State Auditors*, 9 Mich., 327, decided in 1861, it was held that the relators, a manufacturing company, acquired a vested right to the amount, offered by the original Act, for all salt manufactured prior to the amendatory statute reducing the bounty. And the doctrines of that case were re-affirmed in *E. Saginaw Mfg. Co.* v. *E. Saginaw*, 19 Mich., 274, decided in 1869, after the passage of the Act of March 22, 1869.

The diligence of counsel, aided by our own researches, has not disclosed any adjudication of the Supreme Court of Michigan, prior to May 26, 1870, in which the doctrines of these cases were recalled or, in any degree, modified —doctrines constituting, as will not be denied, the foundation upon which, in the courts of this country, rests the power of the Legislature, when unrestrained by constitutional inhibitions, to authorize municipal aid to railroad enterprises.

So far as the action of the Legislative and Executive Departments of Michigan are concerned, we find that from the adoption of the Constitution of 1850 down to the passage of the Act in question, authority was given, in many instances, to municipal corporations to aid in the construction of railroads and plank roads by corporations organized and managed by private persons. And by a general statute passed in 1855, providing for the incorporation of rail- [66] road companies, authority was given to condemn real estate, property and franchises for the purposes of the corporation, making compensation therefor in the mode prescribed. That statute expressly declares that "All real estate or property whatsoever, acquired by any company, under and in pursuance of this Act, for the purpose of its incorporation, shall be deemed to be acquired for public use." Compiled Laws of Mich., 1857, Vol. 1, pp. 638, 643. It was in force when the Act of March 22, 1869, was passed. But this is not all. In the year 1867 a convention was held, charged with the duty of revising the Constitution of the State. The delegates in that body were of course aware of the existence of numerous statutes, public and private, authorizing railroad corporations to condemn private property for the purpose of constructing and maintaining railroads, and empowering municipal corporations of the State to pledge their credit in aid of their construction. If such legislation was in opposition to the will of the people, or if it was deemed to be forbidden by the letter or spirit of the existing Constitution, to remodel and revise which was the object of the convention, we should expect to find in the new Constitution some distinct provision reversing the policy which had been steadily pursued by the Legislative and Executive Departments of the State, and which had been sustained as constitutional by the judiciary. But no such provision was adopted. On the contrary, two sections were adopted, relating to the subject of municipal aid to railroads, one declaring that "The Legislature shall not authorize any city or township to pledge its credit, for the purpose of aiding in the construction of any railroad to such an extent that the outstanding indebtedness, exclusive of interest, on account of aid to any and all railroads, shall exceed ten per cent of the assessed valuation of such city or township;" while the other affirmatively declared that the Legislature might authorize any city or township to raise money by taxation, for such purposes, within the amount named. Although the Constitution submitted by the Convention in 1867 was not adopted by the people, the sections, to which we have referred, adopted by delegates representing every portion of the State, show that there was no purpose to take from the Legislature the power, under all circumstances, of authorizing municipal aid to railroad corporations. The effort was only to restrict the pow- er theretofore exercised by the Legislature. [67]

The Act of March 22, 1869, contains no clause of an unusual character. It is general in its application to all the townships, villages and cities of the State. It requires all bonds executed under its provisions to be delivered to the State Treasurer, to be by him held, as trustee for the municipality and the railroad company, until all the conditions prescribed by popular vote or by the statute, were performed. It declares that the railroad company for which the bonds were voted, should be entitled to receive them whenever the Governor certified that all conditions had been performed. The bonds having been deposited with the State Treasurer, the company entered upon the work of construction in the winter of 1869–70. The road was completed prior to January 1, 1871, and has been in operation ever since. But prior to to May 26, 1870, it had been so far constructed that the railroad company became entitled under its contract to the bonds voted by the City of Ypsilanti. And on the 10th June 1870, the Governor gave his certificate under the state seal, stating that the company had performed all conditions prescribed by the statute and by the vote of the people, and was entitled to receive the bonds voted by the City. Subsequently, on the 21st June, 1870, the Treasurer de-

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livered them to the company, indorsing upon each that it was delivered by him on that day, under the provisions of the Act of March 22, 1869. Thus the City and the railroad company received all for which they respectively bargained.

On the 26th day of May, 1870—after, let it be observed, the railroad company had earned the bonds under its contract with the City, and was entitled to the required certificate from the Governor—the case of *People* v. *Salem* was determined in the Supreme Court of the State. It involved the constitutional validity of an Act, passed in 1864, authorizing certain townships to pledge their credit, and the County of Livingston to raise by tax, a loan of money in aid of the construction of a railroad. The court, *Mr. Justice* Graves dissenting, held the Act to be unconstitutional. The point was distinctly made in argument that municipal aid to railroads was prohibited by sections 6, 8 and 9 of article XIV. of the State Constitution. It was [68] claimed that those sections would be rendered nugatory if so construed as to recognize the power of the Legislature to authorize or compel each city and township in the State to grant or loan its credit to or subscribe to the stock of railroad or other companies, to the amount of a fixed or uniform per centage of the assessed valuation of their taxable property. But the court declined, at least it failed, to rest its decision upon any specific provision of the State Constitution Its conclusion was placed upon what was declared to be fundamental maxims of all taxation It held the exercise, by a municipal corporation, of the power to pledge its credit to be an incipient step in the exercise of taxation; that it is essential to a valid exercise of the power of taxation that it be for a public purpose; that a corporation created for the purpose of constructing a railway, to be owned and operated by the corporators, is a private corporation, that taxation for such a purpose is no more for a public purpose than would be taxation in behalf of the proprietors of a mill or hotel or newspaper establishment, or other similar enterprise, which, while private in its nature, supplied a public need. The conclusion of the court was distinctly placed upon general principles and not upon grounds of local law or upon any special provision of the State Constitution, as is manifest from the last paragraph in the leading opinion, in these words: "As, therefore, it appears that the first and most fundamental maxim of taxation is violated by the Act in question, it becomes superfluous to consider whether the Act would also violate the maxim of apportionment, or be obnoxious in its application, because the burden, even if public, could not also be regarded as local and peculiar to this township Equally superfluous is it to consider in detail the several express provisions of the State Constitution which the respondents suppose to be violated If the authority exercised is not within the taxing power of the State, it is quite needless to discuss whether, if it were within it, there are not restrictions which prohibit its exercise." The conclusion in that case, as thereafter declared in *Bay City* v. *State Treasurer* struck at the root of all legislation in aid of railroad compan

We remark in passing that the doctrines of *People* v. *Salem* were when announced, in direct conflict with those previously promulgated [69] as well by this court, as by the highest courts of a large majority of the States. It was said by *Mr. Justice* Clifford, speaking for the court, in *Rogers* v. *Burlington*, 3 Wall., 663 [70 U.S., XVIII., 82], decided in 1865, that the rule that the Legislature, in the absence of constitutional prohibitions, could authorize municipalities to aid in the construction of railways, owned and managed by private corporations, pervaded the jurisprudence of the United States. We will not, at this late day, enter upon the vindication of that rule. And we may add, that under the later doctrines announced by the Supreme Court of Michigan, it is difficult to perceive how railroads can be regarded as public highways, subject, in the interest of the public, to governmental control and regulation.

Subsequently, in *Bay City* v. *State Treasurer*, the Supreme Court of Michigan re-affirmed the doctrines of *People* v. *Salem*. In that case, however, the invalidity of municipal aid and taxation for the construction of railroads by railroad corporations was apparently placed upon these additional grounds: 1. That such taxation being inadmissible under the fundamental principles announced in *People* v. *Salem*, was to be deemed unlawful confiscation, and, therefore, inhibited by section 32 of article 6 of the State Constitution, protecting all persons against deprivation of property without due process of law; 2. That taxation for such purposes was also in violation of sections 6, 8 and 9 of article 14 of the State Constitution. It is unnecessary to notice the declarations of the state court in subsequent cases, since they are in line with those made in the two to which we have referred.

In January, 1872, the case of *Talcott* v. *Pine Grove* [1 Flipp., 120] was determined in favor of the plaintiff in the Circuit Court of the United States for the Western District of Michigan. The question there was as to the constitutional validity of the identical Act of March 22, 1869, under the authority of which the bonds in suit were issued. That court, the circuit and district judges concurring, declined to follow the case of *People* v. *Salem*, upon the ground, among others, that the Act of March 24, 1869, was valid as well under the laws of Michigan, declared and acted upon by all the departments of the State Government at the time of its passage, as under the principles announced in this court and in the highest courts of most of the [70] States. Upon writ of error the judgment in *Pine Grove* v. *Talcott* was affirmed in this court at its October Term, 1873, 19 Wall. 666 [86 U. S., XXII., 227]. In the argument of that case in this court attention was called to the decisions in *People* v. *Salem* and *Bay City* v. *State Treasurer*, and it was earnestly contended to be the duty of the courts of the Union to accept the declarations of the state court as to the want of power in municipal corporations of Michigan to pledge their credit or aid in the construction of railroads by corporations owned and managed by private persons After adverting to the principle that a statute was not to be pronounced void unless the repugnancy to the Constitution be clear and the conclusion that it exists inevitable, this court, speaking by *Mr Justice* Swayne, affirmed the judgment, holding the Act of March 22, 1869, to be consistent

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with the Constitution of Michigan. *R.R. Co.* v. *Otoe Co.*, 16 Wall., 667 [83 U. S., XXI., 375]; *Olcott* v. *Supervisors*, 16 Wall., 678 [83 U. S., XXI., 382]. Under the circumstances, it was said that we could not yield to the authority of the decisions of the state court without abdicating the performance of one of the most important duties with which this tribunal is charged.

Of the bonds here in suit, Taylor became the purchaser, for a valuable consideration, in the year 1877. He was aware, at the time of his purchase, of the before mentioned decisions of the Supreme Court of Michigan, adjudging municipal aid to railroad corporations to be forbidden by law, and bonds issued therefor to be invalid. But, it is to be presumed he was also aware that this court, affirming the judgment of the Circuit Court of the United States, sitting in that State, had, at a subsequent period, and long before his purchase, distinctly refused to follow the later decisions of the state court, and had adjudged the Act of March 22, 1869, to be in conformity with the fundamental law of Michigan. The present case then appears to be this: testing the rights and obligations of the parties by the law of the State as declared by this court, and as declared and acted upon by all the departments of the State Government, at and before the time when the railroad company entered upon the execution of its contract with the City, we should be obliged to reverse the judgment of the court below; whereas, if we [71] accept the decision of the Supreme Court of Michigan, made after those rights accrued and after the railroad company had earned the bonds, as conclusive evidence of the constitutional invalidity of the Act of March 22, 1869, the judgment must be affirmed.

The position taken by counsel for the City is that the established settled construction, given by the highest court of a State, of the laws and constitution of that State must be deemed, in all cases, binding upon the courts of the Union; this, because the statute defining and regulating the jurisdiction of the Federal Courts, declares that the laws of the several States, when they apply, shall constitute rules of decision in cases at common law tried in those courts. This proposition, in the general terms in which it is announced, is, undoubtedly, supported by the language of some of the opinions which have emanated from this court. But all along through the reports of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the Federal Courts, in all cases, within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such right accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal Courts will accept or adopt the construction which the State Courts give to their own Constitution and laws. The sound and true rule, said *Ch. J.* Taney, in *Ins. Co.* v. *Debolt*, 16 How., 432, is that if the contract when made is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent Act of the Legislature of the State, or decision of its courts, altering the construction of the law. So in *City* v. *Lamson*, 9 Wall., 485 [76 U. S., XIX., 729], *Mr. Justice* Nelson speaking for the court, said: "It is urged also that the Supreme Court of Wisconsin has held that the Act of the Legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued, the de- [72] cisions of the courts of the State favored the validity of the law. The last decision cannot, therefore, be followed.

Again, in *Olcott* v. *Supervisors* [*supra*], the court, speaking through *Mr. Justice* Strong, said: "This court has always ruled that if a contract when made was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature, or the judiciary, will be regarded by this court as establishing its invalidity." To the like effect are some very recent decisions of this court. In *Douglas* v. *Pike Co.*, 101 U. S., 687 [XXV., 971], upon a review of some of the previous cases, the court, speaking by the present *Chief Justice*, said that "The true rule is to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. * * * So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

For these reasons and without reference to any other questions discussed, we are of opinion that the rights of the plaintiff, as the owner of bonds issued under a statute which, when passed, was valid by the laws of Michigan, as declared and acted upon by departments of its government, are not affected by decisions of the Supreme Court of the State rendered after the railroad company, to whose rights plaintiff succeeded, had earned the bonds under contract with the City made in conformity with the statute. Upon the case as presented, the jury should have been instructed to find for the plaintiff, rather than for the defendant. [73]

The judgment is reversed, with directions to set aside the judgment and verdict, and for such further proceedings as may be consistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 73; 106 U. S., 591; 113 U. S., 7.

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[160]

GIDEON BANTZ, *Appt.*,

v.

DAVID FRANTZ ET AL.

(See S. C., 15 Otto, 160-166.)

Void patent—delay in re-issue.

1. The re-issued patent to Gideon Bantz for an improvement in furnaces for heating steam-boilers, is void because it is broader than the original patent.
2. The right to have a correction made in a patent is abandoned and lost by unreasonable delay.

[No. 84.]

Argued Mar. 2, 1882. Decided Mar. 20, 1882.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

Statement of the case by *Mr. Justice* **Woods.**

On June 22, 1858, there was issued to Gideon Bantz, the appellant, who was complainant in the court below, an original patent of that date "For an improvement in furnaces for heating steam-boilers." On February 6, 1872, Bantz obtained a re-issue, and on June 22, 1872, an extension for seven years of his re-issued patent.

The bill in this case was filed by him on May 4, 1876, to restrain infringement by the defendant, David Frantz, of the extended re-issue.

The answer denied the novelty and utility of the invention; denied infringement, and asserted the invalidity of the re-issue.

The circuit court dismissed the bill, and the case is brought here by the appeal of the complainant.

The specification of the original patent declared:

"The object of this invention is the more perfect combustion of tan, sawdust, *bagasse* and all other kinds of refuse fuel in a wet or dry state; as well as of wood or coal. It is, however, with particular advantage to the burning of wet fuels. My invention consists in the arrangement embracing, for united use in the manner and for the purposes hereinafter specified, the following features, to wit:

First, two or more arched fire chambers, with throats of less area than their capacity; second, an auxiliary combustion reservoir, or chamber, with *cima-reversa* shaped bottom and side draft-door; third, a series of reverberatory chambers, [161] with side draft doors and passages at top for communication with each other; and fourth, a diving or direct flue leading into the chimney or smoke-stack.

To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

A A are two arched fire chambers, arranged side by side furnished with grates *a a*, having ash pit B B provided below the said grates. These fire chambers are not placed below the boiler, H, but directly in front thereof, and longitudinally parallel therewith. They may, however, be placed at one side of the boiler or at any angle to it. Each is provided with the usual door *b*, but these are only used for lighting the fires; and the ash pits are provided with doors *c* to regulate the supply of air through the grates, and permit the cleaning out of ashes. On the top of each chamber there are feeders *d d* for supplying the fuel, but as these feeders are the same as used in other furnaces, no particular description of them is necessary. The fire chambers are covered with a flat floor built over the arches, that the fuel may be wheeled to the feeders in barrows, or brought in any other convenient manner. At the rear end of each fire chamber there is a throat-like aperture *e* communicating with what I term the reservoir C, which is built of brick, lined with fire-brick, under the front portion of the boiler, and which has a concave bottom *m* and convex back *n*, which are formed by a *cima-reversa* shaped plate. By having the bottom and back of the reservoir formed by a *cima-reversa* shaped plate, the throat *e* is not partially closed up, as it would be if the plate was straight and set inclined and, beside this, the heated products of combustion are made to hug the bottom of the boiler, and as the draft is at this point, the perfect combustion of partially united gases is insured. The convex back of the reservoir terminates in, and serves as a bridge wall, and has a concave top so formed as to leave a space, *o*, of but three or four inches between it and the boiler.

The purpose of the reservoir will be presently explained. In rear of the bridge wall *f* there is a series of reverberatory chambers D D D, two, three or more, one behind the other, the series extending nearly as far as the rear end of the boiler, and the said chambers being severally separated by bridge walls, *g g*, and each chamber being provided with one or more doors *h*, in either or both sides, for the purpose of admitting air in sufficient quantities either to complete the combustion of the gases from the fire chambers or to check the draft. The reservoir is furnished with a door h^1, for a similar purpose as those *h h* in the reverberatory chamber. At the rear of the hindmost reverberatory chamber there is a wall g^1, like *g g*, behind which [162] there is a diving or drop flue E leading to the chimney.

The operation of the furnace is as follows: the gaseous products of the combustion in the fire chamber A A escape by the throats *e e* into the reservoir C, where they mingle together, and the combustible portion thereof becomes ignited, and where their heat acts upon the boiler, and from whence they pass into one after another of the reverberatory chambers, in each of which a portion of their heat is abstracted by contact with a portion of the boiler, and finally they descend the flue E to the chimney. The effect of the principal portion of my improvement, which consists in the employment of the reservoir C, connected with the fire chambers by the throats *e e*, of much smaller transverse area than the fire chamber, is that the products of combustion and heat are prevented leaving the fire chamber too rapidly, and the said chambers are, consequently, caused to be heated to an intense degree, and a very nearly perfect combustion of the fuel is obtained therein, and when the gaseous products of combustion leave the fire chambers by the said throats, and arrive in the reservoir C, the side walls and curved bottom and back of which are kept at a white heat, the still combustible portion of the gaseous products is ignited under the boiler."

The claim was thus stated: "What I claim as my invention, and desire to secure by letters patent, is: the arrangement of fire chambers A A, contracted throats *e e*, auxiliary combustion reservoir C, with the *cima-reversa* bridge plate

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m n, and the door h^1, reverberatory chambers D D, with doors *h h*, and the diving or direct flue E, substantially as and for the purposes set forth."

The description of the invention in the specification of the re-issued patent is substantially the same as that in the specification of the original patent. The drawings are identical. In the re-issue the invention is called "A new and useful improvement in furnaces for burning wet fuel." The claim is thus set forth:

"I do not claim a furnace for burning wet fuel, broadly, nor the use of a series of fire chambers connecting with the common flue, arranged between the furnace and the boiler, as I am well aware that this has been done before.

Having described my invention, I claim:

1. In a furnace for burning wet fuels, having two or more single fire chambers not ar- [163] ranged under the boiler, the combustion chamber or reservoir C, arranged above the top of said fire chambers, and located directly under the front end of the boiler, essentially as described.

2. The *cima-reversa* bottom *m n* of the combustion chamber or reservoir C, in combination with the narrow throats *e* of the separate fire-chambers, and the narrow exit flue *o* of the bridge walls *f*, for the purpose essentially as described.

3. In combination with the combustion chamber or reservoir C, arranged and located as described, I claim the side door or doors h^1, for the admission of atmospheric air, for the purpose described.

4. In combination with a series of fire-chambers A, and the combustion chamber or reservoir C, located and arranged directly beneath the front end of the boiler, and above the crown of said fire chamber, I claim a series of reverberatory chambers, D, provided with side doors *h*, and a diving flue, E, at the rear end of the boiler to hold the heat beneath the same throughout its entire length, and to arrest and deaden the sparks as described.

5. In a furnace for burning wet fuels in which the fire chambers are not arranged under the boiler, I claim the arrangement of the boiler upon the rear wall of the furnace and the rear wall of the diving flue E, for the purpose of obtaining the full advantage of the heat of the walls of the furnace, and of the diving flue, as described.

6. In a furnace for burning wet fuels, having a flat top, and supplied through openings therein, I claim the dead chambers, arranged between the floor and the arches of the fire chambers, for the purpose of maintaining the top of the furnace cool for the workingmen, as described."

Messrs. **Stern** *&* **Peck** and *John E. Hatch*, for appellants.

Messrs. **Lewis N. Dembitz** and **William A. Maury**, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

We are clearly of opinion that the re-issued patent is void.

It is evident on a cursory reading of the specification and claim of the original patent, that it was meant to cover a combination of the sev- [164] eral contrivances therein described, and not to cover the several parts of the former as distinct inventions. No claim is made for the several parts of which the former is constructed, but for the "arrangement embracing, for united use in the manner and for the purposes specified, the following features," etc.

If the claim of the original patent had been for the several distinct contrivances of which the furnace is composed, as claimed in the re-issued patent, it would not have been granted, because the evidence in the record shows that at least the sixth claim in the re-issued patent, for dead chambers over the arches of the fire chambers, was distinctly covered by the patent of Moses Thompson, dated April 10, 1855, for an improvement in burning tan bark, *ba-* [165] *gasse*, sawdust, or other kinds of fuel in a wet state, for the purpose of creating heat to generate steam, etc. This, the drawings accompanying the specifications of Thompson's patent clearly show.

It is evident, therefore, that if the appellant had, in his application for the original patent, claimed as his own invention all the distinct devices described in the specification, he could not have obtained his patent in its present form. It could have been only on the ground that his claim was for a combination that it was allowed and the patent issued.

If the re-issued patent is valid the appellant could maintain an action against any person who infringed any one of the separate claims covered by it. Under the original patent, suit could be maintained only against those who employed the combination embracing all the distinct contrivances described in the re-issued patent. The re-issue is, therefore, broader than the original patent and is, under the circumstances of this case, void.

The Act of July 8, 1870, 16 Stat. at L., 198, was in force when the re-issue was granted. That Act, section 53, R. S., sec. 4916, declared that "Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee."

In this case the original patent bore date June 22, 1858. The re-issue bore date February 6, 1872, more than thirteen years and six months after the date of the original patent and less than five months before its expiration. If the specification in the original patent was defective or insufficient in claiming a combination of several devices instead of making a distinct claim for every device which entered into the combination, the fact was instantly discernible, even to an unpracticed eye, as soon as the patent was [166] read. Therefore, as said by *Mr. Justice* Bradley in delivering the opinion of this court in a similar case, *Miller* v. *The Bridgeport Brass Company* [*ante*, 783], decided at the present Term, if any correction was desired it should have been applied for immediately; the right to have the correction made was abandoned and lost by un-

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reasonable delay. The case referred to, is apposite and is conclusive of this.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 147, 428; 107 U. S., 645; 111 U. S., 108; 112 U. S., 669.

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[166] NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY ET AL., *Appts.*,
v.
HENRY ELLERMAN.

(See S. C., 15 Otto, 166-174.)

Right of New Orleans to build wharves—enjoining use of

1. The City of New Orleans has the right of building levees and wharves on the banks of the Mississippi River within its corporate limits for public utility, and collecting reasonable wharfage for the actual use of such structures.

2. An assignee of the city has no legal interest which entitles him to enjoin a railroad company from using its wharf in such city as a public wharf beyond the limits of such use as allowed by the State Legislature. A violation of its charter does not of itself injuriously affect any of his rights.

[No. 9.]

Argued Oct. 28, 29, 1880. Ordered for reargument Jan. 3, 1881. Reargued Mar. 1, 1882. Decided Mar. 20, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. John A. Campbell, **John L. Cadwalader** and **Thomas L. Bayne,** for appellants

Messrs. William W. King, P. Phillips, W. Hallett Phillips, Robert Mott and *Durant &* **Hornor,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The New Orleans, Mobile and Texas Railroad Company, one of the appellants and the principal defendant below, is a Corporation of the State of Alabama, by the original name of the New Orleans, Mobile and Chattanooga Railroad Company, which has constructed a line of railroad from Mobile to New Orleans. It was [167] authorized by its charter "To obtain by purchase or grant from any person or corporation, and afterwards maintain, manage, use and enjoy any railroad property and the appurtenances thereto, or any steamboats, piers, wharves and the appurtenances thereto, that the directors may deem necessary, profitable and convenient for the Corporation to own, use and manage in connection with its railroads." Session Acts of Alabama, 1866.

The General Assembly of the State of Louisiana, on August 16, 1868, passed an Act, which recognized it as a body corporate, and authorized it to exercise its franchises in Louisiana, and expressly conferred upon it power "To construct, establish or purchase in the State of Louisiana, and thereafter to own, maintain and use suitable wharves, piers, warehouses, steamboats, harbors, depots, stations and other works and appurtenances connected with and incidental to said railroad and the business of said Company, and by the directors of said Company deemed necessary and expedient for said Company to own and manage."

In 1869, it was further enacted by the Legislature of that State, "That the said Company, with the consent of the owners of lands fronting on any navigable water-course, or after such lands have been acquired by the Company by purchase, release, donation or in any other manner, in accordance with the laws of the State of Louisiana, may erect, construct, and thereafter maintain and use wharves, warehouses, depots or other buildings and structures in and upon the margins, or upon that portion of the margins reserved to public use, of any and all navigable rivers, bayous or water-courses in the State of Louisiana, wherever the same may be deemed, by a majority of the directors of the Company, necessary and requisite for the legitimate and convenient transaction of the business of the Company."

On March 6, 1869, the General Assembly of Louisiana passed a Joint Resolution, having the force of law, granting to the Railroad Company "The right to inclose and occupy for its purposes and uses, in such manner as the directors of said Company may determine, that portion of the levee, *batture* and wharf in the City of New Orleans, between the street laid out between Pilie Street and the Mississippi River, and from Calliope Street to the lower line (about three hundred and fifty-five feet below [168] Calliope Street) of the *batture* rights owned by said Company, and no steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of said Company; and all steamships or vessels discharging or receiving cargo at said wharf for said Company, or any steamships or vessels using said wharf, by and with the consent of said Company, and not receiving or discharging cargo at or occupying any other wharf in the City of New Orleans, shall be exempt from the payment of all levee and wharf dues to the City of New Orleans. Said wharf shall be maintained and kept in repair by said Company." All laws and parts of laws and all ordinances and parts of ordinances conflicting with the provisions of this Joint Resolution, were thereby repealed.

At the date of the passage of the Joint Resolution the Railroad Company was the owner by previous purchase of the land described in it, and in possession, using it for the purposes of a depot and for other railroad purposes, and as a wharf, appropriate structures having been built for that use. A portion of this property was leased in June, 1875, by the receivers of the railroad, appointed under proceedings to foreclose, for twelve months, at the sum of $7,200, to Roberts and Witherspoon, who were made defendants to the bill, the use and employment of the wharf granted by such lease consisting "In the mooring of vessels coming to the consignment, custody or care of the parties of the second part (the lessees) or to either of them, and the loading and unloading of cargoes upon all vessels of this kind with the full consent of the parties of the first part, exempt from wharf and levee dues, according to the terms of the said Joint Resolution."

NOTE—*Wharves; right to construct; right to charge wharfage: lien for.* See *note* to *Ex parte* Easton, 95 U. S. XXIV., 373.

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The object of the bill filed by the appellee was to enjoin the execution of this contract, and the use and employment of the wharf described therein in the manner contemplated by it.

The claim of the complainant, Ellerman, the appellee, was based on a contract between himself and the City of New Orleans, entered into June 29, 1875. This contract purports to be a grant from the city to Ellerman, for a term of four years and eleven months from June 29, 1875, of the contract for building and repairing the wharves and levees according to certain [169] specifications on file, and for the payment of debts contracted on account of them, and for transferring the revenues of the same for the said term, agreeable to the terms of a certain ordinance and resolution of the city, all which are set out in the contract. The specifications state the particulars of the required repairs and extensions of the wharves. The subject-matter of the ordinance is declared to be the sale of "The revenues of the wharves and levees of the City of New Orleans, collectible under existing ordinances upon all ships, vessels, steamships, steamboats, flatboats and water-craft of any and every description, upon the terms and conditions" therein set forth. The purchaser was to assume certain specified liabilities of the city, connected with the wharves, and it was provided that the sale should be awarded to the bidder who would assume to discharge the obligations set forth, in consideration of the transfer of the revenues assigned, in the shortest time. The purchaser should be subrogated to all the rights and privileges of the City of New Orleans, to sue for and collect the revenues; and it was understood and agreed, that "The city only undertakes to transfer only such rights as she possesses, and the purchaser takes the said revenues subject to all the rights now held by other persons by way of lease, privilege, contract, or by law, and the purchaser shall, in reference to them, be subrogated only to the rights of the city." It was provided that the purchaser should take possession of the wharves, landings and levees in the condition in which the same might be at the time, and should repair the same and keep them in good order and condition during the term stipulated. It was further provided that if, from overpowering force, the city should not be able to protect the transferee in receiving the said revenues, or if they should by any such cause be diminished over one third, the transferee might, after satisfying all obligations incurred under the contract up to the time, surrender it and be discharged from further responsibility; but the city, it was expressly declared, in nowise guarantied the payment of the wharfage and levee dues, the collection of which are to be enforced by the transferee at his own cost.

The wharves and levees which constitute the subject-matter of this arrangement consisted of [170] artificial improvements made at the expense of the city, by grading and piling, securely driven, fastened and covered by a plank flooring, so as to furnish safe and convenient landings and moorings for water-craft, and places for loading and unloading their cargoes. Provision was made not only for keeping in repair the existing works and structures, but the transferee of the revenues was bound to build additional new wharves in certain specified districts of the city, if required to do so, not to exceed a named sum per annum; but if new wharves should be required in other districts by the city council a their own or the request of any other person, the party so desiring them should be bound to pay for the cost thereof, and should be entitled to receive the revenues derived from such wharves during the term of contract with the transferee, unless sooner re-imbursed.

The claim of Ellerman is, that the administration of the wharves and levees within the city limits is intrusted by law to the municipal government; that with this administration is coupled a franchise, that the city might charge and receive a reasonable remuneration for the expense of the facilities afforded to commerce; that under this franchise the city expended out of the revenues of the corporation very large sums on the wharves and levees in permanent works and improvements for the benefit of commerce; that, in consequence, the city had a vested right in the franchise and the revenues legitimately derived from these expenditures, of which it could not be devested by an Act of the Legislature, and that the appellee, by virtue of his contract, is subrogated during its term to the rights of the city.

He further claims that it is a violation of these rights for the defendants to permit the use and employment of their property as a wharf, and to charge and receive wharfage for such use, by and from persons not engaged in conducting the proper business of the Railroad Company, thus opening a rival wharf business in competition with the City of New Orleans and the appellee as its lessee; and that if the Joint Resolution of March 6, 1869, must be construed so as to confer upon the Railroad Company any such authority, it is null and void, because contrary to that provision of the Constitution of the United States which forbids the taking of private property without due process of law.

It is not claimed that the city has ever used as a public wharf the premises so occupied by the appellants, or made any expenditures for [171] works and constructions upon them; and it is admitted that all expenditures of that description which have been made thereon have been at the cost of the Railroad Company.

A decree was rendered in the circuit court in favor of the appellees, granting the relief prayed for, to review which this appeal is prosecuted.

In the opinion of the Circuit Judge, *Ellerman* v. *R. R. Co.*, 2 Wood, 120, the case turned upon the construction to be given to the Joint Resolution of March 6, 1869; and being of opinion, upon the authority of the decision of the Supreme Court of Louisiana in the case of *New Orleans* v. *R. R. Co.*, 27 La Ann., 414, that this Resolution conferred upon the Railroad Company no right to charge wharfage dues against vessels landing at said wharf which were in no way connected with the business of the Railroad Company, and no right to maintain a free wharf for such vessels, it was assumed that the appellee had such an interest in the question as qualified him to maintain this suit and entitled him to the relief prayed for.

The case of *New Orleans* v. *R. R. Co.*, *supra*, was a suit brought by the city against the Railroad Company to recover a sum of money for levee dues, charged against the defendant for barges and flatboats belonging to the Company

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and lying at this wharf, and which were used in its business. The Supreme Court of the State, in that case, decided that the Joint Resolution was not void for either of the reasons urged. It said: "The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. C. C., 453, 455, 458. The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled. *Police Jury* v. *Shreveport*, 5 La Ann., 661; *Stevens* v. *Walker*, 15 La Ann., 577; *Louisiana* v. *Fagan*, 22, La Ann., 545; *Gould* v. *R. R. Co.*, 6 N. Y., 522; *People* v. *Vanderbilt*, 26 N. Y., 287. In the case now under consideration the State granted the right to the riparian owner. This is permissible. *Dutton* v. *Strong*, 1 Black, 1 [66 U.S., XVII., 29]. Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a Railroad Company to use its property on the river bank for public purposes, to wit: to facil- [172] itate the transaction of its business with the public. It was the control by the Legislature of a public servitude."

The extent of the rights of the Railroad Company under the Joint Resolution, whether they were limited to the use of the wharf for railroad purposes merely, or embraced its use for all purposes, was a point not involved in the case then before that court, and was not decided by it either in express terms or by any fair inference. What that decision did affirm, however, was, that the disposal of the public right in the premises, as a wharf, was in the State, to the exclusion of the city, so that if the Joint Resolution had been a cession to a natural person, as riparian proprietor, to improve the premises as a landing place for water-craft, and for loading and unloading cargoes, by building levees and wharves, at his own expense, with the right to charge reasonable wharfage for their use, it would have been conclusive upon the city and those claiming in its right. And construing the grant to the Railroad Company as limiting the use of the property as a wharf, to purposes strictly incident to its corporate business, still, in order that it should be beneficial to that extent, it would be essential that the Railroad Company should have the right to exclude all other uses; and this would effectually withdraw it from the jurisdiction of the city authority over the general subject of the public wharves.

Neither would this be in derogation of any vested right of the city. Whatever powers the municipal body rightfully enjoys over the subject is derived from the Legislature of the State. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation, which it is allowed by law to charge for the actual use of structures provided at its expense for the convenience of vessels engaged in the navigation of the river. *Cannon* v. *New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417].

And while it may be true, as was decided by the Supreme Court of Louisiana in *Ellerman* v. *McMains*, 30 La. Ann., 190, that the city cannot lawfully be required to permit the use of its wharves, without compensation, on the ground that they are private property; it is [173] equally true, as was decided by the same court in *New Orleans* v. *Wilmot*, 31 La. Ann., 65, that the city cannot forbid any water-craft from using the banks of the navigable waters of the State for purposes of navigation and commerce, and cannot compel them to pay to it wharfage except as compensation for the use of wharves of which it is the proprietor.

The rights of the city in respect to this controversy would seem, then, to be reduced to that of building levees and wharves on the banks of the river within its corporate limits for the public utility, with the exceptions established by paramount law, and collecting reasonable wharfage for the actual use of such structures. Its right to build a wharf upon the land of the Railroad Company, the appellant, we have seen, is excluded by the terms of the Joint Resolution of March 6, 1869, according to its narrowest construction.

The sole remaining question, then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the Railroad Company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the Joint Resolution. If he has such interest it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the Railroad Company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for anyone to compete with the appellant, although the Railroad Company may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue, in such a case, is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach [174] of some legal or equitable duty. A stockholder of the Company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the Railroad Company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the Railroad Company is acting beyond the warrant of the law, the answer is that a violation of its charter does

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not of itself injuriously affect any of his rights. The Company is not shown to owe him any duty which it has not performed.

This was the principle on which this court proceeded in the case of *Georgetown* v. *Canal Co.*, 12 Pet., 91. It is applied in *Liverpool* v. *Chorley Waterworks Co.*, 2 DeG., M. & G., 852; *Stockport Dist. Waterworks* v. *Manchester*, 9 Jur. (N. S.), 266; *Pudsey Coal Gas Co.* v. *Bradford*, L. R., 15 Eq., 167.

On this ground it is our opinion that the appellee failed to allege and show any right to maintain his bill, which should, therefore, have been dismissed. *The decree is accordingly reversed, with directions to dismiss the bill; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[235]

CHARLES HECHT, *Plff. in Err.*,
v.
MARY E. BOUGHTON.

(See S. C., 15 Otto, 235, 236.)

Review of territorial decisions—form of proceeding.

1. The appellate jurisdiction of this court over the judgments and decrees of territorial courts in cases of trial by jury, must be exercised by writ of error, and in all other cases by appeal.
2. The form of proceeding depends on the single fact of whether there has been, or not, a trial by jury.

[No. 912.]

Submitted Mar. 6, 1882. Decided Mar. 20, 1882.

IN ERROR to the Supreme Court of the Territory of Wyoming.

On motion to dismiss.

The case is sufficiently stated by the court.

Mr. **J. Thomas Turner,** for defendant in error in support of motion.

Messrs. **C. N. Potter** and **E. W. Mann,** for plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Wyoming, to bring up for review the judgment in a suit where there was not a trial by jury. A motion is now made to dismiss because the case should have been brought here by appeal and not by writ of error.

Section 2 of the Act of April 7, 1874 [18 Stat. at L., 27], ch. 80, 1 Sup. R. S., 13, is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe.

Provided, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or appeal.

And provided further, That the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of parties; and that this Act shall not apply to cases now pending in the Supreme Court of the United States, where the record has already been filed."

This Statute seems to us conclusive of the [236] present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been, or not, a trial by jury. *Stringfellow* v. *Cain*, 99 U. S., 612 [XXV., 422]. We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances, the form of proceeding to get a review is not of so much importance as certainly about what is to be done.

We cannot agree with counsel for the plaintiff in error that the Act of Congress was intended to apply only to those territories where the distinction between suits at law and suits in equity had actually been abolished. From the preamble it may fairly be inferred that the object of the legislation was to prevent embarrassments growing out of the mingling of jurisdictions, but the statute as it stands clearly applies to all territorial courts.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited.—105 U. S., 263; 108 U. S., 15; 111 U. S., 357; 114 U. S., 35.

IRA DAVENPORT, *Plff. in Err.*, [237]
v.
COUNTY OF DODGE.

(See S. C., 15 Otto, 237-243.)

County bonds—action upon—mandamus.

1. Under the Nebraska Statute of 1869, the special bonds which the County Commissioners issue for the precincts of the county in aid of works of internal improvement, are, in legal effect, the special bonds of the county, payable out of a special fund to be raised in a special way.
2. An action at law on such bonds will lie in the courts of the United States against the county.

NOTE.—Mandamus *to compel city, town or county to levy tax to pay bonds or interest on bonds.* See *note* to The Mayor v. U. S., 76 U. S., XIX., 704.

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3. In courts of the United States, a judgment at law is necessary to support the writ of *mandamus* to enforce the levy and collection of the taxes, to pay such bonds, it being in the nature of an execution to carry the judgment into effect.

[No. 1186.]

Submitted Jan. 16, 1882. Decided Mar. 20, 1882.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The case is stated by the court.

Messrs **W. H. Munger** and **E. Wakeley**, for plaintiff in error.

Mr. **William Marshall**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

By a Statute of Nebraska, passed in 1869, "To enable counties, cities, towns and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purposes," the legal voters of counties and cities were authorized to vote bonds for such purposes, and upon a favorable vote, the county commissioners in case of a county, and the city council in case of a city, were to issue the bonds as voted, which were to "continue a subsisting liability against said city or county" until paid. It was further made the duty of the proper officer annually to cause to be levied, collected and paid over to the holders of such bonds "a special tax on all taxable property within said county or city, sufficient to pay" the interest and principal as they fell due. Sections 6 and 7 of the Act are as follows:

"Sec. 6. Any county or city which shall have issued its bonds in pursuance of this Act, [238] shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled, by *mandamus* or otherwise, to levy the tax herein provided to pay the same.

Sec. 7. Any precinct, in any organized county of this State, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this Act; and in such case the precinct election shall be governed in the same manner as is provided in this Act, so far as the same is applicable, and the County Commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." General Statutes of Neb., 448.

Under the authority of section 7, bonds were issued by the County Commissioners of Dodge County in the following form:

"UNITED STATES OF AMERICA, }
STATE OF NEBRASKA. }

It is hereby certified that Fremont Precinct, in the County of Dodge, in the State of Nebraska, is indebted unto the bearer in the sum of $1,000, payable on or before twenty years after date, with interest at the rate of ten per cent per annum from date. Interest payable annually on the presentation of the proper coupons hereto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge County, Nebraska; interest payable at the Ocean National Bank, in the City of New York.

This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont Precinct at a special election held on the 11th day of November, 1870, at which time the following proposition was submitted:

Shall the county commissioners of Dodge County, Nebraska, issue their special bonds on Fremont Precinct, in said County, to the amount not to exceed $50,000, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across the Platte River, in said precinct, said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent per annum, payable annually? Which proposition was duly elected, adopted, and accepted by a majority of the electors of [239] said precinct voting in favor of the proposition.

And whereas, the Smith Bridge Company, of Toledo, Ohio, have entered into a contract with said County Commissioners to furnish the necessary materials, and to build and construct said bridge referred to in the foregoing proposition:

Wherefore this bond, with others, is issued in pursuance thereof, as well as under the provision of an Act of the Legislature of the State of Nebraska, approved February 15, 1869, entitled 'An Act to Enable Counties, Cities and Precincts to Borrow Money on their Bonds, to Aid in the Construction or Completion of Works of Internal Improvements in this State, and to Legalize Bonds Already Issued for Such Purpose.'

In witness whereof we, the said County Commissioners of said Dodge County, have hereunto set our hands, this 1st day of September, A. D. 1871.

GEORGE F. BLANCHARD,
A. C. BRIGGS,
JOHN P. EATON,
County Commissioners.

Attest:

[SEAL.] A. G. BRUGH, *County Clerk.*'

Default having been made in the payment of sundry coupons attached to these bonds, Davenport, the plaintiff in error, brought suit against the County for the recovery thereof, in the Circuit Court of the United States for the District of Nebraska. The petition set forth the issue of the bonds according to the facts, and prayed judgment "For the sum of $850 and costs of suit, said judgment to be collected by a tax upon the taxable property within the territory comprising said Fremont precinct at the time said bonds were voted and issued." The County demurred to the petition, and at the hearing the following questions arose:

"1. Whether upon the allegations of the amended petition filed in said court on the 12th day of May, 1881, the said County of Dodge is liable to a suit in which judgment can be rendered against said County of Dodge, on the bonds and coupons therein declared upon and set out.

2. Whether upon the allegations of the said petition, the plaintiff is entitled to recover a

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[240] judgment in form against the County of Dodge, to be satisfied or collected only by levy of a tax on the taxable property in Fremont Precinct, as prayed for in said petition."

Upon these questions the opinions of the Circuit Justice and District Judge holding the court were opposed, and that disagreement has been duly certified here. The opinion of the Circuit Justice being that the questions should be answered in the negative, the demurrer was sustained and judgment given for the defendant. From that judgment this writ of error has been brought, and the case is now here for determination on the certificate of division.

When county bonds are issued under the statute in question, it is expressly provided that they shall constitute a debt against the County, to be paid by the levy and collection of taxes on all the taxable property within the County. If aid is voted by a precinct, bonds also are to be issued, differing only from county bonds in that they are to be paid from taxes levied on property within a precinct. "As to the several duties of the County Commissioners respecting them," says the Supreme Court of Nebraska, in *State* v. *Thorne*, 9 Neb., 461, "the law makes no distinction whatever between precinct and county bonds. They must issue both, and when issued it is their duty to keep a record of the kinds and amounts, as well as the times and places of payment, and make provisions therefor, as the statute directs. In the case of precinct bonds the means of payment must be raised by a tax levied by the commissioners 'upon the property within the bounds of such precinct,' which must be collected in the same manner as is the ordinary county revenue, and through the agency of the county treasurer, whose only duty in connection with the fund arising therefrom, when collected, is to hold it subject to the order of the County Commissioners directing its application to the object for which it was intended. As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the County. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds and, except when [241] there is some special provision of statute authorizing it, payment therefrom can be legally made only on 'warrants by the county commissioners according to law.'"

A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. *State* v. *Dodge Co.*, 10 Neb., 20. Precincts are governed by the County Commissioners, the governing board of the county, and by the appropriate officers of the State. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot, says again the Supreme Court of the State, in the case last cited, "enter into contracts directly or indirectly, nor assume obligations which a court might be called on to enforce." Hence, the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation that is entered into and charged with the debt created thereby. The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment, and in the other only a part. In both, the *mandamus* to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of an intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the County Commissioners are to issue for the precincts are, in legal effect, the special bonds of the County payable out of a special fund to be raised in a special way. Although the form of expression in the Nebraska Statute is somewhat different from [242] that in Missouri, which we were called on to consider in *Cass Co.* v. *Johnston*, 95 U. S., 360 [XXIV., 416], we think the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county, but in Nebraska there can be no bond except it be of the county, and as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say, county bonds, but must contain a statement of their special nature, which confines the area of taxable property to a part rather than the whole of the county.

If there is nothing else in the case, therefore, we think it comes within *Cass Co.* v. *Johnston*, *supra*, and that an action at law will lie in the courts of the United States against the County for the recovery of the special judgment asked for. The case of *Co. Comrs.* v. *Chandler*, 96 U. S., 205 [XXIV., 625], was upon coupons attached to some of this same issue of bonds. Judgment had been rendered against the County in the court below and that judgment was affirmed here. No one seemed to think then that the defense now relied on was good, for it was not mentioned in this court or below. The defense then made related only to the authority of a precinct to vote aid for the building of a toll bridge.

It is contended, however, that as the statute which authorizes the creation of the liability provides a special remedy for its enforcement, this suit cannot be maintained. The remedy provided is by *mandamus* to compel the proper officers to levy the necessary tax. In *Greene Co.* v. *Daniel* [*ante*, 101], a case similar to this in many of its features, we said a suit to get judgment on bonds or coupons was part of the necessary machinery which the courts of the United States must use in enforcing this remedy, and that the jurisdiction of those courts is not to be

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ousted simply because in the courts of the State the *mandamus* could be granted without a judgment. In the state courts the liability may, as we understand the case of *State* v. *Dodge Co.*, *supra*, be determined in the proceedings for the *mandamus*. Such is not, however, the rule in the courts of the United States, where the writ of *mandamus* is only granted in aid of an existing jurisdiction. In those courts the judgment at law is necessary to support the writ, which [243] is in the nature of an execution to carry the judgment into effect. *Greene Co.* v. *Daniel*, *supra*; *Graham* v. *Norton*, 15 Wall., 427 [82 U. S., XXI., 177]; *Bath Co.* v. *Amy*, 13 Wall., 244 [80 U. S., XX., 539]. As the judgment asked for is special, and will only entitle the plaintiff to payment through the instrumentality of the special tax to be levied, the suit as it now stands is in reality only a way of getting the remedy the statute provides. The only execution that can issue on the judgment will be the *mandamus*.

The Supreme Court of the State in *State* v. *Dodge Co.*, *supra*, declined to issue a *mandamus* for the levy of taxes to pay a judgment in the Circuit Court of the United States on some of the coupons attached to this class of bonds, and in the opinion declared the judgment a nullity; but this we must understand to mean a nullity as the foundation of any proceedings in that court for its enforcement. To enable the courts of the United States to afford the remedy which the law has specially provided, such a judgment is a necessary preliminary. In fact, a judgment is but one of the steps in the proceeding to obtain the *mandamus*. The statute has given a remedy by *mandamus* but it has not undertaken to regulate the process by which it is to be secured. That depends on the practice established in the several tribunals from which the writ is to be obtained. The practice in the state courts requires one mode of proceeding, that in the courts of the United States another, but the result is the same in both, to wit: the order for the levy and collection of the requisite tax.

It follows that each of the questions certified must be answered in the affirmative and the judgment of the court below reversed. It is, consequently, so ordered, and the cause remanded for further proceedings in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 666; 107 U. S., 727, 762; 108 U. S., 555; 110 U. S., 162; 111 U. S., 367.

UNITED STATES, *Plff. in Err.*,
[263]
v.
UNION PACIFIC RAILROAD COMPANY.

(See S. C., 15 Otto, 263, 264.)

Review of territorial judgments—jurisdictional amount—suits by United States.

1. A case from a territorial court can only be brought here by appeal, and not by writ of error, where there was no trial by a jury.

2. Writs of error and appeals from the final judgments and decrees of the Supreme Court of Wyoming Territory lie to this court only when the amount in controversy exceeds $1,000, or the judgment is on a writ of *habeas corpus* involving a question of personal freedom.

3. The United States are not entitled to a writ of error or appeal, if the same remedy would not be afforded under similar circumstances to a private party.

[No. 214.]

Submitted Mar. 3, 1882. Decided Mar. 20, 1882.

IN ERROR to the Superior Court of the Territory of Wyoming.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **Samuel Shellabarger** and **Jeremiah M. Wilson,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit in replevin brought by the United States, in one of the district courts of the Territory of Wyoming, against the Union Pacific Railroad Company to recover the possession of certain goods intended for the Indian service. The case was submitted to the court on an agreed statement of facts, from which it appears that the goods belonged to the United States; that they were intended for the Indian service; that the United States had a contract with Dwight J. McCann for their transportation from New York to the White River Agency, in Colorado; that they were put into the hands of this contractor for transportation under his contract; that the contractor agreed with the Railroad Company for their transportation from Omaha to Rawlins; that the Company carried them as a common carrier under this agreement to the place of destination, for which its proper charges were $496.86; that on their arrival at Rawlins they were stored in the Company's warehouses for a long time; that for this storage the proper charge was $91.30; and that the contractor for transportation had never paid any part of these charges.

On the 20th of November, 1877, the United States demanded the goods of the Company, but a delivery was refused unless the charges were paid, the Company claiming the right to hold the goods under a carrier's lien. The United States thereupon replevied the goods without having first paid the charges. The only controversy was as to the lien, and it was agreed that if, upon the facts, the court should be of opinion the Company had a lien, judgment should be entered in its favor and against the United States for the amount of the charges. If, however, it should be decided there was no lien, judgment was to be entered against the Com- [264] pany. The court decided there was a lien, and gave judgment against the United States for $588.16. This judgment was affirmed by the Supreme Court of the Territory, and for the review of that judgment this writ of error has been brought.

Under the decision in *Hecht* v. *Boughton* [*ante*, 1018], just announced, the case should have been brought here by appeal rather than writ of error. There was no trial by a jury. But there is still another objection to our jurisdiction. Under sections 702 and 1909 of the Revised Statutes, writs of error and appeals from the final judg-

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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ments and decrees of the Supreme Court of Wyoming lie to this court only when the amount in controversy exceeds $1,000, or the judgment is on a writ of *habeas corpus*, involving a question of personal freedom. No exception is made in favor of the United States, and this is not an action brought for the enforcement of any revenue law. Consequently, the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party. *U. S.* v. *Thompson*, 93 U. S., 588 [XXIII., 983]. The value of the matter in dispute is the amount of the judgment that has been recovered. This is less than $1,000. *It follows that we have no jurisdiction and the writ is dismissed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WESLEY B. BONNIFIELD, *Plff. in Err.*,
v.
GEORGE F. PRICE.

Case followed—review of Territorial judgments—practice—statement of facts.

1. Hecht v. Boughton, *ante*, p. 1018, followed.
2. A judgment of the Supreme Court of a Territory cannot be reviewed here on writ of error where the trial was not by jury.
3. The appropriate remedy in such case, under the Act of Apr. 7, 1874, ch. 80, Sup. Rev. Stat., 12, is by appeal.
4. If this court could treat the writ of error as an appeal, a statement of facts such as the statute requires is necessary to enable this court to re-examine the case.

[No. 230.]
Submitted Mar. 16, 1882. Decided Mar. 27, 1882.

IN ERROR to the Supreme Court of the Territory of Wyoming.

The case is sufficiently stated by the court.

Messrs. I. S. Moore, **John W. Hammond**, *C. N. Potter* and *E. P. Johnson*, for plaintiff in error.

Mr. **George F. Price**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error to bring here for review a judgment of the Supreme Court of the Territory of Wyoming in a case where the trial was not by jury. It is, therefore, dismissed, on the authority of *Hecht* v. *Boughton* [*ante*, 1018], decided at the present Term. The appropriate remedy in this case, under the Act of April 7, 1874, [18 Stat. at L., 27], ch. 80, Sup. R. S., 12, was by appeal.

But if we could treat this error as an appeal, the case is in no condition for examination here, because there is no such statement of facts in the record as the law requires. The bill of exceptions taken in the district court contains all the evidence, and as the Supreme Court directed a judgment in favor of the defendant, it is clear that court passed on other questions than such as were presented on the rulings in the admission of evidence. Under these circumstances a statement of facts, such as the statute requires, is necessary to enable us to re-examine the case.

The writ is dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL R. C. MATTHEWS ET AL., *Appts.*, [54]
v.
BOSTON MACHINE COMPANY ET AL.

(See S. C., 15 Otto, 54-59.)

Void letters patent.

The two letters patent granted to Washburn Race and S. R. C. Matthews, one dated April 30, 1872 (being a re-issue of a patent granted Jan. 26, 1858), and the other dated Nov. 16, 1869 cannot be sustained because, in the re-issued patent, the elements of the invention are split up and claimed separately and not as a combination, and the re-issue is for a broader claim made many years after the original was granted, and is for a different invention; and the patent of 1869 covers things in public use for many years before it was issued.

[No. 35.]
Argued Mar. 11, 1882. Decided Mar. 27, 1882.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. **George Harding** and **George L. Roberts**, for appellants.

Mr. **Causten Browne**, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This case comes before us on appeal from a decree of the Circuit Court for the District of Massachusetts, dismissing a bill in equity filed by the appellants, in which they prayed for an [55] injunction and account of profits for an alleged infringement of two certain patents granted to Washburn Race and S. R. C. Matthews, one dated April 30, 1872 (being a re-issue of a patent granted January 26, 1858), and the other dated November 16, 1869. The defendants, in answer, denied that Race and Matthews were the first inventors of the thing patented, referring to several prior patents, and naming prior instances of knowledge and use of the alleged invention; and amongst other things setting up a patent issued to one Zebulon E. Coffin, dated July 21, 1868. They also denied that the re-issued patent was for the same invention as the original; and denied infringement. The complainants filed a supplemental bill, alleging that since the filing of the original the defendants had procured a re-issue of Coffin's patent, which contained substantially the same invention as that described in the plaintiff's patent of 1869; but that Race and Matthews were the first and original inventors of the thing patented; and, therefore, they prayed that the Coffin patent might be declared void.

The Race and Matthews patents, on which this suit was brought, relate to casings or jackets around hydrants, and to the valves for letting on the water when wanted for use, and for draining it out of the hydrant when not in use. It is conceded that the objects of the casing are: to prevent freezing in and around the hydrant by surrounding it with a volume of dead air, to keep it free from contact with the surrounding earth, and to enable the hydrant to be taken out of the ground without removing the surrounding earth. If the earth is in contact with the hydrant, it lifts the hydrant out of place by the action of the frost, and has to be dug away when repairs or other operations have to be performed below the surface. Many casings for-

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merly used were fastened in different ways to the hydrant, and when lifted by the frost raised the latter also, causing breakage or leakage or other damage by the displacement; and, also, the hydrant could not be disconnected from the main and removed, without removing the casing also.

So far as the improvement in the casing is [56] concerned, the principal thing claimed to be effected by the patentees Race and Matthews, is the placing of the case in position, without attaching it to the hydrant, or to the elbow of the main pipe below, so that the hydrant, whilst being protected from frost and the surrounding earth, may be lifted out separately, and so that the lifting of the case by the frost and surrounding earth will not disturb the hydrant. These objects are effected by two different devices; first, by causing the case to rest loosely on a flange projecting from the elbow of the main, or otherwise, and allowing it to slide up the hydrant which it surrounds, and which is enlarged at that point, for holding the valves; secondly, by allowing the upper end of the case to embrace the hydrant (enlarged at that point also), and to slide up and down upon it like a sleeve. Of course, the case must fit the hydrant snugly enough to keep out the influx of cold air above, and of dirt below; but not so tight as to prevent the hydrant from being lifted out, or the case from slipping up and down upon it. This is the thing which the complainants contend that Race and Matthews invented.

As first patented in 1858, the invention did not accomplish the object. The bottom of the case, it is true, surrounded the hydrant like a sleeve, and rested on a flange projecting from the elbow (which allowed the hydrant to be separately removed without removing the case); but the top of the case was enclosed in a flange projecting from the enlarged part of the hydrant above, like the brim of a hat, but turned down over the top of the case, so that the latter, though unconnected otherwise with the hydrant, yet, if it were lifted by the frost, it would press upward against the flange and raise the hydrant also. This difficulty was remedied by the invention of the improvement patented in 1869, by which the top of the case was made to surround and inclose the upper enlargement of the hydrant, and to slide over like a sleeve as before stated. The re-issued patent of 1872 substantially embraces both features of the improved case, namely: its disconnection with the hydrant both above and below; and places much stress on the dead-air chamber as a protection from frost, and on the protection of the hydrant below from the surrounding earth; although no claim is based on these last features

The defendants contend that this re-issued patent is not for the same invention as that [57] which is described and patented in and by the original patent of 1858; that the latter made no mention of the dead-air chamber formed by the casing, as a protection of the hydrant from the frost; and that it contained no indication that the case should fit closely to the hydrant so as to prevent the passage of cold air into the chamber from without. But to these objections it is answered, that the case invented by Race and Matthews in 1858 was a machine or apparatus having or being susceptible of various functions, some of which were well known and needed not to be mentioned or described. Amongst these known functions of the hydrant casing were, the formation of a dead-air chamber to prevent freezing, and the protection of the hydrant from contact with the surrounding earth. The patent of Coffin, on which the defendants rely, states that prior to the date of his invention *frost jackets* or cases, on hydrants were well known; that they surround the hydrant proper, an air space existing between the two. It was not necessary for the patentees, Race and Matthews, to enumerate all the known functions of these frost jackets in their original patent; and, as no claim was based upon them, it could not be hurtful to enumerate them in the re-issued patent.

But the complainants in their re-issued patents, have split up and divided the elements of their invention, and claimed them separately, and not as a combination. Of course, this enlarges the scope of their patent. The separate claims embrace fewer elements in combination than were embraced in the claim of the original patent. No one could infringe the original patent unless he used all the elements of the combination. Any one will infringe the re-issue who uses any of those elements which are now separately claimed.

The original patent had but a single claim in reference to the case, being a claim for a combination between the hydrant, the induction pipe provided with a flanch to sustain the jacket, and the jacket itself, when arranged as described in the specification to effect the desired end, to wit: the ready removal of the hydrant. This, in the re-issued patent, is divided into two claims, [58] namely: first, the jacket surrounding the hydrant and forming a separate and removable part from the elbow substantially as and for the purpose set forth; secondly, the independent jacket supported on the arm or elbow of the main at or near the junction of the hydrant, substantially as shown and described; that is to say, there is a claim of a jacket separate and removable from the elbow, and of a jacket resting on the elbow. It cannot be denied that each of these separate claims is much broader than the claim in the original patent; and they are put forth in the re-issue fourteen years after the orignal was granted. The latter showed on its face that these broad claims were not made; and if the patentees were really the inventors of an independent jacket standing loosely on the elbow of the main, when apprised that it was not claimed in the patent they ought to have used due diligence in surrendering it, and having the mistake corrected. The case clearly comes within the ruling lately made in *Miller* v. *Brass Co.* [*ante*, 783].

There is still another objection to the claims in question. There is a wide departure from the original invention in this; that the subject of the latter was a jacket, or casing, whose top was inclosed in and covered by a flange projecting from the hydrant, which effectually prevented the removal of the jacket without removing the hydrant also; and which caused the hydrant to be raised when the jacket was lifted by the frost. In the re-issued patent nothing is said of this arrangement of the top of the jacket; and the claims ignore it altogether; so that, as already intimated, the patent as it now stands would cover such a jacket as that de-

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scribed and claimed in the complainants' patent of 1869, which slides like a sleeve over the hydrant at top as well as bottom. The re-issue is not only for a broader claim made many years after the original was granted, but is for a different invention. Therefore, so far as the jacket is concerned, we think it cannot be sustained.

But the patent of 1869 still remains. That was for an improvement by which it was proposed to liberate the top of the case from the flange which covered and inclosed it, and make it surround the hydrant and slip over it like a sleeve. The claim is for "The detached case B, so combined and arranged with the hydrant A. as to have an end play, or vertical motion of several inches, to compensate for the heaving by frost, the upper part of same passing [59] outside of main stock of hydrant." Had this patent been confined to a hydrant jacket closed at the bottom, and resting on a flange of the main elbow, perhaps it might have been sustainable. But it is not so confined. It is only said that the lower end *preferably* shuts into a flange of the elbow. The specification, it is true, commences with a statement that the invention was a mere improvement upon that described by the patent of 1858, which was for a case closed at the bottom by standing on a flange, but before getting through, there is an evident departure from that, and an indication that the patentees had begun to entertain views of an expanded construction intended to be placed on the original patent, which afterwards found expression in the re-issue of 1872. The claim of the patent of 1869, as it stands, covers any and every loose jacket having an end play to compensate for the heaving of the frost, and having the upper end passing around the hydrant. It covers the old New York wooden case, or housing which was in public use for many years before Race and Matthews gave their attention to the subject. We are of opinion, therefore, that this patent cannot be sustained

As to the valve apparatus, the object of which is to let the water in the body of the hydrant escape when the main valve is closed, and to prevent any escape of water when the main valve is open, since Race and Matthews were not the original inventors of this process, but only of a particular arrangement of valves to effect it, they can only properly claim the specific arrangement which they invented. And in view of the older valve in the St. Louis hydrants, which that of the defendants most nearly resembles, and of the fact that the valve used by the defendants is not in the specific form of that invented by Race and Matthews, we think that the defendants are correct in their position that they do not infringe the patent of Race and Matthews, as that patent must be construed in order to be sustained.

The decree of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 645.

TOWNSHIP OF NEW BUFFALO, *Plff. in Err.*, [73]
v.
CAMBRIA IRON COMPANY.

(See S. C., 15 Otto, 73-76.)

Case followed—municipal bonds—when valid—consolidated company.

1. Taylor v. Ypsilanti, *ante*, p. 1008, followed.
2. A holder for value, of municipal bonds, is entitled to whatever rights the railroad company, to which they were delivered and which transferred them, had by virtue of its contract with the township under state decisions then given holding them valid, and is not affected by a later state decision against their validity.
3. That the bonds were issued as a donation to, and not for a subscription to stock of a railroad company, does not affect the legal principles applicable to them.
4. Under the Statute of Michigan, bonds voted in aid of one railroad company, which was subsequently consolidated with another so as to make a new corporation, were rightly delivered to the new or consolidated corporation.

[No. 189.]

Argued Jan. 4, 1882. Decided Mar. 27, 1882.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

Statement of the case, by *Mr. Justice* **Harlan:**

The judgment below was for the amount due on certain bonds, with interest coupons attached, issued by the defendant in error under the authority of a general statute of Michigan, approved March 22, 1869, conferring power upon townships, cities and villages to pledge their aid, by loan or donation, with or without conditions, to any railroad company organized under the laws of that State, in the construction of its road. *Sess. Laws Mich.* 1869, p. 89. It is the same statute whose validity and construction was involved in *Taylor* v. *Ypsilanti* [*ante*, 1008], recently determined in this court. The bonds were voted on the 22d day of May, 1869, as a donation in favor of the Chicago and Michigan Lake Shore Railroad Company, a Corporation of Michigan, whose road line commenced at the north line of the State of Indiana, in Allen County, running northwardly to the St. Joseph River, in the Village of St. Joseph, Michigan, a distance of thirty miles, passing through the [74] Township of New Buffalo. When the bonds were voted there was in force a general statute, under which any railroad company of the State, forming a continuous or connected line with any other railroad company, in or out of the State, could consolidate with the latter. The statute provided that such new corporation "Shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization." Further: "All and singular the rights and franchises of each and said corporations * * * and all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer." Compiled Laws of Mich. 1857, secs. 1994, 1995, p. 653.

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On the 3d July, 1869, the Lake Shore Railroad Company of Western Michigan was organized, with authority to construct a road from the northern terminus of the before mentioned road, at St. Joseph River, northerly to the mouth of the Muskego River, a distance of ninety miles. By articles of agreement between the two companies, made on 12th and 13th of July, 1869, and filed in the office of the Secretary of State on the 19th day of July, 1869, the two companies became consolidated into a new corporation, under the name of the Chicago and Michigan Lake Shore Railroad Company.

On the day last named the bonds, having been executed on the first day of June, 1869, were deposited in the office of the Treasurer of State, who was required by the statute to "Hold the same as trustee of the municipality issuing the same, and for the railroad company for which they were issued." The road was finished from New Buffalo to the Village of St. Joseph as early as February 1, 1870, and has been in operation ever since. On the 4th day of February, 1870, the Governor of the State made his certificate, stating that the railroad company had constructed the road in compliance, as well with the statute, as with the conditions upon which aid had been voted by the people, and was, consequently, entitled to receive the bonds from the state treasurer. They were thereupon [75] delivered to the consolidated company, who held them until November 4, 1874, when such of them as are here in suit were transferred to the defendant in error in payment of antecedent debts due to it by the railroad company. Upon such transfer, the company's acceptances there tofore given for its debts were surrendered and the debts discharged.

Mr. **Henry F. Severens,** for plaintiff in error.

Messrs. Hughes, O'Brien & **Smiley,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

1. On behalf of the plaintiff in error it is contended that, by the settled law of Michigan as it existed when the bonds were issued, they were void. In support of that position we are referred to *People* v. *Salem*, 20 Mich., 452, decided May 26, 1870; *Bay City* v. *State Treas.*, 23 Mich., 499; and *Thomas* v. *Port Huron*, 27 Mich., 320. This question was fully considered in *Taylor* v. *City of Ypsilanti* [*supra*], where we ruled that by the law of Michigan, as expounded by its Supreme Court, and acted upon by its Legislature and executive departments, prior to the decision in *People* v. *Salem*, bonds issued in conformity with the Act of March 22, 1869, were valid obligations of the municipality by whom they were issued. For the reasons there stated the present objection cannot be sustained.

2. Equally untenable is the proposition that the rights and obligations of the parties are to be determined by the law, as expounded by the Supreme Court of the State, at the time the defendant in error, in fact, received the bonds. The defendant in error is a holder for value. *Railroad Co.* v. *National Bank* [*ante*, 61]. But if not, it is still entitled to whatever rights the railroad company had by virtue of its contract with the Township. That contract was made and fully performed before the decision in *People* v. *Salem* was rendered, and, as already indicated, was not affected by the decision in that case.

3. Nor is it a material circumstance that this was a donation, and not a subscription of stock. In *R. R. Co.* v. *Otoe Co.*, 16 Wall., 674 [83 U. S., XXI., 381]; it was held, that, in the absence of constitutional provisions making a distinction between municipal subscriptions to stock and municipal appropriations of money or credit, [76] there was no solid ground upon which, so far as legislative power was concerned, to rest such a distinction. "Both are for the purpose of aiding in the construction of the road, both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers." *Olcott* v. *Supervisors*, 16 Wall., 678 [83 U. S., XXI., 382] *Town of Queensbury* v. *Culver*, 19 Wall., 91 [86 U. S., XXII., 104].

4. The only remaining objection to the judgment is that the bonds were delivered to the consolidated company, when they were not voted to that company. We concur with the court below in holding that the aid voted must be deemed to have been given in view of the then existing statute, authorizing two or more railroad companies, forming a continuous or connected line, to consolidate and form one corporation, and investing the consolidated company with the powers, rights, property and franchises of the constituent companies. *Scotland Co.* v. *Thomas*, 94 U. S., 682 [XXIV., 219]; *East Lincoln* v. *Davenport*, 94 U. S., 801 [XXIV., 322]; *Wilson* v. *Salamanca*, 99 U. S., 504 [XXV., 331]; *Nugent* v. *The Supervisors*, 19 Wall., 252 [86 U. S., XXII., 89]; *Empire* v. *Darlington*, 101 U. S., 91 [XXV., 879]; *Menasha* v. *Hazard* [*ante*, 83]; *Harter* v. *Kernochan* [*ante*, 411]; *Tipton Co.* v. *Locomotive Works* [*ante*, 340]. The bonds were, therefore, rightfully delivered to the new or consolidated corporation.

We perceive no error in the judgment.

It is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 667; 112 U. S., 330.

BENJAMIN U. KEYSER ET AL., *Appts.*, [265]

v.

HENRY H. FARR ET AL.

(See S. C., 15 Otto, 265-267.)

Effect of appeal.

After the acceptance of the bond for an appeal, and the docketing of the cause in this court, the jurisdiction of the court below is gone, and a motion to dismiss, based upon the order of the court below vacating its allowance of the appeal, must be denied.

[No. 1125.]

Submitted Jan. 9, 1882. Decided Mar. 27, 1882.

APPEAL from the Supreme Court of the District of Columbia.

Motion on the part of the appellants for a writ of *supersedeas*, and on the part of the appellees to dismiss.

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The case is sufficiently stated by the court.

Messrs. **West Steever** and **A. C. Bradley**, for appellants.

Messrs. **W. Hallett Phillips** and **William A. Maury**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[266] The decree in this case was rendered on the 26th of October, 1881. The record also shows that the court on the same day entered an order allowing an appeal and fixed the amount of the bond. On the 29th and 31st of October, bonds for the appeal and *supersedeas* were executed by all the several appellants and approved by the *Chief Justice* of the court. On the last day named the case was docketed in this court, and a transcript of the record filed. Afterwards, on the 14th of November, but during the term at which the order allowing the appeal was entered, the appellees moved the court below to require additional security from the appellants, Keyser, Howard and Smith. On the hearing of this motion the court entered an order purporting to set aside and vacate the former allowance of an appeal, but at the same time made a new allowance to take effect on that day.

Upon this state of facts, the appellants, fearing that execution may issue notwithstanding their appeal docketed here, move for an order restraining the court below from proceeding to enforce the decree, and the appellees move to dismiss: 1, because the allowance of the appeal has been vacated; and 2, because the value of the matter in dispute is less than $2,500.

After the acceptance of the bonds for the appeal and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In *Goddard* v. *Ordway*, 101 U. S., 745 [XXV., 1040], there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the Term. In *Draper* v. *Davis* [*ante*, 122], however, it was decided that after a bond had been accepted by one of the justices of the court, in accordance with such an order of allowance, the jurisdiction was transferred to this court. Here there was not only the acceptance of a bond, but an actual entry of the case here. In this way clearly the court below was deprived of power to make its order of November 14. It follows that the motion to dismiss, so far as it is predicated up-
[267] on the order of the court below vacating its allowance of the appeal, must be denied, and that the *supersedeas* which followed in law from the acceptance of the bond by the *Chief Justice*, is in force. Such was our ruling in *Draper* v. *Davis*, *supra*, on a similar motion at the last Term.

The questions presented by the other branch of the motion to dismiss are important, and have not been directly settled, as we think, by any decision yet made by this court. *Their further consideration is postponed until the case is heard on its merits.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CYRUS NICKERSON ET AL., Owners and Claimants of SCHOONER S. C. TRYON, *Appts.*, [267]

v.

MERCHANTS' STEAMSHIP COMPANY, OF CHARLESTON, S. C.

(See S. C., "*The S. C. Tryon*," 15 Otto, 267-270.)

Appeals in admiralty — exceptions — collision.

1. A bill of exceptions is not necessary to give this court jurisdiction of an appeal in admiralty, under the provisions of the Act of February 16, 1875, ch. 77.
2. The findings, which the statute requires, must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions.
3. A steamer is not liable for the consequences of a collision with a schooner, due solely to an unjustifiable change of course by the schooner, when the vessels were in close proximity, which baffled the steamer in her efforts to pass in safety.

[No. 1121.]

Submitted Feb. 28, 1882. Decided Mar. 27, 1882.

APPEAL from the Circuit Court of the United States for the District of Maryland.

Motion to dismiss, with which is united a motion to affirm.

The appellee filed a libel in the District Court of the United States for the District of Maryland, against the schooner S. C. Tryon, her tackle, etc., to recover damages sustained by the steamship Falcon, owned by the libelant, in a collision with the schooner. The district court rendered a decree in favor of the libelant, and the claimants of the schooner appealed to the circuit court. The circuit court made findings of fact and of law, and rendered a decree also in favor of the libelant, from which decree the present appeal is prosecuted.

The appellee now moved the court to dismiss the appeal, because there was no bill of exceptions in the record; and further, if the court should find that it had jurisdiction, the appellee moved to affirm the decree of the circuit court, on the ground that the appeal was taken for delay only, and that the questions on which the jurisdiction of the court depended were frivolous.

Messrs. **John H. Thomas** and *George Leiper Thomas*, for appellee, for motion.

Messrs. Sebastian Brown and *Robert H. Smith* and **W. A. Maury**, for appellants.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[270] A bill of exceptions is not necessary to give this court jurisdiction of an appeal in admiralty under the provisions of the Act of February 16, 1875, ch. 77 [18 Stat. at L., 315], Sup. R. S., 135. That Act expressly provides that the review here shall extend to the determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. At law a bill of exceptions is only used to put into the record that which would not appear without. The findings which the statute requires must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict, as to which

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the inquiry is always open in the reviewing court, whether, when taken in connection with everything else that appears, it is sufficient to support the judgment.

The motion to dismiss must, therefore, be overruled; but, on looking into the record, we are satisfied the appeal was taken for delay. The only question presented arises on the findings of fact. From these it appears that the collision was due solely to an unjustifiable change of course by the schooner when the vessels were in close proximity, which baffled the steamer in her efforts to pass in safety. It is so well settled that a steamer is not liable for the consequences of a collision occurring in this way that we do not deem it proper to retain the cause for further consideration.

The motion to affirm is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[1]

J. H. WADE, *Plff. in Frr.*,

v.

TOWN OF WALNUT.

(See S. C., 15 Otto, 1-3.)

Illinois Constitution.

The section of the Illinois Constitution adopted in 1870, relating to "Municipal subscriptions to railroads or private corporations," took effect July 2, 1870, according to the decisions of the Supreme Court of that State, which this court follows.

[No. 239.]

Argued Mar. 22, 1882. Decided Apr. 3, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below by the plaintiff in error, against the defendant in error, upon certain coupons cut from bonds numbered 301 to 400 inclusive, alleged in the declaration to have been issued pursuant to an Act of Legislature of the State of Illinois, entitled "An Act to Incorporate the Illinois and Grand Trunk Railway," and the amendments thereto, and in accordance with the vote of the people of the Town of Walnut, on August 6, 1870. The bonds were alleged to have been executed January 1, 1871, and delivered by the defendant in error to the railway company, in payment for an equal amount of stock. The plaintiff in error was alleged to have been a purchaser of the bonds and coupons, in September, 1871, in good faith and for value.

A demurrer was filed to the declaration, which was sustained by the court below. The plaintiff appealed to this court.

Messrs. **Thomas S. McClelland** and **George A. Sanders,** for the plaintiff in error:

This court has already passed upon the validity of the bonds of the defendant in error, and the question is *res judicata.*

Walnut v. *Wade* (*ante*, 526).

The Constitution of Illinois of 1870 did not go into effect until August 8, 1870, two days after the election was held, at which the bonds in controversy were voted.

Constitution of 1870, schedule secs. 1, 11, 12, 25, and Governor's Proclamation pp. 42-64; Gross, Stat., 1871; Cooley, Const. Lim., 67; *People* v. *Potter*, 47 N.Y., 377; *People* v. *Supervisors*, 3 Barb., 333; *Real* v. *People*, 42 N. Y., 270; *Richter* v. *Poppenhausen*, 42 N. Y., 373; *People* v. *Norton*, 59 Barb., 169; *People* v. *Gardner*, 45 N.Y., 816; *People* v. *Gardner*, 59 Barb., 198; *Manly* v. *State, etc.*, 7 Md., 135; *Slack* v. *Maysville R. R. Co.*, 13 B. Mon., 17, 18; *State* v. *Comrs.*; 37 N. J. L., 228; *Homestead Cases*, 22 Gratt., 266; *Charles* v. *Lamberson*, 1 Ia., 443; *Bennett* v. *Bevard*, 6 Ia., 89; *Scott* v. *Davenport*, 34 Ia., 211; *Davenport Gas Co.* v. *City, etc.*, 13 Ia., 233; *Cochran* v. *Taylor*, 13 Ohio St., 382: *Wartman* v. *Philadelphia*, 33 Pa., 202; *White* v. *Hart*, 13 Wall., 646 (80 U. S., XX., 685); *Logan* v. *State*, 3 Heisk. (Tenn.), 442; *State* v. *McAdoo*, 36 Mo., 455; *Chance* v. *Marion Co.*, 64 Ill., 70; *Thompson* v. *Alexander*, 11 Ill., 54; *McHaney* v. *Trustees*, 68 Ill., 142.

The Constitution, not fixing *in hæc verba* a different day for the going into effect of the "municipal aid" article, it must of necessity have followed the body of the Constitution, and become operative on August 8; otherwise, we have a connected whole going into operation in parts.

Supervisors v. *Keady*, 34 Ill., 296; *McCutcheon* v. *People*, 69 Ill., 609.

The town having voted the bonds, its officers having executed them, the State Auditor having certified them, and the town having paid interest for some three years, it should be estopped from denying their validity.

Knox Co. v. *Aspinwall*, 21 How., 539 (62 U. S., XVI., 208); *Bissell* v. *Jeffersonville*, 24 How., 287 (65 U. S., XVI., 664); *Moran* v. *Comrs. of Miami Co.*, 2 Black, 732 (67 U. S., XVII., 347); *Mercer Co.* v. *Hackett*, 1 Wall., 91 (68 U. S., XVII., 548); *Supervisors* v. *Schenck*, 5 Wall., 772 (72 U. S., XVIII., 556); *Pendleton Co.* v. *Amy*, 13 Wall., 305 (80 U. S., XX., 580).

Messrs. Allen C. Story and **W. C. Goudy,** for defendant in error:

The bonds from which the coupons sued on were cut, are void on their face under the separate section of the Constitution of Illinois of July 2, 1870, entitled "Municipal Subscription," etc. When this went into operation is a question of constitutional construction only, which belongs exclusively to the Supreme Court of that State.

Having been repeatedly decided adverse to plaintiff's contention, it is *res judicata* and decisive of this case.

Rev. Stat. U. S., sec. 721; Dwar. St. by Potter, 194; *note* 15, 368; Cooley Const Lim., 13, and many cases cited in *note* 3; Judiciary Act, 1789, Par. 34; Const. Ill., 1870, sec. 4, art. XIV.; Vol. 2, Proceedings Ills. Const. Conv., 1878, 1879; *Schall* v. *Bowman*, 62 Ills., 321; *Richards* v. *Donagho*, 66 Ill., 73; *Wright* v. *Bishop*, 88 Ills., 304; *Concord* v. *Savings Bank*, 92 U S., 625 (XXIII., 628); *Moultrie* v. *Savings Bank*, 92 U. S., 636 (XXIII., 634), Hunt, *J.*, in

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NOTE.—*Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws; power of state courts to construe their own statutes.* See *note* to Jackson v. Lamphire, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions except when specially authorized to by statute. See *note* to Commercial Bk. v. Buckingham, 46 U. S., (5 How.), 317.

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Randolph Co. v. *Post*, 93 U. S., 508 (XXIII., 957), *Fairfield* v. *Gallatin Co.*, 100 U. S., 51 (XXV., 545); *Walnut* v. *Wade*, 103 U. S., 687 (XXVI., 527); *Louisville* v. *Sav. Bank*, Mans. Op. Oct. Term, 1881; 104 U. S., 469.

This court, upon questions of the construction of a State Constitution or Statute, will always follow the construction given by the court of last resort in that State, unless the same has been varied or questioned by conflicting decisions of the same State court (of which in Illinois there are none).

Providence Institution v. *Mass.*, 6 Wall., 630 (73 U. S., XVIII., 913); *Randall* v. *Brigham*, 7 Wall., 541 (74 U. S., XIX., 293); *Gut* v. *State*, 9 Wall., 37 (76 U. S., XIX., 574); *R. R. Co.* v. *McClure*, 10 Wall., 515 (77 U. S., XIX., 998); *Secombe* v. *R. R. Co.*, 23 Wall., 117 (XXIII., 69); *Fairfield Co.* v. *Gallatin*, 100 U. S., 47 (XXV., 544); *Randolph Co.* v. *Post*, 93 U. S., 507 (XXIII., 957); *Concord* v. *Savings Bank*, 92 U. S., 625 (XXIII., 628); *Moultrie* v. *Savings Bank*, 92 U. S., 636 (XXIII., 634); *Walnut* v. *Wade*, 103 U. S., 687 (XXVI., 527); *Louisville* v. *Savings Bank*, *supra*.

The constitutional inhibition of July 2, 1870, cannot be evaded or nullified by estoppel. A levy and collection by taxation and payment of interest upon purported obligations of a *quasi* municipal corporation, cannot validate transactions shown upon their face to have been void because *malum prohibitum*.

Marsh v. *Fulton Co.*, 10 Wall., 676 (77 U.S., XIX., 1040); *Loan Association* v. *Topeka*, 20 Wall., 656 (87 U. S., XXII., 455); *East Oakland* v. *Skinner*, 94 U. S., 255 (XXIV., 125); *Schaeffer* v. *Bonham*, 95 Ills., 381; *Sup. of Schuyler Co.* v. *Farwell*, 25 Ills., 181; *Marshall Co.* v. *Cook*, 38 Ills., 48; *Lippincott* v. *Pana*, 92 Ills., 24.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[2] The only question we have to decide in this case is whether the section of the Illinois Constitution adopted in 1870, relating to "Municipal subscriptions to railroads or private corporations," was in force on the 6th of August, 1870. This question came before the Supreme Court of the State at the January Term, 1872, only eighteen months after the Constitution was adopted, in the case of *Schall* v. *Bowman*, 62 Ill., 321, and it was then decided that this section took effect on the 2d of July, the day the people voted for its adoption. The opinion in the case was written by *Mr. Justice* Breese, two justices dissenting. At the September Term in the same year the same questions came again before the court in *Richards* v. *Donagho*, 66 Ill., 74, and the opinion was then delivered by *Mr. Justice* Thornton, in the following words: "The only question presented by this record was, after mature deliberation, settled by the opinion in *Schall* v. *Bowman*. * * * Notwithstanding the able and plausible argument made in this case, the majority of the court adhere to the opinion in the case referred to above." Afterwards, at the January Term, 1878, in *Wright* v. *Bishop*, [3] 88 Ill., 304, the court said: "Appellants make a very able and interesting argument against the rulings in those cases, but we are not convinced they should be overruled."

This court has never until now been called on to decide the question, but in numerous cases it has assumed that the section took effect on the day fixed by the Supreme Court of the State. *Concord* v. *Bank*, 92 U. S., 625 [XXIII., 628]; *Moultrie Co.* v. *Bank*, 92 U. S., 631 [XXIII., 631]; *Randolph Co.* v. *Post*, 93 U. S., 502 [XXIII., 957]; *Fairfield* v. *Gallatin Co.*, 100 U. S., 51 [XXV., 545]; *Walnut* v. *Wade* [*ante*, 526], and *Louisville* v. *Bank* [*ante*, 775], at the present Term. Under these circumstances we are not inclined to consider the question an open one here while the Supreme Court of the State adheres to its present rulings.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COTESWORTH P. HEAD ET AL., *Plffs. in Err.*, [45]
v.
JOSEPH P. HARGRAVE ET AL.

(See S. C., 15 Otto, 45-51.)

Arizona practice—bill of exceptions—opinions of experts—jury.

*1. A "statement" of the case according to the law regulating civil proceedings in the Territory of Arizona takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken; and though prepared for and used on a motion for a new trial, it is available on appeal from the judgment, when, by stipulation of the parties, it is made a part of the record for that purpose.

2. In an action for legal services the opinions of attorneys as to their value are not to preclude the jury from exercising their "own knowledge and ideas" on the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of witnesses is not, as a matter of law, to be accepted by the jury in place of their own.

[No. 240.]

Argued Mar. 22, 1882. Decided Apr. 3, 1882.

IN ERROR to the Supreme Court of the Territory of Arizona.

Statement of the case by *Mr. Justice* **Field:**

This was an action brought in a District Court of Arizona to recover the sum of $2,000, alleged to be owing by the defendants to the plaintiffs for professional services as attorneys and counselors at law in that Territory in 1877 and 1878. The complaint alleges that the services were performed in several suits and proceedings, upon a retainer by the defendants; and that they were reasonably worth that sum. The answer is a general denial.

On the trial, one of the plaintiffs testified to the rendition of the services by them in several suits, stating generally the nature of each suit, the service performed and its value. Five attorneys at law also testified to the value of the services; three of whom were called by the plaintiffs and two by the defendants. They differed widely in their opinions, the highest estimate placing the value of the services at $5,440, [46] the lowest at $1,000.

The court instructed the jury that, in determining the value of the plaintiffs, services, they

*Head notes by *Mr. Justice* FIELD.

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might consider their nature, the length of time they necessarily occupied, and the benefit derived from them by the defendants; that the plaintiffs were entitled to reasonable compensation for the services rendered; and that the reasonableness of the compensation was a fact to be determined from the evidence as any other controverted fact in the case; and then proceeded as follows:

"The services rendered were skilled and professional, and for the purpose of proving to you the value of that class of services rendered, professional gentlemen, attorneys at law, claiming to be familiar with the value of such services, have testified before you. If you accredit *these witnesses* with truthfulness, their testimony should have weight with you; and the fact as to what is a reasonable compensation should be determined from the evidence offered, and not from your own knowledge or ideas of the value of that class of services. In other words, you must determine the value of the services rendered from the evidence which has been offered before you, and not from your own knowledge or ideas of the value of such services."

[47] The defendants, thereupon, asked the court to instruct the jury as follows:

"In determining the value of the plaintiffs' services the jury are not bound by the testimony of the expert witnesses; that testimony may be considered by the jury, but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable.

In determining the value of the plaintiffs' services the jury are not bound by the opinions of the witnesses, unless the jury shall find from all the evidence taken together, including the nature of the services, the time occupied in the performance of them and the result of them, and the benefit derived by the defendants from the rendition of said services, that said opinions are correct."

The court refused to give these instructions, and an exception was taken. The jury, thereupon, gave a verdict for the plaintiffs for $1,800; upon which judgment was entered. A statement of the proceedings at the trial was then prepared, which, among other things, set forth the alleged errors of law excepted to by the defendants. This statement was used on a motion for a new trial, which was denied; and by stipulation it was embodied in the papers for the appeal to the Supreme Court of the Territory from the judgment, as well as from the order denying the new trial. The order and judgment were both affirmed; and, to review the judgment, the case is brought to this court.

Messrs. Thomas Fitch and **C. J. Hillyer,** for plaintiffs in error.

Messrs. Philip Phillips and **W. Hallett Phillips,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The defendants in error object to the use of the statement, which sets forth the exceptions taken, as not constituting a part of the record before us. The ground of the objection is, that the statement was prepared for and used on the motion for a new trial, with the disposition of which this court cannot interfere. The objection would be tenable but for the stipulation of the parties that the statement might be used on appeal from the judgment. A statement of the case, according to the law regulating civil proceedings in the Territory, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is embodied in the record for that purpose, though used on the motion for a new trial. We have had occasion to refer to this subject in *Kerr* v. *Clampitt*, which arose in Utah, where a similar system of procedure in civil cases obtains; and it is unnecessary to repeat what is there said. 95 U. S., 188 [XXIV., 498].

The only question presented for our consideration is, whether the opinions of the attorneys, as to the value of the professional services rendered, were to control the judgment of the jury so as to preclude them from exercising their "own knowledge or ideas" upon the value [48] of such services. That the court intended to instruct the jury to that effect is, we think, clear. After informing them that in determining the value of the services they might consider their nature, the time they occupied and the benefit derived from them; also, that the plaintiffs were entitled to reasonable compensation for the services, and that the reasonableness of the compensation was a fact to be determined from the evidence, it proceeded to call special attention to the testimony of the attorneys, and told the jury that if they accredited *these* witnesses with truthfulness, their testimony should have weight, and the fact as to what is reasonable compensation should be "determined from the evidence offered," and not from their own knowledge or ideas of the value of that class of services, and emphasized the instruction by repetition, as follows: "You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge or ideas as to the value of such services." This language qualifies the meaning of the previous part of the instruction. It is apparent from the context that by the words "evidence offered" and "evidence that has been offered before you" reference was made to the expert testimony, and to that alone. Taken together, the charge amounts to this: that while the jury might consider the nature of the services and the time expended in their performance, their value, that is, what was reasonable compensation for them, was to be determined exclusively from the testimony of the professional witnesses. They were to be at liberty to compare and balance the conflicting estimates of the attorneys on that point, but not to exercise any judgment thereon by application of their own knowledge and experience to the proof made as to the character and extent of the services; that the opinions of the attorneys as to what was reasonable compensation was alone to be considered. That the defendants so understood the charge, is evident from the qualifications of it which they desired to obtain; and the jury may, in like manner, have so understood it. And as we so construe it, we think the court erred, and that it should have been qualified by the instructions requested. Those instructions correctly pre-

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sented the law of the case. It is true that no exception was taken to the charge; but its modification was immediately sought by the instruc-
[49] tions requested, and to the refusal to give them an exception was taken. Objection to the charge was thus expressed as affirmatively and pointedly as if it had been directed in terms to the language used by the court.

It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services, does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill-perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly re-
[50] ceived, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable.

As justly remarked by counsel, the present case is an excellent illustration of the error of confining the jury to a consideration merely of the opinions of experts. Of the five attorneys who were witnesses, no two agreed; and their estimates varied between the extremes of $1,000 and $5,440. Directing the jurors to determine the value of the professional services solely upon these varying opinions, was to place them in a state of perplexing uncertainty. They should not have been instructed to accept the conclusions of the professional witnesses, in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is, in no case, to be substituted for that of the jurors. The instructions tended to mislead as to the weight to be given to the opinions of the attorneys, especially after qualifications of them designed to correct any misconception on this head, were refused.

In *Anthony* v. *Stinson*, a question, similar to the one here presented, came before the Supreme Court of Kansas and a like decision was reached. The instruction given at the trial, that the testimony of certain lawyers as to the value of professional services should be the guide of the jury, and that they should be governed by it in finding the value of the services rendered, was held to be erroneous; the court observing that the jury were not to be instructed as to what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. 4 Kan., 212.

In *Patterson* v. *Boston*, which arose in Massachusetts, the question was as to the damages to be awarded to the plaintiff for his property, taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact which bore upon the issue, he ought to disclose it and be sworn, and communicate it to his fellows in [51]
open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses. The case being taken to the Supreme Court of the State, it was held that these directions were not open to exceptions. Said *Ch. J.* Shaw, speaking for the court: "Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, which depends on knowledge and experience, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties." 20 Pick., 166.

In *Murdock* v. *Sumner*, the same court, speaking through the same distinguished Judge, said that "The jury very properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry." In that case a witness had testified as to the quality, condition and cost of certain goods, and given *his opinion* as to their worth, and the court said that "The jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality and condition of the goods, and come to a different opinion as to their value." 22 Pick., 158.

In like manner, in this case, the jurors might have taken the facts testified to by the attorneys as to the character, extent and value of the professional services rendered, and then come to a different conclusion. The instructions given, whilst stating that the nature of the services rendered, the time occupied in their performance, and the benefit derived from them might be considered by the jury, directed them that they should be governed by the opinions of the experts as to the value of the services and, in effect, forbade them to exercise their own knowledge and ideas on that kind of services. This

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error would have been avoided if the instructions requested by the defendants had been given.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[132] GEORGE C. RIVES, Administrator of GEORGE RIVES, *Plff. in Err.*,
v.
RICHARD W. W. DUKE, Jr., Administrator of WILLIAM P. FARISH.

(See S. C., 15 Otto, 132-142.)

Contract payable in bankable Confederate Currency—"currency of the day."

* On the 5th of December, 1863, after the Proclamation of Emancipation, and in that part of Virginia, the people of which were in rebellion against the United States, one resident therein sold and delivered to another a number of slaves, with warranty of title, but not of soundness, the purchaser covenanting "to pay on delivery the sum of $25,000 in bankable Confederate currency and, in addition, to give his note," with two persons named as sureties "for the further sum of $20,000, to be paid in twelve months after call, in equal annual payments thereafter, or at the purchaser's option it may be, on call, all or a part paid," and the seller covenanting "not to call upon the purchaser for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call." On the 1st of January, 1864, the purchaser, in lieu of the note, made to the seller two bonds, with the same persons as sureties, to pay $8,000 "on demand, or twelve months thereafter, at the option of the obligors," and $12,000 "on demand, or two years thereafter, at the option of the obligors," "in the bankable currency of the day, according to the agreement of the 5th of December last," "the said demand shall be made in writing by the obligee, his heirs or legal representatives only." Payment of the bonds was demanded in writing by the obligee after the end of the war of the rebellion, and when the bankable currency of Virginia consisted wholly of notes of the United States or of the national banks. *Held*, in an action on the bonds, that the plaintiff had no ground of exception, (1) to the admission of evidence that, at the time of the making of the agreement and the bonds, Confederate currency was bankable and was the only currency in circulation in Virginia, the value of gold in relation to such currency was as nineteen or twenty to one, slaves were not being sold at all for gold, and these slaves were not worth in Confederate currency so much as $45,000, and that before the war, when the price of slaves was at its highest, such a lot of slaves would not have been worth more than a fifth of that sum in gold; (2) to an instruction to the jury that, if they found that the bonds were made in reference to Confederate currency, the plaintiff was entitled to recover the amount, therein stipulated to be paid, at the value of Confederate money compared with National currency at the time of the making of the bonds.

[No. 156.]

Argued Mar. 9, 1882. Decided Apr. 3, 1882.

IN ERROR to the Circuit Court of the United States for the Western District of Virginia.

[133] Statement of the case by *Mr. Justice* **Gray**:

This was an action of covenant, brought by the executor of the will, and prosecuted by the administrator *de bonis non* of George Rives, against the administrator of the estate of William P. Farish, a surety on two bonds.

The declaration alleged that on the 5th of December, 1863, in the County of Albemarle and State of Virginia, George Rives and George L. Peyton executed an agreement under seal, which began with a "list of servants sold to George L. Peyton" (giving the names and ages of thirty-three negroes, the oldest of whom were fifty-one years of age and the youngest were infants), and the rest of which was as follows: "I have this day contracted to sell and deliver on the place on the 1st of January next to George L. Peyton the above list of negroes, thirty-three in number. The title thereto I warrant, but make no warranty of soundness. For the same negroes the said George L. Peyton agrees to pay on delivery the sum of $25,000 in bankable Confederate currency, and in addition to give his note, with William P. Farish and William H. Peyton as sureties, for the further sum of $20,000, to be paid in twelve months after call, in equal annual payments thereafter, or at said Peyton's option it may be, on call, all or a part paid. The said George Rives covenants he will not call on said Peyton for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call. The said postponed payment to carry interest from 1st January next, and to be annually paid at Monticello Bank. The said George Rives further engages to furnish said Peyton 100 barrels of corn at $20 per barrel, to be delivered on the place as soon as gathered, and the money therefor to be paid down in Confederate bankable currency. In witness whereof and mutual obligation to perform our respective engagements, we this day, 5th of December, 1863, [134] have signed our hands and seals."

The declaration then alleged that on the 1st of January, 1864, in pursuance of that agreement, Rives delivered the negroes to Peyton on the farm in Albemarle on which Rives then resided, which was "the place" referred to in the agreement, and also delivered the one hundred barrels of corn, and Peyton paid to Rives in bankable Confederate currency $25,000 in part payment of the purchase money contracted to be paid for the slaves, and gave to Rives his two bonds, executed by William P. Farish and William H. Peyton as sureties, amounting in the aggregate to $20,000, the first of which bonds was in these terms: "On demand, or twelve months thereafter, at the option of the obligors, we promise to pay in the bankable currency of the day (according to agreement of the 5th December last) to George Rives, his heirs or assigns, $8,000, with interest from date, to be annually paid on 1st January at Monticello Bank, Charlottesville; the same being in part of the purchase money for thirty-three negroes, the title whereof is warranted, but no warranty is made of soundness. The said demand shall be made in writing by said George Rives, his assigns or legal representatives only. In witness whereof, we have hereto put our hands and seals this 1st day of January, 1864;" and the other bond was precisely like the first, except in substituting the words "two years" for "twelve months," and "twelve thousand" for "eight thousand;" and that these bonds were delivered and accepted as a compliance on the

*Head note by *Mr. Justice* GRAY.

NOTE.—*Contracts payable in Confederate notes; tender of.* See *note* to Thorington v. Smith, 75 U. S., XIX., 361.

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part of Peyton with the provision in the previous agreement to give his note for $20,000.

The declaration further alleged that in August 1866, before the institution of this suit, Rives demanded in writing of the obligors payment of the principal and arrears of interest of the bonds, and that, with the exception of the interest for one year, which fell due on the 1st of January, 1865, and which was paid, no part of the principal or interest had been paid.

The defendant demurred generally to the declaration, and pleaded covenants performed and covenants not broken, and twenty-five special pleas, which set forth at length, and in various forms, that the bonds were executed in consideration of part of the price of thirty-three [135] negroes which Rives agreed to sell and did sell and deliver to Peyton, with warranty of title as slaves, after the Proclamation of Emancipation issued by the President of the United States on the 1st of January, 1863, and from that date until after the sale and delivery of the negroes both Rives and Peyton were participants in the then existing rebellion against the United States, and they and the negroes were residents of Albemarle County in the State of Virginia, which were designated in the Proclamation among the States and parts of States the people of which were in rebellion against the United States, and the negroes were there held as slaves, and were by the Proclamation ordered and declared to be thenceforward free and, therefore, at the time of the contract, sale and delivery were free persons; that before the demand of payment, or the institution of this suit, and by action of the sovereign authority and Government of the United States and of the State of Virginia, and by the Amendments of the Constitutions of the United States and of the State of Virginia, slavery in Virginia had been abolished, and these negroes had been made, recognized and declared to be free persons; that afterwards Peyton, in pursuance of the Proclamation, was, by the authority and power of the Executive Government of the United States, including the military and naval authorities thereof, wholly deprived of these negroes; that, by reason of the premises, the warranty of title was broken, and the consideration of the bonds failed; that the contract sale and delivery were in direct contravention of the policy of the Government of the United States, as manifested by the Proclamation, and it had become unlawful to make or to enforce in the courts of the United States, or of the State of Virginia, any contract of the plaintiff's testator whereby these negroes had been or were treated or dealt with otherwise than as free persons; that the plaintiff's testator, being one of the persons included in the offer of amnesty and pardon contained in the Proclamations of the President of the 8th of December, 1863, and the 29th of May, 1865, had accepted the same upon the terms and conditions therein set forth, and had taken the oaths therein prescribed, and had also received from the President a special pardon upon the same conditions; [136] and that, upon each of these grounds, the plaintiff could not maintain this action.

The defendant also filed a notice "That, on the trial of this cause he will insist upon his right to have the bonds sued upon, sealed according to the provisions of chapter 138 of the Code of Virginia (ed. of 1873) as bonds which were either, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate State treasury notes, or were entered into with reference to such notes as a standard of value."

The plaintiff joined issue on the first and second pleas, and demurred to the twenty-five special pleas. The court overruled the demurrer to the declaration, and sustained the demurrers to the special pleas.

At the trial of the issues of fact, the plaintiff introduced evidence tending to prove the allegations of the declaration, and that, at and ever since the date of the demand in writing, in August, 1866, the bankable currency of Virginia consisted wholly of United States notes commonly called greenbacks, and of national bank notes, which have always been of about equal value in their relations to gold.

The defendant offered evidence tending to prove the following facts: "1. That Confederate currency was the only currency in circulation in Virginia in December, 1863, or January, 1864. 2. That, in December, 1863, the value of gold in relation to such currency was as 20 to 1, and in January, 1864, as 19 to 1. 3. That of the thirty-three slaves sold by George Rives to George L. Peyton, one woman and her two children were scrofulous, and another woman a cripple; and that in December, 1863, and January, 1864, the said thirty-three slaves were not worth in Richmond, Virginia, in Confederate currency, as much as $45,000; and that they were worth less in Albemarle, where they were sold, than in Richmond. 4. That such a lot of slaves before the late war, even when the price of slaves was at its highest, would not have been worth more than $8,000 or $9,000. 5. That, in December, 1863, and in January, 1864, all Confederate currency in circulation was bankable. 6. That, as early as the fall of 1863, there was a general expectation among the people of Virginia that the Confederate Congress would adopt measures to reduce the volume of Con- [137] federate money, and that the value of such money would be thereby much increased. 7. That, in point of fact, the Confederate Congress, in February, 1864, did pass a law taxing to the extent of 33⅓ per cent all Confederate currency which should not be invested in 4 per cent Confederate bonds, on or before the 1st of April, 1864; the effect of which law was to depreciate still further the value of Confederate currency then in circulation, and that after the 1st of April, 1864, the Confederate money issued prior thereto ceased to be bankable. 8. That in December, 1863, and January, 1864, slaves were not being sold at all for gold. 9. That about the same time Tucker Coles, of Albemarle, living five or six miles from George Rives, owned about two hundred slaves, mechanics and field hands, and averaging in value better than the slaves of George Rives; that he tried to sell a large number of said slaves at $50 a head, in gold, but could not; and that he would have sold them at $30 a head, in gold, had it been offered to him. 10. That all of the slaves purchased of George Rives by George L. Peyton perished as property on his hands at the close of the war. 11. That, in August, 1866, the premium on gold as compared with national currency, was 49 per cent; in August, 1867, it was 41 per cent; and in August, 1868, 45 per cent,

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and that at this time such premium is only ¼ of 1 per cent."

To the introduction of each and every part of this evidence the plaintiff objected, and moved the court to exclude the same: "1. Because the contract sued upon is in writing, and its meaning free from ambiguity, obscurity, or uncertainty of any kind, and cannot, therefore, be explained, added to or in any manner varied by parol evidence. 2. Because the evidence offered does not come within the scope or meaning of the Statute of Virginia in reference to Confederate contracts which was intended to apply only to contracts for the payment of dollars in general, and not to those in which the kind of dollars is specifically expressed, or becomes certain by some event or contingency mentioned in the contract. 3. Because if, according to the true interpretation of the Virginia statute just referred to, it makes parol testimony admissible to explain, add to or in any manner vary a contract [138] in writing entered into prior to its enactment, and which is in no way ambiguous or uncertain, then the statute is a violation of the Federal Constitution, because it not only impairs, but destroys the obligation of the contract, making a new one in its stead. 4. Because the evidence is irrelevant, since if all the facts which it legitimately tends to prove were admitted they would show no defense.'

But the court overruled the plaintiff's objections, and admitted the evidence, and to the ruling admitting it the plaintiff excepted.

The plaintiff asked the court to instruct the jury as follows: "First. If they find that the contract in writing between George Rives and George L. Peyton, dated the 5th of December, 1863, and given in evidence by the plaintiff, is the contract referred to in the bonds sued on, then the contract and bonds are to be construed together and, so construed, they import in themselves, not a contract to be paid absolutely in Confederate money, or any other specific currency, but a contract of hazard, that is to say, a contract payable in whatever currency should be bankable at the respective dates when the obligors were bound to pay said bonds, that is to say, on the 30th of August, 1867, as to the smaller bond, and the 30th of August, 1868, as to the larger bond. Second. If the jury find that the contract of the 5th of December, 1863, and two bonds of the 1st of January, 1864, given in evidence by the plaintiff, contain the true understanding and agreement of the parties as to the currency in which said bonds were to be paid; that more than two years before the institution of this suit George Rives demanded payment of said bonds of each of the obligors therein, and in the mode agreed upon, that at the time of said demand, and ever since, bankable currency in Charlottesville and throughout Virginia consisted wholly of national bank notes and greenback notes of the United States Government, and that these have always been equal in their relation to gold: then the jury must find for the plaintiff the face amount of the bonds, less the one year's interest credited thereon. Third. There is no evidence in the case to warrant the [139] jury in finding that there was any other agreement or understanding between the parties, as to the kind of currency in which the bonds were to be paid, than that which is contained in the written contract and bonds themselves."

But the court refused to give the instructions requested, or either of them, and instructed the jury as follows: 'If the jury find from the evidence that George Rives and George L. Peyton on the 5th of December, 1863, entered into the agreement offered in evidence, and in pursuance thereof, and in accordance with its terms Rives delivered the negroes to Peyton, and the bonds sued on were given, on which the defendant's intestate was surety, then the plaintiff is entitled to recover the amount stipulated to be paid in said writings obligatory in the currency of the United States at its value at the time the same fell due, according to their tenor and effect, unless the jury find, from the evidence in the cause, that the said writings obligatory were at the time made and understood by the parties thereto to be made payable in Confederate money. And if the jury find from the evidence that the said bonds or writings obligatory were made in reference to Confederate currency, then the plaintiff is entitled to recover the amount stipulated to be paid in such bonds, at the value of Confederate money compared with national currency at the time of the making thereof, with interest from the time said bonds according to their tenor and effect became payable. But if the jury find from the evidence that the bonds and contract offered in evidence were made in view of the uncertainty of the value of the then or future bankable currency of the place of payment, and that each party, in entering into the contract, took the risk of what money should be current at the time for payment of said bonds according to the tenor and effect thereof, then the plaintiff, if the jury find that the parties executed the contract offered in evidence, and the bonds offered in proof in pursuance thereof, is entitled to recover the sum nominated in said bonds in national currency at the time the same became due, with interest thereon."

The plaintiff excepted to the refusal to give the instructions requested, and to the instructions given, upon the same grounds on which he had objected to the admission of the evidence offered by the defendant.

The jury, by their verdict, "Find for the [140] plaintiff on the issues joined, and assess his damages at $1,000, with interest at the rate of six per cent per annum from the 1st of January, 1865, till paid, that being the scaled value as of the 1st of January, 1864, of the nominal amount of the bonds sued on, less the one year's interest thereon;" and the court gave judgment for the plaintiff accordingly.

Messrs. **William W. Crump & E. R. Watson,** for appellants.

Messrs. **William J. Robertson,** *R. T. W. Duke* and **S. V. Southall,** for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

It is settled by the decisions of this court, that a contract, made within the so-called Confederate States during the war of the rebellion, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, may be shown, by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in Confederate currency; and that if that fact is shown, in an action upon the contract, no more can be recov-

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ered than the value of that currency in lawful money of the United States *Thorington* v. *Smith*, 8 Wall., 1 [75 U. S., XIX., 361], *Confederate Note Case*, 19 Wall., 548, 559 [86 U. S., XXII., 196, 200]; *R. R. Co.* v. *King*, 91 U. S., 3 [XXIII., 186].

By the bonds in suit, the obligors promise to pay "on demand, or" (in the first bond) "twelve months," and (in the second bond) "two years thereafter, at the option of the obligors," eight thousand and twelve thousand dollars respectively, "in the bankable currency of the day, according to the agreement of the 5th December last." In the agreement so referred to, which is a contract for the sale of slaves, that part of the price which is to be paid on the delivery is clearly expressed to be "the sum of twenty-five thousand dollars in bankable Confederate currency;" and the agreement, upon its face, affords strong ground for inferring that "the further sum of twenty thousand dollars to be paid in twelve months after call," and as to which the seller covenants not to call for specie, but to be satisfied with the "bankable currency of the day," is also to be paid in Confederate currency, and that the effect of this clause is not varied by the omission to repeat therein the word "Confederate," the use of which, in the previous as well as in the subsequent part of the agreement, shows the kind of bankable currency which the parties to the agreement, and to the bonds that refer to it, had in mind. And a consideration of the nature of the agreement, and of the circumstances under which it was made, removes all doubt upon the subject.

[141]

It was a contract for the sale and purchase of slaves, made and to be performed in, between parties residing in that part of the State of Virginia from which the authority of the National Government was excluded by the rebel armies, and was made after the Proclamation of Emancipation issued by the President of the United States had declared all slaves in that district to be free. If the so-called Confederate States should achieve independence, the money of the United States would be the money of a foreign country. If the national authority should be re-established over the insurgent districts, the slaves, for part of the price of which the payment was to be made, would be free, in fact and in law, and be wholly lost to the purchaser. In view of either alternative, the parties cannot reasonably be held to have contemplated payment in any other currency than that of the Confederate States.

That part of the evidence introduced by the defendant, of the competency of which, in the light of the decisions in *Thorington* v. *Smith* and in the *Confederate Note Case*, above cited, there can be no question, leads to the same conclusion. It tended to prove that, at the time and place of the making of the agreement and of the bonds, the only currency in circulation or bankable was Confederate currency; the value of that currency in relation to gold was as one to nineteen or twenty; slaves were not being sold at all for gold; and these slaves were not worth more than the stipulated price computed in Confederate currency, and would never, even before the war, have been worth more than a fifth of that price in gold.

The competency of the evidence as to the popular expectation of an increase in the value of Confederate currency, and as to the price at which another person would or could have sold other slaves, is much more doubtful, and need not be considered, inasmuch as it was not specifically contested at the argument, probably because its exclusion could not vary the result, so long as the evidence which we hold to be competent is admitted.

[142]

The facts of the case clearly distinguish it from *Gavinzel* v. *Crump*, 22 Wall., 308 [89 U. S., XXII., 788], and bring it within that class of cases in which the Court of Appeals of Virginia has held contracts made during the war to be payable in Confederate currency only. See, *McClung* v. *Ervin*, 22 Gratt., 519; *Hilb* v *Peyton*, 22 Gratt., 550; *Bowman* v. *McChesney*, 22 Grat., 609, and *Calbreath* v. *Virginia Porcelain Co.*, 22 Gratt., 697.

For these reasons, we are all of opinion that the parties to the bonds in suit contemplated payment in Confederate currency; and it is immaterial to consider whether, by reason of the option given to the seller in the original agreement, and to the obligors in the subsequent bonds, the value of that currency should be estimated as of the date of the bonds, or as of the date of the demand of payment, because the earlier estimate, upon which the instructions of the court and the verdict of the jury proceeded, is the more favorable to the plaintiff.

As no error prejudicial to the plaintiff is shown in the rulings and instructions of the court, and as the defendant has not and could not have appealed from the judgment below, it would be extrajudicial to pass upon the further position of the defendant, that the bonds sued on have no legal validity or effect.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court U. S.

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[175]

MARINE AND RIVER PHOSPHATE MINING AND MANUFACTURING CO. ET AL., *Appts.*,

v.

WILLIAM L. BRADLEY.

(See S. C., "*Manufacturing Company* v. *Bradley*," 15 Otto, 175-183.)

Suit by assignee—jurisdiction dependent on citizenship—court of equity—stockholders as parties—assignment by receiver.

1. A corporation indorsed one of its own bonds with an agreement in writing to pay the bond to bearer, with interest, on a day certain; *held*, that such indorsement was in effect a promissory note, although the seal of the corporation was thereto affixed, and the assignee thereof was not prevented from suing thereon because the assignor could not.

2. To confer or oust jurisdiction, when that depends on citizenship, the necessary facts must be distinctly alleged and admitted or proved.

3. A court of equity has jurisdiction of an action to enforce a lien on corporate property and, as incident to that, to make a decree against the corporation for the payment of the debt.

4. In such action, stockholders who are charged with individual liability should be made parties, that they may have the opportunity to defend, and in case of payment by them, that they may secure their right to be subrogated to the right of the creditor against the company, and indemnify themselves out of the corporate assets.

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5. The want of authority in a receiver to transfer a bond is no defense to the obligors, where it appears that the transfer, if not previously authorized, was subsequently confirmed by the court.

[No. 215.]

Argued Mar. 6, 1882. Decided Apr. 3, 1882.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The case is stated by the court.

Messrs. **A. G. Magrath,** *Samuel Lord, Jr.*, and *James Lowndes*, for appellants.

Messrs. **William E. Earle** and **James B. Campbell**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The Marine and River Phosphate Mining and Manufacturing Company, one of the appellants, is a Corporation organized under the General Statutes of South Carolina, on March 15, 1870, with a subscribed capital of $500,000, the amount limited by the articles of association, of which but one half had actually been paid in.

On December 28, 1872, it borrowed from William J. Gayer, receiver, appointed by the Court of Common Pleas for the County of Charleston, in a cause pending therein, *Dabney, Morgan & Co.* v. *The Bank of the State of South Carolina*, the sum of $20,000 of the funds in his hands, and which he was authorized so to invest.

As evidence of, and security for the loan, the [176] Phosphate Company executed and delivered its bond, of which the following is a copy:

"STATE OF SOUTH CAROLINA, }
CHARLESTON COUNTY. }

Know all men by these presents, that we, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, are held and firmly bound unto William J. Gayer, receiver, in the sum of $20,000, with interest thereon at the rate of ten per cent annually, payable semi-annually, to be paid on the first day of July next ensuing the date hereof, for which payment well and truly to be made we, the said Company, do hereby bind ourselves and our successors firmly by these presents.

In witness whereof the said Company have caused their seal to be hereunto affixed, the 28th day of December, A. D. 1872.

We, the said Company, do further covenant and agree that the above bond constitutes a lien upon the property of the said Company, and that the same is issued under and pursuant to the provisions of section thirty-nine of chapter sixty-four of the General Statutes."

It is signed by "D. T. Corbin, President, Marine and River Phosphate Mining and Manufacturing Company of South Carolina," and countersigned by "Reuben Tomlinson, Treasurer," and sealed with the corporate seal.

Subsequently to the maturity of this bond, C. C. Puffer, who had become successor in the receivership to Gayer, on April 2, 1874, transferred and delivered it to D. T. Corbin, in exchange for 300 shares of the capital stock in the Phosphate Company, owned by him. This transaction was reported by the receiver to the court as a payment of the note, and the shares of stock were carried as part of the fund in the hands of the receiver, and were afterwards sold by order of the court. No express order of the court is produced authorizing the transaction, but the accounts of the receiver disclosing it were passed and confirmed and the receiver discharged. Corbin, at this time was still president of the Phosphate Company. The bond, while held by the original receiver, had been duly recorded in the office of the register for *mesne* conveyances, as a lien upon the Company's property.

On May 13, 1874, an indorsement was made [177] upon the bond, as follows:

"In consideration of further forbearance on the part of the holder of this bond till the 1st day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promises, waiving all set-off or other defense, to pay this bond to bearer on the first day of January, A. D. 1875, with interest at the rate of twelve per cent per annum from the first day of April, 1874, payable quarterly; and should said bond not be paid on the first day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned, till paid."

This indorsement was signed "The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, by D. T. Corbin, President," countersigned by "Reuben Tomlinson, Treasurer," with the corporate seal affixed.

The evidence on the point does not permit any doubt that this arrangement was made between Corbin and the Company, acting with the full knowledge and express sanction of the directors. The treasurer, Tomlinson, testifies that he objected to taking any action upon the proposal of Corbin for an extension of payment as contained in the indorsement, without first submitting the question to the Board of Directors. The form of the renewal was the one agreed to by them, and by them ordered to be indorsed on the bond. This was done with knowledge that Corbin then held it. The interest to be paid appears to be lawful and customary, being then the rate charged by banks. It was regularly paid by the treasurer to Corbin, and in December, 1876, a payment of $10,000 was made to him by the treasurer on account of the principal. That payment was reported to the Board of Directors, some of whom had been consulted in regard to it by the treasurer before it was made; because, as he states, "The funds on hand at the time having been provided for other purposes, I did not feel at liberty to use them for that purpose without first consulting with such directors as were conveniently at hand." He adds: "Mr. Corbin frequently, during the months of January and February, 1877, requested me to arrange for the payment of the balance of $10,000 princi- [178] pal, and the interest due on said bond. The matter was brought to the attention of the directors by me, and no objection was made by them to the payment of said money if it could be raised without serious embarrassment to the Company. Arrangements to pay said bond were finally made and the money actually raised and deposited in bank for that purpose, subject, however, to conditions, the fulfillment of which was prevented by the change in the organization of the Company which took place in March, 1877."

In June, 1877, Corbin transferred and deliv-

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ered the bond to Bradley, the appellee, in consideration of $10 paid, and his agreement to pay the amount still due on the face of it, less the $10 paid, as stated in a letter from Corbin to Bradley, making the offer which was accepted, "Only when you shall have collected the amount from the Company, and what you shall collect from the Company, less the cost and expenses of collection."

In answer to a question on cross-examination, as to his motive and purpose in parting with the bond in this way, Mr. Corbin said, "That the Company had refused to pay the bond, and I believed if I held the bond I would be compelled to litigate the same with the Company, and I believed if it passed into the hands of a third person, in good faith, that the Company would pay it to him without a long and tedious litigation, having no prejudices against him, as I believed; and further, I did not wish to be a party plaintiff in an important suit against the Company that I had been so long connected with as president."

On July 5, 1877, Bradley, being a citizen of Massachusetts, filed his bill in equity in the Circuit Court of the United States for the District of North Carolina against The Marine and River Phosphate Mining and Manufacturing Company, and several others, alleged to be citizens of South Carolina, and stockholders in that Corporation. It alleges that the bond is a lien upon all the property of the Corporation, embracing certain described personal property, and the franchise granted to it by the State to dig, mine and remove from the bed of the navigable streams and waters within the jurisdiction of the State the phosphate rock and deposits, according to an Act passed March 1, 1870. It also alleges that the defendants [179] charged to be stockholders in the Corporation, have not fully paid up the amount of the capital subscribed by them, and that they are within the provisions of section 23, of chapter 64, of the General Statutes of South Carolina, under which Act the Corporation was organized, which provides that "The members of every company shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company in manner aforesaid is paid in, and a certificate thereof made and recorded as prescribed by the following section."

The bill contains the following averment: "That to bring a separate and distinct action at law against each of such stockholders would be a great hardship to your orator, inasmuch as a court of equity has full power to hear and adjudicate all the issues between your orator and the said several defendants, thus preventing a multiplicity of suits; and by ascertaining the number of shares of the capital stock of the said Marine and River Mining and Manufacturing Company of South Carolina, held by the said several defendants, the amount of the subscription paid upon each of said shares, and the amount still due and unpaid thereupon, can adjust and decree the amount which each of said defendants justly owes to your orator, and can afford him that relief which a court of law is unable to give."

The prayer of the bill is, that the defendant, The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, be decreed to pay the amount due upon the bond, with interest; that the same be declared to be a lien upon its property described in the bill, and that the same be sold for the payment and satisfaction thereof; and that the other defendants be decreed to be justly and severally liable for the amount of the said debt, and to pay on account thereof so much of the unpaid subscription of each share of the stock in said Corporation, held by them severally, as shall be necessary to pay the same, and for general relief.

A final decree was rendered against the Phosphate Company and several of its stockholders, co-defendants, for the payment of the amount due on account of the said bond, for which execution was awarded, and a decree foreclosing the equity of redemption in the corporate property described in the bill, on which the bond is [180] declared to be a lien, and directing its sale.

To review this decree the defendants below prosecute the present appeal.

Several questions, arising upon the pleadings and evidence, and embodying the errors assigned upon the decree, will be considered in their order.

I. The first of these relates to the jurisdiction of the court.

It is objected, in the first place, that the complainant is the assignee of a chose in action on which no suit could have been maintained in the Circuit Court by his assignor, and that, consequently, he is within the prohibition of the 1st section of the Act of March 3, 1875. The answer to this objection is, that the obligation sued on is a negotiable promissory note, and is, therefore, excepted out of the prohibition relied on. It is true that the bond, as originally executed, was payable to Gayer, receiver, simply, and was not negotiable; but the subsequent indorsement was a new and complete contract, upon a distinct and sufficient consideration, and being payable to bearer is negotiable by delivery merely. It is a negotiable note within the meaning of the law merchant, and according to the law of the place of the contract, notwithstanding it is an instrument under seal. *Langston* v. *R. R. Co.*, 2 S. C. (N. S.), 251; *Bank* v. *R. R. Co.*, 5 S. C. (N. S.), 158; *Bond Debt Cases*, 12 S. C. (N. S.), 250.

It is further objected, however, that the transaction between Corbin and Bradley was fictitious and not real, and that the title to the bond remained in the former, so that the latter, not being the real party in interest, cannot maintain an action to enforce it; that the present suit is collusive, for the purpose of conferring jurisdiction upon the Circuit Court and, therefore, within the rule declared in *Smith* v. *Kernochen*, 7 How., 216; *Jones* v. *League*, 18 How., 76 [59 U. S., XV., 263], and *Barney* v. *Baltimore*, 6 Wall., 280 [73 U. S., XVIII., 825], and enacted by the 5th section of the Act of March 3, 1875, as construed in *Williams* v. *Nottawa* [*ante*, 719], decided at the present Term.

The delivery of the bond by Corbin to Bradley under the arrangement for its transfer, however, was a transfer of the legal title to the obligation. Whether the agreement was not also a transfer by Corbin of all beneficial interest in [181] the bond, depends on whether Bradley was bound to account to him specifically for the net proceeds of its collection, or only to pay him so

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much money as they should amount to—a question which it is not necessary to decide; because it does not appear from this record but that Corbin could himself have maintained a suit in his own name in the Circuit Court upon the bond. It is nowhere distinctly alleged or shown that at the time this suit was brought, he was a citizen of South Carolina. That he was so at the time of the original transaction may be presumed or inferred from the circumstances; but to confer or oust jurisdiction, when that depends on citizenship, the necessary facts must be distinctly alleged and admitted or proved. Upon the present state of the record, the assumption could not have been made in his favor to sustain the jurisdiction if he were seeking as a citizen of South Carolina to prosecute an action; and equally it will not be made to defeat the jurisdiction, which otherwise is rightly invoked by the plaintiff below.

It is further objected that the jurisdiction in equity cannot be sustained, because the plaintiff had a complete and adequate remedy at law, so far, at least, as relief is sought against the stockholders individually upon their statutory liability.

That liability is a joint and several personal obligation of all the members of the Company, unlimited except by the amount of the debts and contracts of the Corporation, to which it extends. It is unconditional, original and immediate, not dependent on the insufficiency of corporate assets, and not collateral to that of the Corporation, upon the event of its insolvency. It is, in one aspect, a suretyship for the Corporation, for by section 37 of the Act, any stockholder, paying a debt of the Company for which he is personally liable, is entitled to an action against it, for indemnity, in which he may take the corporate assets, but is without recourse upon the property of any other stockholder.

The jurisdiction in equity, then, cannot rest upon the administration of a trust fund, as in cases where delinquent stockholders are charged with the obligation to make good their subscriptions to unpaid capital stock, or in those where a constitutional or statutory liability is imposed [182] beyond the amount of the subscription, to a fixed sum, but on each in proportion to his share in the capital stock. There the necessity of enforcing a trust, marshaling assets and equalizing contributions, constitutes a clear ground of equity jurisdiction.

The statute under consideration prescribes no form of action, and the jurisdiction may be regarded as concurrent, both at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises. The 35th section of the Act expressly authorizes separate actions at law against the Company and against its officers, in cases where, by the statute, the latter are made personally liable for defined delinquencies; while the 36th section provides that the property of stockholders, in cases where they are liable, may be taken on attachment or execution issued against the Company. In the present case there was an acknowledged jurisdiction to grant equitable relief, by enforcing the lien of the bond upon the corporate property, and as incident to that to make a decree against the corporation for the payment of the debt. Having jurisdiction for that purpose, it is entirely consistent with its principles and practice for a court of equity to extend it, so as to avoid a multiplicity of suits, and to give to the plaintiff a single and complete remedy. As the individual stockholder is bound by the judgment against the Corporation, it is equitable that he should be present as a party, that he may have the opportunity to defend for himself, and in case of payment out of his property, he is entitled to be subrogated to the right of the creditor against the Company, in order to indemnify himself out of the corporate assets. On these grounds, we think, the jurisdiction in equity is well supported.

II. The remaining grounds of defense have been, in effect, anticipated in the statement of the case. They are without merit or substance.

The title of the plaintiff below to the bond sued on cannot be assailed for want of authority in the receiver to transfer it, even if such a defense was open to the obligors, for it sufficiently appears that the transaction, if not previously authorized, was subsequently confirmed by the court.

Nor does the relation between Mr. Corbin and the Company at the time of the transaction furnish any defense either at law or in equity. The relation, undoubtedly, was one of a confi- [183] dential and fiduciary character, but there seems to be no ground in the evidence to challenge the good faith with which the business was conducted. The bond of the Company was purchased from the receiver with his own means, and not those of the Company; the value paid, so far as the testimony discloses, was full; and every step, when taken, was made known and assented to by the directors of the Corporation. The transacuion was legitimate in itself and beneficial to the Company, and the dealing was not by the president with himself, but with the Corporation, in fact, represented and acting by other directors, with full knowledge of all the facts.

The defense of payment was suggested by the circumstance that the receiver, after parting with the bond in exchange for the stock, reported it as paid in that way. So far as the fund in his hands was concerned, it might be so treated; but the Company and its stockholders must be conscious that they have no right so to consider it.

We find no error in the decree, and it is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*, [183]

v.

NANCY HUNT, EXTX. of FIDELIO S. HUNT, Deceased, ET AL.

(See S. C., 15 Otto, 183-189.)

Transcript of account, when evidence—objection to—collector's receipts—erroneous ruling.

1. In an action brought by the United States, upon the official bond of a collector of taxes, against his executrix and his sureties, a transcript of his account from the books of the Treasury Department certified by the auditor is *prima facie* evidence of the fact of indebtedness which it certifies, unless

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upon the face of the account it necessarily appears to be otherwise.

2. The presence in the account of objectionable items could not prejudice the defendants, if they were separable from the remainder of the account by mere inspection.

3. In such action a copy of the collector's receipts certified by the Treasury Department has the same force in evidence as the originals.

4. The ruling of the court rejecting the original statement signed by the collector, showing the amounts collected and the amounts abated as uncollectible, was erroneous.

[No. 228.]

Argued Mar. 16, 1882. Decided Apr. 3, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **William L. Nugent,** for defendants in error.

[184] *Mr. Justice* **Matthews** delivered the opinion of the court:

This was an action brought by the United States upon the official bond of Fidelio S. Hunt, as Collector of Taxes, under the Internal Revenue Act, for the Second District of Mississippi. Hunt was sued as principal, and having died pending the suit, it was revived against his executrix. The other defendants were sureties. The condition of the obligation was that the said Hunt "Shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, etc." It is alleged in the declaration that the bond was delivered and approved on July 19, 1866, on which day Hunt entered upon the discharge of the duties of his said office, and continued therein until on or about May 23, 1867. The breach alleged was, that during that period he became indebted to the United States in the sum of $139,463.15, received by him as such collector for and on account of taxes due to the United States, being a balance reported to be due from him upon the adjustment of his account as such collector in the Treasury Department, of which a duly certified copy was filed, and which he had refused to pay. The sureties filed joint pleas, and the executrix pleaded separately. The pleas were alike, and amounted to a general denial of every allegation necessary to constitute a liability.

There was a verdict and judgment for the de-
[185] fendants. The errors assigned arise upon the rulings of the court upon the trial upon questions of evidence, presented by a bill of exceptions.

The plaintiff offered in evidence the certified transcript of Hunt's account from the books of the Treasury Department. The certificate of the fifth auditor, accompanying it, states that he has examined and adjusted "An account between the United States and Fidelio S. Hunt, late Collector for the Second District of Mississippi, from July 19th, 1866, to May 23d, 1867, and find him chargeable as follows, under bond approved July 19th, 1866." The debit side of the account is, "To amount of assessment lists receipted for, per form 23¼, *viz.*" Its first item is dated July 28, 1866, and is to "amount receipted for as December, 1865, list." It also embraces similar debits, of the same and subsequent dates of entry, for lists of January, February, April, May and June, 1866 The last five items on the same side of the account bear date, as to the entries, subsequently to May 23, 1867, but are for amounts receipted for as lists of January, 1866, April and May, 1867. The credit side of the account contains items of cash paid of dates subsequent to May 23, 1867, and also gives credit for amounts collected by successors in office on lists receipted for by Hunt, and also for amounts collected by him as collector under his first bond, on lists receipted for by him as collector under second bond. This statement of account shows a balance due the United States of the amount claimed in the declaration.

The transcript included, as part of the statement of account and explanatory of it, a statement of differences, showing and accounting for the discrepancies between the balance exhibited by the collector's own account and that ascertained by the adjustment. From this it appeared that the balance due the United States by the collector's account to March 31, 1867, since which date he had rendered none, was $76,756.17, showing a difference to his debit of $62,706.98. This is explained, in part, by showing the whole amount of assessments of form 23¼ charged under his first bond and under his second bond separately, which he had failed to give correct credit for, to the amount of $137,430.78; in part, by showing the amount of cash deposited by him under his first and second bonds respectively, and that he had twice
[186] credited himself with $169,517.83 on account thereof; and by other errors, the whole amounting to $702,434.36. On the other hand, this is reduced to the sum of $62,706.98, the difference to be accounted for, by credits for taxes abated by the adjustment, by credits therein for collections by successors in office, on bills receipted for by him during his term, and by amount claimed and credited in his accounts as collections on cotton. A list of warrants covering into the Treasury the amounts of cash deposited, is appended, showing the amount of each, and on account of which bond it was paid.

To the introduction in evidence of this transcript objection was made on the part of the defendants, "Upon the grounds that the balance exhibited by the said account is the result of the transactions of both terms of the defendant's service, whereas the suit is upon a bond which covers only the transactions of the second term; and because it embraces transactions made by the collector after his removal from office and after the appointment and qualification of his successor, and the balance is in part made up of these transactions, occurring when the collector no longer sustained any official relation to the United States, and after the alleged breach had occurred." And in support of their said objections, the defendants by their attorneys, the bill of exceptions proceeds to state, introduced in evidence the bond of Martin Keary, the successor of the said Hunt as such tax collector, showing that the same was approved on April 29, 1867. Thereupon the objections to the introduction of the certified account in evidence

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were by the court sustained, and the same was excluded, the court holding that the said certified statement should stand and be considered only as a bill of particulars annexed to plaintiff's declaration.

This ruling was excepted to and is assigned for error by the plaintiff in error.

It was an irregularity to permit the defendant to interject into the plaintiff's case testimony upon the merits of the defense in support of his objection that the evidence offered was irrelevant, and the testimony interposed was not, by itself, sufficient to establish the date on which Hunt ceased to hold an official relation to the United States as collector, for it did not show when his successor actually entered upon [187] the discharge of the duties of the office. But passing by, without further comment, these minor errors, we find that the objection to the transcript of the account, as matter of evidence, is without foundation, either in fact or in law.

It was assumed on both sides, though there is no proof to that effect in the record, that Hunt had filled a prior term as collector, being his own successor, and it was admitted that his second term commenced on July 19, 1866. The objectionable items in the first part of the account charge him with amounts of assessment lists receipted for per form 23¼ on dates subsequent to the beginning of his second term, though being described as lists for specified months prior to July, 1866, it is argued that he could not be chargeable upon his second bond with those sums. But this does not follow; for it is entirely consistent with the description of the lists, that the collector actually received the taxes paid upon them, after the date of his second term, and just as he is charged with them in this account. And so, on the other hand, with similar items charged upon receipts of assessment lists, of dates subsequent to May 28, 1867, the alleged date when his second term expired. It is consistent with the nature of those charges, that they were for moneys received on account of taxes paid on account of these lists, and received by him before the end of his second term. The account charges him with distinct sums of money collected by him. They are identified by reference to assessment lists for particular months, and then by the dates of his receipts to the Government for the lists, upon form 23¼. No dates are traced in the account as those on which the taxes were actually collected by him, but the certificate of the Treasury Department declares it to be an account between the United States and the collector from the beginning to the end of the period covered by the bond in suit, and there is nothing on the face of the account which necessarily contradicts this statement. The certificate has the legal effect of making the transcript *prima facie* evidence of the fact of indebtedness which it certifies, unless upon the face of the account it necessarily appears to be otherwise.

But the ruling of the court in excluding the transcript is equally untenable upon the con- [188] trary supposition, that the items on account of which the objection was sustained, were on their face such as could not be charged against the defendants upon the bond in suit. For, rejecting these items, there remained many others with which the collector and his sureties upon his second bond were admitted to be chargeable, and the transcript was clearly admissible in proof of these. The presence of the objectionable items could not prejudice the defendants, for on the supposition, they were separable from the remainder of the account by mere inspection. On the other hand, their presence might be important to the Government, as explanatory of corresponding items upon the credit side of the account; particularly in view of the ruling of the court, which rejected the transcript as evidence against the defendants, but required it to remain upon the record as proof against the United States.

For the same reasons the subsequent ruling of the court must be held to be erroneous, by which it excluded the receipts of the collector on form 23¼, which constituted the items upon the debit side of the account. Even if the receipts alone were not sufficient in each case to charge the collector with the sums charged as taxes collected upon the assessment lists, nevertheless they were competent evidence which, by other testimony, might be made full proof, until overcome by a successful defense. The ground of the objection was that the form 23¼ was a receipt for alphabetical lists, showing in detail the names of persons assessed for taxes and the amounts severally due from each, and that these alphabetical lists were primary and better evidence to charge the collector than the receipt on form 23¼, which expressed merely the aggregate amount of the alphabetical lists. But the receipts offered were signed by the collector, on their face constituted a part of his official transactions, and formed the very basis of the account against him upon the books of the Treasury Department. The originals would be competent against him, for they are not secondary evidence, although they may show the existence of other documents more in detail. The law gives to a copy certified by the Treasury Department at least the same force in evidence which the original would otherwise have.

The ruling of the court rejecting the original [189] statement signed by the collector, showing the amounts collected and the amounts abated as uncollectible during the month, and those collected on May 18, 1867, was likewise erroneous for the same reasons.

For these errors the judgment of the Circuit Court is reversed, with instructions to grant a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CECIL NATIONAL BANK, OF PORT DEPOSIT, MARYLAND, ET AL., *Appts.*, [217]
v.
WATSONTOWN BANK.

(See S. C., 15 Otto, 217-224.)

Transfer of stocks—waiver of rights—cashier of bank—effect of transfer—on books of bank—estoppel.

1. As between the owner of shares of stock in a bank and the purchaser, the property in the shares pass to the latter by the delivery of the certificate,

NOTE.—*Lien of corporation on shares for debt due from stockholder.* See *note* to Union Bk. of Georgetown v. Laird, 15 U. S. (2 Wheat.), 390.

Duties of cashier of bank and when his acts bind the bank.

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with the accompanying power of attorney, without the formality of a transfer on the books of the bank.

2. The clause in the Pennsylvania Statute which denies to the stockholder the privilege of making a transfer of his stock, while a debtor to the bank, until his debt is secured, does not forbid the bank to waive its rights, or prevent the cashier from doing so, acting for the directors by virtue of an express or implied authority.

3. The cashier of the bank is authorized to bind the bank, in consummating a transfer of its stock, by virtue of his office, in the absence of any by-law, according to the usage and practice of the bank, known to and approved by the directors.

4. The transfer, when consummated, destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations.

5. All that is necessary, to perfect the transfer required by law to be made upon the books of the corporation is, that the facts should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books.

6. Where a bank has induced a purchaser of its stock to alter his condition by reliance upon its assurances that it had no adverse claim on the stock, it cannot be permitted to assert a lien, thus lost by its own laches, and the enforcement of which would operate as a fraud.

[No. 241.]

Argued Mar. 23, 1882. Decided Apr. 3, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The case is stated by the court.

Messrs. **John A. J. Creswell** and **William H. Armstrong,** for appellant.

Messrs. **Robert P. Allen** and **Oscar Foust,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court

[218] This is a bill in equity filed by the appellants to compel the defendant below, the Watsontown Bank, a Corporation of Pennsylvania, to issue a certificate for two hundred shares of its capital stock to the Cecil National Bank, of Port Deposit, one of the complainants, to which the latter claims to be entitled.

These shares of stock belonged to Powell & Co., a partnership doing business at Williamsport, Pennsylvania, as private bankers, the certificate whereof, then held by them, they assigned and delivered to Jacob Tome, President of the Cecil National Bank, as collateral security for two promisory notes of $5,000 each, of which they were makers, discounted for them by that Bank, and which it held at their maturity. One of the notes was dated December 4, 1875, at 30 days, the other December 20, 1875, at 40 days, and each contained a stipulation authorizing the sale of the stock in case of default.

These notes becoming due and remaining unpaid, the Cecil National Bank, on January 31, 1876, by its President, J. Tome, transmitted the certificate of stock, in a letter to R. B. Claxton, Cashier of the Watsontown Bank, requesting a new certificate in his name and asking what the stock was worth. To this Claxton replied to Hopkins, Cashier of the Cecil Bank, on February 1, 1876, acknowledging the receipt of the certificate, stating that a new Board of Directors had been elected the day before; that they would organize on February 7, when a president would be elected, and when, as he added: "I will forward your stock certificate. Mr. Pardee, our present president, is not here and I have no signatures on the stock book." He continued: "I think I can find a purchaser for Mr. Tome's stock at from 100 to 102, and possibly more. If you will let me know exact figures I will endeavor to dispose of it promptly, if he so desires." On February 9, Tome answered, authorizing a sale, and directing the

The cashier is the executive officer of the bank and transacts most of its business. Minor v. Machs., etc., Bk., 26 U. S. (1 Pet.), 46; U. S. v. City Bk. of Columbus, 62 U. S., XVI., 130; Baldwin v. Bk. of Newbury, 68 U. S., XVII., 534; Badger v. Bk. of Cumberland, 26 Me., 428; Bissell v. First Natl. Bk., 69 Pa. St., 415: Bridenbecker v. Lowell, 32 Barb., 9.

His ordinary duties are to keep the funds of the bank to be used as may be necessary; to surrender paid notes; to withdraw funds of the bank on deposit; to draw checks; to receive moneys. Frankland Bank v. Steward, 37 Me., 519; Morse v. Mass. Natl. Bk., 1 Holmes, 209; Wild v. Bk. of Passamaquoddy, 3 Mason, 505; U. S. v. City Bk. of Columbus, 62 U. S., XVI., 130; Sturges v. Bk. of Circleville, 11 Ohio St., 153; Kimball v. Cleveland, 4 Mich., 606.

A cashier may, by virtue of his general authority, bind the bank by a promissory note given for borrowed money (Barnes v. Ontario Bank, 19 N. Y., 152); borrow money for the bank (Sturges v. Bank of Circleville, 11 Ohio St., 153; Ballston Spa. Bk. v. Marine Bk., 16 Wis., 120); compromise debts due the bank according to its general course of business (Bridenbecker v. Lowell, 32 Barb., 9; Bk. of Pa. v. Reed, 1 Watts & S., 101): take measures for the securing and collection of such debts (Hartford Bk. v. Barry, 17 Mass., 94; Mitchell v. Cook, 29 Barb., 243; Eastman v. Coos Bk., 1 N. H., 23; Corser v. Paul, 41 N. H., 24); make or superintend the transfer of shares of the bank (Smith v. Northampton Bk., 4 Cush., 1; Com. v. Kortright, 22 Wend., 348); accept or refuse the accounts of depositors (Thatcher v. Bk. of State, 5 Sand., 121): take charge of the correspondence of the bank. New Hope, etc., Br. Co. v. Phœnix Bk., 3 N. Y., 156; Br. Bk. v. Steele, 10 Ala., 915.

His acts within the general business and usage of the bank will bind it in favor of third person without notice. Com. Bk. v. Kortright, 22 Wend., 348; Lloyd v. West Br. Bk., 15 Pa. St., 172; Matthews v. Mass. Natl. Bk., 1 Holmes, 396.

The bank must show any restriction on his general authority. State v. Com. Bk., 6 Sm. & M., 218; Bk. of Pa. v. Reed, 1 Watts & M., 101.

Prima facie he has authority to transfer and indorse negotiable securities of the bank for its use. State Bk. v. Wheeler, 21 Ind., 90; Ryan v. Dunlop, 17 Ill., 40; Robb v. Ross Co. Bk., 41 Barb., 586; Pratt v. Topeka Bk., 12 Kan., 570; Ridgway v. Farms. Bk., 12 Serg. & R., 265; Fleckner v. Bk. of U. S., 21 U. S. (8 Wheat.), 338.

A cashier cannot, without special authority, release a surety upon a note belonging to the bank (Mechs. Bk. v. Rudolf, 5 Neb., 527; Cocheco Natl. Bk. v. Haskell, 51 N. H., 115); nor transfer non-negotiable paper (Barrick v. Austin, 21 Barb., 241; Holt v. Bacon, 25 Miss., 567); nor mortgage the real estate of the bank (Leggett v. N. J., etc., B'king Co., 1 N. J. Eq., 441); nor appear and defend suits against the bank (Br. Bk. v. Poe, 1 Ala., 396); nor bind the bank by his official indorsement on his individual note (West. St. Louis Sav. Bk. v. Shawnee Co. Bk., 3 Dill., 408); nor bind the bank to indemnify an officer (Watson v. Bennett, 12 Barb., 196); nor certify post-dated checks (Clarke Natl. Bk. v. Bk. of Albion, 52 Barb., 592); nor in another State settle an account, taking drafts and private notes for it and giving a receipt in full (Sandy Riv. Bk. v. Mechs., etc., Bk, 1 Biss., 146); nor pledge the assets of the bank for an antecedent debt. Tennessee v. Davis, 50 How. Pr., 447.

His admissions and declarations within the scope of his business bind the bank. Haughton v. First Natl. Bk., 26 Wis., 663; Mechs. Bk. v. Marine Bk., 3 Gill, 96; Sturges v. Bk. of Circleville, 11 Ohio St., 153.

If he receives securities for safe keeping with knowledge of directors, the bank is liable. First Natl. Bk. v. Graham, 79 Pa. St., 106; S. C., 100 U. S., XXV., 750.

If he is suffered to pursue a certain course for a considerable time the bank will be bound by it. Caldwell v. Mohawk, etc., Bk., 64 Barb., 333; City Bk. v. Perkins, 4 Bosw., 420.

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proceeds to be remitted to him; and wrote again on February 14, inclosing a power of attorney to sell and transfer the stock, and stating that [219] it would not be necessary to forward a certificate to him. This letter was an answer to one from Claxton of February 11, asking for the power of attorney from Tome to transfer the stock, and stating that as he intended to sell, it was useless to forward his certificate. He added that he thought he had arranged for the disposition of $1,000 of the stock that day, and would be as prompt as possible in placing the balance. The power of attorney sent by Tome was in the usual form, and authorized R. B. Claxton "To sell, transfer and assign the two hundred shares of stock of the Watsontown Bank standing in my name in the books of said Bank, etc."

In point of fact, on February 4, the account of Powell & Co. on the stock ledger of the Watsontown Bank was charged by Claxton, the cashier, with "$10,000 to J. Tome;" and an account opened with J. Tome, on the same book, crediting him, of the same date, "by Powell & Co.; $10,000." On February 21 this account is debited with two items: "To Henry Scott $500," and "A Scott $500;" and the same day Claxton, the Cashier, remitted to Tome the proceeds of the sale of these 20 shares of stock. On February 16 he had written acknowledging the receipt of the power of attorney previously requested. The accounts of Henry Scott and of Amos Scott, on the same ledger, are credited with the stock sold to them respectively.

It appears that this stock ledger was the only book kept by the Watsontown Bank showing the transfers of stock, except a book of certificates, the stubs of which showed to whom the corresponding certificate had been issued, and what certificate had been surrendered in lieu of it. The stock ledger was kept by the cashier.

Martin Powell, one of the firm of Powell & Co., was a director of the Watsontown Bank, and R. B. Claxton, Jr., its Cashier, was also a member of that firm, and known to be such by the directors of the Bank. It was his usual practice, as Cashier, to make and keep the account of transfers of stock without consulting in each case with the Board of Directors.

On March 12, 1876, Powell & Co. failed, and [220] April 13, 1876, made a voluntary assignment for the benefit of creditors.

On the next day, April 14, the Watsontown Bank, by its attorney, addressed a letter to J. Tome, as follows:

"Watsontown, Pa., April 14, 1876.

MY DEAR SIR: Some time since you sent to our Bank a certificate of stock, originally issued to Powell & Co., and by them transferred to you for $10,000. This transfer was never approved by our president or Board of Directors, and we will not do so, or cannot under the Act of Assembly regulating banks in this Commonwealth, so long as Powell & Co. are indebted to us, either as drawer, maker, or indorser, for matters due and unpaid. And, as this is the existing state of facts, we cannot permit a transfer to be made until we are secured to the satisfaction of our Board of Directors for all their (Powell & Co's.) liabilities."

The statutory provision referred to, is section 10, article 10, of an Act regulating banks, approved April 10, 1850, and reads as follows:

"The stock of the Bank shall be assignable and transferable on the books of the Corporation only, and in the presence of the president or cashier, in such manner as the by-laws shall ordain, but no stockholder indebted to the Bank for a debt actually due and unpaid shall be authorized to make a transfer or receive a dividend until such debt is discharged or security to the satisfaction of the directors given for the same."

No by-law on the subject is shown to have been passed by the directors of the Watsontown Bank.

It is assumed that the account between the Bank and Powell & Co. shows that the latter was indebted to the former on Feb. 1, 1876, for a balance amounting to $5,215.67.

The circuit court rendered a decree denying the relief as prayed for, and requiring the Bank to transfer one hundred and eighty shares of the stock, being the original amount less the twenty shares sold to the Scotts, only, upon payment of the sum found due to it, from Powell & Co., with interest.

The complainants bring the present appeal to review this decree.

As between Powell & Co. and Tome, representing the appellants, the property in the shares of stock, undoubtedly, passed to the latter without the formality of a transfer on the books of [221] the Watsontown Bank. As collateral security for the payment of their notes, discounted and held by the Cecil National Bank, and with the power to sell for the purpose of payment, the title passed by the delivery of the certificate, with the accompanying power of attorney. *Johnston* v. *Laflin* [*ante* 532].

The title, however, was, unquestionably, subject to the lien given by its charter to the Watsontown Bank. That provision, when insisted on and enforced, would be effectual to subject the beneficial interest in the stock to the payment of any indebtedness from the stockholder, making the transfer to the Bank for a debt which, at the time of the proposed transfer, was actually due and unpaid.

According to the terms of this provision, the Bank was properly represented, in the act of transfer, by its cashier; and he was authorized to bind the Bank, in consummating the transaction, by virtue of his office, in the absence of any by-law, according to the usage of the business and the practice of the particular Bank, presumed to be known to and approved by the directors. *Case* v. *Bank*, 100 *U. S.*, 446 [XXV., 695].

The clause which denies to the stockholder the privilege of making a transfer of his stock, while a debtor, until his debt is discharged or secured to the satisfaction of the directors, does not forbid the Bank to waive its rights, or prevent the cashier from acting for the directors, by virtue of an express or implied authority. In this, as in other matters of ordinary business, within the general scope of his official duty, he is their appropriate representative. There is no circumstance which, in our opinion, limits the general and usual authority of the cashier in respect to the transfer of the stock in question. The fact that he was a member of the firm of Powell & Co., whose stock it had been, can have no such effect; for his relation

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to the parties was well known to the directors of the Bank, and he had no interest in the transaction adverse to his official duty. Whether the stock should become the property of the Cecil National Bank, free from the claim of the appellees, or should remain subject to the claim of the latter, was equally indifferent to him, as in either event it served to pay an equivalent amount of debt for which he was liable. It is [222] not alleged, and is not shown, that the appellants were aware of Claxton's relation to the firm of Powell & Co., or of their indebtedness to the Bank whose officers they were, and there is no ground for imputing fraud to or suspecting collusion with them.

Our conclusion, therefore, is, as to this point, that the Watsontown Bank was lawfully represented by Claxton, its cashier, in this transaction, and is effectually bound by his acts. It remains to consider what was the nature and effect of what was in fact done.

A complete transfer of the title to the stock upon the books of the Bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the Bank. The consent of the Bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. The transfer, when thus consummated, destroys the relation of membership between the Corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations. This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it. All that is necessary, when the transfer is required by law to be made upon the books of the Corporation, is, that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose, the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment, or by derivation from others, is quite suitable, and fully meets the requirements of the law. Accordingly, when the cashier of the Watsontown Bank received from Tome the certificate, with the authority for its transfer to him duly executed by Powell & Co., and, in pursuance of the request to make the transfer, charged it in the account against the former owner, and gave to Tome the corresponding credit, the latter became a stockholder in the Bank, invested with the legal title to the stock, and with all the rights, powers and [223] privileges belonging to that character. Nothing more remained to be done to make the conveyance of title complete and absolute and, so far as the Bank was concerned, it was irrevocable. It had consented to the transfer and the transfer had been made. Thenceforward the rights of Tome in respect to the stock in question were all they could have been if it had belonged to him by virtue of an original subscription. The claim of the Bank upon it, based upon the existing relation with the former owner, ceased when, with its consent and through its act, that relation ceased.

The Cecil National Bank, then, had become the owner of the legal title to the stock which Powell & Co. transferred, and was entitled to demand recognition from the Bank of its rights as a stockholder, and to the customary certificate, as evidence of its ownership.

On the supposition that not the legal title but only an equity, based on an executory contract for a transfer, passed to the appellants, by virtue of the transaction with the cashier of the Watsontown Bank, their right to the relief prayed for, is not less clear. Aside from the recognition of the title, as complete, by accepting and acting upon the power of attorney given by Tome to sell and transfer it as his stock, and the sales made to the Scotts under it, whose title is not denied, and yet cannot be better than that of their vendor, which is disputed, the subsequent conduct of the Watsontown Bank raises an equity against it, which is superior to its legal right to insist upon a lien on account of the debt of Powell & Co. When Tome made his claim on behalf of the Cecil National Bank for a transfer of the stock, if the appellee had intended to insist on its legal rights and assert its lien, then was the proper time to do it; for it then, at least, had notice of the interest and the claim of the appellants. If it had done so promptly, the latter might still have had an opportunity to obtain other security, or to enforce by other means their claims against their debtors, who, although in default, do not appear to have been as yet *in extremis*. So far, however, from adopting this course, the Watsontown Bank pursued one exactly the reverse. It permitted the parties, by its actual exercise, to rest in the belief that their right to dispose of the stock for the purpose of [224] paying the debt due them would not be questioned, until the failure and assignment of Powell & Co. made any other resort useless; and, having induced them to alter their condition by reliance upon assurances, which were equivalent to a declaration, that it had no adverse claim, the appellee cannot now be permitted to assert a lien, lost by its own laches, and the enforcement of which would operate as a fraud.

For these reasons, we conclude that the appellants are entitled to the relief sought by their bill, and that the decree, so far as it denies it, should be reversed. It is accordingly so ordered and the cause is remanded, with instructions to modify the decree in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—133 Mass., 520.

MEMPHIS & ST. LOUIS RAILROAD COMPANY, *Plf. in Err.*, [258]

v.

JOHN R. LOFTIN, Collector of JACKSON COUNTY.

(See S. C., 15 Otto, 258-261.)

State taxation of railroad lands—swamp lands.

1. Lands granted by the State of Arkansas to the Memphis and St. L. R. R. Company, to aid in the construction of its railroad, which are held by the Company for the purpose of raising money to build its road, are liable to state taxation.
2. Swamp and overflowed lands donated by the

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United States to the State are exempt from taxation for ten years if the lands are not sooner reclaimed: but if they are, then the exemption ceases on the reclamation.

[No. 501.]

Submitted Mar. 15, 1882. Decided Apr. 3, 1882.

IN ERROR to the Supreme Court of the State of Arkansas

The case is stated by the court.

Messrs. **Humes & Poston**, for plaintiff in error

Messrs **Augustus H. Garland** and *William F. Henderson*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court

This was a suit in equity begun in the Circuit Court of Jackson County, Arkansas, to restrain the collection of taxes imposed under the authority of the State upon certain lands in that County owned by the Memphis & St. Louis Railroad Company, plaintiff in error. The Supreme Court of the State affirmed a decree of the circuit court dismissing the complaint on demurrer. To reverse that judgment this writ of error has been brought

Two questions are presented for our consideration

1. Whether the State by imposing the tax has impaired the obligation of a contract in the charter exempting the capital stock of the Company from taxation: and,

[259] 2 Whether it has impaired the obligation of a contract made with the purchasers of its swamp and overflowed lands for exemption from taxation.

1 As to the charter.

The section of the charter relied on is as follows.

"Sec 21. The capital stock of said Company, with all the immunities and franchises herein specified and all machinery, cars, engines, or carriages, belonging to said Company, together with all their works and property, and all profits which shall arise from the same, shall be vested in the respective stockholders forever, in proportion to their respective shares; and the capital stock of said Company, and the dividends shall be exempted from taxation until a dividend of six per cent is realized upon the capital stock, and the road, with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempted from taxation for the period of twenty five years from the completion of the road, and no tax shall ever be levied on said road or its fixtures which will reduce its dividends below ten per cent per annum. Said stockholders shall not be bound or liable for any greater amount than the respective shares of stock which they or either of them own."

The averment in the complaint to bring the lands in question under this exemption is in the following words:

"3 And that the said lands were acquired by the plaintiff and are now held by it for the purpose of raising money to build said road, and that it is a part of the property of said Company, fully represented by its capital stock and not otherwise, and that said road has not as yet been completed, and that no dividend has as yet been realized on said capital stock, or any part thereof."

In *R. Co.* v. *Loftin*, 98 U S., 559 [XXV., 222], in passing upon a provision of the charter of the Mississippi Valley Railroad Company, substantially like the section here relied on, this court held the exemption did not extend to lands granted the company by the State to aid in the construction of its railroad. Such lands, it was then said, were used in lieu of capital, and to the extent they could be made available relieved the company from the necessity of raising money through stock subscriptions. Like the court below, we are unable to distinguish the case made by this complaint from that. The only [260] material averment of fact in this connection is that the lands in question are held by the Company for the purpose of raising money to build its road. This is entirely consistent with their use in lieu of capital. It is true, the complaint alleges that the lands are fully represented by the capital stock, but that is only as a legal conclusion from what was stated before. The facts showing why the lands represented the capital must be set forth. Those which have been stated are not enough and, consequently, the legal conclusion which the pleader has drawn from them in the complaint cannot be sustained.

In the elaborate printed argument presented for the appellant, reference is made to facts not stated in the complaint. These we cannot consider. As the case was submitted on demurrer, only the averments in the complaint are before us. While we may take judicial notice of the several statutes of the State which are relied on, the complaint alone must be looked to for information as to the manner in which the lands were acquired and the purposes for which they are held. While it may be true, as is claimed, that, under section 3 of the charter of the Company, lands might have been accepted in payment for increased stock, and that the lands in question were acquired in that way, it is not so stated in the complaint. Whether, if the facts as claimed in argument had been stated, the exemption contended for would follow, is not for us now to decide. Upon this branch of the case, as it comes to us, the judgment of the court below was, in our opinion right, and must, consequently, be affirmed.

2. As to the swamp lands.

These were part of the swamp and overflowed lands donated by the United States to the State, and the state statute providing for their reclamation and sale contained the following:

"Sec. 14. *Be it further enacted*, That to encourage by all just means the progress and completion of the reclamation by offering inducements to purchasers and contractors to take up said lands, that the swamp and overflowed lands shall be exempt from taxation for the term of [261] ten years, or until said lands are reclaimed."

That under this section, purchasers of the lands acquired a right by contract to exemption from taxation for the stipulated time is not denied, and this court so decided in *McGehee* v. *Mathis*, 4 Wall., 143 [71 U. S., XVIII., 314]. The only dispute is as to the time the exemption is to continue. The Railroad Company insists that it is for ten years absolutely, and thereafter until the lands are reclaimed; the State, that it is for ten years, if the lands are not sooner reclaimed, but if they are, that it ceases on the reclamation. The Supreme Court of the State, in *State* v. *Crittenden Co.*, 19 Ark., 260, as early

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as January, 1858, gave the statute the construction now contended for by the State, and this decision has never been overruled. It was expressly recognized by the Supreme Court of the State in *McGehee* v. *Mathis*, 21 Ark., 58, and by this court in the same case, which came here or writ of error, and is reported in the 4th of Wallace, *supra*. Counsel frankly concede that the language of the statute is ambiguous, and that the grammatical construction is in accordance with what has been ruled. All such exemptions are to be construed strictly. Every doubt is to be resolved in favor of the power to tax. Under such circumstances, if the question were an open one, we should have little difficulty in reaching the same conclusion as the courts of the State have done. Manifestly, therefore, we are not now called upon to overrule what has been settled for nearly a quarter of a century.

It is expressly stated in the complaint that the the lands held by the Company were sold by the State more than ten years before this suit was begun. Consequently, they are not exempt as swamp lands.

The judgment of the Supreme Court of the State is affirmed.

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[265]

DAVID E. JAMES, *Appt.*,
v.
MICAJAH McCORMACK.

(See S. C., 15 Otto, 265.)

Motion to re-instate appeal.

A motion will not be granted to re-instate an appeal which has been dismissed, except for very good cause.

[No. 166.]

Submitted Mar. 20, 1882. Decided Apr. 3, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

Motion to re-instate.

The case is sufficiently stated by the court.

Messrs. **P. E. Dye** and **J. Ambler Smith,** for motion.

Messrs. **John A. Campbell** and **John W. Johnston,** opposed.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. When the appellant was called and his appeal dismissed, the case had been nearly three years on the docket of this court. He had no brief on file and was not present, either in person or by counsel. Under these circumstances the appellees were entitled under Rule 16, to a dismissal. No notice of their intention to enforce the rule was necessary. The appellant has not excused himself for his default, and his case is clearly within that of *Hurley* v. *Jones*, 97 U.S., 318 [XXIV., 1008], in which we announced our intention to enforce rigidly this salutary rule, and not to set aside defaults growing out of the neglect of counsel or parties, except for very good cause.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

BOARD OF SUPERVISORS of the COUNTY OF ALBANY, *Plffs. in Err.*,
v.
EDWARD N. STANLEY.

(See S. C., 15 Otto, 305-318.)

Construction of statute—taxation of bank shares—deduction of debts—authority of assessors—notification.

1. In a statute which contains invalid or unconstitutional provisions, if the valid and invalid are capable of separation, only the latter are to be disregarded.
2. The New York Act of 1866, concerning the taxation of bank shares is valid, except so far as it does not authorize a deduction for debts of the shareholder.
3. When the shareholder has no debts to deduct, the Act provides a mode of assessment for him, which is not in conflict with the Act of Congress, and the Act in that case is valid.
4. Assessors have authority to assess national bank shares, under that Act. Where no debts of the owners of the shares exist to be deducted, the assessment and tax are valid. In cases where there exists such debts, which ought to be deducted, but are not, the assessment is voidable, but not void.
5. The assessing officers act within their authority in such cases, until they are notified in some proper manner that the shareholder owes just debts which he is entitled to have deducted.

[No. 847.]

Argued Jan. 26, 1882. Decided Apr. 3, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Messrs. **Wheeler H. Peckham** and **Rufus W. Peckham,** for plaintiffs in error:

1. The Act of 1866, as to taxation of bank shares, should not be construed as preventing the deduction of indebtedness from the value of the shares of stockholders in national banks.

The plaintiffs below contend:

1. That the Court of Appeals of New York has decided, that this statute does not permit the deduction of debts from the assessment upon bank shares.

2. That the court below was, and this court is, absolutely bound by the decision of the state court, as to the meaning of this statute, local in its nature.

3. That as so construed, the statute is at variance with the Federal Statute as to the rate of taxation, and is therefore void.

To this reasoning, the answer is:

1. That the Court of Appeals decided the question as to the meaning of the statute under entirely different circumstances, both as to law and fact.

2. That, under such a change of circumstances, the Circuit Court sitting in New York had, and this court in review of its decision has, the right to consider the question as open, and to be decided as the court shall be of the opinion the Court of Appeals would now decide, and as the law would seem to be under such changed circumstances as to fact.

The decision of the *Dolan Case*, as to whether the Act of 1866 permitted deductions, or rather permitted the general law in relation to deductions, to have effect as to shares in national banks, was so obviously made in the manner it was upon the theory that, as so construed, it complied with the federal statute, that it would seem impossible to successfully contend the reverse

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There is no difficulty in holding that the Statute of 1866 does permit this deduction, so far that is, as the statute itself is concerned. Verbal criticisms, it is true, were made in the opinion of the Court of Appeals as to the language used in the Act, that the assessment should be on the value of their shares, and it was argued it could not be thus taxed and a deduction allowed. But it is apparent that such language might very well have been used for the purpose of providing for the taxation of the stock at its actual, instead at its par value, as the capital of the banks had been sometime before that taxed, and that the use of the word "value" had no reference whatever to such a taxation as should prevent the operation of the general statute applicable to all persons indebted, and permitting them to deduct such indebtedness from the assessment.

The cases cited by counsel for plaintiff below, in regard to the effect to be given to the decisions of state courts as to the statutes of their State, are not adverse to the above views. The cases cited were *Leffingwell* v. *Warren*, 2 Black, 599 at 603 (67 U. S., XVII., 261, 262); and *Douglass* v. *County of Pike*, 101 U. S., 677 (XXV., 968); see, *Green* v. *Neal's Lessee*, 6 Pet., 291; *Chicago City* v. *Robbins*, 2 Black, 418 (67 U. S., XVII., 298); *Township* v. *Marcy*, 92 U. S., 289 (XXIII., 710); *Gelpcke* v. *City of Dubuque*, 1 Wall., 175 (68 U. S., XVII., 520); *Pease* v. *Peck*, 18 How., 595 (59 U. S., XV., 518).

It is clear, therefore, that the circuit court should have examined the statute, to see what it really did mean in the light of the decision by the Court of Appeals in the *Dolan Case* and of this court in the *Williams Case*. It is a familiar rule, that where of two possible ways of construing a statute, one will render it in some of its parts invalid and the other entirely legal, and either view may rationally be adopted, that view will be taken by the court which renders the Act legal in all its parts.

Roosevelt v. *Godard*, 52 Barb., N. Y. Sup. Ct., 533; *Turnpike Co.* v. *McKean*, 6 Hill, 616; *In re Cooper*, 22 N. Y., 67.

2. But the question of the illegality of the Act of 1866 can, in the equity suit, be raised only on behalf of one person, and in the action at law, only as to the tax paid in one year by one taxpayer (Mr. Williams).

This Act of 1866, provides for the taxation of shares in national banks, and the process of assessment and taxation may be carried out under that Act. The claim that such Act is void, because it does not permit the deduction of debts from the value of the citizen's personal property, including his bank shares, is a claim which can only be made by some one having a pecuniary interest in such claim, *i. e.*: one who stands in the position of a debtor, who, but for the law, would be authorized to insist upon this deduction.

See, *Evansville Nat. Bank* v. *Britton, Treasurer, etc.*, 10 Biss., 503, decided in the Circuit Court of the United States, for the District of Indiana, and now before this court on writ of error from that decision.

To the proposition that the person claiming a deduction on account of his debts should have complied with the statute, by making his affidavit and a demand for a deduction, the plaintiffs below answered, the assessors would not have given the deduction, and as it was, therefore, a useless or vain thing to do, the law did not require them to do it. This, it is respectfully submitted, is no answer at all. The affidavit and demand can only be said to be a step in the process of securing the right, but it is a condition precedent to the taking of any further or other step.

It is the manner pointed out by the statute; the procedure necessary to be taken in order that the court may judicially see that such rights have been violated. If on such demand, supported by the proper affidavit, the refusal to deduct is made, then and not till then, has the person the right to appeal to the court to secure his legal deduction.

3. In any event, the whole Statute of 1866 is not void. That part only is void which comes in contact with and violates the federal law; and if any portion remain after the illegal part is eliminated, such portion may be enforced and carried out to its full extent.

The general principle is well understood in all courts, that if it be possible to hold one portion of a statute valid while deciding another portion to be invalid, the courts will do so unless the provisions be so intimately blended that they cannot be operated separately, and so that it is obvious that the Legislature would never have passed the valid parts, if those declared void could not be carried into effect.

People v. *Bull*, 46 N. Y., 56 at 68; *Gordon* v. *Cornes*, 47 N. Y., 608-617; *Boese* v. *King*, 78 N. Y., 471; *In re Petition of Roberts*, 81 N. Y., 62 at 67; *In re application Village of Middletown*, 82 N. Y., 196 to 202; *Allen* v. *Louisiana*, 103 U. S., 80 at 83, 84 (XXVI., 319); *Railroad Co's.* v. *Schutte*, 103 U. S., 118 at 142 (XXVI, 335).

We affirm that this illegal provision as to the refusal to grant a deduction for indebtedness is the only provision of the Statute of 1866 that falls by reason of illegality.

Now, assume that this statute had ordained in so many words, "No deduction shall be allowed from the valuation of the shares of stock by reason of the indebtedness of the owner thereof."

There is a general statute of the State providing that such deduction shall be allowed the owner, of all personal property.

This court says that where such statute exists, it is a violation of the Act of Congress to refuse such deduction to a national bank shareholder. This statute thus assumes to refuse such deduction.

In that respect it is a violation of the federal law, and such provision is void. With that provision, therefore, stricken out, or in the language of this court "disregarded," three questions arise:

(1) Is there enough of the statute left to become operative, as thus separated from that provision?

(2) Is the part thus left capable of separation?

(3) Would the Legislature have passed the rest of the statute for taxing these bank shares (so far as such intention can be gathered from the Act itself and from those contemporaneous events, of which courts will take judicial

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notice), if the refusal to allow this deduction were known to be illegal and, therefore, could not be inserted in the statute?

(1) There is enough left of the statute with the refusal to deduct indebtedness, "disregarded," to become fully operative. There is nothing which is not provided for by the Act, as thus existing, from the first step towards assessment to the compulsion of payment by the marshal of the city, under the warrant of the proper officer.

(2) The second question, whether the statute, as left after disregarding the refusal to deduct, can be separated, is substantially answered in this instance by the answer to the first question.

(3) Can it be determined that the Legislature would have passed the Act without this provision in it? We think it entirely clear that it can be so determined.

The section of the Act of 1865 relating to taxation had been declared void, and there were no means or method existing by which this banking capital invested in national banks could be taxed. The banks themselves could not be taxed to any extent, owing to the investment of their funds in non-taxable securities. The amount of this taxable property invested in banks was known to be large (then over $100,000,000, *Van Allen* v. *The Assessors*, 3 Wall., 573 (70 U. S., XVIII., 229) at 579; *People* v. *Dolan*, 36 N. Y., 59 at 64), and the State, it may be decided at once, never meant to voluntarily give up its right to tax such property. The Act of 1866 was then passed, which provided expressly for the taxation of shareholders in banks generally including both state and national banks in such designation.

The great and important feature of the statute was the taxation of this large amount of taxable capital. The intention, of course, was to comply with the condition upon which the right to tax depended. The case need only to be stated to be decided, that the taxing of this property would have been provided for by the Legislature, coupled with any condition or subject to any exception which Congress might have annexed to its grant of power to tax.

The scheme of not permitting the shareholder to deduct his debts was a mere subsidiary provision, wholly disconnected from the main, important and essential feature of providing at all events for some taxation of such capital. It would seem as if there could be no successful denial of the proposition that the Legislature would still have passed this Act in all its essential and valid features, as it now exists, without the provision as to refusing deductions for indebtedness.

4. There are no other grounds upon which these actions can be maintained.

The claim that the shareholders in the National bank were assessed at a greater rate than those in a state bank, or than certain corporations by reason of an over valuation of the stock in the bank, does not afford ground for calling the assessment void. It is a simple claim in legal effect that the assessments are partial, unequal and unjust. But the shares are liable to some assessment for taxation and some tax should be paid upon them. The assessors had jurisdiction, therefore, to tax these shares, and at what sum was a matter of judicial decision. *Williams* v. *Weaver*, 75 N. Y., 30. If as a result they were taxed unequally, unjustly and unfairly, the fair amount for which they should have been taxed should have been paid or tendered, and an injunction asked for the balance. *State Railroad Tax Cases*, 92 U. S., 575 (XXIII., 663); *Pelton* v. *Nat. Bank*, 101 U. S., 143 (XXV., 901;) *Cummings* v. *Nat. Bank*, 101 U. S., 153 (XXV., 903); *National Bk.* v. *Kimball*, 103 U. S., 732 (XXVI., 469).

5. In the action at law, there is one cause of action which has no defense * * and it is set out in the fourth count of the complaint. In that case the party made his affidavit and demanded a reduction of the assessment against him, which was refused. In no other case was there any affidavit or demand made. But in that case the assessors had no jurisdiction to assess. With that exception there was complete jurisdiction to make an assessment, and money cannot be recovered back which was obtained by reason of an assessment which the assessors had jurisdiction to make.

The Bank v. *Mayor of New York*, 43 N. Y., 184; *Newman* v. *Supervisors*, 45 N. Y., 676, 687.

Messrs. **George F. Edmunds, Matthew Hale,** *Wager Swayne* and *Julien T. Davies*, for defendant in error:

The taxes in question were illegally assessed and collected, because the law of the State of New York (ch. 761 of 1866), under which such assessment and collection were made, violated the restriction imposed on such assessment and taxation by section 5219 of the Revised Statutes of the United States, and was, therefore, void, so far as it relates to shares of stock in National banks.

1. The Act in question as construed by the highest court of the State of New York, has been decided by this court to be in conflict with section 5219 of the Revised Statutes of the United States, and void as to shares in National Banks. *People* v. *Weaver*, 100 U. S., 539 (XXV., 705).

2. The reason for this decision was, that no deduction for indebtedness was allowed to the stockholder from the assessment of his bank shares by the Law of 1866, while the law of New York permitted such deduction in the case of all other moneyed capital, and thus the Act in question established a "greater rate" of assessment and taxation for bank stock than was imposed by law on other moneyed capital.

3. The construction given by the New York Court of Appeals to the Law of 1866, and accepted as conclusive by the United States Supreme Court was first announced in *People* v. *Dolan*, 36 N. Y., 59. It was repeated by the same court in the case of *People* v. *Weaver*, 75 N. Y., 30. It was also re-stated by the Court of Appeals in *Williams* v. *Weaver*, 75 N.Y., 30, in which the case of *People* v. *Dolan* was cited with approval at page 36.

4. This court will not indulge in any conjecture as to what the New York Court of Appeals will hereafter decide in relation to the construction of the state law. This court is only concerned with what it has decided. Such construction is as much a part of the statute as the text itself.

Leffingwell v. *Warren*, 2 Black, 603 (67 U. S.,

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XVII., 262). Even if that court should, as counsel for plaintiff in error anticipates (as appears by his brief in the court below), reverse its own repeated adjudications on the subject, such change will not affect this case. The plaintiff's rights are fixed, and are governed by the law as construed by the former decisions. A change of judicial construction, should it occur, will have only the same effect as an amendment of the statute, which could affect only subsequently occurring cases. *Douglass* v. *County of Pike*, 101 U. S., 677 (XXV., 968).

5. Looking at the Act of 1866, and comparing it with the general tax law relating to the City of Albany, and the provisions of the New York Revised Statutes on the same subject, and reading the opinions in *People* v. *Dolan*, 36 N. Y., 59, it will be seen that the Act of 1866 cannot properly be otherwise construed than as it has been by the Court of Appeals.

The general law makes it the duty of the assessors to ascertain and assess the full value of each person's taxable personal property "after deducting the just debts owing by him."

1 N. Y. Rev. Stat., 390, sec. 9; Laws of 1850, 126, sec. 6.

The Law of 1866 requires stockholders in banks to be assessed and taxed on the value of their shares.

The general laws give to the assessors no jurisdiction to assess anything but the net value of personal estate; *i. e.*, the value after deducting debts.

The Law of 1866 gives the assessors no jurisdiction to assess anything but the gross value of bank stock; *i. e.*, its value without making any deduction for indebtedness.

The policy of the Legislature has for a period of nearly fifty years been uniform to tax bank stock at its nominal or actual value without deductions for debts.

Hunt, *J.*, 36 N. Y., 63.

The valuation contemplated by the Law of 1866, was intended to be a continuation of the same special system, *Id.*, p. 17. "The language of the Act of 1866, 'Shall be assessed and taxed on their value,' devotes the whole value to taxation, without reduction for debts, as has ever been the policy of the State in reference to the property which this is made to represent, and in perfect accordance with what we have seen to have been the object of the statute." Parker, *J.*, 36 N. Y., 73.

6. This "policy" of the New York Legislature, this "distinct system," or "plan by itself," as it is termed by *Judge* Hunt, the main object of which is clearly shown by the learned Judges in the case of *People* v. *Dolan*, to be to prevent the reduction for debts allowed by the general statutes in the case of other moneyed capital in the hands of individual citizens in the State, has been condemned by the United States Supreme Court as in conflict with the laws of Congress. The law being pronounced void in its most essential features cannot be deemed valid in any part as to national banks.

The subordinate powers fall with the main idea.

People v. *Commissioners of Taxes*, 94 U. S., 415, 418 (XXIV., 164, 165); *U. S.* v. *Reese*, 92 U. S., 215 (XXIII., 563); *Trade Mark Cases*, 100 U. S., 92, 98, 99 (XXV., 551, 553); *Allen* v. *Louisiana*, 103 U. S., 80 (XXVI., 318).

7. Chapter 596 of the Laws of 1880 is a legislative admission of the invalidity of the Law of 1866.

See, Laws of 1880, Vol. 1, p.888; App., p.10.

8. There is no force in the claim that the Law of 1866 is void only as to those who are indebted. The general laws assume that all persons assessed for personal property are more or less indebted.

It would have been useless for stockholders who were indebted, to apply for a reduction by reason of such indebtedness: for such application if made, must necessarily have been denied under the Act of 1866, as construed by the New York courts. Indeed, the assessors had no jurisdiction to make such reduction * * the State law under which they acted did not permit it.

The law never requires the performance of an idle and useless act. *Lex neminem cogit ad vana seu inutilia.*

Boot v. *Franklin*, 3 Johns., 208, 210; *Loomis* v. *Tifft*, 16 Barb., 541; *Schroeder* v. *Hudson R. R. Co.*, 5 Duer, 55; *Tracey* v. *Irwin*, 18 Wall., 549 (85 U. S., XXI., 786).

9. The case of *Williams* v. *Weaver*, 100 U. S., 547 (XXV., 708), is no authority against the plaintiff. The question in that case was, simply, as to the personal liability of the assessors for making an assessment under the Act of 1866, it being found that they acted in good faith. The courts of the State of New York decided against such liability and this court held that such decision presented no federal question that could be reviewed here. The remark, in regard to the right of reduction for debts, not having been raised, must be taken in connection with the subject under review, namely: the personal liability of the assessors. The remark was entirely *obiter*, but was evidently not intended by the learned Justice who made it, to apply any further than as it bore upon the personal liability of the defendants in that case.

10. The Law of 1866 was also void, because it violated the restriction of section 5219, by establishing a separate system for the taxation of bank stock, to the prejudice of owners of such bank stock.

11. It must be noticed, that in this case it is a fact admitted by the parties and found by the court that the assessments were made and the taxes collected under color of the Act of 1866, and not otherwise. It is, therefore, unnecessary to inquire whether there was any other law of the State of New York under which said assessments might have been made. It is clearly shown however, in the brief in the other case (No. 817), that there was no such law.

II. The complaint also alleged that the assessments complained of were void irrespective of the invalidity of the law of 1866, because made at a greater rate than was assessed upon shares of stock in a State bank, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York. Evidence was given upon the subject of these allegations, but they were not passed upon by the court and the case was decided solely upon the ground of the invalidity of the state law.

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We do not claim, therefore, that the judgment can be upheld (except as to the fourth count), unless the court should concur with the court below, that the state law was invalid; but in such case it would not follow as the plaintiffs in error claim in their brief, that final judgment should be ordered by this court against the defendant in error, except as to the conceded claim in the 4th count; but a new trial should be ordered upon which the defendant in error would be at liberty to establish the allegations which have not yet been passed upon.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Northern District of New York, in which Stanley, the defendant in error, recovered a judgment against plaintiffs in error for taxes exacted and paid under legal process on shares of the stock of the National Albany Exchange Bank. A large number of the shareholders of the bank who had paid this tax made an assignment of their claims to Stanley, and he recovered a judgment in the action for the sum of $61,991.20, with interest and costs.

The ground of this recovery was that the Statute of New York, under which the shares of the bank were assessed, was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of the shares of the stock owned by him, in ascertaining the amount for which the shares should be taxed.

[306] The pleadings in the case set out the sums paid by the stockholders and their names, and their assignment to Stanley, the payment under compulsion of legal process, and a demand for the repayment on the Albany County authorities.

The case was submitted to the court on a waiver of trial by jury and, on the finding of facts and conclusions of law thereon by the court, judgment was rendered for plaintiffs. The facts found by the court are thus stated:

"*First.* That the allegations of the complaint in regard to the citizenship of the plaintiff, the citizenship and powers and liabilities of the defendant, the organization and capital of the National Albany Exchange Bank, the ownership of the shares of capital stock of the National Albany Exchange Bank, the assessment of the stockholders in said bank, named in said complaint, by the Board of Assessors of the City of Albany, the names and residences of said stockholders, the collection of taxes from said stockholders, and the payment of the same to the county treasurer of the County of Albany, and the demand made by Chauncey P. Williams, before the commencement of this action, of the treasurer of the County of Albany, are true as therein set forth.

Second. That the amounts collected from the said stockholders and paid to the treasurer of the county of Albany, and the times when the said amounts were so paid to said treasurer, were as follows, to wit:

$ 907.90 paid	August 11,	1874
127.84 paid	August 11,	1874
1,868.06 paid	May 1,	1875
1,409.33 paid	May 27,	1876
1,202.32 paid	May 3,	1877
1,336.60 paid	April 17,	1878
1,473.02 paid	April 22,	1879
11,604.75 paid	May 1,	1875
8,147.26 paid	May 27,	1876
7,822.34 paid	May 3,	1877
7,357.94 paid	April 16,	1878
6,243.20 paid	April 21,	1879

Third. That the sums above named were not paid voluntarily by said stockholders, but were forcibly collected by the marshal of the City of [307] Albany, under a warrant issued to such marshal by the receiver of taxes of said city, pursuant to a warrant issued to said receiver of taxes by the Board of Supervisors of the County of Albany, by levying upon the property of the said stockholders respectively, as alleged in said complaint.

Fourth. That the said assessments were made and said amounts collected and received by the treasurer of the County of Albany, as above stated, under color of an Act of the Legislature of the State of New York, entitled 'An Act Authorizing the Taxation of Stockholders of Banks, and Surplus Funds of Savings Banks.' passed April 23, 1866, being chapter 761 of the Laws of 1866, and not otherwise.

Fifth. That the allegations of the complaint with reference to the assignments by the respective stockholders of said bank of their claims against the County of Albany, by reason of the matters alleged in the said complaint, are true as set forth in said complaint, and that the plaintiff, at the time of the commencement of this action, was the holder and owner of all claims against the County of Albany, or against the defendant, arising out of the matters alleged and set forth in said complaint.

Sixth. That the said Act of the Legislature of the State of New York chapter 761 of the Laws of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations, in the assessment thereof for taxation, although such deduction of debts of the owner was, at the time of the assessments alleged in the said complaint, permitted and required by the laws of the State of New York to be made from the value of every kind of personal property and moneyed capital, other than bank stock, in assessing the same for the purpose of taxation.

Seventh. That the allegations in the fourth count of said complaint, as to the presentation to the said Board of Assessors by said Chauncey P. Williams of the affidavit of his indebtedness, and the request by him for a reduction of his assessment on his bank stock, and the refusal of said Board of Assessors to make such reduction, and the application by said Williams to the Supreme Court of the State of New York for a writ of *mandamus*, and the subsequent legal proceedings thereon, including the decision of the Supreme Court of the United States, are true, as set forth in said fourth count."

It does not appear by this finding of the court [308] that any shareholder, for whose payment of taxes this suit is brought, made affidavit or other application in regard to his indebtedness, that it might be deducted from his assessment, nor that any of these shareholders owed anything to be deducted from the assessed value of the shares held by them, except the seventh finding of facts in regard to C. P. Williams.

Unless, therefore, the other shareholders, who paid the tax on the shares of their stock, were

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entitled to recover back the sum paid without any evidence that they had made affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to assessment of bank shares as to other personal property, and without any evidence that they owed anything whatever to be deducted from any assessment of their personal property, including bank shares, the judgment in this case cannot be supported.

The Judge who decided the case on the circuit found, as a conclusion of law, that the assessment of all shares of national banks was void, because the Statute of New York, under which the assessments were necessarily made, was void, as being in conflict with the Act of Congress on that subject; and he declares, in an opinion delivered in the case of *Bank* v. *Hills*, in a chancery suit, that the assessments in this class of cases are absolutely void, the assessors having acted without any jurisdiction.

If this view of the subject be sound; if the officers who assessed and collected this tax were utterly without authority to collect any tax whatever, or, if there was no law by which in any case they could assess and collect tax on shares of national banks, then it is of no consequence to inquire of anything beyond the fact that plaintiff's assignors did pay such a tax under legal compulsion.

On the other hand, if the law is for any purpose a valid law, and if it can be held to furnish the rule of taxation as to any class of owners of national bank shares, then the onus is on plaintiff to show that his assignors are not of that class.

[309] The question here to be decided arises under two Statutes of the State of New York in regard to taxation.

The first of these is the Act of 1850, relating to the assessment and collection of taxes in the City of Albany. The 6th section of the Act requires the Board of Assessors to prepare an assessment roll, in which there shall be set opposite the name of each taxpayer: (1) All his real estate liable to taxation and its value; (2) The full value of all his personal property after deducting the just debts owing by him.

Section 9 of the Act is as follows:

"If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the Board of Assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In 1866 the State enacted a law concerning the taxation of bank shares which was evidently intended to meet the requirements of the Act of Congress in relation to State taxation of the shares of national banks, and the provision of this statute related only to taxing stockholders in banks, and to the capital invested in individual banks. The 1st section of this Act reads as follows, and it contained no other provision for deductions as the basis of taxation, except what is found in this section:

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere; whether the said stockholder reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the [310] hands of individuals in this State. And in making such assessment, there shall also be deducted from the value of such shares, such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held to the whole amount of the capital stock of said bank or banking association. *And provided further*, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by such bank or banking association; but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

In the case of *People* v. *Dolan*, 36 N. Y., 59, the question was whether, taking these two statutes together, an owner of shares of stock in a national bank was entitled to deduct from the assessed value of his shares the just debts owing by him. It was argued that into this Act of 1866 for the taxation of bank shares there should enter, as part of it, the provision of the Act of 1850 which allowed this deduction as to all personal property, and that nothing in the Act of 1866 forbid this or was inconsistent with it. It was also insisted that unless the Act of 1866 was so construed, it would violate the Act of Congress which only permitted the shares of national banks to be taxed at the same rate as other money, capital of the citizens of the State.

But the Court of Appeals overruled both propositions, and held that the true meaning of the Act of 1866 was that no such deduction should be made, and that as thus construed it was not in conflict with the Act of Congress on that subject.

In the subsequent case *Williams* v. *Weaver*, Wil- Williams, who was a shareholder in the National Albany Exchange Bank, made the affidavit required by section 9 of the Act of 1850, and presenting it to the Board of Assessors of the county demanded a reduction in accordance with it, from the valuation of his bank shares. On the refusal of the assessors to comply with this request, a proceeding was commenced in the courts of the State, in which the Court of Appeals re-affirmed the principles of the case of the *People* v. *Dolan*. That case coming into this court by writ of error, it was here held that while we were bound to accept the decision of the highest court of the State in construction [311] of its own statute, the Act of 1866 as thus construed was in that particular in conflict with the Act of Congress, because it did tax shares of the national banks at a higher rate that other

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moneyed capital in the State. In that case [*People* v. *Weaver*], reported in 100 U.S., 539 [XXV., 705], there are no words which declare the Act of 1866 to be void, but the careful language of the decision is, that "In refusing to plaintiff the same deduction for debts due by him from his shares of national bank stock that it allows to others who have moneyed capital otherwise invested, it is in conflict with the Act of Congress."

Accepting, therefore, as we must, the Act of 1866, as construed by the Court of Appeals of New York, as not authorizing any deduction for debts by a shareholder of a national bank, is it for that reason absolutely void? This cannot be true in its full sense, for there is no reason why it should not remain the law as to banks or banking associations organized under the laws of the State, or as to private bankers, of which there no doubt exists a large number of both classes.

What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the Act of Congress in a case where he has no rights to protect? Are courts to sit and decide abstract questions of law in which the parties before the court show no interest, and which, if decided either way, affects no right of theirs?

It would seem that if the Act remains a valid rule of assessment for shares of state banks, and for individual bankers, it should also remain the rule for shareholders of national banks who have no debts to deduct, and who could not, therefore, deduct anything if the statute conformed to the requirements of the Act of Congress.

[312] It is very difficult to conceive why the Act of the Legislature should be held void any further than when it affects some right conferred by the Act of Congress. If no such right exists, the delicate duty of declaring by this court that an Act of state legislation is void, is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit.

The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.

In the case of *The Railroad Companies* v. *Schutte* [*ante*, 327], decided at the last Term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. "It is contended," said the court, "that as the provision of the Act in respect to the execution and exchange of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law." And yet this was a case in which the scheme of exchanging the bonds of the State for the bonds of the company, in order that the company might get the benefit of the better credit of the State, was accompanied by a mortgage created alone by the statute in favor of the State as her security, and the court, while holding that the exchange of bonds was void as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid.

The language of this court in the two cases, cited in the brief, of *U. S.* v. *Reese*, 92 U. S., 214 [XXIII., 563], and the *Trade Mark Cases*, 100 U. S., 82 [XXV., 550], concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so. Said the court in the latter case: "While it may be true that when one part of the statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each may stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear. * * *" The case of *U. S.* v. *Reese*, also implies that there may be unconstitutional provisions which do not vitiate the whole statute or even a single section because the argument is to show that in that case there could be no separation of the good from the bad. It is also to be observed that in both these cases it was a statute creating and punishing offenses criminally which was to be construed in regard to the limited constitutional power of Congress in criminal matters. [313]

The case of *The State Freight Tax*, 15 Wall., 232 [82 U. S., XXI., 146], arose out of a statute of Pennsylvania, which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The Act imposed a tax upon every ton of freight carried by every railroad company, steamboat company and canal company doing business within the State. The railroad companies, who contested the tax, presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. This court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void. It said: "It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. * * * The conclusion of the whole matter is that, in our opinion, the Act of the Legislature of Pennsylvania of August 25, 1864, *so far as it applies to articles* carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void." The same language is repeated in *The Erie Co.* v. *Pa.* [82 U. S., XXI., 164], decided at the same time, and both cases were remanded to the state court for further proceedings in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State and not on interstate commerce.

This is a clear case of distinguishing between the articles protected by the Constitution of the

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United States and those which were not, though nothing in the language of the statute authorized any such distinction.

But in a review of the cases in this court on this subject, that of *Austin* v. *The Aldermen of Boston* [74 U. S., XIX., 224], will be found most nearly to resemble the one before us. It [314] related to the same matter of the invalidity of a statute of a State taxing shares of the national banks as being in conflict with the Act of Congress. That Act said that such taxes might be assessed *at the place where said bank was located, and not elsewhere.*

The Act of the Massachusetts Legislature directed the assessment and taxation of the shares at the *place where the owner resided.* The plaintiff in error, Austin, having contested the tax on his shares in the courts of the State unsuccessfully, brought the case here by writ of error. This court declined to enter upon the question of the validity of the Massachusetts Statute, because the case did not show that Mr. Austin was taxed on his shares in any other place than Boston, the place where the bank was located.

The argument of counsel in the case before us is, that any tax or a tax on any person on account of his bank shares, is void because the whole of the New York Statute is void. If the argument is sound, it was equally applicable to *Austin's Case.*

The Statute of Massachusetts, which made no limitation of taxation to the place where the bank was located, must be held void under any principle which would wholly invalidate the Statute of New York, because it did not allow the deduction of the owner's indebtedness from his shares. And if the Massachusetts Statute was utterly void as to national bank shares, then the tax on Mr. Austin's shares in Boston was void, and he had *a right to be protected* against the unconstitutional statute. The court evidently went upon the principle that the statute was only void as against the Act of Congress, in cases where some one was injured by the particular matter in which there was such conflict. The case seems to us directly in point.

To the same effect are the cases of *People* v. *Cassity*, 46 N. Y., 46; *Gordon* v. *Cornes*, 47 N. Y., 608; *Village of Middleton, Ex Parte*, 82 N. Y., 196.

If we examine the statute before us on principle, we shall find but little reason to hold it to be wholly void as regards bank shares. If the statute stood alone, there is nothing in it in conflict with the Act of Congress. It is only when we look to the other statute, which prevents the deduction of debts from the entire [315] value of personal property, that we discern the discrimination against bank shares. The Act declares that bank shares shall be taxed according to their value, after deducting the real estate and other property on which the bank itself pays tax. This is eminently just. It provides for a mode of ascertaining their value, the officers who shall do it, and how the tax shall be collected. In all this the law is valid, except that it does not authorize a deduction for debts of the shareholder. This is a distinct and separable principle. When the shareholder has no debts to deduct, the law provides a mode of assessment *for him*, which is not in conflict with the Act of Congress, and the law in that case can be held valid. Under the decision in *Austin* v. *The Alderman* [*supra*], it is valid as to him.

If he has debts to be deducted, the case of *People* v. *Weaver* [XXV., 705], shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured, the remainder of the law remains valid. In other words, in such a case, so much of the law as conflicts with the Act of Congress in the given case is held invalid, and that part of the state law which is in accord with the Act of Congress is held to be the measure of his liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and those to which it does, between the cases in which it violates the Act of Congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts.

It follows that the assessors were not without authority to assess national bank shares; that where no debts of the owners existed to be deducted, the assessment was valid and the tax paid under it a valid tax. That in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some proper manner that the shareholder owed just debts which he was entitled to have deducted.

If they then proceeded in disregard of the Act of Congress, the assessment was erroneous, and the case of *People* v. *Weaver* shows how that error could be corrected.

The case before us shows no error in any case but that of Mr. Williams, and in that case he [316] has obtained the judicial decision of this court, that the tax he paid was illegally exacted from him. Nor do the facts of his case raise the question whether, in a case where the debts of the shareholder do not equal the assessors' value of his shares, the tax is wholly erroneous, or only so much as represent the assessment of his indebtedness that should have been deducted, for his affidavit was that his debts equaled the value of his bank shares. Nor do the findings of fact raise the question whether, without making affidavit and demand on the assessors, a suit can be maintained to recover, when such indebtedness actually existed; for he did make affidavit and demand, and no other taxpayer has shown any such notice or demand, or that he had any indebtedness to be deducted. There is neither finding of fact nor averment in the pleadings on either point as to any other assignors of plaintiff than Mr. Williams. *It results from these considerations that the judgment of the Circuit Court is reversed, and that on the finding of facts judgment should be rendered for plaintiff on the fourth count for the amount of the tax paid by Williams, with interest, and on all the other counts for defendants.*

It is so ordered.

Mr. Justice **Bradley**, dissenting:

I dissent from the judgment of the court in all these cases, for the reason that, in my opinion, the state laws authorizing the capital stock of national banks to be taxed, without allowing

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any deduction for the debts of the stockholders, where such deduction is allowed in relation to other moneyed capital, are void *in toto* so far as relates to national banks. To hold the laws valid except as to those who are actually indebted, and actually claim the benefit of the deductions, and actually set it up in a suit brought by the bank for relief, is practically to render the condition of the Act of Congress nugatory, and to deprive the national banks and their stockholders of its protection. The tax though laid on the stockholders is required to be paid by the bank itself, which must pay without deduction unless the shareholders give the bank notice of the amount of their debts. This is a most ingenious expedient to avoid such deductions altogether. The probability that not one in ten of the shareholders will ever have notice of the assessment in time to make the claim, and the natural reluctance they would have (if they had notice) to lay the amount of their debts before a board of bank officers, will effectually secure the State from claims for deduction. And that was, no doubt, the object of the law. But this unequal operation of it, in its practical effect, might not be sufficient to render it void. It is void, in my judgment, because it makes no exception, but is general in its terms, subjecting to taxation the capital stock of national banks without the privilege of deducting debts. Denying to it operation and effect as to those who desire to claim the benefit of the deduction, and giving it effect as to all others, is to tear a portion of the law out by the roots. *It is not like the case where a portion of a law, which may be separated from the rest, can be declared invalid, without affecting the remainder of the law; nor like the case of a general law which the Legislature has power to make, but from the operation of which some individuals may have a legal or constitutional exemption, which they can plead in their defense;* but it is wrong in form, wrong *in toto*. The Legislature had no authority or power to make the capital of national banks taxable except in the same manner as other moneyed capital of the State. The practical iniquity of the law is seen in this, that it affects the value of all the stock whoever holds it. As the law stands it acts as a prohibition against the purchase of the stock by those who owe debts, and they constitute a considerable portion of every community. It does not help the validity of the law for us to declare that it is *pro tanto* void, and, in fact, make a new law for the State. Its validity must be decided by its actual form and terms. If these cannot stand, the law is void.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 319; 113 U. S., 695.

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[319] CHARLES A. HILLS, Receiver of Taxes, AND MICHAEL E. HIGGINS, Marshal of the CITY OF ALBANY, *Appts.*,

v.

NATIONAL ALBANY EXCHANGE BANK.

(See S. C., 15 Otto, 319-322.)

Case followed—enjoining collection of tax, by bank or shareholder—tender of performance—when demand of deduction unnecessary.

1. Supervisors v. Stanley, ante, p. 1044 followed.
2. A bank may maintain a suit on behalf of its shareholders, to enjoin the collection of a tax unlawfully exacted on its shares.
3. Where a shareholder has made the requisite affidavit and the proper demand upon the assessors for deduction from his tax by reason of his debts, and shows that no assessment should be made on his shares and he has not yet paid the money, he is entitled to relief by injunction, to restrain the collection of the tax.
4. When the tender of performance of an act is necessary to the establishment of any right against another party, such tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.
5. When it is entirely clear that all affidavits and demands for deduction which could have been made would have been disregarded, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation, it is not essential, in order to sustain an injunction, to show such affidavit and demand when it is established that there were debts to be deducted.

[No. 817.]

Argued Jan. 25, 1882. Decided Apr. 3, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Messrs. **Wheeler H. Peckham** and **Rufus W. Peckham,** for appellants.

Messrs. Matthew Hale, George F. Edmunds, **Wager Swayne, Julien T. Davies,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree in chancery of the Circuit Court for the Northern District of New York, and it presents very much the same questions that have just been decided in the case of *Supervisors* v. *Edward Stanley* [*ante*, 1044]. That was a common law action to recover for taxes unlawfully exacted for years prior to 1879 on shares of the National Albany Exchange Bank, and the present suit was brought to enjoin the appellants from collecting a similar tax assessed and yet unpaid for that year. In this case the Bank sued in right of and as representing all the stockholders, and the circuit court made a decree perpetually enjoining the collection of all taxes on shares of said Bank. Several questions are raised or rather suggested which we think have heretofore been decided by this court, such as the right of the Bank to maintain a suit on behalf of its shareholders. This was established by the [320] cases of *Cummings* v. *Bank*, 101 U. S., 153 [XXV., 903]; *Pelton* v. *Bank*, 101 U. S., 143 [XXV., 901]. There is, also, an attempt to show that there was a settled rule or purpose on the part of the assessors to value the shares of the appellee Bank higher in proportion to their real value than in the case of other banks, bankers and moneyed corporations. We think the proof fails to establish this in a manner to justify the

NOTE.—*Taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares in national banks and of other corporations.* See *note* to Prov. Bk. v. Billings, 29 U. S. (4 Pet.), 514.

When an injunction to restrain the collection of a tax will be granted. See *note* to Dows v. Chicago, 78 U. S., XX., 65.

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interference of a court of equity. *Bank* v. *Kimball* [*ante*, 469].

The bill, however, in its main feature, asserts the right to an injunction, on the ground that the Act of 1866, under which the bank shares were assessed, is absolutely void because it makes no provision for deduction from the assessed value of these shares, of the debts honestly owing by the shareholders. And the court, proceeding upon the idea that both the statute and the assessment made under it are absolutely void, decreed relief accordingly. Under the ruling just made on that subject this decree must of course be reversed, because as to the larger number of the shareholders whose taxes are enjoined, there is no evidence that they owed any debts whatever at the time the assessment was made.

The allegations of the bill on this subject are: First. That one shareholder owning five hundred and thirty-two shares of the stock made affidavit that the value of personal estate owned by him, including said bank shares, after deducting his just debts and other investments not taxable, did not exceed $1, and presented said affidavit to the Board of Assessors, with a demand that they should reduce the assessment of his shares accordingly, which was refused. The evidence shows this to have been Mr. Chauncey P. Williams.

2. The further allegation of the bill on that subject is, that other shareholders were indebted to an amount equal to or in excess of the personal property owned by them, including their bank shares, but omitted to make affidavit and demand the proper reduction, because they knew such demand would be refused by the board, both from information of their refusal in other cases, and from knowledge of the decisions of the Court of Appeals of New York that they had no authority to make such deduction. This allegation is also supported by the evidence of four or five shareholders who are represented in this action.

While the decree of the court, enjoining the collecting officers as to all the tax assessed on [321] the shares of this Bank, must be reversed, the question arises, what shall be done with the cases in which it appears that there are shareholders taxed who owed just debts entitled to deduction.

With regard to the case of Mr. Williams, we have no doubt that there should be an injunction to the amount of his tax. He made the requisite affidavit and the proper demand for deduction, and his affidavit shows that no assessment should be made on his shares. He has not yet paid the money and is entitled to relief by injunction.

A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. That question is, whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused; that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett* v. *Hunter*, 9 Wall., 326 [76 U. S., XIX., 672]; *Tracey* v. *Irwin*, 18 Wall., 549 [85 U. S., XXI., 786]; *Atwood* v. *Weems*, 99 U. S., 183 [XXV., 471].

Without elaborating the matter we are of opinion that, considering the decision of the Court of Appeals of New York, the action of the assessors in the case of Mr. Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation. It is, therefore, not now essential to show such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri*, the tax being unpaid. And we are of opinion that it is open to the court below when this case returns to permit such amendment of the pleading as will enable plaintiff to make proper allegations on that subject, or by reference to a [322] master to allow each shareholder to establish the amount of deduction to which he was entitled at the time of the assessment, and to enjoin the collection of a corresponding part of the tax. But as the assessment is not void, but only voidable, it must stand good for all of the assessment in each case which is not shown to be in excess of the just debts of the shareholder that should be deducted.

The decree of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with this opinion.

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Mr. Justice **Bradley** dissenting.

Cited—105 U. S., 322; 106 U. S., 202; 10 Bias., 511 (n); 114 U. S., 282.

EVANSVILLE NATIONAL BANK OF [322] EVANSVILLE, INDIANA, *Appt.*,

v.

THOMAS P. BRITTON, Treasurer of VANDERBURGH COUNTY.

THOMAS P. BRITTON, Treasurer of VANDERBURGH COUNTY, *Appt.*,

v.

EVANSVILLE NATIONAL BANK OF EVANSVILLE, INDIANA.

(See S. C., 15 Otto, 322-327.)

Cases followed—taxation of bank shares—rule as to.

1. Hills v. Exchange Bank, *ante*, p.1052, and Supervisors v. Stanley, *ante*, p. 1044, followed.
2. The taxation of national bank shares by the

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Indiana Statute without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the Act of Congress.

3. The shares of the national banks are taxable with exclusive reference to their value, and without regard to the nature of the property held by the bank as a corporation.

[Nos. 1149, 1156.]

Argued Jan. 24, 1882. Decided Apr. 3, 1882.

CROSS appeals from the Circuit Court of the United States for the District of Indiana.

This action arose in the court below, upon a bill filed by the Evansville National Bank, to enjoin the collection of certain taxes assessed for 1879.

The case is further stated in the opinion.

Messrs. Alexander Gilchrist, Charles H. Butterfield, **Thomas A. Hendricks, Asa Iglehart** and *J. E. Iglehart,* for complainant.

Messrs. H. A. Mattison, H. C. Gooding, **Jacob S. Buchanan, Benjamin Harrison** and *Cicero Buchanan,* for defendant.

Mr. Justice **Miller** delivered the opinion of the court:

These are cross appeals from a decree of the Circuit Court for the District of Indiana, rendered in a suit in chancery, in which the Evansville National Bank was complainant and Britton, as Treasurer of Vanderburgh County, was defendant.

The case is in all essential points analogous to that of *Hills* v. *Bank,* just decided [*ante,* 1052].

[323] And the principal question of law is the same as that discussed and decided in the case of *Supervisors* v. *Stanley* [*ante,* 1044]. In fact the three cases were advanced out of their order, and heard consecutively, because they involved important questions concerning taxation by state statutes of the shares of national banks, and the argument, able and exhaustive throughout, has been almost wholly directed, on the part of the Banks, to establish the proposition that, where the law of the State either makes or permits a discrimination operating only against a particular class of holders of national bank shares, in the manner of assessing those shares as regards other moneyed capital in the State, all the laws for such assessments are void, and all such assessments are absolutely void, and no tax on national bank shares can be collected in the State.

The brief of counsel in this case in various forms repeats the idea that the bill was brought, not so much to assert the rights of stockholders who may have been injured by the enforcement of the statute, as to obtain a judicial declaration of this court that the Act is void, and the attempt to tax the shares of the Bank equally so.

We have rejected this proposition in the case of *Supervisors* v. *Stanley,* and have there given our reasons for it, and shall not repeat them here.

The objection made to the Indiana Statute is the same as that made against the New York Statute, namely: that it permitted the taxpayer to deduct from the sum of his credits, money at interest, or other demands, the amount of his *bona fide* indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares.

A distinction is attempted to be drawn between the Indiana Statute and the New York Statute, because the former permitted the deduction of the taxpayer's indebtedness to be made from the valuation of his personal property, while in Indiana he can only deduct it from his credits; and, undoubtedly, there is such a difference in the laws of the two States. But if one of them is more directly in conflict with the Act of Congress than the other, it is the Indiana Statute. The subject of taxation from which the taxpayer may deduct his *bona fide* indebtedness is, in the schedule of the Act, placed under two heads, as follows:

"1. Credits or money at interest, either within or without the State, at par value. [324]

2. All other demands against persons or bodies corporate, either within or without this State.

Total amount of all credits."

The Act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana Statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.

It is unnecessary to repeat the argument in the case of *People* v. *Weaver,* 100 U. S., 539 [XXV., 705], on this point. We are of opinion that the taxation of bank shares by the Indiana Statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the Act of Congress.

There is in the bill of complaint in this case the usual allegation, apart from the special matters we have just considered, that the assessing officers habitually and intentionally assess the shares of the national banks higher in proportion to their actual value than other property generally, and especially shares in other corporations. It is denied in the answer and is unsupported by proof.

It is also alleged that the Bank is taxed a considerable sum for its real estate, and that in assessing the value of the shares no deduction is made on that account. The positive testimony of the assessor shows that such deduction was made.

It is alleged that the capital of the Bank is almost entirely invested in the bonds and treasury notes of the United States, and the shares only represent this untaxable investment. The [325] case of *Van Allen* v. *Assessors,* 3 Wall., 578 [70

NOTE.—*Taxation of stock or shares in corporation does not impair the obligation of contracts; taxation of shares in national banks and of other corporations.* See *note* to Prov. Bk. v. Billings, 29 U. S. (4 Pet.), 514.

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U. S., XVIII., 229], settles the principle that the shares of the national banks are taxable without regard to the value of the property held by the bank as a corporation, having exclusive relation to their value. The very point here made was expressly overruled in that case.

Acting upon these principles, the circuit court decreed a perpetual injunction as to those shareholders who had proved in the case that, at the time of the assessment, they owed debts which should rightfuily have been deducted. These were four in number, and the appeal of the collector, Britton, is from this injunction. The decree in that respect was right and must be affirmed.

The Bank appeals from that part of the decree which dismissed the bill as to all the other shares. This was because no evidence was given that any other shareholders except the four above referred owed any debts which could have been deducted from the value of the shares. In the case of *Hills* v. *Bank*, we authorized the court on return of the case to permit the bank to show what shareholders had such indebtedness in some appropriate form. It is not necessary to consider whether this case ought to be reversed at the instance of the Bank to enable that to be done now, for it is stated by the counsel of the Bank in their printed brief that the offer was made to them to have a reference to a master to take testimony on this point before final decree, and they declined to accept the privilege. *That branch of the decree is, therefore, affirmed on the appeal of the Bank.*

Mr. Chief Justice **Waite**, dissenting:

I cannot agree to so much of the judgment in this case as affirms that part of the decree below appealed from by Britton, the Treasurer. "Credits" are but one of a number of kinds of moneyed capital. They represent, in the classi- [326] fication of taxable property, the ordinary debts due to a person, and it has been common for so long a time in the States to measure their taxable value by their excess over like debts owing to the same person in the same right, that I cannot believe it was the intention of Congress, in its limitation on the power of taxing national bank shares, to require a deduction of debts from the value of shares when such a deduction was only allowed to other persons from this one kind of moneyed capital. The law of Indiana expressly prohibits deductions from the value of any other property than credits. Ample provision is made for the taxation of all other moneyed capital at its value without deduction, the same as national bank shares. In *Hepburn* v. *School Directors*, 23 Wall., 485 [90 U.S., XXIII., 112], this court said "It could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt." In that case a tax on bank shares was sustained when, by law, mortgages, judgments, recognizances and moneys owing on articles of agreement for the sale of lands were not taxable. I am unable to distinguish this case in principle from that. The exemption here is partial only, as it was there.

I am authorized to say that *Mr. Justice* **Gray** concurs in this dissent.

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KNICKERBOCKER LIFE INSURANCE [350]
COMPANY OF NEW YORK, *Plff. in Err.*,

v.

BARTHOLOMEW FOLEY.

(See S. C., 15 Otto, 350-355.)

Instruction to jury—intoxicating liquors—temperate habits.

1. No instruction to a jury should be given, which assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof.
2. Occasional use of intoxicating liquors does not render one a man of intemperate habits, nor will an exceptional case of excess justify the application of this character to him.
3. Where an applicant for life insurance, in the application, in answer to a question whether the assured was and had always been of temperate habits, answered "yes," it was not error in the court to instruct the jury that if the habits of the insured, "in the usual, ordinary and every-day routine of his life were temperate," the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence.

[No. 212.]

Submitted Mar. 3, 1882. Decided Apr. 3, 1882.

IN ERROR to the Circuit Court of the United States for the District of South Carolina.

Statement of the case by *Mr. Justice* **Field**:

In January, 1872, the plaintiff in the court below obtained from the Knickerbocker Life Insurance Company, of the City of New York, a policy of insurance for $5,000, on the life of one Badenhop, his debtor to that amount. The premium required at the time and the annual premiums stipulated were paid. The profits arising upon them entitled the assured in May, 1873, to a further insurance on the life of his debtor, to the amount of $36.03; and in June, 1874, to the amount of $39.36; and policies for these sums were issued to him.

Badenhop died in January, 1875; but the assured, being ignorant of the fact, paid the next [351] annual premium. The present action is brought to recover the amount of the policies and of the premium overpaid, with interest. It was commenced in a court of the State, and upon application of the Company was removed to the Circuit Court of the United States. The complaint alleges the issue of the policies, the interest in them of the plaintiff, the death of the debtor whose life was insured, the notice and proof thereof furnished to the Company, the fulfillment by the plaintiff and the deceased of "all the conditions" of the policies, the amount due, and its non-payment. It also alleges the payment of the annual premium after the death of the insured. A copy of the policies is annexed to the complaint. The first policy declares that it is issued upon the express condition, that the application on file in the office of the Company is an express warranty of the truth of the answers and statements contained in it, and that, if they are in any respect untrue, the policy is to be void and of no effect to anyone. The additional policies declare that they are subject to the same conditions as the first one.

In its answer the Company admits the issue of the policies and the payment of the premiums mentioned, but sets up, among other things, as a defense, that the plaintiff and the insured did

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not make true and correct answers and statements to certain questions contained in the application for the first policy, in this: that to the question, "Is the party of temperate habits? Has he always been so?" the answer given was "Yes," when, in fact, the insured was a man of intemperate habits, thus concealing by the answer his true habits, and making a false statement concerning them; whereby the policy became void.

On the point thus raised, whether the answers given as to the habits of the insured were true or false, the testimony offered was conflicting. On the part of the Company, one witness testified that in 1871, and in the early part of 1872, he was the family physician of Badenhop; that at that time Badenhop was drinking hard; that during that year he had attended him for *delirium tremens*, and once or twice for indisposition, produced, "as he thought," from the excessive use of intoxicating drink; and that he "regarded" him as a man of intemperate habits. But on his cross-examination, [352] he admitted that he did not know Badenhop intimately, had no relations with him other than professional, and saw him only when he attended him professionally, or met him occasionally in the street. Two other witnesses testified for the Company—one, that he was intimate with Badenhop; the other, that he had known him for several years—and that he was a very intemperate man; that they had frequently seen him under the influence of liquor; but neither of them stated when his acquaintance commenced, whether before or after the policy was issued.

On the part of the plaintiff several witnesses were called, who had known Badenhop intimately for many years, their acquaintance with him commencing before the policy was issued and continuing afterwards, and one of whom had been his partner in 1869 and 1870; and they all testified unqualifiedly to his being a man of temperate habits.

The defendant requested the court, among other things, to instruct the jury: "That where, in a question whether the party assured is one of temperate habits at the time when he seeks to be insured, and has always been so, witnesses testify, from their own knowledge of the party and his habits, that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits."

This instruction the court refused to give, and an exception was taken. The court, among other things, instructed the jury that all the representations in the application for the policy of insurance are warranties that such representations are true, and that if they find from the evidence that the habits of the insured, at the time of or at any time prior to the application, were not temperate, then the answers made by him to the questions, "Are you a man of temperate habits?" "Have you always been so?" were untrue, and the policy is void; but that if they find that his habits in the usual, ordinary and every-day routine of his life were temperate, then such representations were not untrue with- [353] in the meaning of the policy, although they may find that he had an attack of *delirium tremens* resulting from an exceptional indulgence in drink prior to the issue of the policy; and that the burden of proof is upon the defendant to show the breach of any warranty in the policy. To the charge the defendant excepted. The jury found for the plaintiff, and upon its verdict judgment was entered; to review which the case is brought to this court on a writ of error.

Messrs. **A. G. Magrath** and *James Lowndes*, for plaintiff in error.

Messrs. **Bryan** & *Bryan* and *J. N. Nathans*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The instruction requested by the defendant, treating it as applicable to the case at bar, and not as containing a mere abstract proposition of law, is open to several objections.

In the first place, it assumes that there was a difference in the sources of knowledge of the witnesses in the case; which was not the fact. All of them testified from their observation of the conduct of the deceased; and the jury would properly give weight to the testimony, not according to the positiveness of the averments of the witnesses as to their knowledge; but, other considerations being equal, according to their opportunities of observation of the deceased's conduct, and the anner in which those opportunities had been improved. No witness testified, from his own knowledge, that the deceased was of intemperate habits at the time he applied for the insurance, and that he had always been so. No instruction should be given which thus assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof. *Ins. Co.* v. *Baker*, 94 U.S., 610 [XXIV., 268].

In the second place, the instruction requested does not present the law with entire accuracy. Whether the testimony of the persons alleging knowledge is entitled to greater consideration than that of persons asserting opinions, mainly depends upon the subjects with respect to which the testimony is given. If the subject be, as in this case, the habits of a party, affirmations of knowledge will be weighed with reference to the opportunities of the witnesses to obtain the knowledge they assert. If they are not intimate [354] with him, and see him only occasionally, the assertion of knowledge of his habits, however strong, will amount to no more than the assertion of an opinion, and will not be entitled to equal weight with less positive testimony of other witnesses founded upon a more extended acquaintance.

In the third place, the instruction requested omits the consideration of the character of the witnesses, as an element in determining the weight to be given to their testimony. The force of testimony often depends as much upon the intelligence and judgment of the witnesses, disclosed by their manner of testifying, as upon confidence in their general veracity.

The charge given by the court, as stated above, correctly presented the law of the case. The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him. An attack

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of *delirium tremens* may sometimes follow a single excessive indulgence. Doctor Ray, in his treatise on Medical Jurisprudence, says that, though it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those who are not habitually intemperate as well as in those who are. Sec. 545. In the American Encyclopædia, under the head of "Delirium Tremens," it is stated, that it "sometimes makes its appearance in consequence of a single debauch;" though commonly it is the result of protracted or long continued intemperance. Vol. V., p. 782.

When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits [355] be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured, "in the usual, ordinary and everyday routine of his life were temperate," the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testimony of the witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[423] ALFRED MARCHAND, *Plff. in Errr.*,

v.

HENRY FRELLSEN.

(See S. C., 15 Otto, 423-430.)

Surety on appeal—liability of—satisfaction.

1. The surety in a bond for appeal from an order directing a writ of seizure and sale by virtue of articles 575 and 579 of the Louisiana Code of Practice, is bound for the debt for which the writ had issued, if affirmed on appeal.
2. The validity of a judgment cannot be questioned collaterally for errors which do not affect the jurisdiction of the court which rendered it.
3. The satisfaction of a bond for an appeal on one note cannot be a satisfaction of another bond for another appeal on a different note.

[No. 236.]

Argued Mar. 22, 1882. Decided Apr. 3, 1882.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

Statement of the case by *Mr. Justice* **Woods:**

On December 31, 1868 Henry Frellsen, the defendant in error, sold to one Daniel Fairex a plantation in St. Charles Parish, in the State of Louisiana, for the consideration of $133,000, $3,000 of which Fairex paid in cash, and the residue he agreed to pay in eleven annual installments, bearing interest and falling due respectively on the first of May in every year for eleven years. He executed and delivered to Frellsen his promissory notes for the principal of these deferred payments, and also notes for the interest to accrue thereon. In the authentic act by which Frellsen conveyed the property to Fairex he reserved his vendor's privilege.

On May 19, 1869, Frellsen applied to the Seventh District Court of the Parish of Orleans for an order of seizure and sale, to be directed against the plantation sold by him to Fairex, to satisfy the two notes given for the installment of the purchase money which fell due on May 1, 1869, one for $11,000, principal money, and the other for $5,390, interest. The court directed the writ to issue as prayed for. The execution of the writ was suspended by an appeal taken by Fairex to the Supreme Court of the State. The bond for the appeal was in the penalty of $26,000, and the plaintiff in error, Alfred Marchand, was the surety. The condition of the bond was as follows: "Now the condition of the above obligation is such that the above bound D. Fairex shall prosecute this appeal and [424] shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise, that the said Marchand, surety, shall be liable in his place." The Supreme Court affirmed the order of the seventh district court directing the writ of seizure and sale to issue, and gave judgment against Fairex for ten per cent on the amount of the two notes which were the basis of the writ of seizure and sale, on account of his frivolous appeal.

While the appeal just mentioned was pending in the Supreme Court of the State, the two notes, one for $11,000, principal, and the other for $4,620, interest, given by Fairex for the installment of the purchase money, maturing May 1, 1870, became due and were not paid. Thereupon Frellsen, on May 18, 1870, filed, in the Fifth District Court for the Parish of Orleans, his petition for an order of seizure and sale, directed against the same plantation, to satisfy the two notes last mentioned. On the same day the court made the order as prayed for. On May 26, 1870, Fairex appealed to the State Supreme Court from this order also, and gave bond for the appeal in the penalty of $23,000. Marchand, the plaintiff in error, was surety on this bond also. It was conditioned precisely as the bond for the former appeal.

Fairex, the defendant, died on August 26, 1871, and the administratrix of his estate was made party to the appeal in the Supreme Court.

On January 19, 1874, the Supreme Court of the State made the following decree upon this appeal: "The court, therefore, orders that the

NOTE.—*Lien for purchase money.* See *note* to Bayley v. Greenleaf, 20 U. S. (7 Wheat.), 46.

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plaintiff and appellee recover from the defendant $500 as damages for a frivolous appeal, and that the appeal be dismissed at the costs of the appellant."

While the appeal from the fifth district court was pending in the Supreme Court, that court having affirmed the order of seizure and sale made by the seventh district court, Frellsen, on November 28, 1871, applied to the last named court for an *alias* order of seizure and sale, to satisfy the two notes which matured May 1, 1869, the amount due on which was $16,890. The court directed the writ to issue, and by virtue of it the plantation was sold by the sheriff to Frellsen, the original vendor, for $40,000. This sum, by order of the court, was applied *pro rata* to all the notes for the purchase money of the plantation remaining unpaid. After the notes which were the basis of the proceedings in the fifth district court were thus credited, there remained due thereon the sum of $8,595, and after the credit was applied to the notes [425] which were proceeded on in the seventh district court, there remained due thereon the sum of $13,342.

On May 21, 1872, a rule was taken on Marchand in the seventh district court to hold him liable upon the bond for the appeal taken from that court. Judgment was demanded against him on the bond for the balance, $13,342, due on the notes which had been proceeded on in that court; and for $1,639, the judgment for damages for the frivolous appeal, rendered by the Supreme Court. Upon the trial of this rule the seventh district court entered judgment against Marchand for $1,639, the damages for the frivolous appeal, and for interest and costs, amounting to $1,900, and dismissed the rule as to the residue of Frellsen's demand. The sum of $1,900, which Marchand was condemned to pay, was paid by him on December 3, 1873, and accepted by Frellsen in full satisfaction of the judgment rendered as aforesaid.

After all these proceedings, on May 8, 1876, Frellsen took a rule upon Marchand in the fifth district court, in which it was alleged that there was due on the demand of Frellsen against Fairex, upon which Frellsen had obtained the order for seizure and sale in that court, the sum of $8,595, with interest at the rate of 8 per cent per annum from February 3, 1872; that the property of Fairex subject to executory judgment had been sold pursuant to an order and judgment of the seventh district court, and that no other property of Fairex could be found by the sheriff to satisfy said demand; that Fairex was dead and his estate insolvent; and requiring Marchand to show cause why he should not be condemned, by reason of his suretyship on the bond for the appeal from the order of seizure and sale made by that court, to pay said balance of $8,595, with interest, and $500, the damages adjudged by the Supreme Court for a frivolous appeal. This suit was removed by Marchand to the United States Circuit Court for the District of Louisiana.

Upon the hearing of this rule in the circuit court it was made absolute, and judgment was rendered against Marchand for $8,595, as due on the notes upon which the writ of seizure and sale had been ordered in the fifth district court, with interest thereon, and also for the sum of $500, the damages awarded against Fairex by the Supreme Court for his frivolous appeal.

This writ of error is prosecuted to review that judgment.

Messrs. **Philip Phillips** and **W. Hallett Phillips**, *Samuel P. Blanc* and *H. G. Morgan*, for defendant in error.

Messrs. Durant & **Hornor**, for plaintiff in error.

Mr. Justice **Woods** delivered the opinion of [426] the court:

The first contention of the plaintiff in error is that the court below erred in the construction which it gave to the appeal bond executed by Marchand for the appeal taken by Fairex from the order of the fifth district court. He insists that the obligation assumed by Marchand when he executed this bond was to pay for the use and detention of the property pending the appeal, just damages for delay, costs of suit, and cost and interest on the appeal, and that he did not bind himself to pay the debt to satisfy which the writ of seizure and sale was ordered.

We find no warrant for this construction of the bond in the decisions of the Supreme Court of Louisiana, which interpret the articles of the Code by virtue of which the bond was exacted.

Bonds for appeal from an order directing a writ of seizure and sale are given by virtue of the provisions of articles 575 and 579 of the Louisiana Code of Practice. *Alley* v. *Hawthorn*, 1 La. Ann., 122; *Tournillon* v. *Ratliff*, 20 La. Ann., 179; *State* v. *Judge*, 22 La. Ann., 116.

These articles are as follows:

"Art. 575. If the appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit, when such notice is required by law to be given, it shall stay execution and all other proceedings until definitive judgment be rendered on the appeal; provided the appellant gives his obligation with good and solvent security, residing within the jurisdiction of the court, in favor of the clerk of the court rendering the judgment, for a sum exceeding by one half the amount for which the judgment was given, if the same be for a specific sum, as security for the payment of the amount of such judgment, in case the same is affirmed by the court to which the appeal is taken. * * *

Art. 579. In the appeal bond it must be set forth in substance that it is given as security [427] that the appellant shall prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise, that the surety shall be liable in his place."

It is evident from an inspection of the bond, which is the basis of this suit, that it was given under these articles.

The authentic act executed by both Frellsen and Fairex, which is set out in the record, whereby the former conveyed the plantation to the latter, and the latter agreed that the plantation should be subject to the vendor's lien for the payment of the notes given for the purchase money, imported a confession of judgment in favor of Frellsen by Fairex for the amount of

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said notes respectively as they severally fell due. When, therefore, Fairex, the mortgagor, appealed from an order of the court directing a writ of seizure and sale to satisfy such of the notes as were then due and unpaid, he suspended the execution of a judgment against him, and the surety on the appeal bond became bound for the debt. That such is the effect of the bond for appeal in cases of this class has been repeatedly decided by the Supreme Court of Louisiana.

In the case of *Whann* v. *Irwin*, 27 La. Ann., 706, that court said:

"It is contended that the proceeding against the surety was premature, as only the property mortgaged had been sold under the writ, and no execution had been issued against the judgment debtor, and returned *nulla bona*. If this proposition be correct, to require a bond for an appeal from an order of seizure and sale is an idle form.

Article 575 of the Code of Practice, and article 87 of the Revised Statutes of 1871, justify the mode of proceeding in this case. The only execution which it was possible for the judgment creditor to cause to be issued, was issued and returned not satisfied. The requirements of the law were substantially complied with. The surety knew that under the executory process, no other property could be sold except that which was included in the mortgage, and when he stopped that by signing the appeal bond, he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.

[428] By reason of the nature of the judgment no execution could be taken out, after the return of the order of seizure and sale, which could reach the property of the debtor, and, therefore, the plaintiff had the right to proceed against the surety on the appeal bond. A different interpretation of the law would make of judicial suretyship a mere farce, the commencement rather than the end of litigation."

The rule thus laid down was re-affirmed in the case of *Landry* v. *Victor*, 30 La. Ann., 1041.

So in *Thompson* v. *G. w*, not reported, it was held that the surety on a bond given for a suspensive appeal from an order of seizure and sale is liable for the amount of the mortgage claim sued on. See, Louque's Digest, title Appeal III., ch. 4, p. 39. We have been able to find no conflicting decisions.

This interpretation of the local law and of the construction of bonds executed pursuant to its provisions, is binding on this court and leaves no ground for the contention of the plaintiff in error now under consideration, to stand on.

It is next insisted by the plaintiff in error, that all the proceedings in the fifth district court, in which the bond sued on in this case was given, were absolutely void and, therefore, that the bond given for appeal in that case was also void.

The reason for this contention is stated to be, that Frellson having begun his proceedings for seizure and sale in the seventh district court on the notes which matured May 1, 1869, the institution of a similar proceeding on other notes of the same series, subsequently falling due, in the fifth district court, was an illegal and oppressive act. It is asserted that "All the proceedings in the seventh district court were regular and legal, whilst all those in the fifth district court were null and void, on account of the error produced in the minds of the Judges of the Supreme Court and the fifth district court by the action of Frellsen in withholding from them knowledge of the pendency of the suit in the seventh district court."

It is not disputed that the subject-matter of the proceedings in the fifth district court was within the jurisdiction of that court and the parties were before it. Its proceedings, therefore, however erroneous, cannot be null and void. In passing upon this point it is only necessary to apply the rule laid down by this court [429] as an axiom of the law, that the validity of a judgment cannot be questioned collaterally for errors which do not affect the jurisdiction of the court which rendered it. *Cooper* v. *Reynolds*, 10 Wall., 308 [77 U. S., XIX., 931].

The complaint of the defendant in error seems to be this: that in the proceeding in the fifth district court, Frellsen, on whose appeal bond he became surety, had a good defense against the order or judgment rendered in that case if he had only taken the trouble to make it. But the fact that he did not make it, and that his antagonist did not make it for him, does not render the judgment void, the court having unquestioned jurisdiction to make orders for seizure and sale, and the mortgagor being present in court to resist it.

The plaintiff in error further insists that the payment by him on December 3, 1873, of the judgment for $1,900, rendered against him by the seventh district court upon the appeal bond given for the appeal from the order of that court, is also a satisfaction of any claim on the appeal bond signed by him in the fifth district court, for the appeal from the order of that court allowing the writ of seizure and sale for the satisfaction of other notes of Fairex.

If, as decided by the Supreme Court of Louisiana, the appeal bond in such cases is a security for the payment of the notes on which the application for the order of seizure and sale is based, it is plain that the satisfaction of a bond for an appeal on one note cannot be a satisfaction of another bond for another appeal on a different note. Each note is a separate cause of action, and the satisfaction of one does not necessarily imply the satisfaction of another.

Lastly, plaintiff in error relies on article 3061 of the code of 1870 for a reversal of the judgment below.

That article declares: "The security is discharged when, by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety."

The defense founded on this article is thus set forth in the answer filed by plaintiff in error to the rule taken on him in the fifth district court: "Said plaintiff has by his acts made it impossible and placed it beyond the power of respondent to satisfy the alleged order of seizure and sale herein, or the alleged decree on appeal therefrom; that said plaintiff, without re- [430] spondent's consent, has, by his said acts, impaired respondent's rights to subrogation, and respondent is thereby released from any liability, if any existed, which is denied."

It is sufficient to say, in reply to this con-

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tention, that the mortgage to which the plaintiff in error claims the right of subrogation has been enforced, and the proceeds of the mortgaged property applied *pro rata* to the satisfaction of the claim for which he is surety. If he had been actually subrogated to the rights of Frellsen, under the mortgage, he could have secured nothing more. He has not been injured. He has lost nothing by the foreclosure of the mortgage. It has resulted to his advantage in the reduction of the debt for which he is surety, and is no ground for his discharge from the unpaid balance.

There is no error in the record. *The judgment of the Circuit Court must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BENJAMIN S. RUSSELL, *Appt.*,

v.

[433] JESSE P. FARLEY, Receiver of the ST. PAUL AND PACIFIC RAILROAD COMPANY.

(See S. C., 15 Otto, 433-447.)

Decree for costs—injunction—security—damages.

1. An appeal does not lie from a decree in equity as to costs merely.
2. The circuit court, where no undertaking has been required on an injunction, has no power to award damages sustained by either party in consequence of the litigation, except by making a decree as to the costs of the suit.
3. As a condition of granting an injunction to stay proceedings at law, the court may require the plaintiff to enter into an undertaking as to damages in the event of the injunction proving to have been wrongly granted, and the court has the power to mitigate the terms imposed, or to relieve from them altogether.
4. When the court sees no just cause for superseding or suspending the effect of an injunction bond, the party for whose benefit it was given will be entitled to an assessment of damages, which may be ascertained by reference or otherwise, as the court may direct, or it may leave the parties to an action at law.

[No. 168.]

Argued Dec. 6, 1881. Decided Apr. 3, 1882.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is stated by the court.

Messrs. **Thomas H. Hubbard** and **Richard L. Ashhurst,** for appellant.

Messrs. J. D. V. Heard and **Henry J. Horn,** for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This case comes before us by appeal from a decree of the Circuit Court of the United States for the District of Minnesota, in a case in equity wherein Jesse P. Farley, as Receiver of certain branch lines of the St. Paul and Pacific Railroad Company, and of all lands and other property appurtenant thereto, was complainant, and the firm of De Graff & Co., the Northern Pacific R. R. Co., the Lake Superior and Miss. R. R. Co., B. S. Russell, G. W. Cass, Receiver of the Northern Pacific R. R. Co., and C. W. Mead, General Manager of said Company, were defendants. The complainant was appointed Receiver August 1st, 1873, by the circuit court in a foreclosure suit brought by John S. Kennedy and others, trustees under a mortgage given by the St. Paul and Pacific R. R. Co. to secure $15,000,000 of bonds issued by a subsidiary corporation called the First Division of the St. Paul and Pacific R. R. Co., which had a [434] contract to build the railroad, and a lease of the road for ninety-nine years. Amongst the assets supposed by the Receiver to be subject to this mortgage was certain railroad iron, which had been purchased in England with the money raised by the sale of the bonds, to wit: 1,700 tons lying at Glyndon, on the line of the road, and 1,000 tons at Duluth, claimed by De Graff and Co., and 1860 tons at Duluth, claimed by B. S. Russell; that at Duluth being mostly held in the custom-house for unpaid duties, but some of it being about to be reshipped. The bill in this case was filed by the Receiver in the State District Court for the County of Ramsey on the 21st of June, 1875, seeking to set aside the respective transfers of iron by virtue of which De Graff & Co. and Russell claimed to hold it, and for an injunction to restrain them from removing it, or taking it from the custom-house.

By a statute of Minnesota it is declared that, "When no special provision is made by law as to security upon injunction, the court or judge allowing the writ shall require a bond on behalf of the party applying for such writ, in a sum not less than $250, executed by him or some person for him, as principal, together with one or more sufficient sureties, to be approved by said court or judge, to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct." 2 Biss., Stat., 806, sec. 121.

On filing the bill in this cause, the complainant (the said Receiver) obtained a temporary injunction upon giving to the defendants a bond in the penalty of $10,000, with the following condition, to wit: "Whereas, the said plaintiff is about to apply to this court for a temporary injunction enjoining and restraining the defendants, and each of them, from shipping, removing, selling, hypothecating, transporting, interfering or intermeddling with 4,560 tons of iron rails now lying at Glyndon and Duluth, Min- [435] nesota, or any part thereof; Now, therefore, if the plaintiff will pay the parties enjoined by such writ, or detained thereby, such damages as they or either or any of them may sustain by reason of the writ, if the court finally decide that the party was not entitled thereto, the above obligation shall be void, else of full force and virtue."

De Graff & Co. having by consent rebonded 1,000 tons of the iron claimed by them, the court on the 11th of August, 1875, required a further bond from the complainant in the sum of $79,000, the condition of which was as follows, to wit: Whereas, an injunction has heretofore been granted in this court enjoining and restraining the said defendants, and each of them,

NOTE.—*Error; the court will not review the discretionary action of the court below.* See *note* to Barrow v. Hill, 54 U. S. (13 How.), 54.

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from shipping, removing, selling, hypothecating, transferring or interfering or intermeddling with 4,500 tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof; and whereas, said injunction is still in force and effect except as to 1,000 tons of said iron, claimed by said De Graff & Co., at Duluth aforesaid; and whereas, the said court has ordered, as a condition for the continuance of said injunction, that the plaintiff execute to the defendants herein a bond in the sum of $79,000, in addition to the bond for $10,000 heretofore given by the plaintiff on the issuance of the injunction Now, therefore, if the plaintiff will pay the parties enjoined by such injunction, or detained thereby, such damages as they, or either or any of them, may sustain by reason of such injunction, if the court finally decide that the party was not entitled thereto, the above obligation shall be void, else of full force and virtue."

The defendants severally answered the bill, and on the first of March, 1876, on application of the complainant, the cause was removed to the Circuit Court of the United States for the District of Minnesota. After taking a large amount of evidence, it was brought to a hearing, and on the 13th of October, 1877, a final decree was made dismissing the bill as to De Graff & Co. without costs to either party. As to the defendant, Russell, who was charged with holding 1,860 tons of the iron, it appeared that he was acting as agent for William G. Morehead, who was trustee or agent for the First Division Company in procuring the iron and carrying on the work of construction, and who had sold to De Graff & Co., subcontractors, the iron claimed by them, in part payment of moneys due them for work; and had pledged a portion, of the 1,860 tons of iron (claimed by [436] Russell) to pay Jay Cooke & Co. for advances of money, and Jay Cooke & Co. had pledged and sold it to the United States (the Navy Department) for a debt due to it. Some 1,090 tons of the 1,860 tons in question, remained at Duluth unsold, and this was claimed by Edward M. Lewis, trustee in bankruptcy of Morehead; but the court held that it was subject to the mortgage, and that the receiver was entitled to it. The decree on this part of the case was as follows, to wit:

"It is also further ordered, adjudged and decreed, that the said Farley, as Receiver, as against the defendant B. S. Russell, and against the defendant Edward M. Lewis, trustee in bankruptcy of William G. Morehead and others, is entitled, for the benefit of the trust which he represents, to all the iron rails in controversy herein not sold to De Graff & Co., and not pledged and sold to the Navy Department; which said iron rails, subject to the customs duties to the United States, thus decreed to the said Farley as Receiver, he is authorized to use in the construction of the said extension lines or to sell at the best prices and on the best terms practicable, and apply the net proceeds thereof to the credit of the mortgage, dated April 1, 1871, executed by the St. Paul and Pacific R. R. Co. to Horace Thompson, George L. Becker, and William G. Morehead, trustees, who in the said trust have been succeeded by the said Wetmore, Pearsal and Denny as trustees, and which mortgage is now being foreclosed in this court, neither party as against the other to recover costs or damages. It is further adjudged and decreed, that all transfers of the 1,860 tons of iron in controversy herein claimed by defendant Russell from William G. Morehead to said Russell, except transfers relating to the iron pledged to the Navy Department, are null and void, and that said Russell has no right, title or interest therein as against the said Farley and said trustees. It is further ordered, adjudged and decreed, that said Farley has no right, title or interest in the iron transferred to the Navy Department, and which is claimed herein by defendants Russell and Lewis; and it is further adjudged that neither the plaintiff nor the defendant Russell is entitled to costs or damages herein."

Russell alone appealed from this decree, and [437] appealed only from that portion of it which declared that neither party as against the other is entitled to costs or damages.

That an appeal does not lie from a decree in equity as to the costs, merely, is well settled. *Canter* v. *Ins. Co.*, 3 Pet., 307; *Elastic Fabrics Co.* v. *Smith*, 100 U. S., 112 [XXV., 547]. But it is contended by the appellant that the circuit court had no power to decree that he was not entitled to damages, thereby precluding him from recovering damages on the injunction bond; and, if it had any power to make a decree on the subject of damages, the decree denying him damages in this case is erroneous.

Had the cause remained in the state court, there can be no doubt that that court, under the Minnesota Statute which required an injunction bond to be given, could have determined the question of damages. The statute expressly declares that "The damages may be ascertained by a reference, or otherwise, as the court shall direct." But the Circuit Court of the United States is not governed in its practice in equity by the laws of the State in which it sits, but by the rules of practice prescribed by this court and by the circuit court not inconsistent therewith; and, when these are silent, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied. Equity Rule 90. The injunction bond taken by the state court, it is true, comes into the circuit court with the other proceedings in full force; but the power of the circuit court to deal with it depends upon the principles which govern the practice of that court, the same as if it had been originally taken by its direction.

The question then arises, whether the circuit courts have any power to make a decree on the subject of damages arising from an injunction, where an injunction bond has been required. Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just. Has it any such power, or any power over the subject, where such a bond has been given? For a solution [438] of this question, it will be proper to advert briefly to the history and object of this kind of obligations.

It is a settled rule of the court of chancery, in acting on applications for injunctions, to

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regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr, Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon and arises from the discretion which the court has in such cases, to grant or not to grant the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial. The older authorities refer to numerous instances in which it has been exercised. *Chief Baron* Gilbert in his *Forum Romanum*, p. 196 (repeated in Bacon's Abridgment, title Injunction, C), speaking of the course where an answer is put in, denying the equity of the bill, followed by a rule *nisi* to dissolve the injunction, says: "The plaintiff must show cause either upon the merits, or upon filing of exceptions; if upon the merits, the court may put what terms they please upon him, as bringing in the money, or paying it to the party, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to *give security* to abide the order on hearing, or the like." See, also, Newland, Ch. Pr., 223, 224; Kerr, Injunctions, 212, 622; Story, Eq. Jur., secs. 958 *b*, 959 *d*. In the case of *Marquis of Downshire* v. *Lady Sandys*, 6 Ves., 107, A. D. 1801, *Lord* Eldon said if there was a real doubt on the subject in controversy, he would direct an issue, "Taking care that if in the result of such a direction the defendant should be prejudiced by not being permitted to cut in the meantime [trees claimed to be ornamental], the [439] plaintiff should undertake to pay the value if the decision should be against him." In a similar case, in 1825, the same Judge made an order that the plaintiff should go before the master and give such security as would in the master's judgment secure to the defendants the value of all the trees which they should be prevented from cutting by the injunction, in case it should finally turn out in the judgment of the court that they ought not to have been enjoined in equity." *Wombwell* v. *Belasyse*, 6 Ves., 110, *n*.

Mr. Kerr in his Treatise on Injunctions says: "In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. The court may often, by imposing terms on the one party as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. * * * The defendant may be required to do such acts, or execute such works, or otherwise deal with the same as the court shall direct; or to enter into an undertaking to refrain from doing in the meantime the acts complained of by the bill, or to abide the order the court may make as to damages or otherwise, in the event of the legal right being determined in favor of the plaintiff. * * * So, on the other hand, as a condition of granting an injunction [the court may], require the plaintiff to enter into an undertaking as to damages in the event of the right at law being determined in favor of the defendant, and the injunction proving to have been wrongly granted." Kerr, Injunc., 212. Again, in another place, he says: "In doubtful cases, where damage may be occasioned to the defendant in the event of an injunction or *interim* restraining order proving to have been wrongly granted, the court will require the plaintiff, as a condition of its interference in his favor, to enter into an undertaking to abide by any order it may make as to damages." Kerr, 622. In *Wilkins* v. *Aikin*, 17 Ves., 422, where a bill was filed to prevent the infringement of a copyright; but it being doubt- [440] ful whether the defendant did more than make allowable extracts from the plaintiff's work, *Lord* Eldon said: "The proper course in this instance will be to permit this work to be sold in the meantime; the defendant undertaking to account according to the result of the action." P. 426.

The same practice has prevailed in this country, in some cases in pursuance of statute, and in others, by the action of the court itself. As early as 1723 a law was passed in Maryland, that any person desiring to proceed in equity against a verdict or judgment rendered against him in the county court, should be required to give security in double the amount of the debt, for the due prosecution of the injunction and payment of debt and all costs and damages that should accrue in the chancery court, or should be occasioned by the delay, unless the court of chancery should decree to the contrary, and in all things obey such order and decree as the court should make. In 1793 an additional law was passed, to the effect that whenever application should be made for an injunction to stay proceedings at law, the *Chancellor* should have power and discretion to require the applicant to give a bond to the plaintiff at law, with condition to perform such order or decree as the *Chancellor* should finally pass in the cause.

Similar laws were passed in Virginia in 1787 and in New Jersey in 1799, and no doubt in other States at an early date. Their object was, where an adjudication had already been had at law, to make it compulsory on the Chancellor to require security before granting an injunction. The jealousy of the courts of law at the interference of the court of chancery with their judgments is a matter of historical notoriety. But these laws did not interfere with the Chancellor's discretionary power to require a bond in all other cases.

Regulations, substantially similar to those above adverted to, were prescribed by general rule of the Court of Chancery of New York prior to the adoption of the Revised Statutes. In 1828 they were codified, with amendments,

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in that revision. But the rule, as well as the statute, only related to injunctions for staying proceedings at law.

In 1830, the Chancellor of New York, for the first time, made a general rule (No. 31), that where no special provision was made by law as [441] to security, the *Vice-Chancellor*, or *master*, who allowed an injunction out of court, should take from the complainant, or his agent, a bond to the party enjoined, either with or without sureties in the discretion of the officer, in such sum as might be deemed sufficient, not less than $500, conditioned to pay such party all damages he might sustain by reason of such injunction if the court should decide that the complainant was not entitled to the same; and that the damages might be ascertained by a reference or otherwise, as the court should direct. 1 Hoffman, Ch. Pr., 80; 1 Barb., Ch. Pr., 622; 2 Paige, 122. The object no doubt was, to prevent hasty and oppressive injunctions from being issued by subordinate officers.

This rule, enlarged and made applicable to all courts and judges, was copied in the New York Code of Procedure of 1848, section 195 (now sec. 222), and has been followed in other codes and systems of practice in other States.* It was substantially adopted in the Chancery Rules of New Jersey in 1853, except that it was left to the discretion of the officer to require a bond or not. It was copied in the Statutes of Minnesota, under which the bonds in the present case were taken, as may be seen by comparing it with the section of said statutes already cited.

But no Act of Congress, or rule of this court, has ever been passed or adopted on this subject. The courts of the United States, therefore, must still be governed in the matter by the general principles and usages of equity. To these we have already adverted so far as concerns the power to require security or impose terms before granting an injunction. It remains to notice the control which a court of chancery may exercise in relieving from, or modifying such terms during the progress or at the termination of the cause; and of enforcing and carrying out the conditions imposed or the undertakings entered into.

Since the discretion of imposing terms upon a party, as a condition of granting or withholding an injunction, is an inherent power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the pow- [442] er to mitigate the terms imposed, or to relieve from them altogether, whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them. Besides, the power to impose a condition implies the power to relieve from it. If, for example, it is deemed proper, upon an application for an injunction to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its use, the court assuredly has the power, though, undoubtedly, to be exercised with caution, to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. Where the fund is security for a debt or a balance of account, or other money demand, this would rarely be allowable; but in many other cases it might not unfrequently occur that injustice would result from keeping property impounded in the court. On general principles, the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed.

Against this view, however, the appellants have strenuously urged the case of *Novello* v. *James*, 5 DeG. M. & G., 876, in which an injunction against the sale of certain compositions of Mendelssohn in violation of a copyright, was obtained on an undertaking of the plaintiff to abide the order of the court as to damages. After a three years' litigation, the case was decided against the plaintiff. The legal title having been [443] a doubtful one, the plaintiff moved that his bill might be dismissed without costs, and the defendant moved that the plaintiff might be decreed to pay him damages sustained by reason of the injunction. The Vice-Chancellor decided that the proper damages would be the costs of the suit. Upon appeal this order was reversed upon the ground that the defendant, under the circumstances, had a right to insist on having his damages ascertained either by reference to an officer of the court, or by a trial at law. The *Lords Justices* thought that it would be unjust to the defendant to disregard, or not to give effect to, the undertaking which was the price at which the plaintiff accepted the injunction; and that there was not sufficient evidence before the Vice-Chancellor to enable him to decide what the defendant's damages amounted to, or whether the costs, supposing him not otherwise entitled to them, were a just measure of the damages.

It is evident, from a careful reading of this case, that the decision was based on the merits; and that the *Lords Justices* were of opinion that the defendant was entitled to damages; not as a matter of course because an undertaking had been given; but as a matter of justice and equity, which the undertaking would enable him to enforce. They held, therefore, that evidence of the damages should have been taken; and that the decree of the Vice-Chancellor was erroneous because made without any such evidence. We do not perceive that this case is at all adverse to the view which we have taken.

* See 2 R. S. Wisconsin, 748; also Laws of Illinois, Iowa, Colorado, etc.

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When the court sees no just cause for superseding or suspending the effect of an injunction bond, or undertaking, it should be enforced in pursuance of its terms; and the party for whose benefit it was given will be entitled to an assessment of damages.

But then arises the question (not essential, however, to be decided in this case), how the damages should be assessed, and on this point different opinions have been entertained. Sometimes the form of the bond itself, or the order requiring it, or the statute or rule of court under which it is given, prescribes the mode of assessment, as by a reference, or otherwise, as the court shall direct. This is the ordinary course in England, and is that prescribed in *Chancellor* Walworth's order, which, as before stated, is followed in several state statutes, and, amongst others, in the Statute of Minnesota. In such case no question can arise as to the authority of the court of chancery to cause the damages to be assessed under its own direction.

[444]

But where, as in the present case, no specific provision is made, either in the bond, or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the parties enjoined may sustain by reason of the injunction, if the court finally decide that the party was not entitled thereto, as before stated, some difference of opinion exists, as to the power of the court of chancery to assess the damages, and whether the only proper method is not an action at law on the bond. The appellants insist that the latter is the only proper and legal course. In the case of *Bein* v. *Heath*, 12 How., 179, *Ch. J.* Taney made this remark: "A court proceeding, according to the rules of equity, cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction." In that case, an injunction bond had been given to stay proceedings on an executory process in the Circuit Court for the District of Louisiana, and, in an action on the bond, that court had given judgment against the sureties, not merely for the damages arising from the delay caused by the injunction, but for the whole debt, interest and costs, in accordance with the law of Louisiana, where injunction bonds are binding to that extent, and where judgment is usually given against the sureties as parties to the cause, on dismissing the injunction, similar to the proceeding against stipulators in admiralty. This court held that the circuit courts sitting in equity could not take such a bond, or give it such effect, and reversed the judgment. The remark that the bond must be prosecuted at law was a mere passing remark; it was so prosecuted in that case; but from the great experience of the *Chief Justice*, it undoubtedly expressed the prevailing practice with regard to ordinary injunction bonds given under the Maryland Statute in cases of injunctions to stay proceedings at law. Whether the remark can be understood as having a wider scope is doubtful.

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A decision on the point, however, was made by *Mr. Justice* Curtis, on the First Circuit, in the case of *Merrifield* v. *Jones*, 2 Curtis, 306. That was a patent case in which an injunction had been issued upon condition of entering into bond to pay the defendant any damages he might suffer by reason of the injunction, if finally determined not to be rightful. On dismissal of the bill, motion was made to refer to a master the question of damages. *Justice* Curtis denied the motion, holding that the party's remedy was an action at law, but he only referred to the case of *Bein* v. *Heath*. The opinion is brief, and the question does not seem to have been very fully examined. The learned Justice seemed to think that, inasmuch as the bond gave a legal action, the court sitting in equity had no jurisdiction over the question of damages.

Other cases are referred to by the counsel of the appellants to sustain their position; but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court, is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power; and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England); nor on the existence of an express law or rule of court (as adopted in some of the States) that the damages may be ascertained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases, the latter course would be the more suitable and convenient one.

[446]

In the present case, however, the court did not attempt to assess any damages which the defendants may have sustained in consequence of the injunction and proceedings in the cause, but decreed that it was not a case for damages; in other words, that the bond ought not to be prosecuted. That damages were sustained is very probable. Such a litigation as this was could hardly fail to result in damage to all the parties engaged in it. But it is generally *damnum absque injuria*. The question before the court, or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered. Its decision was that none ought to be recovered; or, in effect, that the bond ought not to be prosecuted. In view of what has already been said, we think that the court had power to decide this question.

But the appellants contend that, even if the court had the power to pass upon the question at all, its decision was erroneous, and ought to

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be reversed on the merits. On this point, the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. The conduct of the parties and the course of litigation in the court below, pass so directly under the inspection of that court, as to give it many advantages which no other court can possess, for forming a correct decision on the question, whether any extra damages should be allowed for the issuance of the injunction. Nevertheless, we have looked at the case with the view of ascertaining whether injustice has been done. And, at the very threshold of the inquiry, we are met by the prominent fact, that the injunction has never been entirely dissolved, and it has never been decided that the complainant was not entitled to it, at least for a portion of the iron claimed by the appellant. [447] The latter strenuously defended the suit as to the whole; but it turns out, on the final hearing, that as to more than half of it, his claim is unsupported, and that the injunction was properly issued. A decree was made accordingly, from which no appeal has been taken. We must presume that it was equitable and just. This fact alone would make a *prima facie* case for the decree in relation to damages. We have not been able to find anything in the record which leads us to think that it was erroneous or improper.

The decree of the Circuit Court is affirmed.

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James H. McKenney, Clerk, Sup. Court, U. S.

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[447] WILLIAM G. WINSLOW AND HEZEKIAH J. WINSLOW, *Appts.*,

v.

BLISS O. WILCOX, Owner and Claimant, SCHOONER S. S. OSBORNE.

BLISS O. WILCOX, Owner and Claimant SCHOONER S. S. OSBORNE, *Appt.*,

v.

WILLIAM G. WINSLOW AND HEZEKIAH J. WINSLOW.

(See S. C., "*The S. S. Osborne*" 15 Otto, 447-451.)

Appeal from District Court—jurisdiction of Circuit Court—cross appeals.

1. The rule of the District Court, requiring an appeal to be in writing and filed with the clerk, can be dispensed with by that court.
2. Where an appeal claimed while the court is sitting, is formally allowed by the court, any further appeal in writing is dispensed with, and when afterwards the bond is given and accepted, the appeal is perfected, and from that time the jurisdiction of the Circuit Court attaches, and can not be taken away by any act or requirement of the District Court, nor by the failure of its clerk to deliver to the Circuit Court, the appeal and record in twenty days.
3. Cross appeals must be prosecuted like other appeals.

[Nos. 243, 1211.]

Argued Mar. 24, 1882. Decided Apr. 3, 1882.

APPEALS from the Circuit Court of the United States for the Northern District of Ohio.

The cases are stated by the court.

Messrs. H. L. Terrell and *Albert G. Riddle*, for appellants.

Messrs. S. Prentiss and *Jacob D. Cox*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The question presented by the appeal of the Winslows is, whether the Circuit Court erred in taking jurisdiction of the appeal of Wilcox from the District Court. Section 631 of the Revised Statutes provides that from all final decrees of the District Courts, in causes of equity, or of admiralty and maritime jurisdictions, except prize causes, where the matter in dispute exceeds $50, appeals shall be allowed to the Circuit Court, next to be held in such district, and the Circuit Court is required to receive, hear and determine such appeal. It is not declared in this section what shall constitute an appeal from the District to the Circuit Court, any more than it is in section 692 what shall be an appeal from the Circuit Court to this court. Admiralty Rule 45 of this court provides that appeals from the District to the Circuit Courts, in admiralty cases, must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specifically made in a particular suit, or, in case no such rule or order is made, then within thirty days from rendering the decree; and, Rule 46, that in cases not provided for by the rules of this court, the District and Circuit Courts may regulate their own practice. [448]

The District Court for the Northern District of Ohio provided by rule that appeals in admiralty to the Circuit Court should be taken within ten days from the date of the decree, unless further time was given by a special order of the Judge; that the appeal should be in writing and specify particularly from what part of the decree, if less than the whole, it was taken; whether it was intended to make any new allegations or proofs, and, if so, what; whether it was intended to pray for any other relief, and if so, what; and further providing that on the trial the appellant should be strictly confined to the specifications in his appeal. The rule also required that the appeal should be filed with the clerk, and from that time, security having been given, it should be considered perfected. It was then made the duty of the clerk, within twenty days, unless a longer time should be allowed by the Judge, to prepare and deliver to the clerk of the Circuit Court, together with the appeal, the record required by the 52d Rule of this court, and that when this was done so, much of the case as was appealed should be in the exclusive control of the Circuit Court. [449]

In the present case, the date of the decree in the District Court was December 26, 1877. At the foot of the decree, and as part of it, is the following:

"And thereupon said Bliss O. Wilcox, claimant of said schooner S. S. Osborne, gave due notice of his intention to appeal this cause to the next Circuit Court, which said appeal is allowed, and bond therefor is fixed at eight thousand dollars. And it is further ordered that the time within which said appeal shall be perfected shall be extended for the period of twenty days from this date."

It does not appear that any formal appeal in

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writing was ever filed with the clerk of the District Court, but, within the time fixed, bond for an appeal was given and duly accepted. The record was not filed in the Circuit Court, neither was the cause docketed there until February 27, 1878. This was during the term of the Circuit Court which began on the 15th of January, and which was the Term next held after the decree in the District Court. With the record there was filed in the Circuit Court an appeal in writing, such as the rule required. On the 11th of March the Winslows moved the Circuit Court to dismiss the suit, because no appeal in writing had been made, as the rules of the District Court required, and also because the suit had not been docketed in the Circuit Court in time. This motion was denied. The ruling of the Circuit Court to that effect is now assigned for error by the Winslows.

[450] An appeal in admiralty from the District to the Circuit Court must be to the Term of the Circuit Court held next after the decree, and it must be made while the District Court is sitting, or within the time required by the general rules or a special order. These requirements are jurisdictional. They are prescribed either by the Act of Congress or by the rules of this court, promulgated under the authority of an Act of Congress and having the force of law. All except this is mere procedure in either the District or Circuit Court. The rule of the District Court, requiring an appeal to be in writing and filed with the clerk, could certainly be dispensed with by that court. It simply prescribed a mode of proceeding to get an appeal, and while it continued in force the court might properly refuse to allow an appeal or accept security until what was required had been done. But if the District Court allows an appeal without the writing, the appellee cannot object to the jurisdiction of the Circuit Court on that account. Here it distinctly appears that Wilcox claimed his appeal while the court was sitting, and that his claim was formally allowed by the court. In this way any further appeal in writing was dispensed with, and when afterwards the bond was given and accepted, the appeal was as clearly perfected as it would have been if a writing, such as the rule required, had been filed with the clerk. From that time the jurisdiction of the Circuit Court attached, and could not be taken away by any act or requirement of the District Court.

The provision in the rule of the District Court that the clerk should prepare and deliver to the Circuit Court the appeal and record in twenty days cannot prevent the Circuit Court from entertaining the cause if for any reason this is not done. The appeal, when once made, continues during the whole of the next term of the Circuit Court, unless sooner dismissed by that court for want of prosecution or otherwise, in accordance with its own practice. It follows that so far as the appeal of the Winslows is concerned, the decree must be affirmed.

When the decree of the Circuit Court was rendered, both the Winslows and Wilcox appealed to this court. The Winslows filed the transcript and docketed their appeal here on the [451] 19th of September, 1879; but Wilcox neither entered his appearance as an appellant in this court, nor did anything to make himself an actor in reference to his own appeal, until March 28, 1882, the day before the cause was called for hearing. Under these circumstances we must decline to consider his appeal. *Grigsby* v. *Purcell*, 99 U. S., 505 [XXV., 354]. Rule 9 of this court requires every plaintiff in error or appellant, on docketing his cause, to have the appearance of counsel entered; and Rule 10, that he secure the costs. Cross appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered and giving the security required by the rules. Otherwise, if he is here as appellee on the appeal of his adversary, he will be heard only in support of the decree as it was entered below. If he asks affirmative relief beyond what he got below, he must enter himself in this court in due time as the prosecutor of his own appeal, even though his adversary has docketed the case against him.

The decree is affirmed, and the appeal of Wilcox dismissed for want of prosecution.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 168; 109 U. S., 117.

Ex Parte:

WILLIAM P. SLAYTON, Administrator of [451]
MONTGOMERY CROSSMAN.

(See S. C., 15 Otto, 451-458.)

Limitation of liability.

The owner of a vessel may institute appropriate proceedings, in a court of competent jurisdiction, to obtain the benefit of the limitation of liability provided for by sections 4284 and 4285 of the Revised Statutes, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises.

[No. 7, Orig.]

Argued Mar. 15, 1882. Decided Apr. 3, 1882.

PETITION for a writ of prohibition.

The case is sufficiently stated in the opinion of the court.

Mr. **Alfred Russell**, for petitioner.

Messrs. A. T. Britton and **J. H. McGowan**, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

We are of opinion that notwithstanding Admiralty Rules Nos. 54, 55, 56 and 57 of this court, the owner of a vessel may institute appropriate proceedings, in a court of competent jurisdiction, to obtain the benefit of the limita- [452] tion of liability provided for by sections 4284 and 4285 of the Revised Statutes, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises. As was said at this Term in *Dyer* v. *Steam Nav. Co.* [*ante*, 1001], our rules were not intended to prevent an owner from availing himself of any other remedy or process which the law itself entitled him to adopt, but to aid him in bringing into concourse those having claims against him arising from the acts of the master or crew.

Section 4284 expressly allows the owner to institute appropriate proceedings in any court,

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that is to say, any court of competent jurisdiction, for the purpose of apportioning the sum for which he is liable among the proper parties. Section 4285 provides, that it shall be deemed a sufficient compliance on the part of the owner with the requirements of the Act if he shall transfer all his interest in the vessel and freight to a trustee, appointed by the court for the persons who may prove to be legally entitled thereto. Any court, therefore, which gets actual possession of the things to be transferred, and about which the concourse of claimants is to be had, is a court of competent jurisdiction to try the questions that will properly arise upon the apportionment to be made. Even though proceedings should be instituted by the owner before he or his vessel is sued, the courts will either follow our rules as far as practicable, or do something which is equivalent, to obtain jurisdiction of the thing about which the litigation is to be had. No monition can properly issue either under the operation of our rules, or otherwise, until this jurisdiction of the thing has been in some way secured.

On looking into the return of the District Judge in this case, we find that the proceedings were instituted by the owner of the steamer Alpena in the district where the port is situated, to which the steamer was bound, at the time the loss occurred, on one of her regular trips between Grand Haven, Michigan and Chicago, Illinois; that the steamer lies sunk in Lake Michigan; that some portions of the wreck were washed ashore in Michigan between Grand Haven and Chicago; that, on filing the petition an order was entered by the court appointing a trustee, such as was provided for in the statute, and requiring the owner to transfer to him all [453] its right, title and interest to whatever remained of the steamer, her tackle, apparel and furniture, and the pending freight; that such a transfer was made, and freight, admitted to be pending, amounting to $196, actually paid over, and that when this was done the monition issued. It is true the return does not expressly show that the remnants of the wreck, scattered on the shores of the lake, have actually been gathered together and brought within the Northern District of Illinois; but it is stated that the transfer has been made and the freight money paid over. This is not denied. Such being the case, we cannot say the court (upon the showing here made) has not acquired jurisdiction of the thing about which the litigation arises, to wit: the fund to be apportioned among the parties who may prove to be legally entitled thereto. It has the freight money in its possession, and its trustee is in a condition to gather up the remnants of the vessel if it has not already been done. The jurisdiction of the court is not dependent at all on the amount, but on the rightful possession of that which is to be divided.

We cannot, on an application for a writ of prohibition, determine what shall be the effect of any judgment of the district court while exercising its rightful jurisdiction, neither are we to determine in this form of proceeding what persons, or what classes of persons, are entitled to the fund in hand. All these are questions to be settled in some other way than by prohibiting the court from proceeding under the jurisdiction it has acquired by getting possession, in an appropriate manner, of that which, according to the claim of the owner, represents the extent of his liability, or that of his vessel. Whether it does so or not, is to be settled between the parties when the case is tried. With the possession and control of the property the court has jurisdiction.

The petition is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 598.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.* [460]
v.
STATE OF TEXAS.

(See S. C., 15 Otto, 460-466.)

Telegraph companies—instruments of commerce—taxing messages sent out of State.

1. The telegraph is an instrument of commerce, and telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business.
2. The Western Union Telegraph Company having accepted the restrictions and obligations provided by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business.
3. The power to tax its occupation cannot be exercised by the State by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States.
4. Any tax which the State may put on messages sent by private parties, and not by the agents of the Government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States.

[No. 902.]

Argued Jan. 23, 1882. Decided Apr. 3, 1882.

IN ERROR to the Supreme Court of the State of Texas.

The case is stated by the court.

Messrs. Walton, Green & Hill, John F. Dillon and **Wager Swayne,** for plaintiff in error.

Messrs. **Philip Phillips,** *J. H. McLeary* and *W. Hallett Phillips,* for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Western Union Telegraph Company is a New York Corporation engaged in the business of transmitting telegrams at fixed rates of compensation. Its lines extend into and through most of the States and Territories of the United States, and to Washington, in the District of Columbia. It has availed itself of the privileges and subjected itself to the obligations of title LXV. of the Revised Statutes relating to telegraph companies, and its lines connect with those owned and established by the Government of the United States for public purposes. It has one hundred and twenty-five offices in the State of Texas, and is in close communication with other telegraph companies doing business in this country and abroad.

By the Constitution of Texas, article VIII., section 1, the Legislature is authorized to "Impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing business in the State;" and by article

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4655 of the Revised Statutes, enacted under this provision of the Constitution, every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full rate message sent, and one half that for every message less than full rate. This tax is to be paid quarterly to the Comptroller of the State on sworn statements made by an officer of the company. In addition to this, taxes must be paid on the real and personal property of the company in the State.

Between October 1, 1879, and July 1, 1880, the Company sent over its lines from its offices in Texas 169,076 full rate and 100,408 less than [461] full rate messages. A large portion of these messages were sent to places outside of the State, and by the officers of the Government of the United States on public business. The Company neglected to pay the tax imposed, and a suit was brought in one of the courts of the State for its recovery. In defense it was insisted that the law imposing the tax was in conflict with the Constitution and laws of the United States and, therefore, void. The Supreme Court of the State, on appeal, sustained the law, and directed a judgment against the Company for the full amount claimed, allowing no deductions for messages sent out of the State, or by government officers on government business. To reverse that judgment this writ of error has been brought.

In *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., 1 [XXIV., 708], this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

Congress, to facilitate the erection of telegraph lines, has, by statute, authorized the use of the public domain and the military and post-roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-General. Thus, as to government business, companies of this class become government agencies.

The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its [462] occupation and its business. The precise question now presented is, whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States.

In *State Freight Tax Case*, 15 Wall., 232 [82 U. S., XXI., 146], this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax "on each two thousand pounds of freight carried," without regard to the distance moved or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and interstate commerce. In this the court but applied the rule, announced in *Brown* v. *Maryland*, 12 Wheat., 444, that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are *Welton* v. *Missouri*, 91 U. S., 275 [XXIII., 347]; *Cook* v. *Pennsylvania*, 97 U. S., 566 [XXIV., 1015], and *Webber* v. *Virginia* [*ante*, 565]. And in *Passenger Cases*, 7 How., 283; *Crandall* v. *Nevada*, 6 Wall., 35 [73 U. S., XVIII., 745], and *Henderson* v. *Mayor of N. Y.*, 92 U. S., 259 [XXIII., 543], taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers; and in *State Tonnage Cases*, 12 Wall., 204 [79 U. S., XX., 370]; *Peete* v. *Morgan*, 19 Wall., 581 [86 U. S., XXII., 201]; *Cannon* v. *New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417], and *Steamship Co.* v. *Tinker*, 94 U. S., 238 [XXIV., 118], that taxes on vessels according to measurement, without any reference to value, were taxes on tonnage.

The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full [463] rate, the tax is one cent, and if less than full rate, one half cent. Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers and, therefore, void. It was so decided in *McCulloch* v. *Maryland*, 4 Wheat., 316, and has never been doubted since.

It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other Nations or States or the Indian Tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the

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State, is as well settled as that the regulation of commerce which does affect other Nations or States or the Indian Tribes, belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the Government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State and as to which we have no power of review.

The judgment of the Supreme Court of Texas is reversed and the cause remanded, with instructions to reverse the judgment of the District Court and proceed thereafter as justice may require, but not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 73; 95 Ind., 12; 48 Am. Rep., 694.

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT WESTERN INSURANCE COMPANY, *Plff. in Err.*,

v.

WILLIAM R. STEELE.

154 US 675.

1. Hecht v. Boughton, *ante*, followed.
2. Where there was no trial by jury in the territorial court, the case must be brought to this court by appeal instead of a writ of error.

[No. 263.]

Submitted Apr. 3, 1882. Decided Apr. 10, 1882.

IN ERROR to the Supreme Court of the Territory of Wyoming.

The plaintiff in error, as assignee, brought this action to the District Court of the First District of the Territory of Wyoming, against the defendant in error, to collect a balance alleged to be due upon certain shares of the capital stock of the bankrupt company. The defendant filed a special demurrer to the petition of the plaintiff, which the district court sustained, and gave judgment for the defendant. The case having been taken to the Supreme Court of the Territory, the judgment of the district court was affirmed. The plaintiff then sued out this writ of error.

Messrs. **Homer Cook** and *Edward P. Johnson*, for plaintiff in error.

Mr. **William R. Steele**, in person.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit is dismissed on the authority of *Hecht* v. *Boughton*, No. 912, of the present Term [*ante*, 1018]. As there was no trial by jury, the case should have been brought here by appeal instead of a writ of error.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT WESTERN INSURANCE COMPANY, *Plff. in Err.*,

v.

J. W. MASON.

154 US 675.

1. Hecht v. Boughton, *ante*, followed.
2. The remedy to review a judgment of the Supreme Court of a territory, where the trial was not by jury, as where the judgment was on demurrer, is by appeal and not by a writ of error.

[No. 262.]

Submitted Apr. 3, 1882. Decided Apr. 10, 1882.

IN ERROR to the Supreme Court of the Territory of Wyoming.

This action was brought in one of the District Courts of Wyoming, by the plaintiff in error, to recover a balance alleged to be due from the defendant on certain shares of the capital stock of the Insurance Company.

The defendant demurred to plaintiff's petition, and the district court sustained the demurrer and rendered judgment against Upton.

The Supreme Court of the Territory affirmed this judgment.

Messrs. **Homer Cook** and *E. P. Johnson*, for plaintiff in error.

Mr. **E. W. Mann**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit is dismissed on the authority of *Hecht* v. *Boughton*, No. 912, of this Term [*ante*, 1018]. The remedy is by appeal instead of a writ of error.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff.*,

v.

FERDINAND E. CANDA AND AZRO D. HUTCHINS.

154 US 674

1. This court has no jurisdiction on a certificate of division of opinion as to questions arising on a motion to quash an information.
2. U. S. v. Rosenburg, XIX., and U. S. v. Avery, XX., followed.

[No. 257.]

Submitted Apr. 3, 1882. Decided Apr. 10, 1882.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

This case arose in the court below upon an information under section 3583, of the Revised Statutes, against the defendants, for issuing "notes and obligations intended to circulate as money." Upon a motion to quash such information, the Judges below differed upon the following questions:

1. Whether the notes and obligations described in said information are in violation of section 3583, of the Revised Statutes of the United States.

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2. Whether said information sets forth a criminal offense under said statute.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for United States.

No counsel appeared for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case comes here on a certificate of division as to questions arising on a motion to quash an information, *and must be dismissed for want of jurisdiction*, on the authority of *U. S.* v. *Rosenburgh*, 7 Wall., 580 [74 U. S., XIX., 263], and *U. S.* v. *Avery*, 13 Wall., 251 [80 U. S., XX., 610]. *It is, consequently, so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[249] ALBERT SCHEFFER ET AL., Executors of CHARLES SCHEFFER, Deceased, *Plffs. in Err.*,

v.

WASHINGTON CITY, VIRGINIA MIDLAND AND GREAT SOUTHERN RAILROAD COMPANY.

(See S. C., 15 Otto, 249-252.)

Action for causing death.

Where a collision occurred between two railroad trains, and a person was so injured thereby that he subsequently became deranged and committed suicide; held, that the proximate cause of his death was his own act, and an action could not be maintained against the railroad company forneglgently causing his death.

[No. 246.]

Argued Mar. 27, 1882. Decided Apr. 10, 1882.

IN ERROR to the Circuit Court of the United States, for the Eastern District of Virginia.

The case is stated by the court.

Messrs. John B. Sanborn, Charles King, and **George A. King,** for plaintiffs in error:

No opinion was delivered by the learned Judge who decided the cause in the court below. The ground of the decision, however, was understood to be, that the collision on the railroad was too remote a cause of the death.

It is respectfully submitted that in this there was error.

"Negligence in its civil relations is such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as produces, in an ordinary and natural sequence, a damage to another." Whart. Neg., 3.

The terms "proximate" and "remote" do not signify proximity or remoteness in point of time or place. There may be several causes and effects, and yet the first cause may be, in law, the proximate cause of the last effect. While the death in this case happened in a very strange manner, nothing could be more ordinary or natural than that the death of a passenger should ensue from such a destructive collision as that described in the declaration. The fact that the injury inflicted on Scheffer's brain passed through several phases before it finally caused his death, and that death finally ensued in an unforseen manner, can no more relieve the Railroad Company from liability than if he had been injured in the arm, leg or stomach, and the injured organ had passed through different stages of disease, ending in his death from some internal disturbance as the immediate cause.

Whart. Neg., 76-78, 134-155; *Scott* v. *Shepherd*, 2 W. Bl., 892; *Sneesby* v. *Lan. & Y. R. Co.*, L. R., 9 Q. B., 262, affirmed, L. R., 1 Q. B. D., 42; *Ins. Co.* v. *Tweed*, 7 Wall., 44 (74 U. S., XIX., 65); *Ins. Co.* v. *Seaver*, 19 Wall., 531 (86 U. S., XXII., 155); *Grand Trunk R. R. Co.* v. *Richardson*, 91 U. S., 454 (XXIII., 356); *Milwaukee Ry. Co.* v. *Kellogg*, 94 U.S., 469 (XXIV., 256); *Cuff* v. *R. R. Co.*, 35 N. J., 17.

It cannot be said in answer to the above, that the death of Scheffer was caused by his own act. The reply is that he was a lunatic—made so by the negligence of the defendant. Idiots, lunatics, infants of tender years, persons intoxicated to a great degree, and persons acting under the impulse of sudden fright, are incapable of being held responsible for their own acts. Least of all can the defendant escape responsibility, where his own act has destroyed the free agency of another, and that other had, while in an irresponsible condition, committed the damage complained of.

Ad. Torts, 5; 1 Dudley's & Bailey's Am. ed., 7; Whart. Neg., 87, 96, 306; *Life Ins. Co.* v. *Terry*, 15 Wall., 580 (82 U. S., XXI, 236); *Dixson* v. *Bell*, 5 Maule & S., 198; *Balt. & P. R. R. Co.* v. *Reaney*, 42 Md., 117; *Carter* v. *Towne*, 98 Mass., 567; *Vandenburgh* v. *Truax*, 4 Den., 464; *Guille* v. *Swan*, 19 Johns., 381; *Pollett* v. *Long*, 56 N. Y., 200.

Suicidal mania is a well defined disease, and when that disease is caused by a railroad collision and death ensues, there is no more reason why the company should escape liability than in the case of any other disease.

Brown's Med. Juris. of Insanity, sec. 230, *et seq.*

Mr. **Linden Kent,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The plaintiffs in error, who are executors of Charles Scheffer, deceased, bring this action to recover of the Railroad Company damages for the death of said Charles, which is alleged to have resulted from the negligence of the Company while carrying the deceased on their road. The defendant demurred to the declaration, and the demurrer was sustained, and to reverse the judgment rendered on demurrer this writ of error is sued out.

The Statute of Virginia, under which the action was brought, is, as to the question raised on the demurrer, identical with those of all the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the Railroad Company, [250] by which a collision occurred between the train on which Scheffer was and another train, on the 7th day of December, 1874, proceeds as follows:

"Whereby said sleeping-car was rent, broken, torn and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed and disfigured, wounded, lamed and injured about his head, face, neck, back and spine; and by reason whereof the said Charles Scheffer

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became and was sick, sore, lame and disordered in mind and body, and in his brain and spine; and by means whereof, phantasms, illusions and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy and prostrate the nervous system of him, the said Charles Scheffer, to wit: from the 7th day of December, A. D., 1874, to the 8th day of August, 1875, when said phantasms, illusions and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions and forebodings, which he then and there did, whereby and by means of the careless, unskillful and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit: on the 8th day of August, 1875, lost his life and died, leaving him surviving a wife and children."

The circuit court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the Railroad Company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent—his death by his own immediate act.

In this opinion we concur.

Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs in error, we think they both sustain the judgment of the circuit court.

The first of these is that of *Ins. Co.* v. *Tweed*, 7 Wall., 44 [74 U. S., XIX., 65].

[251] In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur "By means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion, earthquake or hurricane."

An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse—the one insured, situated across the street from Marshall warehouse—and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The court said that no new or intervening cause occurred, between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

In the case of *R. Co.* v. *Kellogg*, 94 U. S., 469 [XXIV., 256], the sparks from a steam ferryboat of the company had set fire to an elevator, and the sparks from the elevator had set fire to Kellogg's saw-mill and lumber-yard, which were from three to four hundred feet from the elevator. The court below was requested to charge the jury that the sparks from the steamboat as a cause of the fire of the mill and lumber was too remote.

Instead of this, the court submitted to the jury to find "Whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow [252] from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

The Supreme Court affirmed this ruling, and in commenting on the difficulty of ascertaining, in each case, the line between the proximate and remote causes of a wrong for which a remedy is sought, says: "It is admitted that the rule is difficult. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." To the same effect is the language of the court in *McDonald* v. *Snelling*, 14 Allen, 294.

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was, within the rule in both these cases, a new cause and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument, would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—19 N. W. Rep., 747; 134 Mass., 176; 45 Am. Rep., 317.

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[393] M. O. H. NORTON ET AL., Surviving Partners of HEWITT, NORTON & COMPANY, *Appts.*,

v.

A. J. PHELPS AND MARY B. PHELPS.

(See S. C., "*Hewitt* v. *Phelps*," 15 Otto, 393–401.)

Suit pending—removal of cause—dealings with trustee—payment from estate.

1. A suit was pending at the time of the passage of the Act of March 3, 1875, ch. 137, for the purposes of removal, after decree of dismissal and during the time an appeal might be taken from such decree of the State Court.
2. Such suit may be removed after such decree has been reversed by the highest state court on appeal, and the cause remanded to the inferior court for a rehearing upon the merits.
3. Persons dealing with a trustee must look to him for payment of their demands and, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand.
4. But where the estate is either indebted to the trustee, or would be, if he should pay the demand, and the trustee is insolvent or non-resident, the trust estate may be reached directly by a proceeding in chancery.

[No. 229.]

Argued Mar. 16, 1882. Decided Apr. 10, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Mr. **William L. Nugent,** for appellants.

Messrs. **E. Jeffords, James Z. George** and **Charles W. Clarke,** for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellants, who were the complainants below, filed their bill in equity, April 17, 1869, in the Chancery Court of Washington County, Mississippi, against the appellees and Jonathan Pearce, the object and prayer of which was to charge certain real estate in that State, which had been conveyed by Sarah Vick to Pearce upon certain trusts, and of which Mary B. Phelps was the sole beneficiary, with certain sums, [394] which the complainants allege they had advanced to the trustee, and for which they claimed the trust estate was liable.

The appellees were served with process; Pearce was brought in by publication. The cause having been put at issue, on final hearing in the chancery court, the bill was dismissed, November 7, 1874, for want of equity. From this decree an appeal was taken, but not until March 30, 1876, when it was thus removed to the Supreme Court of the State. It was disposed of in that court May 21, 1877, by a decree reversing the decree of the court below, and remanding the cause, "With leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views contained in the opinion" of the court, which is to be found reported under the name of *Norton* v. *Phelps*, 54 Miss., 467. On June 7, 1877, the mandate of the Supreme Court was filed in the Chancery Court of Washington County, and on the same day a petition for the removal of the cause to the Circuit Court of the United States for that district was presented by Phelps and his wife, on the ground that at the time of the commencement of the suit they were citizens of Kentucky, and had continued so to be at all times since, the plaintiffs during the same period being citizens of Louisiana, which was granted, bond given and approved, and transcript filed in the circuit court on August 4, 1877. On November 20, 1877, the appellants moved to remand the cause, which the circuit court refused to do. This ruling of the court is first assigned for error under the present appeal.

The contention of the appellants is that the circuit court had no jurisdiction to proceed with the cause, because first, the suit was not pending at the time of the passage of the Act of March 3, 1875 [18 Stat. at L., 470], nor thereafter brought and, therefore, not within the purview of that Act; and second, because, at the time the removal was effected, the trial of the cause in the state court had already taken place, or at least begun and was in progress, whereas the Act requires that the petition for removal shall be filed before the trial thereof. [395]

In our opinion neither of these positions is tenable. Whether, after final decree and before appeal is perfected, a purchaser of the subject of the suit is affected with the notice of *lis pendens* may be a question; although a distinction in this respect is made by some of the authorities between an appeal in equity and a writ of error, the latter being considered a new proceeding, not pending until service of citation, while the former is regarded as a step in the progress of the cause. But in contemplation of the Act of March 3, 1875, there are and can be but two classes of suits: one, those, pending at the time of its passage; the other, those, thereafter brought. Of course, a suit terminated has ceased to be a suit. Confessedly, the present is a suit, and could not be said, at the time the Act was passed, to have ended, although the decree was final in respect to the court of chancery which had rendered it, and would have become so between the parties if no appeal had been taken within the time limited by law. But until that period had elapsed it was still a *lis pendens*, in the sense that the party against whom the decree had been rendered had the right by an appeal further to prosecute it. It was not the beginning of a new suit; it was but one additional step in the progress of an existing one.

The second ground of exception to the removal of the cause is maintained in argument upon the authority of *Jifkins* v. *Sweetser* [*ante*, 129], but that case does not govern this. That decision turned upon the fact that the judgment of the Supreme Court of the State "disposed of the case finally upon its merits, and nothing remained to be done but to continue the hearing already begun until the necessary accounts could be taken, and the details of a final decree settled." But here, although the Supreme Court of Mississippi passed in its opinion upon the merits of the case, as disclosed by the record then before it, nevertheless, in remanding the cause, "with leave to both parties to amend pleadings as they may be advised, and to take testimony," the whole matter was open and at large, as though the cause had never been at issue; and the clause providing "for an account to be taken in accordance with the views [396] contained in the opinion rendered herein," must be understood as qualified by the previous part of the order, and as obligatory upon the court of chancery only as a declaration of general principles, to be applied as the facts should

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thereafter appear. It was not a judgment which operated as an estoppel between the parties. It was neither final nor conclusive. In point of fact, after the removal of the cause into the circuit court the parties availed themselves of the leave granted, and filed new and amended pleadings. The cause then stood in that court just as it would have stood in the state court, but for the removal; *i. e.*, for a rehearing upon the merits, and not for the purpose of merely executing the judgment of the appellate court, as in the case of *Duncan* v. *Gegan*, 101 U. S., 810 [XXV., 875]. Being properly removed, the parties are subject to that administration of law which is approved in the judicial tribunals of the United States, whose jurisdiction is thus invoked, as was held in *King* v. *Wortlington*, decided at the present Term [*ante*, 652].

The circuit court having acquired jurisdiction, on final hearing, upon demurrer, dismissed the bill. We are now required by the appeal to review that decree.

The allegations upon which the alleged equity of the appellants is supposed to arise are, in substance, as follows:

On May 4, 1850, Sarah Vick and Henry W. Vick, her husband, executed and delivered to Jonathan Pearce a deed, conveying to him all the property which Sarah Vick then owned as separate property, including a plantation, slaves, utensils and stock in Washington County, Mississippi, the subject of the present suit, upon trust, nevertheless, for the sole and separate use of Sarah Vick, during her life, and in remainder in fee for the use of her children, living at the time of her death. It was provided that the proceeds of the property in Washington and Issaquena Counties, and such parts of it as might be sold should be applied to the payment of a debt due to the Bank of the United States, after the payment of which, the proceeds of the property, over what was necessary to support the plantation and family, were to be invested for the benefit of all her children living at the time of her death. It was also provided that Sarah Vick should retain possession of the property during her life, with power to sell or exchange any part, but any property received in exchange to be subject to the trusts; "Provided further," the deed continued, "that said trustee [397] is to permit the said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah Vick, during her life, and as agent and trustee for her children after her death, to superintend, possess, manage and control said property for the benefit of all concerned; said Henry Vick is to have power to sell and exchange said property after the death of said Sarah Vick, and apply the proceeds to the payment of the debt due to the trustee of the Bank of the United States, or, if the said debt is paid, the proceeds of the debt to be re-invested and be subject to the trusts of this deed." Provision is then made for applying a fund due to her from property in the hands of Col. Durden, held by him in trust for creditors of Col. Vick, to the payment of certain debts due from Henry W. Vick, but, it is added, "All the debts (aforesaid) to be paid by Col. Vick, if he is able to do so, and it is only in case he is not able that it is to be paid out of said fund; provided, further, that said property is always to stand charged for the payment of such amount for the liberal support and maintenance of the said Henry W. Vick during his natural life." The concluding clause in the deed is as follows: "My intention is, that said Henry W. Vick shall be regarded for the purposes of this deed, not merely as an agent, but also a co-trustee, and I desire he may be required to give no security for the performance of his duties, and the said Jonathan Pearce is not in any manner to be responsible for the acts or conduct of said Henry W. Vick."

Henry W. Vick carried on the business of the plantation until he died in 1861, when Pearce, as trustee, took possession of the trust property; Mrs. Vick, having previously died, leaving no issue surviving her, except Mary B. Phelps, wife of A. J. Phelps, the appellee.

The complainants, Hewitt, Norton & Co., were commission merchants in New Orleans, and claim a balance due to them from Pearce, as trustee, of $7,631.16 which they insist is a charge in equity upon the trust estate.

From statements of the account, contained in the bill and amendments and exhibits, it appears that the whole of this balance resulted from transactions with H. W. Vick, while conducting the business of the plantation, prior to April 25, 1861. In a petition addressed by Pearce to the Judge of the Probate Court of Washington County, November 28, 1865, and made an exhibit to the original bill, he states [398] the transactions with Vick as resulting in a balance due complainants, of $6,145.99, which with $4,231.82, accruing from transactions with himself as trustee, make $10,377.81, which is the amount of the balance of the account as stated by the complainants, as due them June 30, 1862. The subsequent credits were all received from Pearce, and reduced the balance, October 3, 1866, to the amount claimed in the bill, being less than the amount due at the death of Vick, with interest added. This analysis of the accounts shows that the whole claim of the complainants is covered by their transactions with Vick, and is not embraced in those had with Pearce, all the debts incurred by the latter being canceled by payments made by him. It is alleged, however, that the balance due at Vick's death was carried forward in account with Pearce as a charge against him, with his consent and approval; and that when he took possession of the trust estate he received and used for the benefit of the estate, clothing, provisions and other supplies which had been furnished or paid for by the complainants upon Vick's orders; and it is charged in the bill "That all the items charged in your orator's said account for money loaned and supplies furnished were necessary and proper under the deed of Sarah Vick, and the said money and supplies were applied to the use and benefit of the trust estate, and upon a settlement of the accounts of the said Jonathan Pearce he would have had the right to charge the same against the said estate, and the balance due to him by said estate would have been, and would now be, equal in amount to the debt now claimed by your orators," etc. It is also alleged that Henry W. Vick, at the date of the deed, was a man of no means, property or credit, and continued in the same condition until his death; and that Pearce, when he took possession, was in the

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same financial condition, and a resident citizen of the State of Kentucky.

At the death of Mrs. Vick, her daughter, now Mrs. Phelps, was unmarried and a minor, and Jonathan Pearce became her guardian. On November 28, 1865, he filed his final account as guardian and trustee in the Probate Court of Washington County, showing a balance due to the estate from him of $2,989.40, and reporting, as heretofore stated, the account, between himself, as trustee, and the appellants. His account as guardian was settled by an order of the court in January, 1866, and he received credit for an allowance by way of compensation for his services in excess of the balance due from him. It is charged in the complainant's bill that at this settlement Pearce admitted the balance to be due to the complainants as claimed, and that he surrendered possession of the estate to Phelps and wife upon an understanding and agreement with them that it should be paid out of the cotton crop then growing on it.

[399]

It is manifest that the deed of trust from Mrs. Vick to Jonathan Pearce does not confer upon the trustee or upon Henry W. Vick any power to charge the estate directly with the payment of any sums of money for any purpose whatever, with the single exception of a personal support and maintenance for the latter. The grantor charges it with the payment of certain specified obligations, and there is no evidence of an intention to permit it to be incumbered by the trustee or by Vick.

It is to be noted, also, that Jonathan Pearce is a trustee merely of the title, without any active duties in regard to the estate. The power to sell or exchange during his own lifetime the grantor reserves to herself, and after her death directs that it be exercised solely by her husband surviving her. All powers to superintend, possess, manage and control the property are conferred exclusively upon Henry W. Vick, "As agent for said trustee and as agent and trustee for said Sarah Vick during her life, and as agent and trustee for her children after her death;" but to be regarded for the purposes of this deed, not merely as an agent, but also as a co-trustee. "And the said Jonathan Pearce is not in any manner to be responsible for the acts or conduct of said Henry W. Vick." So that, while Pearce was trustee of the title merely, Vick was a co-trustee, having no title or estate in the property, but charged with all the active duties of management. After the death of Mrs. Vick, Pearce's sole duty in regard to the trust estate was to convey the title to the surviving children. By these provisions the power of either to create a charge upon the trust estate seems to be effectually excluded.

It follows also from these provisions of the deed of trust, and the facts recited as to the origin and nature of the applicant's account, that no equitable charge against the estate can be established through the supposed liability of Pearce. It is quite plain that he was never personally answerable for the obligations created by Vick, and his alleged assumption of the account may be rejected as incompetent to create any such liability upon his part. Neither his admission nor that of the appellees could, in contemplation of law, create any charge upon the estate; and, as trustee, he could not establish it as necessary to his own exoneration.

[400]

The appellants, then, can reach the state only, if at all, through their claim against Vick. For this purpose, he may be regarded as an independent trustee, authorized to do whatever was necessary and proper in the performance of his duty to superintend and manage the trust property. He was, undoubtedly, personally bound for all his contracts, made in that character. The question is, does his insolvency create an equity in behalf of the appellants to reach the estate, for the benefit of which the advances are admitted to have been made?

On this point the law prevailing in Mississippi, and governing the case, was well declared, we have no doubt, by the Supreme Court of that State, in this very case. It said, *Norton* v. *Phelps*, 54 Miss., 471: "In the case of *Clopton* v. *Gholson*, 53 Miss., 466, we announced the principles applicable to this case. These are, that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But while this is the rule there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or nonresident, so that the creditor can not recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery."

The ground and reason for this rule is, that the trustee has an equity of his own, for re-imbursement for all the necessary expenses to which he has been put in the administration of his trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in the cases supposed of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee, upon a principle of equitable substitution or attachment, for his own security. It would not apply against the trust estate in this case for the enforcement of a debt created by Vick, for the reason that he had no title to the property; but adopting it and applying it as though he had, it is equally plain that the appellants have established no right to the relief prayed for. What the state of the account may have been at the time of his death, between the trust estate and Henry W. Vick, does not appear. There is no allegation on the subject in the record. For aught that appears he may have had in his hands means enough belonging to the estate to satisfy all demands against it; he may, indeed, have been largely in debt to it. The case, in any of its aspects, clearly is not within the rule; and the effort to reach the estate through Pearce instead of Vick, for the reasons already stated, must fail.

[401]

These are the grounds upon which the circuit court proceeded in the decree complained of. We find no error in the record and *the decree is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 476.

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[401] CHARLES HAUSELT AND CHARLES KORN, *Plffs. in Err.*,

v.

JEFFERSON HARRISON, Assignee in Bankruptcy of EDWARD BAYER.

(See S. C., 15 Otto, 401-408.)

Construction of contract—unlawful preference.

1. An agreement between A and B that in consideration that A should furnish money to B to buy skins, B would tan them and return them to A for sale on commission, and that such skins in the process of tanning should be security for the moneys advanced, creates a charge upon the property in favor of A, in the nature of a mortgage, which is good between the parties and as to B's assignee in bankruptcy, without a change of possession, and is capable of enforcement.

2. A subsequent agreement between the parties, on B's becoming unable from sickness to fulfill such contract, that A should take possession of the tannery, finish the skins and sell them, and pass the net proceeds to the credit of B, after deducting advances and expenses, made shortly before B's petition to be adjudicated a bankrupt, though made with knowledge of B's insolvency, and in contemplation of his bankruptcy, if made in good faith for the purpose of securing to A the benefits of the former contract, is legitimate, and does not constitute an unlawful preference in fraud of the bankrupt law.

[No. 253.]

Argued Mar. 31, 1882. Decided Apr. 10, 1882.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

The case is stated by the court.

Messrs. **Lewis Sanders,** *W. H. Armstrong, Samuel Linn, John S. Woodward,* for plaintiffs in error.

Messrs. **M. F. Elliott** and **H. C. Parsons,** for defendant in error.

[402] *Mr. Justice* **Matthews** delivered the opinion of the court:

This was an action of replevin brought in the circuit court, February 20, 1875, by the defendant in error to recover possession of certain tanned skins, part finished and part unfinished, and bark, which, it is alleged, had been transferred by the bankrupt to the plaintiffs in error, in fraud of the bankrupt law. There was a verdict and judgment for the plaintiff below, to reverse which this writ of error is prosecuted.

Edward Bayer, who was adjudicated a bankrupt January 18, 1875, upon his own petition, filed November 10, 1874, owned and was possessed of a tannery at Tioga, Pennsylvania, at which he had been conducting the business of a tanner; and Charles Hauselt, the plaintiff in error, was a leather merchant in New York.

On the day of its date, they entered into an agreement in writing, as follows:

"Articles of agreement entered into this 29th day of May, 1874, between Edward Bayer, of Brooklyn, New York, party of the first part, and Charles Hauselt, of New York City, party of the second part, witnesseth:

In consideration of certain moneys advanced, at the rate of seven per cent per annum, to the party of the first part, for the purchase of veal and kip-skins to be tanned, curried and finished by one Charles Korn, the party of the first part hereby agrees to send all the skins so tanned, curried and finished by the said Charles Korn, said skins to be labeled and stamped with a label and stamp bearing the name of said Charles Korn, the skins to be in every way so finished as those now known in the New York market as the 'Korn skin,' exclusive to the party of the [403] second part, he being sole agent for the so-called 'Korn skin' in the United States, in consideration of a commission of five per cent of proceeds of all sales and a further one per cent to cover fire insurance, storage and labor; the said party of the second part agrees to sell all such skins to be sent him at the best market prices, the wholesale or cash price only to be taken as an average in account sales, small sales to be taken to own account at same price; the party of the second part further agrees to place all proceeds of sales of said skins, after deduction of aforementioned commission and advances for the purchase of veal and kip-skins, at the disposal of the party of the first part, for his own use and benefit.

And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security for the refunding, with interest, of all the moneys advanced by the party of the second part, and that all the skins shall be insured for their full value in good companies only.

Signed, sealed and delivered on the day and year above written.

EDW'D BAYER.
CHARLES HAUSELT,
By E. HAUSELT, *Att'y.*

Witness: FREDERICK E. SHEARER."

The business contemplated by this contract was carried on, according to its terms, until November 6, 1874. During that time Hauselt had made large cash advances and had received some tanned hides, but on that date was largely in advance, in excess of receipts, and in excess of the value of the property replevied. Bayer, having become broken in health and financially embarrassed, informed Hauselt of his condition, and that, in consequence, he could proceed no further in the execution of the contract between them and could not otherwise repay his advances. Thereupon the parties entered into the following agreement:

"This agreement, made the 6th day of November, 1874, between Edward Bayer, of the City of Brooklyn, State of New York, party of the first part, and Charles Hauselt, of the City, County and State of New York, party of the second part, witnesseth:

That, whereas, an agreement was entered into by the parties hereto on the 29th day of May, [404] 1874, whereby the party of the first part was, among other things, to tan, finish and deliver to the party of the second part veal and kip-skins purchased in the raw by moneys advanced by the party of the second part; and whereas, the party of the first part has become ill and physically unable to complete the tanning and finishing the skins now on hand at the tannery of the party of the first part, and in order that said contract or agreement may be carried out, it is hereby agreed, and the party of the second part is hereby authorized to take immediate possession and sole control of tannery, buildings and out-houses connected therewith, of the party of the first part, in Tioga Township, Pennsylvania, and run and use the same, together with such of the materials on hand as may be necessary

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to finish and complete said skins now on hand in said tannery, etc., and to take possession of and sell said skins in any state as may be to the best advantage of the parties hereto, all sales guarantied by the parties of the second part, the net proceeds of all said sales to be passed to the credit of the party of the first part, after deducting advances and expenses of finishing said skins as per the terms of said agreement.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

EDW. BAYER. [SEAL.]
CHARLES HAUSELT. [SEAL.]
T. H. BRORMAN, *Att'y.*

Signed, sealed and delivered in the presence,
C. H. SEYMOUR."

Hauselt immediately took possession of the tannery, holding the property replevied at the time this action was brought, in pursuance of this arrangement.

It may be assumed that at the date of the second contract Hauselt had knowledge of Bayer's insolvency and of his intention immediately to file his petition in bankruptcy.

The court below charged the jury, in substance, as follows: that the property in the skins purchased by means of the advances under the contract of May 29, 1874, was in Bayer; that Hauselt had no right to the possession of them at any time while they were in the process of manufacture; that the only security given by the contract was the personal obligation of Bayer to consign them to Hauselt for sale, when [405] the manufacture was complete; that the contract of November 6, 1874, and the possession delivered and taken in pursuance of it, was a transfer, to which Hauselt was not entitled, and constituted a preference within the meaning of the bankrupt law; that if it was made to make and obtain payment of the whole of the debt to Hauselt, Bayer being in fact insolvent, and Hauselt having reasonable cause to believe him to be so, the transaction was fraudulent and void, and the verdict should be for the plaintiff.

These charges were duly excepted to and are now assigned for error.

Notwithstanding the differences between the contract of May 29, 1874, between Bayer and Hauselt, and the contract considered by this court in the case of the *Powder Co.* v. *Burkhardt*, 97 U. S., 110 [XXIV., 973], it must be conceded that the legal title to the skins purchased with the money advanced by Hauselt vested in Bayer. But it was not an unqualified property. We cannot agree with the circuit court in the construction, that the only security given to Hauselt by the contract was the personal promise of Bayer that he would perform it. To limit the contract to that extent, is to deprive its last provision of all force; for without it, the personal obligation to deliver the skins when tanned would still remain. The clause providing for security must be held to mean something; and it declares that the skins themselves, before delivery of possession to Hauselt under the contract, for purposes of sale, shall be considered as security.

The legal effect of such a contract, it was decided in *Gregory* v. *Morris*, 96 U. S., 619 [XXIV., 740], was to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely.

Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to [406] some other and unauthorized use, it would have been in fraud of the rights of Hauselt, and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement.

"Indeed," says Story, Eq. Jur., sec. 1231, "there is generally no difficulty in equity in establishing a lien not only on real estate, but on personal property or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice. For it is a general principle in equity that, as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust."

If, in consequence of his bankruptcy, the property had come into the possession of his assignees, they would have taken it subject to all legal and equitable claims of others not in fraud of the rights of general creditors. They would be affected by all the equities which could be urged against him. *Cook* v. *Tullis*, 18 Wall., 341 [85 U. S., XXI., 937]. In *Yeatman* v. *Savings Inst.*, 95 U. S., 764 [XXIV., 589], it was held to be an established rule that, "Except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt." "He takes the property in the same plight and condition that the bankrupt held it." *Winsor* v. *McLellan*, 2 Story, 492. In *Stewart* v. *Platt*, 101 U. S., 739 [XXV., 818], it was held that, although the chattel mortgages, involved in that litigation, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as [407] between the parties. *Mr. Justice* Harlan, delivering the opinion of the court, said: "The assignee took the property subject to such equities, liens or incumbrances as would have affected it had no adjudication in bankruptcy been made. * * * The latter (the assignee) representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the

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mortgagors. The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee."

It follows that, Bayer becoming a bankrupt while in possession of the skins purchased, and in the tannery, under the contract of May 29, 1874, if his assignee in bankruptcy had taken possession of them, he would have done so, subject to the terms of that contract; and Hauselt would have had the right to require, either that he should perform the contract to its termination, so far as the skins then on hand were concerned, by finishing them, and forwarding them for sale; or that he should surrender possession to Hauselt, under some arrangement, mutually beneficial, whereby the enterprise might be wound up, under his management, such as that actually made by Bayer, on November 6, 1874; or if the assignee sold the property in the condition in which he received it, that he should account to Hauselt specifically for the proceeds of the sale, and recognize him as a creditor for the remainder of his advances, not thereby refunded

Such being the mutual rights of the parties, the transaction of November 6, 1874, though made with knowledge of Bayer's insolvency, and in contemplation of his bankruptcy, if made in good faith, as it is admitted to have been, for the purpose of securing to Hauselt the benefits of the contract of May 29, 1874, was legitimate, and did not constitute, as was held by the circuit court, an unlawful preference in fraud of the bankrupt law. It is quite true that Hauselt could not have compelled Bayer by an action at law, to deliver to him possession of his tannery and its contents; nor could he have recovered possession of the skins, tanned or untanned, by force of a legal title; but it is equally true that, in equity, he could, by injunction, [408] have prevented Bayer from making any disposition of the property, inconsistent with his obligations under the contract; and upon proof of his inability or unwillingness to complete the performance of his agreement, the court would not have hesitated, in the exercise of a familiar jurisdiction, to protect the interests of Hauselt, by placing the property in the custody of a receiver for preservation, with authority, if such a course seemed expedient, in its discretion, to finish the unfinished work, and ultimately by a sale and distribution of its proceeds to adjust the rights of the parties.

For these reasons, we think the court below erred in its charges to the jury. *The judgment is, therefore, reversed, with instructions to grant a new trial, and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.
Cited—133 Mass., 142.

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[414]

UNITED STATES, *Appt.*,
v.
BERNARD EMHOLT ET AL., *Claimants.*

(See S. C., 15 Otto, 414-416.)

Division of opinion—information for forfeiture.

*At the hearing in the Circuit Court, of an appeal from the District Court, the District Judge who rendered the judgment appealed from cannot, under section 614 of the Revised Statutes, give a vote, even by consent of parties, when another judge is present; and the case cannot be brought to this court upon a certificate of division of opinion between him and the other judge.

An information for a forfeiture, under the internal revenue laws, cannot be brought from the Circuit Court to this court by appeal.

*Head notes by *Mr. Justice* GRAY.

[No. 238.]

Argued Mar. 22, 1882. Decided Apr. 10, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Wisconsin.

Statement of the case by *Mr. Justice* **Gray**:

This was an information, filed in the District Court of the United States for the Western District of Wisconsin, for the forfeiture of the right, title and interest of Severin Schulte in certain real estate on which he carried on the business of a distiller, without having given bond as required by law, and with intent to deprive the United States of the tax on the spirits distilled by him.

In the District Court, held by *Judge* Bunn, Bernard Emholt and Eliza Bergener appeared and answered as claimants of the real estate under mortgages from Schulte; upon the trial it was found by special verdict that Schulte was guilty as charged in the information, and that he held the legal title to the real estate, subject to a mortgage to each of the claimants; judgment was given that the mortgages constituted no lien or incumbrance against the United States, and that all the real estate be forfeited; and the claimants appealed to the Circuit Court.

In the Circuit Court, held by *Mr. Justice* Harlan and *Judge* Bunn, the judgment was reversed; and a certificate, signed by *Mr. Justice* Harlan only, was entered of record, stating that the hearing upon the special verdict found in the District Court was, by consent of parties, had before the Circuit Justice and the District Judge, and that they were divided in their opinion on the question whether, upon the facts found in the special verdict, the United States were entitled to judgment forfeiting the property described in the information to the use of the United States, except subject to the interest and claim of the claimants, as set out in their answers.

From the judgment of the Circuit Court the district attorney claimed and was allowed an [415] appeal to this court.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for appellant.

Messrs. J. T. Mills, **George C. Hazleton** and **S. U. Pinney**, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This court has no jurisdiction of the question certified. The office and object of a certificate of division of opinion are to bring to this court for determination a question of law upon which the opinions of two judges, competent to take part in the judgment of the Circuit Court, are opposed to each other. By the provisions of the Judiciary Acts of September 24, 1789, sec. 4 [1 Stat. at L., 73], and April 29, 1802, sec. 5 [2 Stat. at L., 156], re-enacted in the Revised Statutes, sec. 614, upon the hearing in the Circuit Court of an appeal from a judgment of the District Court, the District Judge who rendered

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the decision appealed from, although he may, for the information of the Circuit Court, assign his reasons for that decision, is prohibited from voting or taking part in the judgment of the Circuit Court, and that judgment is to be entered according to the opinion of the judge who is not so disqualified. The provision of the Act of March 2, 1867, sec. 2 [14 Stat. at L., 545], also incorporated in the same section of the Revised Statutes, which, in order to prevent failure or delay of justice, permits such a case, by consent of parties, to be heard and disposed of by the District Judge when alone holding the Circuit Court, has no application when another judge is present. And the provisions of the Acts of April 29, 1802, sec. 6 [2 Stat. at L., 156], and June 1, 1872, sec. 1 [17 Stat. at L., 196], embodied in secs. 650, 652, 693, 697 of the Revised Statutes, do not enlarge the authority of the District Judge in this respect. It necessarily follows that the case cannot be brought to this court upon a certificate of division of opinion between the judge who is qualified and the judge who is disqualified to take part in the judgment. *U. S.* v. *Lancaster*, 5 Wheat., 434; *Nelson* v. *Carland*, 1 How., 265.

The case cannot be treated as before this court on the appeal from the Circuit Court, without regard to the certificate of division, because it is on the common law side of that court. If it [416] is to be considered as a civil action, the proper mode of bringing it up is by writ of error, and not by appeal. *Bevins* v. *Ramsey*, 11 How., 185; *Jones* v. *La Vallette*, 5 Wall., 579 [72 U. S., XVIII., 550]. If, according to *Clifton* v. *U. S.*, 4 How., 242, 250, it should be treated as in the nature of a criminal proceeding, it is hard to see how it could be brought to this court at all, except upon a certificate of division of opinion. *Ex parte Gordon*, 1 Black, 503 [66 U. S., XVII., 134].

Neither the consent of parties nor the allowance of the appeal in the court appealed from, can enable this court to review the judgment of that court in any other form of proceeding than the law prescribes. *Kelsey* v. *Forsyth*, 21 How., 85 [62 U. S., XVI., 32]; *Callan* v. *May*, 2 Black, 541 [67 U. S., XVII., 281].

This court having no jurisdiction of the case, the appeal must be dismissed, and the case remanded to the Circuit Court.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[416] E. A. HITCHCOCK, *Plff. in Err.*,

v.

WILLIAM C. BUCHANAN ET AL.

(See S. C., 15 Otto, 416-418.)

Bill of exchange, when that of company and not of its officers—demurrer.

*1. A bill of exchange, headed "Office of Belleville Nail Mill Co.," and concluding, "charge same to account of Belleville Nail Mill Co., A. B., Pres't, C. D., Sec'y," is the bill of the company, and not of the individual signers; and a declaration thereon against the latter as drawers, setting forth the instrument, and alleging it to be their bill of exchange, is bad on demurrer.

2. A statute prohibiting defendants, in actions upon written instruments, from denying their signatures, except under plea verified by affidavit, does not apply to a case in which the defendants demur because the instrument declared on appears upon its face to be the contract of their principal and not of themselves.

*Head notes by *Mr. Justice* GRAY.

[No. 250.]

Submitted Mar. 27, 1882. Decided Apr. 10, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Statement of the case by *Mr. Justice* **Gray:**

This was an action of *assumpsit* by the plaintiff as indorsee against William C. Buchanan and James C. Waugh as drawers of the following bill of exchange:

"OFFICE OF BELLEVILLE NAIL MILL CO.,
BELLEVILLE, ILLS.,

$5,477.13. Dec. 15th, 1875.

Four months after date, pay to the order of John Stevens, Jr., cashier, fifty-four hundred and seventy-seven $\frac{13}{100}$ dollars, value received, [417] and charge same to account of Belleville Nail Mill Co.

WM. C. BUCHANAN, Pres't.
JAMES C. WAUGH, Sec'y.

To J. H. PIEPER, Treas., Belleville, Illinois."

The declaration alleged that the defendants, on the 15th of December, 1875, "at the office of Belleville Nail Mill Co., Belleville, Ills., made their certain bill of exchange" (describing it) and, after it had been accepted by the drawee, delivered it to the payee therein named, and he indorsed it to the plaintiff, and the bill at maturity was presented for payment, and payment refused, and the bill protested for non-payment, and the defendants, knowing that it would not be paid by the acceptor, had omitted to provide funds for its payment. A copy of the instrument above set forth, and of the acceptance and indorsement thereon, was filed with the declaration.

The defendants, after oyer craved and had, severally filed general demurrers to the declaration, which were sustained by the Circuit Court, and judgment given for the defendants, on the ground that the instrument declared on was the bill of exchange of the Belleville Nail Mill Company and not the bill of the defendants.

Mr. **Thomas G. Allen,** for plaintiff in error:

The instrument declared on is properly to be taken and adjudged the bill of exchange of the defendants, upon which they are individually liable.

Chit. Bills, 37; *Leadbitter* v. *Farrow*, 5 Maule & S., 345; *Thomas* v. *Bishop*, 2 Str., 955.

The law, as thus held, was fully recognized and affirmed by the Supreme Court of Illinois, in the case of *Powers* v. *Briggs*, 79 Ills., 493.

The following are the cases cited as authorities, and referred to by the court in the opinion delivered in *Powers* v. *Briggs*:

NOTE.—*When promissory notes, executed by an officer, bind the corporation; when the officer.*

The addition of official character to the signature at foot of the note will not of itself be sufficient to bind the corporation, but will be regarded as merely *descriptio personæ*. Such signatures as "A. B., Prest. Henderson Loan Co.," have been held to bind the individual, particularly where the note begins "I promise" or "We promise," and the only indication of corporate liability is by addition to the names signed. Hovey v. Bannister, 8 Cow., 31; Fitch v. Lawton, 6 How. (Miss.), 371; Scott v. Baker, 3 Hag. (W. Va.), 285; Rand v. Hale, 3 Hag. (W. Va.), 495; Sturdivant v. Hull, 59 Me., 172; Drake v. Flewellen, 33 Ala., 106; Brockway v. Allen, 17 Wend., 41; Fowler v. Atkinson, 6 Minn., 579; Haverhill, etc., Ins.

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Leadbitter v. *Farrow*, 5 Maule & S., 345; *Bradlee* v. *Boston Glass Co.*, 16 Pick., 350; *Morell* v. *Codding*, 4 Allen, 403; *Leach* v. *Blow*, 8 Sm. & M., 228; *Chick* v. *Trevett*, 20 Me., 462; *Fogg* v. *Virgin*, 19 Me., 352; *Sturdivant* v. *Hull*, 59 Me., 172; *Barker* v. *M. F. Ins. Co*,. 3 Wend., 94; *Hills* v. *Bannister*, 8 Cow., 31; *Moss* v. *Livingston*, 4 N. Y., 208; *Dewitt* v. *Walton*, 9 N. Y., 571; *Savage* v. *Rix*, 9 N. H., 263; *Tucker Manufacturing Co.* v. *Fairbanks*, 98 Mass., 103.

To the same effect are the following:

Price v. *Taylor*, 5 Hurl. & N., 540; *Dutton* v. *Marsh*, 19 W. R., 754; *Taft* v. *Brewster*, 9 Johns., 334; *Stone* v. *Wood*, 7 Cow., 453; *White* v. *Skinner*, 13 Johns., 307; *Appleton* v. *Binks*, 5 East, 148; *Fash* v. *Ross*, 2 Hill (S. C.), 294; *Seaver* v. *Coburn*, 10 Cush., 324; *Thacher* v. *Dismore*, 5 Mass., 299; *Mayhew* v. *Prince*, 11 Mass., 54; *Duval* v. *Craig*, 2 Wheat., 56.

Mr. **Charles W. Thomas,** for defendant in error:

The bill declared on is the paper of the Belleville Nail Company, and not the paper of the defendants, and no pleas were necessary to show this to the court. The instrument is dated at the office of the Belleville Nail Mill Company, and directs F. H. Pieper "Treas.," to pay a certain amount and "charge same to account of Belleville Nail Mill Company," and is signed Wm. C. Buchanan, Pres., James C. Waugh, Secy. The paper in these respects is like that in *Safford* v. *Wyckoff*, 1 Hill, 11, and unlike that in any of the cases cited by counsel for plaintiff in error. Daniel, in his work upon Negotiable Instruments, section 411, citing the case in 1 Hill says, that the bill was plainly the bill of the corporation.

See, also, *Witte* v. *Derby Fishing Co.*, 2 Conn., 435; *Fuller* v. *Hooper*, 3 Gray, 334; Story, Prom. N., sec. 69.

In the case of *Hypes* v. *Griffen*, 89 Ill., 134, the Supreme Court of Illinois draws a distinction between such cases as are cited by counsel for plaintiff in error, and one where the only indication of agency is some word following the name of maker, who acts as the agent of the corporation in making the paper and says:

"It seems to be settled, so far as there is any well defined rule on this subject, that where a party signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness in its ordinary business, if it appears it was the obligation of the corporation, and the cashier or agent had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence."

Mr. Justice **Gray** delivered the opinion of the court:

The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Company, and not of the individuals by whose hands it is subscribed. It purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary. An instrument bearing on its face all the signs of being the contract of the principal cannot be held to bind the agents personally. *Sayre* v. *Nichols*, 7 Cal., 535; *Carpenter* v. *Farnsworth*, 106 Mass., 561, and cases there cited.

The allegation in the declaration, that the defendants made "their" bill of exchange, is inconsistent with the terms of the writing sued on and made part of the record, and is not admitted by the demurrer. *Dillon* v. *Barnard*, 21 Wall., 430 [88 U. S., XXII., 673]; *Binz* v. *Tyler*, 79 Ill., 248. [418]

The provision of the Statute of Illinois, ed. 1877, title Practice, sections 34, 36, prohibiting defendants sued on written instruments from denying their signatures, except under plea verified by affidavit, has no application where the fact of signature is admitted by demurrer, and the only issue is one of law.

Judgment affirmed.

True copy. Test.

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 422; 109 U. S., 198.

Co. v. Newhale, 1 Allen, 130; Burbank v. Posey, 7 Bush., 373; Fiske v. Eldridge, 12 Gray, 474; Gregory v. Leigh, 33 Tex., 813; *contra*, 1 Parsons B. & N., 168 and cases cited.

Where in the body of the note there are official designations, as "I ——, President of ——," or "I ——, Treasurer of ——," or "I ——, cashier of —— company or Bank," and it is signed in like manner, it has been held the note of the corporation. 1 Parsons B. & N., 169; Proctor v. Webber, 1 D. Chipman, 371; Blanchard v. Kaull, 44 Cal., 448; Mann v. Chandler, 9 Mass., 335; Hovey v. Magill, 2 Conn., 680; Johnson v. Smith, 21 Conn., 627; Dispatch Line of Packets v. Bellamy Mfg. Co., 12 N. H., 205; McCall v. Clayton, Busbee L. R. (N. C.), 422.

In New York a note running "I, John Franklin, Pres't of the Mechanic Fire Insurance Company, promise" was held Franklin's. Barker v. Mech. F. Ins. Co., 3 Wend., 94.

In Indiana a note beginning "We, The Trustees of the Methodist Church in Rockport, promise," signed with the individual names with the words "Trustees of the M. E. Church" added, was held the individual note of the signers for want of power to bind the corporation. Mears v. Graham, 8 Blackf., 144; McClure v. Bennett, 1 Blackf., 189.

Similar decisions have been made in other States, but not on the same ground. Packard v. Nye, 2 Metc., 47; Pomeroy v. State, 16 Vt., 220; Fogg v. Virgin, 19 Me., 353; Morrell v. Codding, 4 Allen, 403.

Where a note ran "We, the undersigned, Directors of School District No. —," parol evidence to bind the makers was excluded. Baker v. Chambliss, 4 Iowa, 429.

Where the note ran "We, as Directors, etc.," the word *as* has been held to exclude the idea of individual liability. Sanborn v. Neal, 4 Minn., 127; Blanchard v. Kaull, 44 Cal., 448; Yowell v. Dodd, 3 Bush., 561.

The corporate seal attached to a signature, "A. B., Secretary," held to make the note a corporate note. Dow v. Moore, 47 N. H., 419; *contra*, Dutton v. Marsh, L. R., 6 Q. B., 359.

Where the promise is that of the corporation in the body of the note, as "The Ocean Mining Co. promise," etc., and there is added an official designation to the signature, as "A. B., Trustee," the note is that of the company. Shotwell v. McKown, 2 Southard, 828; Shaver v. Ocean Mining Co., 21 Cal., 45; Com. Bk. v. Newport Mfg. Co., 3 B. Mon., 13; Pitman v. Kintner, 5 Blackf. 250; Hamilton v. Newcastle R. R. Co., 9 Md., 19.

Where the promise is "We, jointly and severally, and the note is signed "for Boston Glass Manufactory," A., B. & C., it was held that the joint and several promise and the omission of any designation of official character, made the undertaking individual. Bradlee v. Boston Glass Co., 16 Pick., 347; Rice v. Gore, 22 Pick., 158; Healey v. Story, 3 Exch., 3; 18 L. J. N. S., 8.

See, on this subject, Burroughs Public Securities, 7 *et seq.*

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[100] HERMAN BLENNERHASSETT, WILLIAM A. STEPHENS, AND THE CHARTER OAK LIFE INSURANCE COMPANY, *Appts.*,

v.

HOYT SHERMAN, Assignee of BENJAMIN F. ALLEN, and BENJAMIN F. ALLEN.

(See S. C., 15 Otto, 100-122.)

Mortgage by insolvent debtor, when void.

*1. A mortgage executed by an insolvent mortgagor, and covering his entire estate, to his creditor, who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, conceals the mortgage and withholds it from the record, and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he cannot pay, is void at common law.

2. A mortgage executed by an insolvent debtor with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the Bankrupt Act, and who, for the purpose of evading the provisions of that Act, actively conceals and withholds it from the record for two months, is void under the Bankrupt Act, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

[No. 61.]

Argued Oct. 28, 1881. Decided Apr. 17, 1882.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Statement of the case by *Mr. Justice* **Woods:**

The bill in this case was filed January 26, 1875. The suit was brought to foreclose a mortgage executed by B. F. Allen, lately of the City of Chicago, in the State of Illinois, to Allen, Stephens & Co., of the City of New York. The firm was composed of B. F. Allen, the mortgagor, and William A. Stephens and Herman Blennerhassett. The bill of complaint set out the mortgage in full, as follows:

"NEW YORK, 18 Nov., 1874. I hereby acknowledge the receipt of four hundred and sixty-five thousand four hundred and seventy-six and 88-100 dollars of advance to the Cook County National Bank, of Chicago, for my account, same being made by Allen, Stephens & Co. in money, paper and indorsements. I have arranged with them for additional advances. In consideration thereof I hereby grant and convey to Allen, Stephens & Co., by way of mortgage and security for such advances, all my real estate of every kind and description, and wherever situated B. F. ALLEN."

This instrument was duly acknowledged by Allen before a notary public in the City of New York, and delivered to the complainants, Stephens and Blennerhassett. It was not recorded until January 19, 1875. On that day it was filed for record in Cook County, Illinois, and on the next day in Polk County, Iowa.

[101] The bill charged "That in consideration of said security the complainants had further advanced to said Allen in money and valuable securities, and become personally liable by indorsement of securities for said Allen, in the further sum of $434,523.12, making a total amount of advancements and indorsements on account of said security of the sum of $900,000, paid and advanced by your orators, and for which they became liable as indorsers." The bill then gave a description of the real estate which complainants claimed was covered by the mortgage, and prayed for an account of the moneys advanced by the complainants to Allen, and the moneys paid by them on account of the liabilities incurred and the amounts intended to be secured by the mortgage, and for a foreclosure of the same and general relief.

On February 8, 1875, the mortgage mentioned in the bill was assigned by Allen, Stephens & Co. to The Charter Oak Life Insurance Company of Hartford, Connecticut, and on April 17th that Company, leave of the court having been obtained allowing it to intervene and become a party complainant, filed a supplemental bill, in which the assignment of the mortgage was averred. On February 23, 1875, a petition in bankruptcy was filed against B. F. Allen in the United States District Court for the District of Iowa, and on April 22d he was adjudged a bankrupt, and on July 1 following, Hoyt Sherman was appointed assignee of his estate.

Afterwards, on August 7, 1875, Stephens and Blennerhassett, and the Charter Oak Life Insurance Company, filed their bill of review, in which they prayed that Hoyt Sherman, the assignee of Allen, might be made a party defendant. Allen was retained as a defendant on account of a claim of homestead which he set up to certain of the property covered by the mortgage.

In this bill, which is called in the record "A bill of reviver and consolidated bill," the complainants averred: that prior to the date of the mortgage Allen had applied to Stephens and Blennerhassett, as copartners in the firm of Allen, Stephens & Co., in behalf of the Cook County National Bank, to make to the bank, upon the credit and responsibility of Allen, certain large advances of money, commercial paper [102] and indorsements, and that in pursuance of such application Allen, Stephens & Co. did make such advances to the amount of $465,476 prior to the date of the mortgage, and that after its date "They continued to make advances of money and valuable securities to the said Cook County National Bank, at the request of said B. F. Allen, and between the said date of the 18th of November, 1874, and the date of the suspension of payment by the said Cook County National Bank, as hereinafter set forth, in addition to the said sum of $465,476.88, ascertained and acknowledged to have been received at the date of said mortgage, the said Allen, Stephens & Co. advanced in the aggregate the sum of $2,722,284.29.

That said Cook County National Bank from time to time, between said dates, to wit: between the said 18th day of November, 1874, and the 18th day of January, 1875, made remittances to the said firm of Allen, Stephens & Co., on account of said advances, which remittances were made in currency and in bills receivable, on which currency was realized, and all of which was applied on account, and was sufficient to extinguish and did extinguish wholly the amount so advanced prior to the date of the execution of said mortgage, but was wholly inadequate to pay the amount advanced subsequent to said date. That the balance due on account of said advances and in excess of the credits and remittances aforesaid, on the said 18th day of January, 1875, and still due and unpaid, is the sum of $900,000.

*Head notes by *Mr. Justice* WOODS.

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Hoyt Sherman, the assignee, filed his answer to this bill, in which he averred that the advances made by Allen, Stephens & Co. prior to the date of the mortgage, were made to Allen on his own individual account and for his own use, and not to the Cook County National Bank, but denied that such advances amounted to the sum of $465,476, "or anything like that amount." He admitted the execution of the [103] mortgage, but charged that, on and prior to its date, Allen was largely indebted to persons and banks in New York City and to the Cook County National Bank; that he was insolvent, his liabilities were more than $1,500,000; and exceeded his assets by at least $600,000; that the Cook County National Bank was embarrassed and unable to pay its debts, and that all these facts were then well known to Stephens and Blennerhassett. That they, desiring to take advantage of the necessities of Allen, and desiring to extort from him a mortgage on his real estate in Iowa and elsewhere, in fraud of his other creditors, falsely represented to him that he was largely indebted to the firm of Allen, Stephens & Co. for advances theretofore made to the Cook County National Bank for his account, "and that if he, Allen, would execute to said firm an agreement or mortgage as hereinbefore mentioned, said firm of Allen, Stephens & Co. would advance or procure to be advanced to him an amount that would be sufficient to enable him and the said Cook County National Bank to go on with their business, and that they would continue to make such advances till he and the said bank had gotten over their crippled financial condition, and were able to go on with their business without such assistance; and that if he the said Allen, would do so, that the same should not be put upon record; and should not in any manner be uttered or published; that it should be held by said Stephens and Blennerhassett, and should be kept from the knowledge of all the general creditors of said Allen, and of said Allen, Stephens & Co.; that the only use they would make of it would be as a justification to their depositors for making such advances to said Allen, and then only in case any question should be made with them, the said Stephens and Blennerhassett, by such depositors in regard thereto; and that it should in no way or manner have any force or validity, even between the said parties thereunto, unless the said Allen, Stephens & Co. should advance to said Allen funds sufficient to enable him and the said Cook County National Bank to go on with their business, as above stated, and then that it should be held by them, the said Stephens and Blennerhassett, and in no way used without the consent of the said Allen.

"They further declared to Allen that if he refused to execute said mortgage they would at once cease to make advances to him or the Cook County National Bank, and would take no steps to protect the drafts drawn by the Cook County National Bank on New York, which would [104] cause its suspension. That Allen being in great need of money, and relying on the representations of Stephens & Blennerhassett, and believing that if he could procure the aid which they promised he could sustain the Cook County National Bank and pay off his debts, and fearing lest Stephens & Blennerhassett would carry out their threats, executed said mortgage."

The answer averred that Allen, Stephens & Co., on and before January 18, 1875, refused to make the advances, upon the making of which alone said mortgage was to have any validity or effect, even between the parties thereto, and said firm, in other respects, failed to comply with the promises made, upon the faith of which the said mortgage was executed; that, in consequence of the refusal and failure of Stephens and Blennerhassett to comply with their promises, Allen and the Cook County National Bank were compelled to and did suspend payment, and to quit business and go into liquidation, and so it was averred that said mortgage became null and void.

The answer denied that after the execution of the mortgage Allen, Stephens & Co., continued to make advances to the Cook County National Bank; denied that there was due from Allen or the Cook County National Bank to Allen, Stephens & Co. the sum of $900,000, and averred that Allen and the Cook County National Bank had paid and delivered to Allen, Stephens & Co. in money and securities sufficient to satisfy all the advances of said firm to Allen and the Cook County National Bank, if any such were made.

It was further averred in the answer, as follows:

"That, on and prior to the 18th day of November, 1874, the date of said pretended mortgage, the said B. F. Allen and the said Cook County National Bank was each insolvent and unable to pay their debts; that said firm of Allen, Stephens & Co., as well as the several members thereof, had, at and prior to such date, reasonable cause to believe said Allen and said bank were each insolvent: that said firm fraudulently procured said Allen to execute and deliver said pretended mortgage, knowing it was made to and would give said firm a preference over the other creditors of said Allen, and that it was [105] made in fraud of the provisions of the bankrupt law and the more effectually to perpetrate such fraud on the general creditors of said Allen at the time said mortgage was executed and delivered, and said Stephens and Blennerhassett, for themselves and said firm, agreed to conceal the same, not to publish the same or put the same on record; and, in pursuance of such agreement, they did, with intent to defraud the general creditors of said Allen, keep the same in their possession for two months after it was executed, and until the 19th day of January, 1875, and until they had positive knowledge that the said Allen and the said Cook County Bank would be compelled to suspend, when said pretended mortgage, or a copy thereof, was fraudulently, and for the purpose of creating an illegal preference in their favor, filed for record in the recorders' offices in the different counties in Iowa and Illinois wherein the real estate of said Allen is situated; that while said mortgage was, as aforesaid, secretly kept by said Stephens and Blennerhassett, it had no effect or validity as against the other creditors of said Allen, and that as to them (if valid between the parties to it, which this respondent denies) it only took effect at and from the time the same was filed for record, which was within the two months next prior to the filing of the petition in bankruptcy against the said B. F. Allen, and on which he was adjudged a bank

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rupt as aforesaid; and that the same is fraudulent and void under and by virtue of the provisions of the national bankrupt law and the amendments thereto, and that the same is now a cloud upon the said real estate then owned by said Allen, the title of which has passed to your orator as the assignee of said bankrupt, and it ought by the decree of this honorable court to be so declared, and said cloud removed."

The complainants filed the general replication to this answer.

Afterwards, on January 17, 1876, an amendment was filed to the said "consolidated bill," in which it was averred that, by the application of money collected by Allen, Stephens & Co. from collateral securities held by them to secure the amount due them from the Cook County National Bank, the amount of such indebtedness had been reduced to the sum of $784,000, by reason whereof the said firm of Allen, Stephens & Co. had no longer any beneficial interest in [106] said mortgage, but the entire and absolute interest in and ownership of said mortgage was held and owned by the Charter Oak Life Insurance Company.

Hoyt Sherman, as assignee of B. F. Allen, filed his cross-bill against Stephens, Blennerhassett and the Charter Oak Insurance Company, alleged the invalidity of said mortgage on substantially the same grounds as those set up in the answer, and prayed that the mortgage mentioned in the original bill might be declared fraudulent and void, and the cloud upon the title to the real estate of the bankrupt, B. F. Allen, created by the registry of the same, might be removed. The defendants to the cross-bill filed their answer thereto, to which Sherman, the assignee, filed the general replication.

It is unnecessary to state the pleadings in greater detail. Proofs were taken, and upon final hearing the circuit court dismissed the original bill and made a decree in accordance with the prayer of the cross-bill, declaring the mortgage to be null and void and canceling the same. The appeal of the complainants brings up this decree for our consideration.

The defendants in the court below contended that the mortgage was void, because:

First. It was procured by fraud and used without the consent of Allen, and was given and received to hinder, delay and defraud Allen's creditors.

Second. It was concealed and kept from the records from its date until January 19, 1875, and until after Allen failed, and that such concealment gave to Allen and the Cook County National Bank a delusive and fictitious credit, thereby enabling Allen, under the semblance of being the owner of a large amount of unincumbered real estate, to deceive and mislead other persons to give him credit which would otherwise have been withheld, by reason of which Allen did contract debts after the giving of this mortgage, now remaining unpaid, of a greater amount than the value of the real estate covered by this mortgage. Many of these debts were [107] contracted by Allen, Stephens & Co., upon the representations of W. A. Stephens and H. Blennerhassett, members of said firm, while they held this mortgage in concealment; that Allen's real estate was a vast property and was unincumbered.

Third. This mortgage was a fraudulent preference under the provisions of sections 5128, 5129 and 5180 *a* of the Revised Statutes of the United States, under the title of bankruptcy, then in force.

Fourth. If the instrument was valid, it was given to secure a debt of B. F. Allen, and not a debt of the Cook County National Bank, and that B. F. Allen did not then, nor does he now, owe Allen, Stephens & Co. anything.

Fifth. If the advances were made by Allen, Stevens & Co. to the Cook County National Bank, such advances would create no valid debt against the said bank under section 5202 of the Revised Statutes of the United States, and being no debt there can be no mortgage.

Sixth. The instrument is not a legal mortgage, for the reason that it describes neither debt nor real estate.

Messrs. **C. C. Nourse, A. P. Hyde, Coles Morris** and *Kauffman and Hubbard*, for appellants.

Messrs. **J. S. Polk** and **L. H. Bisbee** and *Geo. B. Corkhill*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

After an attentive consideration of the evidence in this case, much of which is conflicting and irreconcilable, we have reached the conclusion that the mortgage, which is the basis of the suit, is fraudulent and void at common law, because it was accepted by Allen, Stephens & Co. and used by them to hinder, delay and defraud the creditors of B. F. Allen, the mortgagor, and that it is also void under that section of the Bankrupt Act now embodied in the Revised Statutes of the United States as section 5128.

We shall state the grounds of our conclusion as succinctly as the case will admit. We are relieved from any discussion of the question of the insolvency of Allen, the mortgagor, by the admissions of counsel for the appellants. It is conceded by them, a fact which, in our judgment the evidence abundantly shows, that not only at the date of the mortgage, on November 18, 1874, but also at the date of its registration, on January 19, 1875, Allen was insolvent. It is conceded that at the same dates the Cook County National Bank was also insolvent. We may add to this concession, what is perfectly clear from the evidence, that the insolvency of both Allen and the bank was actual and absolute; that their [108] assets were largely insufficient to pay their debts.

In order to a clear understanding of the controversy between the parties, it will be necessary to state generally the financial history of B. F. Allen and of the firm of Allen, Stephens & Co., of which B. F. Allen was the senior member, prior to the date of the mortgage.

In 1856 Allen commenced business as a private banker in Des Moines, Iowa. He soon began dealing in Iowa lands. He bought claims, made entries and located them mainly in Polk County, Iowa. The real estate of which he was seised at the date of this mortgage had cost him $242,616, and that of which he was seised on January 18, 1875, had cost him $240,794.

He continued his business as a banker in Des Moines up to a short time before the proceedings in bankruptcy were instituted against him. On October 31, 1867, he was appointed by the United States Circuit Court for the District of

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Iowa, receiver in the case of *Mark Howard* v. *The City of Davenport*, then pending in that court, and as such there came into his hands 541 bonds of $1,000 each, of the Chicago, Rock Island and Pacific Railroad Company, and between $90,000 and $100,000 in cash. The bonds bore 7 per cent interest per annum, which Allen collected as it fell due, amounting to $37,870 per annum. He continued the custodian of this entire fund until May, 1873.

In 1868, according to Allen's evidence, which is corroborated by his books, his assets amounted to $1,641,017, and his liabilities, including his indebtedness as receiver, amounted to $1,466,131 leaving an excess of assets over liabilities of $174,886. Of these assets $150,000 were invested in his house and furniture, in addition to the cost of the land, one hundred and thirty acres, on which his house stood.

It is, therefore, apparent, that at the time mentioned he had little or no available capital of his own with which to carry on business. This state of his affairs caused him to succumb to the temptation to use the trust assets in his possession as receiver. Towards the close of the [109] year 1868 he had deposited a part of the Chicago, Rock Island & Pacific Railroad bonds (which we shall call for the sake of brevity Rock Island bonds), which belonged to this trust fund, with Gilman, Son & Co., bankers in the City of New York, and borrowed upon them as collateral security, the sum of $55,000. At this time Blennerhassett was the confidential clerk of Gilman, Son & Co.

On November 2, 1868, Blennerhassett left that firm and became a partner in the banking house of George Opdyke & Co., in which Stephens was already a partner. At the solicitation of Blennerhasset, Allen, on December 19, 1868, changed his account from Gilman, Son & Co. to George Opdyke & Co. During the years 1869, 1870 and 1871, it is made clear by the letters of Allen to Opdyke & Co., which appear in the record, that Allen was pressed for money and embarrassed. During this time he was speculating largely in the stock of the Chicago, Rock Island & Pacific Railroad Company, and had used through Oydyke & Co. a large part of the Rock Island bonds, which belonged to the receiver fund in his possession.

In the fall of 1871 Stephens & Blennerhassett began negotiations with Allen with a view to a partnership between the three to carry on the business of banking in the City of New York, which resulted in the creation of the partnership of Allen, Stephens & Co., which began business on January 1, 1872.

It was agreed that Allen should furnish the capital on which the partnership was to do business. The amount named was $50,000.

At this time Allen was largely insolvent, and neither Stephens nor Blennerhassett had any means. Allen never contributed any money or property to the partnership capital. Stephens and Blennerhassett were not requlred by the partnership articles to pay anything and paid nothing. The firm, therefore, started without any capital whatever; two of the partners had no property, and the other owed more than he could pay.

The complainant, the Charter Oak Life Insurance Company, at once made a large deposit with the new firm, and in a few days their deposits amounted to more than $200,000. With the funds thus placed in their hands they paid the overdrafts of Allen on Gilman, Son & Co., and received from them the securities which had been deposited with them by Allen, namely: 168 Rock Island bonds of $1,000 each, [110] certificates of 3050 shares of stock of National State Bank of Des Moines, and of 960 shares of First National Bank of Des Moines.

It is unnecessary to trace minutely the shifts and devices to which Allen resorted to keep afloat. They are fully shown by the record. On October 7, 1872, it appears from a letter addressed to him by Stephens for the firm of Allen, Stephens & Co., that he was indebted to the firm in the sum of $379,000, and the security held by the firm was 416 Rock Island bonds. That these were the bonds which belonged to the fund of which Allen was receiver, the record leaves no doubt. Allen so testifies and there is no conflicting testimony, and his possession of so large an amount of these bonds is not otherwise accounted for.

All the bonds which belonged to the receiver fund were at various times pledged by Allen. They all passed through the hands of New York brokers as collateral security for loans made by him. In January, 1873, all the Rock Island bonds held by Allen as receiver were in the hands of a broker in New York, held by him as security for advances made to Allen. This broker continued to borrow upon them for Allen until July 1, 1873, when he commenced selling, and continued to sell them until October, 1873, before which nearly all were disposed of, some of them at quite low prices.

During the months of February, March and April, 1873, Allen paid the broker who negotiated these loans for him, the sum of $43,000 extra interest over and above 7 per cent on the loans.

Before May, 1873, it fairly appears from the evidence that Allen's losses had entirely consumed the receiver fund intrusted to him. In the month just mentioned he was ordered to pay into court by the middle of July the 541 bonds of $1,000 each, which had come into his hands as receiver, or their equivalent in money. The residue of the fund, amounting to about $300,000, was to be paid in May of the following year. He was in a desperate strait, and resorted to desperate means to save himself. On May 30, 1873, he purchased $275,000 of the stock of the Cook County National Bank of Chicago, Illinois, which gave him the control [111] of the bank. He paid for a large part of this stock by his checks on the bank, and the residue by a check on Allen, Stephens & Co.

Having thus obtained the control of the Cook County Bank, which had a deposit of $1,300,000, he paid the $541,000 demanded of him as a part of the receiver fund, mainly by his checks on the bank. At this time the larger part of the receiver's bonds had been sold and their proceeds applied to the payment of moneys borrowed by Allen in New York on the pledge of the bonds.

In the fall of 1873 Allen bought an interest in the New York State Loan and Trust Company. His purchases of stock in that institution amounted to nearly $200,000. He paid for this stock by giving his notes and a check on the Cook County Bank. His object in mak-

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ing this purchase, as Allen states it, was to get control of the institution and be enabled thereby "to carry his assets until he could realize on them." In other words, he bought the stock on credit with a view to get in his hands the cash assets of the Trust Company.

During the panic of September, 1873, the Cook County Bank lost $100,000 by the purchase of worthless drafts drawn by one Badger. The bank suspended a short time, but soon resumed.

During the fall of 1873, the private bank of Allen at Des Moines, and the National State Bank of Des Moines, in which Allen was a large stockholder, were both overdrawn with the house of Allen, Stephens & Co. They were both hard pressed for money.

In January, 1874, Allen sold, through the house of Allen, Stephens & Co., to the Charter Oak Life Insurance Company, bills receivable, "in the shape of mortgages," drawn from his private bank in Des Moines, to the amount of $114,000. This money all passed through the books of Allen's private bank at Des Moines.

In May, 1874, the house of Allen, Stephens & Co. made a loan of $400,000 to two men of the name of Hussey and Gisbourne, and took for security a deed of trust to Stephens upon a silver mine, called the Mono mine, in Utah Territory. The Charter Oak Life Insurance Company took one third of this loan off the hands [112] of Allen, Stephens & Co. The mine proved worthless, and the entire loan was a dead loss, taking from Allen, Stephens & Co. $266,666. This largely exceeded all the profits made by the firm since it commenced business, and left it insolvent.

In October, 1874, it was arranged between Allen and the Charter Oak Life Insurance Company, the negotiation therefor having been carried on through Allen, Stephens & Co., that Allen should make his twelve notes for $25,000, payable in five years from date, and deliver the same to the Charter Oak Insurance Company, and secure the same by pledge of mortgage notes, stocks and bonds. The Charter Oak Company was to advance to Allen $300,000 on the notes so secured. Allen, on October 24, 1874, made his notes accordingly, and delivered them to Allen, Stephens & Co. for the Charter Oak Company, and the Company sent $300,000 of its paper to Allen, Stephens & Co. to be used for Allen's benefit. The notes of Allen were secured by the pledge of mortgage notes, amounting to $277,041; by Cook County Bank stock, $70,000; New York State Loan and Trust Company stock $100,000; National State Bank of Des Moines stock, $30,000; and county bonds, $500; amounting in all to $478,000.

On the same day Allen, for himself, executed to Allen, Stephens & Co. a paper writing, in which he authorized them, in case he became indebted to them for loans or advances, or liabilities assumed by them for him, to sell, without notice to him, any property, things in action, collateral securities belonging to him and held by them, or to hypothecate the same and use their proceeds towards the payment of such indebtedness and the interest. On the same day he executed and delivered to Allen, Stephens & Co. a similar paper as president of the Cook County Bank.

Between the date of his appointment as receiver and October 24, 1874, Allen had sustained great losses. In 1871 he had lost by stock speculations in New York City, $200,000. He had lost $50,000 by a subscription to the Canada Southern railroad. He built for a church society at Des Moines a church edifice, in which was tied up the sum of $60,000, and which afterwards resulted in a loss of $50,000. In 1873 and 1874 he had lost $200,000 as a member of the firm of B. F. Murphy & Co., and $75,000 as a [113] member of the firm of H. M. Bush & Co., and $30,000 in the firm of Lewis & Stephens. In swamp, coal and mountain lands he lost $61,000. He lost in corn speculations in Chicago and in property in the Towns of South Evanston, Illinois and Sheffield, Indiana, $92,000. He sunk $35,000 in the stock of the Toledo, Wabash and Western Railroad Company, and lost $30,000 in the firm of A. T. Andreas & Co., and $10,000 invested in the Grand Pacific Hotel in Chicago. Besides his residence and furniture at Des Moines, which cost him $150,000, he had invested in a residence in Chicago $50,000. His actual losses amounted to over $1,000,000, and he had $200,000 invested in unproductive real estate. It is true, so inveterate a speculator sometimes made a fortunate venture, but his losses were greatly in excess of his gains.

The mortgage on which this suit is founded was given on November 18, 1874. On that day the firm of Allen, Stephens & Co. was insolvent, and Stephens and Blennerhassett must have known it. Their profits, since January 1, 1872, when the partnership was formed, had not exceeded $200,000. They began with no capital. Both Stephens and Blennerhassett had drawn out their share of the profits. Allen's share remained, which was one third and amounted to about $66,000. The loss of the firm in the Mono mine loan was $266,000, leaving a deficit of $200,000. As already stated, it is conceded that at the date of the mortgage both Allen and the Cook County Bank were insolvent. But they were not merely insolvent, but irretrievably so.

On that day Allen owed the depositors in his private bank at Des Moines $736,783, he owed the Cook County Bank $557,943; the Charter Oak Life Insurance Company $300,000; the Newark Savings Institution of Newark, New Jersey, $200,000; making an aggregate of $1,794,726. At the same time, placing a liberal estimate on the value of his assets, they did not exceed $800,000, leaving a deficit of $994,727, which other, smaller items of indebtedness shown by the record, would swell to more than $1,000,000, the excess of his liabilities above his assets. The condition of the Cook County Bank on the same day may be approximately ascertained from the following facts: on November 18, 1874, its books showed its indebtedness to be [114] $1,891,620. The receiver of the bank testifying on August 26, 1876, said that he had admitted and given certificates for claims against the bank to the amount of $803,035, that other claims had been presented to the amount of $915,000, for which receiver's certificates had not been given, and that the amount collected from its assets was $92,000. The cash on hand when the receiver took possession was $4,000.

Such was the condition of the firm of Allen, Stephens & Co., B. F. Allen, and the Cook County Bank when the mortgage in suit was executed.

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There are several propositions of fact which, in our opinion, the evidence satisfactorily shows. A statement and discussion of the evidence which sustains these conclusions of fact would extend this opinion beyond reasonable limits, and would not be profitable.

First. Allen when he gave the mortgage, and Stephens and Blennerhassett when they took it, knew that both Allen and the Cook County Bank were insolvent. A large part of the correspondence between Stephens and Blennerhassett and the firm of Allen, Stephens & Co. on the one hand, and Allen on the other, commencing before the partnership of Allen, Stephens & Co. was formed, down to the date of the mortgage, is to be found in the record. The record also contains the correspondence between Allen, Stephens & Co. and the Cook County Bank, and many letters written by Allen, Stephens & Co. in the interest of Allen, and much correspondence between Stephens and Blennerhassett. This evidence shows that both Allen and the Cook County Bank were on the verge of suspension from the time when Allen was compelled to replace the bonds intrusted to him as receiver down to the date of the mortgage in November, 1874, and their suspension in January, 1875. It also brings home to Stephens and Blennerhassett the knowledge of the desperate shifts and devices to which Allen and the bank were driven to meet their engagements and keep the fact of their utter bankruptcy from the knowledge of the public. It is impossible that men of much less business experience and intelligence than they are shown [115] to be, should know what they did of the resources and practices of Allen and the Cook County Bank, and not have known of the insolvency of both.

Notice of the insolvency of Allen was also brought home to Stephens and Blennerhassett by their knowledge of the fact that Allen had appropriated to his own schemes and speculations a fund which, principal and interest, amounted to over $800,000, committed to his custody as a trustee and receiver. The evidence that they knew of the fact of his appointment as receiver, the amount of the fund which came to his hands, and the appropriation of the fund to his own uses, is conclusive.

During the sixty days which elapsed between the date of the mortgage and its registration, the proofs of the insolvency of Allen and the Cook County Bank accumulated, and Stephens and Blennerhassett knew that the insolvency was hopeless and irretrievable.

Second. The record shows that the mortgage covered all the property of Allen. His personal property had long been exhausted, and his real estate was all that remained which was not pledged for his debts.

Third. In order that the credit of Allen and the Cook County Bank might not be impaired, the mortgage was purposely withheld from record and actively concealed by Stephens and Blennerhassett until after the suspension of both Allen and the Cook County Bank on January 18, 1875.

Blennerhassett testifies that after its execution he disposed of the mortgage as follows: "I put it in our safe and kept it there until December 1, when I gave it in a sealed parcel to A. N. Denman. I said to Denman something like this: 'Here is a sealed package which contains instructions and valuable documents; you will go to Chicago, take quarters at some hotel there, and remain there, never leaving the hotel for any great length of time, and should a telegram come, you are to open that parcel and obey instructions.'"

The instructions directed Denman, when ordered by telegram to act, to have the mortgage recorded in Chicago, and then catch the first train for Des Moines, Iowa, and have it recorded there, etc.

On January 18, 1875, Allen and the Cook County Bank both suspended. On the next day Allen, Stephens & Co. sent a telegram to Den- [116] man at Chicago, as follows: "Open your instructions and act." Denman opened his instructions and followed them. He filed the mortgage for record in Chicago on January 19, and in Des Moines on January 20.

Fourth. While the mortgage was thus kept from the record and from public knowledge, Stephens and Blennerhassett were busily engaged in sustaining the credit of Allen and the Cook County Bank, and to accomplish their end, falsely and fraudulently represented Allen to be a man worth over $1,000,000, and of unlimited credit, and the Cook County Bank to be sound and good.

Fifth. That, by means of these representations of Stephens and Blennerhassett, and the concealment of the mortgage and the withholding of it from the record, the creditors of Allen and the Cook County Bank were misled and deceived; and in consequence thereof they did, between the date and the registration of the mortgage, deposit large sums of money in Allen's private bank at Des Moines, and in the Cook County Bank, and at the instance of Stephens and Blennerhassett discounted the paper of Allen and the Cook County Bank to a large amount, and that such deposits and discounts, though due, still remain unpaid.

Sixth. That the mortgage was made by Allen, who was insolvent, with a view to give a preference to the firm of Allen, Stephens & Co., the firm being a creditor of Allen individually, and the firm and all its members having reasonable cause to believe Allen to be insolvent and knowing that the mortgage was made in fraud of the provisions of the Bankrupt Act, and it was withheld from the record and actively concealed for the period of two months preceding the failure of Allen and the filing of the petition in bankruptcy against him, for the purpose of protecting it from assault as a preference void under the provisions of the Bankrupt Act.

There is a large mass of evidence in the record which, in our opinion, establishes the truth of the foregoing propositions beyond controversy. The new debts which were contracted by Allen and the Cook County Bank, after the date of the mortgage and before its registration, on the strength of the representations of Stephens and Blennerhassett, and the fact that Al- [117] len's property appeared to be unincumbered, amounted to a larger sum than the value of the real estate covered by the mortgage.

By the aid of the means thus obtained, Stephens and Blennerhassett were able to stave off the suspension of Allen and the Cook County Bank for a period of exactly two months after the date of the mortgage. They, doubtless, sup-

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posed this lapse of time would render the mortgage proof against any attack by an assignee in bankruptcy of Allen's estate. Allen and the bank were then allowed to fail and the mortgage was placed on record.

Upon this state of facts, we are of opinion that the mortgage was a fraud upon the creditors of Allen and, therefore, void at common law and without regard to the provisions of the Bankrupt Act.

It is not to be disputed that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage.

But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers the mortgagor's entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give credit to the mortgagor, who fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor.

It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay or defraud creditors, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. [118] *Twyne's Case*, 3 Coke, 81; *Holmes* v. *Penney*, 3 Kay & J., 99; *Gragg* v. *Martin*, 12 Allen, 498; *Brady* v. *Briscoe*, 2 J. J. Marsh, 212; *Bozman* v. *Draughan*, 3 Stew., 243; *Bk.* v. *Douglass*, 11 Smed. & M., 469; *Bunn* v. *Ahl*, 29 Pa., 387; *Root* v. *Reynolds*, 32 Vt., 139, *Kempner* v. *Churchill*, 8 Wall., 362 [75 U. S., XIX., 461]; Kerr, Fraud and Mistake, 200.

As long ago as the case of *Hungerford* v. *Earle*, 2 Vern., 261, it was held that "A deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money." This doctrine has been repeatedly re-affirmed. Chancellor Kent, in *Hildreth* v. *Sands*, 2 Johns. Ch., 35; *Scrivenor* v. *Scrivenor*, 7 B. Mon., 374; *Bank* v. *Housman*, 6 Paige, 526.

In *Coates* v. *Gerlach*, 44 Pa., 43, a deed of land had been made directly by a husband to his wife. The deed bore date March 23, 1857, but was not filed for record until December 2, 1857. On January 21, 1858, the husband, professing to act for his wife, sold the land to a third party. The creditors of the husband attached the unpaid part of the purchase money in the hands of the vendees, and between them and the wife a contest arose on the question which had the better right to the proceeds of the sale. Touching this controversy, *Mr. Justice* Strong, delivering the opinion of the court, said: "There is another aspect of the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity she is met with the fact that she asserted no right under it, in fact concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."

So in *Hilliard* v. *Cagle*, 46 Miss., 309, it was held that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may, nevertheless, be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde*, showing [119] the conduct of the parties in their dealings in reference to the deed. The principal circumstance relied on in this case to avoid the deed, was the fact that the grantor retained possession of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The court declared that "The natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object.

In the case of *Gill* v. *Griffith*, 2 Md. Ch., 270, the court decided that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request and to keep the public from a knowledge of its existence withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage which was in controversy in this case was, therefore, declared void. Upon appeal, the Court of Appeals affirmed the decree for the reasons assigned by the Chancellor. See *note* of the reporter at the end of the case.

So in the case of *Hafner* v. *Irwin*, 1 Ired., 490, which grew out of the making of a deed of trust by one Dwight to the plaintiff, Hafner, to secure certain creditors named thereon, it was said:

"There was evidence tending to show that it was a condition of this instrument, and as understood between the parties thereto, that it should not be registered nor put in use, but kept a secret from the world until after the 20th of [120] February ensuing the date. * * * There was also evidence tending to show that it was a further part of the agreement between the parties that the transaction should be kept secret, at all events until the debtor should escape be-

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yond the reach of the process of his creditors. * * * We need not and cannot lay down as a rule of law that those who take securities from a debtor about to abscond must apprise creditors of his intention to place himself beyond their reach, under penalty of forfeiting such securities, but we feel ourselves justified in holding that when secrecy is part of the consideration of such securities, the securities are contaminated thereby, and ought not to be regarded as given *bona fide*."

In *Hildeburn* v. *Brown*, 17 B. Mon., 779, a mortgage was executed by one Sherwood to the plaintiffs, which they withheld from record. Commenting on that fact, the court said:

"The petition of appellants avows that the arrangement between their agents and Sherwood was to withhold the mortgage from registration, for the purpose of sustaining the latter in business, and not to record the same unless there was danger of Sherwood's failure. * * * The effect of this arrangement, though it may not have originated in any actual fraudulent or evil purpose, was to secrete from the public eye the true condition of the debtor, and thereby enable him, under the semblance of being the owner of unincumbered real estate, to deceive and mislead other persons by inducing them, upon the faith of his supposed unembarrassed condition, to give him credit which would otherwise have been withheld. Such contrivances or acts, though not designed to perpetrate an actual fraud upon other persons, have an inevitable tendency that way, and are obviously opposed to the general policy of the law requiring the public registration of all liens and incumbrances upon property permitted to be retained and claimed by debtors.

If not directly within that class of acts which the law denominates constructive frauds, it approximates so nearly to it that the party avowing himself a participant in such transaction ought not to receive the countenance or aid of the Chancellor in enforcing any lien or claim growing out of it as against a third person."

The case of *Neslin* v. *Wells*, decided by this [121] court at the present Term [*ante*, 802] arose in the Territory of Utah, where the law permitted, but did not require, the registration of mortgages, but where there was a general custom to record such instruments. Neslin, the vendor of land, took from Smith, his vendee, a mortgage to secure a part of the purchase money, but did not file it for record until after a subsequent mortgage executed by the vendee on the same land, to one Kerr, had been filed for record, Kerr having no notice, actual or constructive, of the prior mortgage to Neslin. It was held by the court, *Mr. Justice* Matthews delivering its opinion, that "Under the circumstances of the case there arose a duty on the part of Neslin, the vendor, to record his purchase money mortgage, towards all who might become subsequent purchasers for value in good faith, a breach of which in respect to Kerr, the subsequent mortgagee, without notice, constituted such negligence and laches as in equity requires that the loss which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned."

See, also, *Worseley* v. *Demattos*, 1 Burr., 467, and *Tarback* v. *Marbury*, 2 Vern., 510.

The principles upon which these decisions are based are, in our opinion, conclusive of this case. None of the cases cited disclose such a premeditated and contrived purpose to deceive and defraud other creditors of the mortgagor as appears in this. We are of opinion, therefore, that the mortgage executed by Allen to Allen, Stephens & Co., on November 18, 1874, which the complainants in this case seek to foreclose, is a fraud upon the creditors of Allen and void at common law.

We further declare that a mortgage executed by an insolvent debtor, with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the Bankrupt Act, and who, for the purpose of evading the provisions of that Act, actively conceals and withholds it from record for two months, is void under the Bankrupt Act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor. [122]

If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under the letter of the Bankrupt Act. Where all the other circumstances necessary to render the mortgage void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and void as against its spirit.

The conduct of the mortgagees in this case shows them to be without claim to the consideration of a court of equity. On the contrary, it clearly appears to be the duty of the court to take care that they shall not reap the fruits of their fraudulent practices. Their assignee of the mortgage, the Charter Oak Life Insurance Company, stands in no stronger position. *The decree of the Circuit Court must be affirmed.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[271]

JAMES H. SIMMONS, *Appt.*,

v.

JOSEPH OGLE.

(See S. C., 15 Otto, 271-278.)

Statute of Limitations—possession of lands—equitable action—legal title.

1. Neither the Statute of Limitations nor the equitable doctrine of lapse of time can have any effect against the United States.
2. The weight of the inference in favor of any claim of right, whether legal or equitable, to lands against the United States, growing out of mere possession, is very slight indeed.
3. Where defendant, in an action to compel a conveyance of land, has the legal title and the possession without any fraud or unfairness, and the evidence for plaintiff is not conclusive, the maxim applies that better is the condition of the defendant.
4. The equities of the parties being equal, the legal title must prevail.

[No. 957.]

Submitted Jan. 23, 1882. Decided Apr. 10, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Messrs. **Robert A. Habberts, Franklin**

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A. McConaughy and *John W. Ross*, for appellant.

Mr. **James L. D. Morrison,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

Simmons, the appellant, recovered in the Circuit Court of the United States for the Southern District of Illinois, on the 17th day of January, 1878, a judgment in an action of ejectment against Ogle, the appellee, for the possession of the south half of northeast quarter of section 3, township 1 north, of range 9 west, in St. Clair County, Illinois, and under the proper writ was placed in possession of it. The title on which he recoved was a patent to himself from the United States, dated June 12, 1874.

The defendant in that action, Ogle, thereupon instituted the present suit in chancery to compel a conveyance of the legal title thus established by Simmons to himself, on the ground that he had a superior equity, by reason of which the title in Simmons should be decreed to be held by him in trust for the benefit of Ogle. After answer, replication, and a full hearing on the evidence, the circuit court granted the prayer of the bill, and from that decree Simmons brings the present appeal. There is much conflict in [272] the testimony, and some parts of it are irreconcilable, and the result of it in producing any very clear conviction of the true state of the case is unsatisfactory, especially in regard to the foundation of the right of complainant to be the true equitable owner of the land.

The fact which he takes upon himself to establish is that, on December 30, 1835, one John Winstanley bought the land in question of the United States, at the land-office in the Town of Edwardsville, and paid for it. The subsequent conveyances and transfers from Winstanley to Ogle are not controverted, and if the purchase and payment now stated and alleged in the bill were satisfactorily established by the evidence, the decree of the circuit court in his favor should be affirmed.

The evidence by which this proposition is supported is of two classes:

1. The records of the Edwardsville Land-Office, now found in the General Land-Office at Washington, where they were removed by law.

2. The conveyances from Winstanley, and other proceedings by which, if Winstanley ever had any right, it became vested in Ogle, and the actual possession of the land by Ogle.

As regards the first of these, the records of the Edwardsville Land-Office show a written application by Winstanley at that office, on the 30th day of December, 1835, for the purchase of the piece of land now in controversy, and it is numbered 13,164. This shows the quantity of the land to be 84.46 acres, and the price to be paid $1.25 per acre.

There is, also, an entry on the books of the office, of which the following is a copy, and which is photographed in the record:

"No. 13,164.]

Dec. 30, 1875, to John Winstanley, of St. Clair County, State of Illinois, for S. ½ NE. ¼ section No. 3, township No. 1 north, range No. 9 west of the third principal meridian, containing $84\frac{46}{100}$ acres, at $1.25 per acre.

$105.57.] S. H. THOMPSON, *Register*."

These, it is said, being the original entries made in the records of the local land-office, are sufficient evidence of the purchase and payment for that land by Winstanley, and that no successful contradiction of them is found anywhere. When to this is added the conveyance by Winstanley to William C. Anderson of the same land, [273] in 1837, and that Anderson's title came to Ogle, who, in 1851, took possession of the land and held it until his removal under the action of ejectment brought by Simmons against him, the case of complainant is substantially stated.

As regards the weight to be given to the possession of Ogle, it is to be considered that whether he had the equitable right or not, neither the Statute of Limitations nor the equitable doctrine of lapse of time could begin to have effect against anyone until Simmons purchased of the United States and obtained his patent in 1874, for up to that time the legal title was undeniably in the United States. If this had not been so, Ogle would have successfully pleaded the Statute of Limitations against Simmons in the action at law. No laches could be imputed to Simmons, who brought suit very soon after he received his patent. Nor can laches be imputed to the United States, either as a matter of law or on any moral or equitable principles. For so common is it for squatters and trespassers to settle on the lands of the United States, and so indulgent are the laws in encouraging such settlements, and so numerous are these settlements without claim of right, that the very impossibility of resisting them, or of ejecting them, or of any efficient assertion of the right of possession by the government, that the weight of the inference in favor of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed.

Nor does the sale and conveyance by Winstanley to Anderson afford any legal evidence of his right to do so, and very little that he believed himself to have such right. He could never be made responsible for more than the purchase money and, knowing what entries were on the books of the local land-office, he might well be willing to take the money and the chances. The evidence, therefore, in support of the entries on the books of the land-office do not add greatly to its force, and the complainant's case must rest on the intrinsic probability arising from those two pieces of evidence, that Winstanley bought and paid for the land.

If either of these entries had stated the pur- [274] chase and payment in words, they are open to the weakness which arises from the fact that in all such completed sales two other documents of superior probative force usually attend the sale, one of them invariably, neither of which is here produced or shown ever to have existed. The most conclusive of these is the patent. There is no pretense here that any patent ever issued to anyone on Winstanley's purchase. It is proved that Mr. Winstanley was a careful business man, much accustomed to dealing in lands, and as he had sold this land and made himself liable by a warranty deed, he would naturally have made that title secure by procuring the issue of the patent.

It is, however, well known that early purchasers of the public lands were careless about their patents. But as a reason for this, they attached primary importance to the paper issued

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when a sale was made, and delivered to the purchaser by the register and receiver of the land-office, called a certificate of entry.

This was a paper in two parts, the first of which, signed by the register, gave a description of the land, the amount paid for it, the name of the purchaser and a statement that on its presentation at the General Land-Office a patent would be issued to the purchaser. The second, signed by the receiver, was a simple receipt for the payment of the price, and a description of the land for which it was paid.

The statutes of almost every State and Territory in which the public lands have been sold, provide for the registration of this instrument, and that in all actions concerning title or possession it shall be *prima facie* evidence of title. See Revised Statutes of Illinois, p. 271, sec. 31, and p. 508, sec. 20. In the estimation of the people generally, and in the practice of the courts, this paper became the efficient substitute or equivalent of the patent, and in regard to millions of acres of land the patent either was never issued, or if issued never delivered, but remains in the local or General Land-Office, subject to call of the owner.

In the case before us, there is no evidence whatever, except presumption, that this certificate of entry ever had an existence. In the absence of the patent, it is the instrument of all [275] others which it is important to produce, or if it cannot be produced, to account for its loss.

The only effort to do this is an affidavit of Ogle, that he went down to John Winstanley's and examined through all his papers and did not find it. He wrote to the son of Anderson, to whom Winstanley sold it, who replied that he could find no paper of the kind. He went to the Commercial Bank of Cincinnati, which at one time had a mortgage on the land. They said a majority of the papers of the bank had been burned. So he failed to get the certificate or any information about it. "I do not know where it is nor have I ever seen it," he says.

This would have been sufficient to authorize the introduction of a copy in evidence if any copy existed. But no copy is produced, for the reason that no human being has been found who can say that any such paper ever existed or was ever seen by anyone. When we consider the number of persons interested in the property through Winstanley, there being several mortgages and intervening conveyances between him and Ogle, and that the certificate of entry, if ever made, could only have been forty years old when this suit was brought; that many persons must have been alive who had been interested in the title, this total absence of all evidence of its existence, no one ever having seen it nor any copy of it, nor any record of it under the recording Acts of Illinois, the inference that such a paper was made and delivered to Winstanley is very much shaken.

When we turn to the evidence of defendant, there is much positive testimony to convince us that no such paper was ever delivered and no such sale was ever made.

There is in pencil mark, on the page where the application of Winstanley for this land, numbered 13164, is found, the following words: "13164. Changed to NE. ¼ of NW. ¼, 9, 2, N. 9, W. 3d."

The transactions of the local land-offices are forwarded regularly to the General Land-Office at Washington and accurate copies or duplicates are there found of all the transactions in the local offices, and in the present case the original records of the Edwardsville office, long since closed up, are in the General Land-Office.

Among these are found the following:

"No. 13,164.] LAND-OFFICE AT EDWARDSVILLE, ILL., December 30, 1835. [276]

It is hereby certified that, in pursuance of law, John Winstanley, of St. Clair County, Illinois, on this day purchased of the register of this office the lot or west half of the northwest quarter of section number nine, of township number two north, in range number nine west of the third principal meridian, containing eighty acres and——hundredths of an acre, at the rate of one dollar and twenty-five cents per acre, amounting to one hundred dollars—cents, for which the said John Winstanley has made payment in full as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land-Office the said John Winstanley shall be entitled to receive a patent for the lot above described.

S. H. THOMPSON, *Register.*

No. 13,164.] RECEIVER'S OFFICE, EDWARDSVILLE, ILL., December 30, 1835.

Received from John Winstanley, of St. Clair County, Ills., the sum of one hundred dollars and——cents, being in full for the west half of the northwest quarter of section number nine, township number two north range number nine, west of the third principal meridian, containing eighty acres and $\frac{}{100}$, at the rate of $1.25 per acre.

75 B. U. States.
25 Specie.
$100. ——
$100 B. F. EDWARDS, *Receiver,*
By WM. H. RIDER."

And upon this certificate No. 13164 there was issued to John Winstanley a patent on the 2d day of December, 1839.

It will be observed that this certificate of entry bears date the same day of Winstanley's application for the other piece of land; that it bears the same serial number as that application throughout, up to the issue of the patent, which is very important, as though it is possible Mr. Winstanley might have entered two pieces of land on the same day, they would necessarily have been separate entries and would not have borne the same number.

For this land, without any unusual delay, there was issued a patent to Mr. Winstanley; for the other, none was ever issued.

Another circumstance confirming the truth [277] of the pencil memorandum is found in the cash-book or register of receivers' receipts at Edwardsville, now on file in the General Land-Office. In that book, which is kept in tabular form, it is shown that on December 30, 1835, on certificate No. 13164, there was paid to the receiver by John Winstanley $100, for the W. ½, NW. ¼, S. 9, T. 2, R. 9, 80 acres and as the transcript is complete for that day no other receipt of money from Winstanley is shown. The quarterly account of the receiver with the department shows precisely the same thing.

So that we here have the evidence of these records that Winstanley bought and paid for

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another piece of land on that day, under cover of the same No. 18164 as to application and entry; that the price was $100, and not $105 46; that no certificate of entry is known to have ever been made for the tract first applied for, no evidence that any money was paid for it, no entry on the cash-book or quarterly account of the receiver of the amount for which the land in controversy could only have been sold; but ample evidence that on that same day, and under the same entry number, Winstanley bought and paid for another piece of land near by, at the same office, for which he received the usual certificate of entry, and for which the patent was issued.

We cannot resist the conclusion, in the presence of what is positively shown by the records, and what is wanting in the evidence of complainant in regard to the existence of a certificate of entry of this land, that the pencil memorandum whenever it was made is true; that on the same day, and before the purchase was finally completed, Winstanley changed his purpose, and bought and paid for the other piece of land; and that the officers omitted to make the requisite change in the application while making the transfer and preserving the original number.

If, however, this were not so clear, the appellant here has the legal title and the possession, without fraud or any unfairness. He found the land subject to entry by the records of the land-office, and he bought and paid for it and has the [278] title. In such case, the maxim applies in all its force that better is the condition of the defendant. The equities of the parties being equal, the legal title must prevail.

Instead of the weak case made by appellee, the position of affairs required him to make clear and satisfactory proof of his superior equity. This he has signally failed to do.

The decree of the Circuit Court is, therefore, reversed and the case remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[278] STATE OF LOUISIANA, *ex rel.* the SOUTHERN BANK, *Plff. in Error,*
v.
EDWARD PILSBURY, Mayor of NEW ORLEANS, ET AL.

(See S. C., 15 Otto, 278-302.)

City contract—valid Act—state decisions—abolishment of slavery—invalid Act—impairing obligation of contracts.

1. Under the Louisiana Act of 1852, consolidating the three previously existing municipalities within the limits of New Orleans into one, and adding to it the adjacent City of Lafayette, when the creditors surrendered their debts against the former municipalities and in consideration of the surrender, the city gave to them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and ultimately of the principal, the transaction thus consummated amounted to a contract between the city and the parties taking the bonds and the pledge to levy the annual tax formed part of the contract.

2. The Act of 1852 is not invalid on the ground that its object is not sufficiently expressed in its title, nor because the tax prescribed is to be levied upon real estate and slaves, to the exclusion of personal property, and in each municipality in proportion to its indebtedness.

3. The construction given by the highest tribunal of the State, to its statute or Constitution must be taken as correct, so far as contracts made under the Act are concerned, and constitutes a part of the law as much as if embodied in it. A subsequent change in such construction can affect only subsequent contracts.

4. Although slavery has been abolished, and there are no longer slaves upon whom taxation can be levied, the obligation of the city to raise the required fund by special tax on real estate still remains.

5. The Premium Bond Act of March 6, 1876, nullifying the pledges of the Act of 1852, is invalid.

6. Legislation of a State, impairing the obligation of contracts made under its authority, is null and void; and the courts, in enforcing the contracts, will pursue the same course and apply the same remedies as though such invalid legislation had never existed.

[No. 217.]

Argued Mar. 7, 1882. Decided Apr. 17, 1882.

IN ERROR to the Supreme Court of the State of Louisiana.

Statement of the case by *Mr. Justice* **Field:**

This was a petition of the State of Louisiana, on the relation of the Southern Bank, a Cor- [279] poration created under its laws and doing business in New Orleans, to one of its district courts, for a *mandamus* to compel the municipal authorities of that city to levy a special tax to pay certain coupons on outstanding bonds issued under an Act of the State in 1852, and to purchase the bonds with any surplus remaining of the moneys collected. The history of the issue of the bonds is as follows: the City of New Orleans was originally incorporated by an Act of the Legislature in 1805, and its charter continued in force until the 8th of March, 1836. An Act was then passed which divided the city into three municipalities, each of which was created a distinct corporation, with "such rights, powers and capacities as are commonly incident" to municipal bodies. This division continued until February 23, 1852, when an Act was passed, known as Act No. 71 of that year, by which the three municipalities were again united into one. The Act was entitled, "An Act to Consolidate the City of New Orleans and to Provide for the Government and Administration of its Affairs." The city, when divided into three municipalities, was in debt; and the Act making the division provided that a proportionate part of it should be paid by each municipality, the quota being fixed upon the basis of the amount of taxes and other revenue accruing to it. The separate municipalities had, also, created debts; and the Act of February 23, 1852, in consolidating them, provided for the issue of bonds for the payment of their debts, and also for the debt of the old city. The 37th section, which dealt with this subject, is as follows:

"Sec. 37. *Be it enacted, etc.*, That the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities, whether in the form of bonds, notes, interest coupons, cash warrants or other species of obligation whatever shall be assumed and paid by the City of New Orleans, and said city is hereby declared liable therefor. The Mayor, comptroller and treasurer, and chairmen of the finance committees of the two boards of the common council shall constitute a commission, to be called the commissioners

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of the consolidated debt of New Orleans; and they shall have power to issue bonds of the City of New Orleans, having not more than forty years to run, with interest payable at such place as may be agreed on between said commissioners and the parties to whom the bonds are issued, in semi-annual coupons, *in* [280] *exchange for any bonds*, obligations or debts of the old corporation, or of any of the old municipalities, whether matured or not, or to sell the new bonds and apply the proceeds to the payment of the matured debts of the old corporation or of the municipalities, but to no other purpose. The bonds thus issued shall form a stock to be called the consolidated debt of New Orleans. At the time this Act goes into operation, an exact and detailed statement of the indebtedness of the old corporation and of each municipality, shall be filed in the office of the comptroller, by the secretary of the board of liquidators and the municipal comptrollers respectively, when the commissioners of the consolidated debt shall proceed to divide the debt of the old corporation between the several municipalities, in proportion to the assessed value of real estate within the limits of each, according to the state assessment roll for 1851. The amount thus apportioned to each, together with its individual indebtedness at the time this Act goes into operation, shall constitute the separate debt of each municipality, and shall be known as the debt of municipality No. 1, No. 2, No. 3. The common council shall, annually, in the month of January, pass an ordinance to raise the sum of $600,000, by a special tax, on real estate and slaves, to be called the consolidated loan tax, and the rate per cent of said tax, in each municipality, shall be in proportion to the indebtedness of each. All ordinances, resolutions or other Acts passed by said council, after the first day of January, in each year, shall be null and void, unless the ordinance imposing the consolidation loan tax shall have been previously passed At the end of each and every year, any surplus of the consolidated loan tax remaining in the treasury, after the payment of all the interest and the expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such bonds issued under this Act, as have the shortest period to run; and the common council shall have the right of rejecting all bids demanding more than the face of the bonds; for which purpose, public notice shall be given by the comptroller in the official gazette for thirty days, inviting proposals from bondholders for the sale, to the city, of the bonds herein described. From and after the passage of this Act, no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the City of New Orleans or under its authority; nor shall any loan be contracted, unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the city council, after ten days proclamation by the Mayor, in the [281] newspaper chosen by the common council; and no ordinance creating a debt or loan shall be valid, unless such ordinance shall prescribe ways and means for the punctual discharge, at maturity, of the capital borrowed or debt incurred; and such ordinances shall not be repealed until principal and interest of the capital borrowed or the debt incurred are fully paid and discharged."

By a supplementary Act, approved on the same day, known as No. 72 of the year, the adjacent City of Lafayette was added to the City of New Orleans, and provision was made for the assumption and payment of its debt. The 5th section of the Act is as follows:

"Sec. 5. *Be it further enacted, etc.*, That the debt of the City of Lafayette shall be assumed and paid by the City of New Orleans, and the said City of New Orleans is hereby declared liable therefor; and the amount of said debt shall be ascertained, and its payment provided for and made in the same manner as the debt of each municipality of New Orleans is ascertained and provided for in the Act to which this Act is a supplement; and in raising annually the consolidation loan tax for the payment of the debt of New Orleans, an additional sum of $50,000 shall be raised for the purpose of providing for the debt of the City of Lafayette, now added to that of New Orleans, so that the whole amount of the annual levy of taxes for the payment of the debt of New Orleans, shall be $650,000.

Under these Acts, No. 71 and No. 72, the commissioners of the consolidated debt issued bonds of the City of New Orleans, known as consolidated bonds, to the amount of $10,000,000, in exchange for the bonds, obligations and debts of the old city, of the three municipalities, and of the City of Lafayette. Of this amount over $5,000,000 of bonds have been paid by funds received under the tax levied pursuant to the provisions of the 37th section of Act No. 71 and of the 5th section of Act No. 72, beyond what was necessary to meet the annual interest. There remain outstanding unpaid over $4,000,000 of bonds, with interest since 1876. Of these bonds, with unpaid coupons, the relator owns upward of six hundred, each for the sum of $1,000.

The petition of the relator refers to the Acts No. 71 and No. 72 of 1852, and cites at length the sections mentioned. It also alleges that the bonds issued under them were negotiable securities; [282] that by reason of the provisions of the law for the payment of the interest and the gradual reduction of their number through a sinking fund, the bonds were negotiated at their par value or above it, and were distributed in the markets of Europe and of the United States in the due course of business as a secure, permanent and trustworthy investment; that the free banks of the State were compelled to invest in them to secure the circulation of their bills, and that individuals and corporations did likewise with confidence in the provisions of section 37 of Act No. 71 and section 5 of Act No. 72, for the maintenance and enforcement of which the public faith of the State of Louisiana and of the City of New Orleans was inviolably pledged.

The petition then alleges that, in violation of the provisions of law mentioned, which constitute a contract with the bondholders, binding both upon the State of Louisiana and the City of New Orleans, the Legislature of the State, on the 12th of March, 1874, passed an Act entitled "An Act to Postpone the Levy and Collection by the City of New Orleans of a Tax for a Sinking Fund for the Purchase of its Bonds, to

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authorize the Administrators of the City to Modify the Last Budget and Tax Levy, and to Repeal conflicting Laws and Penalties," the object of which was to relieve the authorities of the city until December, 1876, from the duty of estimating, levying and collecting any tax for a sinking fund for the purpose of purchasing any of the bonds issued under the Acts mentioned.

The petition also alleges that, in further violation of the provisions of the Act of 1852 and of the contract with the holders of the bonds, the Legislature, on the 6th of March, 1876, passed another Act, designed, as stated in its title, to adjust, regulate and provide for the bonded debt of the City of New Orleans, and authorize the exchange of its bonds for other bonds to be issued on the plan known as the premium bond plan, the avowed object of which was to impair, if possible, the obligation of the contract between the bondholders and the city, and devest the rights acquired by them under it, by prohibiting the city authorities from levying a tax in any year under the provisions of the Acts of 1852, by shackling the judicial tribunals in the issue of process, and by repealing the provisions of that Act. The 7th section is as follows: [283]

"Sec. 7. *Be it further enacted, etc.*, That no tax for the payment of bonds or interest on bonds other than that authorized by the preceding sections (the premium bonds), shall be levied either for the year 1876, or any year or years thereafter by the City of New Orleans, and that all existing laws requiring or authorizing the city council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, be and the same are hereby repealed; and it shall be hereafter incompetent for any court to *mandamus* the officers of said city to levy and collect any interest tax other than that provided in this Act, or in case of such *mandamus*, by a receiver or otherwise, to direct the levy and collection of any such tax."

The petition then avers that these Acts of the Legislature of Louisiana are in conflict with the Constitution of the United States, in that they impair the obligation of the contract between the bondholders and the city; that, nevertheless, the authorities of the city, its Mayor and administrators, in disregard of the provisions of the Acts of 1852, and in contempt of their duties and of the rights of the relator and other bondholders similarly situated, have refused to perform the duty imposed upon them by those Acts for the years 1874, 1875, 1876 and 1877, to levy a special tax for the payment of the matured coupons and the purchase of bonds; that they have levied upon the property subject to the levy of such special tax for the payment of the consolidated bonds, other taxes to meet other bonds issued by the city, in disregard of the prohibitory clauses of section 37 of the Act of 1852, and the moneys collected have been applied to the payment of those bonds, and other illegal purposes; that the authorities of the city have been notified to levy the special tax required for the years mentioned, but they have refused to discharge their duty in that particular and, in place thereof, have sought by all sorts of frivolous and unfounded technicalities to contest the validity and integrity of the consolidated bonds; that the relator has demanded payment of the matured coupons held by it, which was refused, the city authorities answering that there were no funds out of which they could be paid; and that the city and the taxable real estate within its limits are liable for the payment of the matured coupons and for the purchase of said bonds to the extent of $650,000 per annum, for the years 1874, 1875, 1876 and 1877, less coupons paid for 1874 and 1875. [284]

The petitioner, therefore, prays for a writ of *mandamus* and injunction against the city authorities; the former, commanding them to levy the special tax of $650,000 for the years named; and the latter, enjoining them from levying any other tax on real estate within the limits of the city which is subject to the special tax for the consolidated debt, until the special tax has been levied.

Upon the petition, an alternative writ of *mandamus* was issued, requiring the city authorities to show cause why they should not comply with its prayer.

The authorities appeared on the return day and excepted to the jurisdiction of the court to grant the writ, on the following grounds:

1. That by the provisions of the Acts of the Legislature, No. 5 of the extra session of 1870 and No. 31 of 1876, the courts of the State were prohibited from issuing a writ of *mandamus* to compel the respondents to pay any debt not liquidated by judgment, or to levy and collect any interest tax other than that provided in Act No. 31 of 1876, the Premium Bond Act;

2. That the duty of the respondents by the city charter and the 6th section of the Act No. 31 of 1876, was limited to the levy and collection of a tax on the assessed value of all property subject to taxation within the city, at a rate not exceeding one and one half per cent on the dollar, to meet all expenses of the city government, and to pay the interest on its bonded debt;

3. That the respondents are expressly forbidden by Act No. 31 of 1876, the Premium Bond Act, from levying the tax demanded for the year 1876, or for any year afterwards;

4. That the Legislature, by Act No. 53 of 1874, had suspended the levy and collection of any tax for the sinking-fund under the Act of 1872 until December, 1876, which, the respondents charge, was passed with the assent of the Southern Bank. [285]

And if the exceptions should be overruled, the respondents, reiterating and pleading the matters contained in them as part of their answer, further add:

5. That the provisions of the 37th section of Act No. 71 of 1872 are unconstitutional and void, because their object is not expressed in the title of the Act, as required by article 118 of the Constitution of 1845, in force at the time;

6. That the tax provided by the section mentioned is unconstitutional and void, and in violation of section 127 of the Constitution of 1845, and article 123 of the Constitution of 1852; because, first, it is to be assessed on real estate and slaves and not on personal property; and, secondly, because the rate per cent of the tax in each municipality is to be in proportion to the indebtedness of each.

By a supplementary answer, the respondents reiterated the same objections to the writ in more ample terms.

Various parties, including the State of Louisi-

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ana, holders of premium bonds, owners of real estate in the city, and taxpayers, were allowed to intervene under the practice which obtains in Louisiana, and various exhibits produced by them were made part of the case.

In March, 1878, the district court gave judgment granting a peremptory writ of *mandamus* as prayed, and denying the injunction. On appeal to the Supreme Court of the State, this judgment was reversed and judgment entered that the demand of the relator be dismissed, with costs, in both courts. To review this judgment the case is brought to this court.

Messrs. **John A. Campbell, Edward Bermudez, D. H. Chamberlain** and **William B. Hornblower,** for plaintiff in error.

Messrs. **Benjamin F. Jonas** and **Henry C. Miller,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

As will be seen by the statement of the case, the petition for the *mandamus* proceeds upon the theory that the transaction, authorized by the 37th section of the Act of 1852, and the 5th [286] section of the supplementary Act of the same day, when consummated by the issue of the bonds of the City of New Orleans, and their exchange for the obligations of the old city, of the three municipalities, and of the City of Lafayette, constituted a contract between the city and the bondholders, the obligations of which could not be subsequently impaired by state legislation; and that the provision pledging the levy and collection of an annual tax of $600,000, increased by the supplementary Act to $650,000, for the payment of the interest on the bonds, and their gradual retirement, was an essential part of that contract.

On the other hand, the city authorities, the respondents here, deny the validity of the Act of 1852, on two grounds: 1, that its object is not sufficiently expressed in its title, under the Constitution of 1845; and 2, that in providing for a tax to be levied upon real estate and slaves, to the exclusion of personal property, and in proportion to the indebtedness of each municipality, it violates the Constitution of 1845, which requires equality and uniformity of taxation throughout the State. And they also invoke against the issue of the writ the subsequent legislation of the State limiting the taxes which shall be levied upon property in the city, prescribing the purposes to which they shall be applied, prohibiting the levy and collection of any other tax and depriving the courts of the State of the power to issue a *mandamus* to compel them to pay any debt not liquidated by judgment, or to levy and collect any interest tax other than that provided by the Premium Bond Act of 1876.

Assuming for the present that the Act of 1852 is not invalid, for the reasons stated, the first inquiry is as to the character of the transaction authorized by it and the supplementary Act. Did it, when consummated, amount to a contract between the city and parties subsequently taking the bonds; and did the pledge to levy the annual tax named form a part of the contract? Unless both of these questions can be answered in the affirmative, it will be to no purpose to inquire into the subsequent legislation of the State respecting the tax, as no inhibition would rest upon its power over the subject.

The Acts of 1852 consolidated the three previously existing municipalities within the limits [287] of New Orleans into one, and added to it the adjacent City of Lafayette. The new corporation took all the property and interests of the municipalities and of Lafayette and, consequently, became subject to their obligations. The advantages which accrued from the possession of their property were accompanied with the burdens of their debts. This liability was not, however, left to rest upon any general principles of corporate liability in such cases. The Legislature recognized its existence, and in consolidating the municipalities and Corporation of Lafayette, declared that the debts of the old corporation, of the municipalities and of that city, should be assumed and paid by the City of New Orleans, which was declared to be liable therefor. The first of the Acts appointed commissioners of the debt thus consolidated, and authorized them to issue new bonds of the city, having forty years to run, with interest coupons payable semi-annually, in exchange for the obligations and debts of the old corporation and of the municipalities, to which the debts of Lafayette were subsequently added by the supplementary Act. To meet the interest it provided that the common council of the city should annually, in the month of January, pass an ordinance to raise the sum of $600,000, increased to $650,000 by the supplementary Act, by a special tax on real estate and slaves, to be called the consolidated loan tax. It also provided that any surplus remaining at the end of each year, after payment of the interest on these bonds, and the expenses of managing the debt, should be applied to the purchase of such of the bonds as might have the shortest period to run. These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities and of Lafayette. The State, in effect, said to them: the city will give these bonds, running for the period designated, and drawing interest, in exchange for your demands; and as security for the payment of interest, and the gradual redemption of the principal, the city shall annually, in January, levy a special tax for that purpose to the amount of $650,000. The provisions were designed to give value to the proposed bonds in the markets of the country and, necessarily, operated as an inducement to the creditors to take them. When [288] the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and ultimately of the principal The annual tax was the security offered to the creditors; and it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction.

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Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. *Von Hoffman* v. *Quincy*, 4 Wall., 535 [71 U. S., XVIII., 403]; *Hartman* v. *Greenhow* [*ante*, 274]; *People* v. *Bond*, 10 Cal., 563; *Brooklyn Park Co.* v. *Armstrong*, 45 N. Y., 235.

There were other provisions in the Act of 1852 besides those stated, which, though not essential to the obligatory form of the contract, were designed to inspire the creditors with confidence in the punctual payment of the interest and principal. It declared that all ordinances, resolutions, or other Acts passed by the council after the first day of January of each year should be null and void, unless the ordinance imposing the consolidated loan tax should have been previously passed. It also declared that after its passage no obligation or evidence of debt of any description whatever, except those therein authorized, should be issued by the city or under its authority. Whatever legal force may be ascribed to them, they were intended as solemn asseverations that the pledge of the annual tax should never be violated.

[289] The question then arises: was the Act of 1852 valid? Its invalidity is asserted, as stated above, on two grounds; the first of which is that its object is not expressed in its title, as required by article 118 of the Constitution of 1845. The title of the Act is "An Act to Consolidate the City of New Orleans, and to Provide for the Government and Administration of Its Affairs." The article of the Constitution declares that "Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title." A similar provision is found in several State Constitutions. Its object is to prevent the practice, common in all legislative bodies where no such provision exists, of embracing in the same bill incongruous matters, having no relation to each other, or to the subject specified in the title, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation. But it was not intended to forbid the union of several different provisions in the same bill if they are germane to the general subject indicated by its title. A bill to incorporate a city and provide for its government may, without conflicting with the constitutional clause, contain provisions relating to the various subjects upon which municipal legislation may be required for the preservation of peace, good order and health within its limits, the promotion of its growth and prosperity, and the raising of revenue for its government. So here, under the title of the Act in question, provisions might be enacted, not merely relating to the union of the different municipalities and the government of the city, but to all the varied details into which the general administration of its affairs might lead. The municipalities were in debt at the consolidation, and this was well known to the Legislature. A change in their government, and in the administration of their affairs, required some disposition to be made of their debts. Whatever interests were possessed by them were the proper subjects of legislation in the Act which took them out of existence as separate municipalities and created a new corporation in their place, with power to deal with their affairs. We hold, therefore, that the Act of 1852 was not invalid, on the ground that its object is not sufficiently expressed in its title.

The second ground of objection to the validity of the Act of 1852 is, that the tax prescribed is to be levied upon real estate and slaves, to the [290] exclusion of personal property, and in each municipality in proportion to its indebtedness; which, as contended, violated the rule of equality and uniformity required by the Constitution of 1845. The language of the Act is, that, "The common council shall annually, in the month of January, pass an ordinance to raise the sum of $600,000 by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent of said tax in each municipality shall be in proportion to the indebtedness of each." This amount, as already stated, was, upon the annexation of the City of Lafayette, increased to $650,000. On the passage of this Act, February 23, 1852, the Constitution of 1845 was in force. The Constitution of 1852 was not adopted until July of that year. Article 127 of the Constitution of 1845 is as follows: "Taxation shall be equal and uniform throughout the State. After the year 1848 all property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied; the Legislature shall have power to levy an income tax and to tax all persons pursuing any occupation, trade or profession."

This article has been frequently before the Supreme Court of the State for construction, and until the decision of the present case the requirement of equality and uniformity in the tax has been held to apply only to taxes levied for State, and not to those levied for muncipal purposes. The first case was that of the *Second Municipality of New Orleans* v. *Duncan*, 2 La. Ann., 182. That municipality had passed an ordinance imposing a special tax of one per cent on all real estate within its limits for the purpose of paying its debts and providing for the support of schools, and objection was taken to its constitutionality on two grounds: 1, that the power of taxation was vested exclusively in the Legislature and could not be delegated to the municipality; and 2, that the taxation authorized impinged upon the rule that no one species of property should be unduly assessed. Both grounds were supposed to derive [291] support from the article of the Constitution in question; the first, because, as contended, the equality and uniformity required throughout the State were only obtainable by confining the exercise of the power of taxation to the Legislature, whose authority was co-extensive with the territorial limits of the State; and the second, from the inhibition against taxing one species of property higher than another. But the court replied, speaking through its *Chief Justice*: "The article, by its terms, applies to state and not to municipal taxes. It provides for equality and uniformity of taxation *throughout the State*. * * * The framers of the Constitu-

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tion had before them the condition of the municipalities of New Orleans, with their debts, their abuses and their wants; and their corporate existence is recognized and continued, as to certain public rights, by an express provision. The jurisprudence under which the present system of taxation had grown up was before them and the power of remedying the evils of misgovernment was left in *statu quo*, with the Legislature; and the convention confined itself to providing for the State Government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control." And referring to the admission made in the record that there was no special ordinance of the municipality assessing taxes on personal property, the court added: "We know of no reason imperative on the municipality to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance."

This case was decided in 1847, and it is objected that it arose before that part of the article went into effect, which declares that "No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied." It is doubtful whether this objection be correct in point of fact, but assuming it to be so, the requirement of equality and uniformity was in force; and the part cited does not require that taxation shall be universal. It simply requires that when different kinds of property are taxed, the rate [292] of taxation shall be the same on all. The construction given was afterwards affirmed by the same court in *Lafayette* v. *Cummings*, 3 La. Ann., 673, which was decided in 1848. There the question was as to the validity of a municipal tax on the trade and occupation of the defendant as a butcher, levied under an ordinance of the city passed in 1847. There were other trades and occupations not embraced in the Ordinance and, consequently, not taxed. It was, therefore, contended that the imposition of the tax was contrary to that clause of the article of the Constitution which provides for the equality and uniformity of taxation throughout the State. But the court replied that "In the case of *Duncan* v. *Second Municipality*, this question, after very thorough argument, was determined by this court, and the article was held applicable only to state and not to municipal taxes." It is said in answer to this decision, that the language of the court was a mere *dictum*. We do not so regard it. The point of contention in the case was, whether the equality and uniformity applied to taxation on occupations and trades as well as on property. The answer which met the objection to the taxation on real property exclusively was held to meet the objection to taxation on certain occupations to the exclusion of others.

The Constitution of 1852 contained a similar clause (identical in language, omitting the words "after the year 1848") and, with one exception, subsequently reversed, it has received a similar construction from the Supreme Court of the State. The case referred to was that of *Municipality No. Two* v. *White*, which arose in 1854. 9 La. Ann., 446. The municipality had imposed a tax on the owners of property contiguous to a newly opened street, to pay the expenses of opening it, under a law which authorized the apportionment of the cost in such cases upon the owners of adjacent property, according to the benefit derived from the improvement. The court was of opinion that the law was liable to the objection that the tax was not equal and uniform, as required by the clause in question, and held it to be unconstitutional. The decision was in conflict with that in *Duncan's Case*, but it was rendered by a divided court; and in *Yeatman* v. *Crandall*, which arose in 1856, it was overruled. In the latter case, the plaintiff sought to enjoin the collection of a levee tax, which was imposed on certain allu- [293] vial lands, on the ground that the statute authorizing it was unconstitutional, in that it violated the rule of equality and uniformity prescribed by the article in question. But the court said: "This article refers to state taxation, in its proper sense, for general or state purposes. When it says that taxation shall be equal and uniform throughout the State, it points directly to its object, which is to regulate the mode of filling the state Treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden. * * * It is notorious that an acre of land pays twice as great a tax for local purposes in one parish, as an acre of equal value pays in another parish. Yet no one thinks the Constitution infringed by such a state of things." 11 La. Ann., 220.

By this decision the doctrine of the earlier cases, upon the clause in the Constitution of 1845, was re-established; and one of the Judges, who had concurred in the decision in the *White Case*, stated that he had been led to reconsider his opinion, and that he yielded his former impressions on this point the more readily, because the Supreme Court which sat under the Constitution of 1845, and five of the seven Judges with whom he had sat upon the bench, had concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements.

The doctrine of this case was affirmed the same year in *Surgi* v. *Snetchman*, and *Surgi* v. *Batalord*, 11 La. Ann., 387; and again in 1859 in *Wallace* v. *Shelton*, 14 La. Ann., 503. In its opinion, in the latter case, the court said that the questions in the *Yeatman Case* were decided upon full consideration, after having the aid of the arguments of learned counsel in that case, and also in another case then under consideration on a rehearing, and were subsequently affirmed in the two cases mentioned; and added that, "After these decisions, which were in conformity with those under the Constitution of 1845, we had hoped the question would be considered as at rest."

The objection to the want of equality and uniformity in the taxation authorized by the Act of 1852, in that it was to be levied on the property of the different municipalities in pro- [294] portion to the indebtedness of each, does not strike us as possessing much force. The debts created by the municipalities were separate and different in amounts, and before the consolidation the taxes upon the property in them must necessarily have been assessed at different rates.

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There was no obligation upon the Legislature to relieve either of them from the unequal burdens consequent upon the different amounts of their indebtedness. The subject was one resting in its discretion. Nor was it an unreasonable provision, when authorizing the city to issue its bonds for the indebtedness of them all, to require that taxation to raise the funds for their payment should be thus apportioned.

From the extended reference to the adjudications of the Supreme Court of Louisiana, upon the Constitution of 1845 requiring uniformity and equality in taxation, there can be no serious question as to the validity of the Act of 1852, so far as the consolidated bonds of the City of New Orleans are concerned, and the provisions made by it and the supplementary Act for the annual levy of a tax of $650,000 to pay the interest and reduce the principal. The decisions upon the clause of the Constitution of 1852 are corroborative of the correctness of the construction originally placed upon the clause of the Constitution of 1845. Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the Act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it. *Christy* v. *Pridgeon*, 4 Wall., 197 [295] [71 U. S., XVIII., 322]; and *Shelby* v. *Guy*, 11 Wheat., 367. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the *Chief Justice* in the recent case of *Douglass* v. *Pike Co.*, 101 U. S., 686 [XXV., 971]. "The true rule," he observes, "is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." See, also, *Gelpcke* v. *Dubuque*, 1 Wall., 175 [68 U. S., XVII., 520]; *Havemeyer* v. *Iowa Co.*, 3 Wall., 294 [70 U. S., XVIII., 38]; *Thompson* v. *Lee Co.*, 3 Wall., 327 [70 U. S., XVIII., 177]; *Lee Co.* v. *Rogers*, 7 Wall., 181 [74 U. S., XIX., 160]; *Chicago* v. *Sheldon*, 9 Wall., 50 [76 U. S., XIX., 594]; *Olcott* v. *Supervisors*, 16 Wall., 678 [83 U. S., XXI., 382]; *Fairfield* v. *Gallatin Co.*, 100 U. S., 47 [XXV., 544].

We refer to this doctrine, not from any doubt as to the correctness of the construction of the article of the Constitution of 1845 given by the Supreme Court of the State, but in answer to the objections of counsel and the position of the court below. We are of opinion that the construction given was correct. It is impossible to apply to the varying wants of a municipality, the rule invoked with reference to taxation for state purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied. The same construction of a similar clause in the Constitutions of other States has been adopted by their highest courts. The Constitution of Virginia of 1850 prescribed that "Taxation shall be equal and uniform throughout the Commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be pre- [296] scribed by law;" and the Court of Appeals of the State held that the provision related solely to taxation for purposes of state revenue, and did not apply to taxes by counties and corporations for local purposes. *Gilkeson* v. *Frederick Justices*, 13 Grat., 577. The Constitution of Arkansas of 1836 provided that "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State;" and the Supreme Court of the State held that the provision was intended to apply to state revenue and was not applicable to taxes levied for county purposes. *Washington* v. *State*, 13 Ark., 761; see, also, *McGehee* v. *Mathis*, 21 Ark., 40.

That taxation for state purposes, to be equal and uniform within the meaning of the Constitution of 1845, need not have been universal, is a proposition which calls for no argument. It was only necessary that all property on which taxes were levied, not all property in the State, should be taxed according to its value, and in conformity with some fixed rate or mode. *State* v. *Lathrop*, 10 La. Ann., 398; *New Orleans* v. *Bank*, 10 La. Ann., 735.

The validity of the consolidated debt of New Orleans, and the obligation of the city to provide for the payment of the interest and the redemption of the principal were never questioned by the Legislative Department of the State until 1876, but were repeatedly and in the most emphatic manner recognized and affirmed. In fourteen Acts of the Legislature passed prior to that year, the consolidated bonds are referred to as valid obligations of the city, though in one of them, it is true, a different mode of raising the tax from that specified in the Act of 1852 is required, and in another the levy and collection of the tax are postponed for two years. Thus the Act passed in 1856 amending the charter, provides that the common council shall, in each year, levy an equal and uniform tax upon all property in the city, real and personal, but that said tax, added to the consolidated loan tax and other taxes designated, shall not in the aggregate be more than $1.50 on $100

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of valuation, except in case of invasion, "Provided it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the City of New Orleans." In the mode thus prescribed, the amount stipulated by the Act of 1852 was annually raised and applied until 1874, without objection from the bondholders. Hence it is contended that they waived their right to the special tax mentioned. But no such inference can be justly drawn from their silence. They could not complain so long as the amount prescribed was raised and applied as stipulated. Had the requisite funds been given to the city, and then applied to pay the interest on the bonds, and to purchase with the residue such of them as had the shortest time to run, the bondholders would have been equally without cause of complaint, and would as little have waived by their silence the right to insist upon the special tax if a resort to it should be become necessary. Nor is their right in that respect affected by the fact that since 1852 slavery has been abolished, and that there are no longer slaves upon whom taxation can be levied. The obligation of the city to raise the required fund by special tax on real estate still remains. That is no more lessened than it would be by the destruction of any other portion of the taxable property; although the rate of taxation on what is left might be thereby increased.

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The Act of 1874, which postponed the levy and collection of the tax for a sinking fund for the purchase of bonds of the city until December, 1876, also declared that the Act should in nowise be construed to hinder, delay or affect the prompt payment of the interest on them as they matured. The validity of the consolidation bonds was "Recognized in all its integrity, it being the object of the Act to afford temporary relief to the taxpayers of New Orleans in the embarrassed condition of its affairs, and not to detract from or impair the rights of the holders of said bonds."

But, notwithstanding this declaration of the validity of the consolidated debt, and the inviolability of the provisions for its payment, no tax was subsequently raised to pay the interest, or to retire the principal. And before the time arrived to which the postponement of a levy was made, new light respecting the obligations of the city and the rights of the bondholders had dawned upon the city authorities. Although for twenty-two years all departments of the State Government had recognized the validity of the bonds, and the annual interest had been regularly paid, and more than half of them retired, it was then for the first time discovered that the Act of 1852, authorizing the issue of the bonds, was invalid, that its object was not sufficiently stated in the title, that the tax prescribed was neither equal nor uniform and, therefore, was in conflict with the constitution. The outcome of these new notions was the Premium Bond Act of March 6, 1876, passed by the Legislature at the solicitation of the municipal authorities.

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This Act is a most remarkable piece of legislation. So far as the consolidated bonds are concerned it amounts to little less than open repudiation of the city's faith. It admits that the debt of the city as established by law is so large as to require for its liquidation taxation on property within its limits at the rate of at least five per cent, and yet authorizes a tax of only one and a half per cent to pay the expenses of the city government, and to meet the obligations which are offered in exchange for those bonds.

It recites in its preamble that the total debt of the city, bonded and floating, exceeds $23,000,000; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent per annum to liquidate the debt; that the levying of a tax at so exorbitant a rate will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay would lead to a further destruction of the assessable property of the city and to ultimate practical bankruptcy; and, that the council of the city have adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, "Obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor."

The plan proposed was to exchange all recognized and valid bonds of the City of New Orleans, and of the Cities of Jefferson and Carrollton, for bonds to be known as premium bonds of the city; the latter to be of the denomination of $20, and dated September 1, 1875, each bearing five per cent interest from July 15th of that year, the interest and principal to be paid at the same time and not separately, and that time to be determined by chance in a lottery. One million of these bonds was to be divided into ten thousand series of one hundred bonds each. The ten thousand series were to be placed in a wheel and, in April and October of each year, as many series were to be drawn as were to be redeemed, according to a certain schedule adopted. The bonds composing the series thus drawn were to be entered for payment three months thereafter, principal and interest, and were to be receivable for all taxes, licenses and other obligations of the City. At the expiration of the three months, the bond numbers of the drawn series were to be placed in a wheel and 1,176 prizes, amounting to $50,000, were to be drawn and distributed. Under this plan, the city was to be released from payment of the principal and interest of its debt, except such portion as might be drawn in the lottery each year. Under this arrangement, it would depend upon the turn of a wheel and the drawing of a fortunate number whether a creditor would be paid in one year or in fifty years. The plan completely disregards all the conditions upon which the consolidated bonds were issued, and postpones indefinitely the payment of interest and principal, or rather leaves the time of payment within fifty years to be determined by chance.

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The Act of 1852, as we have stated, declares that the city council shall, in January of every year, pass an ordinance for the levy and collection of a special tax to be applied to the payment of the interest on the consolidated bonds and to retire the principal. The Act of 1876 declares that no tax shall be levied by the city council that year or any year afterwards to pay the principal or interest on those bonds, or on any other than the premium bonds. The Act of 1852 declares that all ordinances, resolutions and acts of the city council of any year shall be null and void unless the ordinance imposing the special tax designated shall have been previously passed. The Act of 1876 declares that all laws

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requiring or authorizing the city council to levy any tax for bonds or interest on bonds other than premium bonds are repealed; and, as if that was not sufficient evidence of the repudiation of former obligations, it forbids the courts to issue a *mandamus* to the officers of the city to levy and collect any interest tax other than for those bonds.

To meet the interest on them and for all other [300] purposes of the City, the Act further provides that a tax of only one and one half per cent per annum shall be levied; and this limitation of the taxing power of the corporation is "Declared to be a contract not only with the holder of said premium bonds, but also with all residents and taxpayers of said city, so as to authorize any holder of said premium bonds to legally object to any rate of taxation in excess of the rate herein limited."

If the provisions of this Act nullifying the pledges of the Act of 1852 are valid, the consolidated bonds are virtually destroyed; no taxation is allowed, to raise funds for them; their payment, therefore, would be so uncertain as to render them practically valueless. The chance with premium bonds offered in their place of a favorable turn of the wheel in a lottery would be a poor substitute for the levy of an annual tax for the payment of interest and principal. We shall not waste words upon the scheme thus developed to evade the just obligations of the city. Notwithstanding the declaration in its preamble that the Act seeks from the creditors the indulgence necessary "for the public well-being and the maintenance of the public honor," it is, so far as the consolidated bonds are concerned, tainted with the leprosy of repudiation. It says to the creditors: "Take these premium bonds, and trust for payment within fifty years to your fortune in the lottery we offer; no other way is left open to obtain a possible payment. No tax can be levied for your benefit. No compulsory writ can issue from the courts. Take these bonds or take nothing." The primal duty of the city authorities to fulfill punctually their obligations and maintain good faith is thus proclaimed to be no duty at all.

We do not deny that the power of taxation belongs exclusively to the Legislative Department of the Government, that the extent to which it may be delegated to municipal bodies is a matter of discretion, and that in general the power may be revoked at the pleasure of the Legislature. But, as we said in the case of *Wolff* v. *New Orleans*, decided at the last Term [*ante*, 395], legislation revoking the power is subject to this qualification, which attends all state legislation, that it "Shall not conflict with the prohibitions of the Constitution of the United States, and among other things, shall not oper- [301] ate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded, treated as if never enacted, by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. * * * However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts."

The case of *Von Hoffman* v. *Quincy*, reported in 4th Wallace, 535 [71 U. S., XVIII., 403], is a leading one on this subject. The court there said: "That when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound."

The inhibition upon the courts of the State to issue a *mandamus* for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy, existing when a contract was made, is permissible without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded. Here, no remedy whatever is substituted for that of *mandamus*. The holders are denied all remedy. *Louisiana* v. *New Orleans* [*ante*, 132, 133].

Legislation of a State thus impairing the ob- [302] ligation of contracts made under its authority, is null and void; and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. The Act of March, 1876, cannot, therefore, be permitted to restrict the power of the city authorities to levy the tax stipulated by the Act of 1852 to pay the interest on the consolidated bonds issued thereunder, and to retire the bonds.

It follows from the views expressed, that the judgment of the Supreme Court of the State of Louisiana must be reversed, and the cause be remanded to that court with instructions to reinstate the same and to remand it to the Third District Court of the Parish of Orleans, or its successor, to carry into effect the provisions of the 37th section of the Act of the Legislature approved February 23, 1852, and the 5th section of the supplementary Act approved the same day, embraced in Nos. 71 and 72 of the Acts of that year, as containing a valid contract between the City of New Orleans and the creditors holding the bonds issued under them; and to direct the District Court to issue a *mandamus* to the City of New Orleans and its authorities, annually to levy and collect the tax of $650,000 directed by the Acts, and to apply the same in the following order: first, to the payment of the current interest of the year; secondly, to the payment of arrearages of inter-

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est of former years until all the arrearages are satisfied; and thirdly, to the purchase of bonds having the shortest period to run.

Judgment to this effect, and that the defendants pay the costs in this court and in the Supreme and District Courts of Louisiana, will be entered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 775, 800; 109 U. S., 290; 111 U. S., 705.

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[347]

CITY OF MANCHESTER, VIRGINIA, *Plff. in Err.*,
v.
O. A. ERICSSON.

(See S. C., 15 Otto, 347-350.)

Question of fact.

In an action against a city for an injury to plaintiff, occurring by reason of an approach to a bridge being out of repair, the question whether the city had assumed such control of the approach as to make it responsible, is an inference of fact to be drawn from all the testimony by the jury, and not a question of law for the court.

[No. 242.]

Argued Mar. 24, 1882. Decided Apr. 17, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The case is stated by the court.

Messrs. Philip Phillips, **William A. Maury**, and **Christopher C. McRae**, for plaintiff in error.

Messrs. **Meredith** *&* *Cocke* and **George K. Macon**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Virginia.

The defendant in error, plaintiff below, recovered a judgment against the City of Manchester for injuries received by a fall from a public way, of which the City had been negligent in regard to protecting the sides of a high embankment. The laws of Virginia authorize a recovery in such cases.

The chief controversy on the trial in the circuit court was on the question whether the City or a bridge company was responsible for the condition of the street in such a manner as to incur liability for negligence in the care of it. That part of the street where the accident occurred constituted also the approach to a bridge across the James River, between the Cities of Manchester and Richmond, and both the bridge and this approach to it had been built, at least nominally, by an incorporated company called the James River Bridge Company, and the contention of the defendant below was that this corporation was the responsible party, and the City was not.

That point was much pressed in argument before us, and it seemed to be assumed that if the bridge company was liable the City was not. We do not think that this necessarily follows, for the bridge company may be liable for negligence in regard to the *locus in quo* as an approach to and part of their bridge, while the City may also be liable for like negligence regarding it as a street for the care of which it is responsible. The question in this case is, whether the *City* is liable. [348]

This depends, in our opinion, not so much on the question whether the place where the injury occurred was, by law, placed under the exclusive control of the City, as whether the city authorities had so far assumed the care of it as one of the streets of the town as to incur an obligation to be diligent and watchful in the performance of that duty.

The Judge, in his charge to the jury, attached much importance to the fact that the bridge was built by money advanced by the City of Richmond and the Town of Manchester, and assumed that the corporation was a mere matter of form, and though chartered by the Legislature, was only an agency of the two municipal corporations to connect their towns by a bridge spanning the river which runs between them.

We are not satisfied of the soundness of this view, though it appears that the two cities owned all the stock and advanced the money.

NOTE.—*What constitutes a public highway or street; highway defined.*

To constitute a public street or highway it is necessary that it should be set off and used as such. Comrs. v. Taylor, 2 Bay, 282; S. C., 1 Am. Dec., 647.

A way, to become public, must be used in such manner as to show that the public requires it, and that the owner of the land intends to dedicate it to the public. Barker v. Clark, 4 N. H., 380; S. C., 17 Am. Dec., 428.

A highway may be established by immemorial usage. Reed v. Northfield, 13 Pick., 94; S. C., 23 Am. Dec., 662; State v. Wilkinson, 2 Vt., 480; S. C., 21 Am. Dec., 560; Folger v. Worth, 19 Pick., 110; Gould v. Boston, 120 Mass., 306; Thayer v. Boston, 19 Pick., 476; S. C., 23 Am. Dec., 157.

Public highways may be proved within a city by prescription or dedication. Stetson v. Faxon, 19 Pick., 147; S. C., 31 Am. Dec., 123; Valentine v. Boston, 22 Pick., 75; S. C., 33 Am. Dec., 711; Pomeroy v. Mills, 3 Vt., 279; S. C., 23 Am. Dec., 206; Abbott v. Mills, 3 Vt., 521; S. C., 23 Am. Dec., 222.

Public highways may be established by adoption and use. Blodgett v. Royalton, 17 Vt., 40; S. C., 42 Am. Dec., 476.

No formal act of acceptance is necessary where there has been long use by the public after dedication. Requa v. Rochester, 45 N. Y., 129; S. C., 6 Am. Rep., 52.

Ten years non-user does not amount to an abandonment of a highway. State v. Culver, 65 Mo., 607; S. C., 27 Am. Rep., 295.

Streets laid out by an individual proprietor do not become such unless sanctioned by the corporation or its duly authorized officers. Underwood v. Stuyvesant, 19 Johns., 181; S. C., 10 Am. Dec., 215; People v. Jones, 6 Mich., 184; Niagara Falls Br. Co. v. Bachman, 66 N. Y., 261; Guthrie v. New Haven, 31 Conn., 308; Bryant v. Biddeford, 39 Me., 193.

Streets and alleys of a town are highways. Brace v. New York Cent. R. R. Co., 27 N. Y., 269; Morris v. Bowers, Wright, 749; Council v. Cross, 7 Ind., 9; State v. Mathis, 21 Ind., 277; Road from Fitzwater, 4 Serg. & R., 105; Conner v. Trustees, etc., 1 Blackf., 58; Adams v. Rivers, 11 Barb., 390; Cincinnati v. White, 33 U. S. (8 Pet.), 431.

A highway is a public way for the use of the public in general, for passage and traffic, without distinction. Starr v. Camden, etc., R. R. Co., 4 Zab., 592.

A highway is a passage, road or street, which every citizen has a right to use. Sutliffe v. Greenwood, 8 Price, 535; Rex v. Cumberworth, 3 B. & Ad., 108; Stackpole v. Healy, 16 Mass., 33; Jackson v. Hathaway, 15 Johns., 447; Makepeace v. Worden, 1 N. H., 16.

Mere use cannot make a public highway of a private way. Hall v. McLeod, 2 Met., 98.

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It still remains that the corporation was the legal entity which owned the bridge; that if it had borrowed money or created debts, the cities would not have been liable for them without an express agreement to that effect. And if the negligence by which plaintiff suffered was solely the negligence of the bridge company and its officers, the City of Manchester would not have been liable because of the stock held by it in the company or the money advanced to it.

But testimony was submitted to the jury tending to show that after the bridge and this approach to it had been built, or commenced, the limits of the City of Manchester had been extended so as to include this part of the bridge or approach, and that the City did work on it as a street or extension of the street into which it ran, and in many ways assumed such control of it as it did of other streets.

This testimony is in the record and was proper evidence to sustain the proposition that the city authorities had so acted in regard to this part of the highways of the City, as to make it [349] responsible for a more careful attention to the dangerous condition of it than was given by them.

The counsel of defendant prayed several instructions in regard to the sufficiency of this evidence, which was refused by the court, and instead of those asked it gave the following:

"There are three questions for the jury, namely:

1. Whether a proper guard or protection had been provided at the point where the accident to the plaintiff ocurred; if there was not,

2. Whether the accident was in consequence of the absence of such proper guard or protection; and

3. If so, whether damage ensued to the plaintiff, and what amount of money shall be allowed as the measure of damage to him.

If the jury believe from the evidence that a proper guard or protection to the highway was not provided; that the accident occurred in consequence, and that damage ensued to the plaintiff from the accident, then the court instructs the jury, that the City of Manchester is liable for the damage, unless it proves that the plaintiff sustained his injury through his own negligence or want of care."

It will be seen that the court here takes from the jury entirely the question whether the City was responsible for the want of the guard or protection which was absent, and instructs them peremptorily that if such protection was wanting and the accident was caused by its absence, the City was liable.

We think it was for the jury to decide whether the City had made itself responsible.

The evidence on this subject had been properly submitted to the jury. Whether the City had assumed such control of the *locus in quo* as to make it responsible, was an inference of fact to be drawn from all the testimony by the jury, and not a question of law for the court.

This evidence consisted of various things done by order of the authorities of the City of Manchester, such as paving the money on condemnation of the land for the use of the bridge; regulating the grade of the approach to the bridge and of the neighboring streets; continuing the pavement of the street into and upon this approach; depositing cinders on it; building a fence on the side of it; and otherwise expending money on it. [350]

In our opinion, though strongly persuasive of the proposition that the City had assumed charge of the place, the evidence was not necessarily conclusive. The inference was one of fact and not of law, and was to be made, if at all, by the jury, under such proper instructions on the matter as the court should give, and not by the court alone. It was a mixed question of law and fact, proper for the jury, aided by the court.

For this error, the judgment of the Circuit Court is reversed and the case remanded, with instructions to set aside the verdict and grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JACOB M. DUNCAN ET AL., *Appts.* [381]
v.
THE STEAMSHIP FRANCIS WRIGHT, Her Engine, etc., HUMPHREY E. WOODHOUSE ET AL., Claimants.

(See S. C., "*The Francis Wright*," 15 Otto, 381-392.)

Jurisdiction of this court—refusal to find facts—finding against evidence—incidental facts—grounds of exceptions—seaworthy vessel.

1. Congress has the constitutional power to confine the jurisdiction of this court, on appeals in admiralty, to questions of law arising on the record.

2. If the circuit court neglects or refuses, on request, to make a finding, one way or the other, on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal presented by a bill of exceptions, may be considered here on appeal.

3. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. Both these are questions of law.

4. Mere incidental facts, which are part only of the evidence on which the ultimate finding depends, occupy in the case the position of testimony rather than of facts. The refusal of the court to put such statements into the record, even though established by uncontradicted evidence, cannot properly be brought here by a bill of exceptions.

5. A bill of exceptions ought to show the grounds relied on to sustain the objection presented, so that it may appear that the court below was properly informed, as to the point to be decided. Proper grounds of exceptions stated.

6. An agreement in a charter-party, that the vessel is seaworthy, is satisfied if the vessel was actually seaworthy when delivered into the possession of the charterers under the charter.

[No. 102.]

Argued Mar. 8, 1882. Decided Apr. 17, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **Benedict,** *Taft & Benedict,* and **Benjamin H. Brewster,** for appellants.

Messrs. **Butler,** *Stillman & Hubbard,* for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Three questions have been presented on the argument of this appeal:

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[384] 1. Whether Congress has the constitutional power to confine the jurisdiction of this court on appeals in admiralty to questions of law arising on the record;

2. Whether, upon the bill of exceptions, the court below erred in refusing to find certain facts which, as is claimed, were established by uncontradicted evidence, and in finding others which had no evidence at all to support them; and,

3. Whether, on the facts found, the decree below was right.

1. As to the jurisdiction:

If we understand correctly the position of the counsel for the appellants, it is precisely the same as that which occupied the attention of the court in *Wiscart* v. *Dauchy*, 3 Dall., 321, decided at February Term, 1796. There the question was, what could be considered under the Judiciary Act of 1789 [1 Stat. at L., 73], on a writ of error bringing to this court for review a decree in admiralty. The decision turned on the construction to be given the 22d section of the Act, and *Mr. Justice* Wilson, in his minority opinion said: "Such an appeal," that is to say, an appeal in which all the testimony is produced in this court, "is expressly sanctioned by the Constitution; it may, therefore, clearly, in the first view of the subject be considered as the most regular process; and as there are not [385] any words in the judicial Act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. Even, indeed, if positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision." "*Ch. J.* Ellsworth, however, who spoke for the majority of the court, said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is, simply, whether Congress has established a rule for regulating its exercise." And, further on: "It is observed that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error and no other mode, by which it is to be exercised, still, I say, we are bound to pursue that mode, and can neither make nor adopt another." And again; "But surely, it cannot be deemed a denial of justice that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the circuit court has been made final, no denial of justice can be imputed to our government; much less can the imputation be fairly made, because the law directs that in case of appeal, part shall be decided by one tribunal and part by another; the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England."

This was the beginning of the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. As was said by *Ch. J.* Marshall in *Durousseau* v. *U. S.*, 6 Cranch, 314, "The appellate powers of this court are not given by the judicial Act. They are given by the Constitution. But they are limited and regulated by the judicial Act, and by such other Acts as have been passed on the subject." The language of the Constitution is that "The Supreme Court shall have appellate [386] jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make." Undoubtedly, if Congress should give an appeal in admiralty causes, and say no more, the facts, as well as the law, would be subjected to review and retrial; but the power to except from—take out of—the jurisdiction, both as to law and fact, clearly implies a power to limit the effect of an appeal to a review of the law as applicable to facts finally determined below. Appellate jurisdiction is invoked as well through the instrumentality of writs of error as of appeals. Whether the one form of proceeding is to be used or another, depends ordinarily on the character of the suit below; but the one as well as the other brings into action the appellate powers of the court whose jurisdiction is reached by what is done. What those powers shall be and to what extent they shall be exercised are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right. The Constitution prohibits a retrial of the facts in suits at common law where one trial has been had by a jury (Amendment, art. VII.); but in suits in equity or in admiralty, Congress is left free to make such exceptions and regulations in respect to retrials as, on the whole, may seem best.

We conclude, therefore, that the Act of 1875 is constitutional and that under the rule laid down in *The Abbotsford*, 98 U. S., 440 [XXV., 168], and uniformly followed since, our inquiries [387] are confined to questions of law arising on the record, and to such rulings, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions of law.

2. As to the questions arising on the bill of exceptions:

It is undoubtedly true, that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and

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properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law and proper subjects for review in an appellate court. But this rule does not apply to mere incidental facts, which only amount to evidence bearing upon the ultimate facts of the case. Questions depending on the weight of evidence are under the law as it now stands, to be conclusively settled below, and the fact in respect to which such an exception may be taken, must be one of the material and ultimate facts on which the correct determination of the cause depends.

In the present case, the ultimate fact to be determined was, whether the loss for which the suit was brought happened because of the insufficient refrigerating apparatus, or the unseaworthiness of the vessel. It is found, in express terms, that the loss was "Caused by the defective construction and working of the refrigerating room and apparatus connected therewith, either from inherent defects in said apparatus, or from not using a sufficient quantity of ice, and not by any fault of the claimants." As to this, both the circuit and district courts agree. This fact being established, it was unimportant to inquire whether the vessel was seaworthy or not. If the unseaworthiness was not the proximate cause of the loss, [388] it is not contended the vessel can be charged with the damages.

But if it be conceded that the case depended on the seaworthiness of the vessel, we think the exceptions which have been taken cannot be considered here. The only unseaworthiness alleged was in respect to the boiler, and as to this the court has found that the boiler was a tubular one; that tubular boilers are liable to leakage in the tubes; that such leakage does not necessarily interfere with the capacity or fitness of the boiler for the purposes of navigation; that this particular boiler had one hundred and forty-four tubes; that some of these tubes gave out from time to time and were plugged up; that, when the vessel arrived at Philadelphia at the end of her voyage, twenty-six of the tubes had been plugged up, but that the boiler was still efficient and seaworthy. It was also found that the voyage from Galveston to Philadelphia was two days longer than was usually occupied by well equipped steamers, and that the vessel put back for repairs, by which an additional week's time was lost at Galveston.

The complaint now made is, that the court refused to state in its findings that there was leakage in the tubes and stoppage for repairs while the vessel was on her voyage from Philadelphia to Galveston, and while she was lying in the harbor at Galveston taking in her cargo; and that when the vessel put back to Galveston the engineer had not sufficient tools with which to make his repairs. All these are mere incidental facts, proper for the consideration of the court in determining whether the boiler and the vessel were actually seaworthy or not. It is not pretended that the question at issue was to be determined alone by the probative effect of these circumstances. They were part only of the evidence on which the ultimate finding depended, and occupy in the case the position of testimony rather than of the facts to which the law is to be applied by the judgment of the court. The refusal of the court to put such statements into the record, even though established by uncontradicted evidence, cannot properly be brought here by a bill of exceptions, unless it also appears that the determination of the ultimate fact to be ascertained depended alone upon the legal effect as evidence of the fact stated. Such, clearly, is not this case. [389]

There is another equally fatal objection to this bill of exceptions. An evident effort has been made here as it has been before, to so frame the exceptions as, if possible, to secure a re-examination of the facts in this court. The transcript which has been sent up contains the pleadings and all the testimony used on the trial below. The bill of exceptions sets forth that at the trial the pleadings were read by the respective parties, and the testimony then put in on both sides. This being done, the libelants presented to the court certain requests for findings of fact and of law. These requests were numbered consecutively, sixteen relating to facts and three to the law. Afterwards, six additional requests for findings of fact were presented. It is then stated that the court made its findings of fact and of law and filed them with the clerk, together with an opinion in writing of the Circuit Justice who heard the cause. The libelants then filed what are termed exceptions to the findings and refusals to find. In this way exceptions were taken separately to each and every one of the facts found and the conclusions of law, and to the refusal to find in accordance with each and every one of the requests made. The grounds of the exceptions are not stated. Many of the requests of the libelants are covered explicitly by the findings as actually made, some being granted and others refused.

We have no hesitation in saying that this is not a proper way of preparing a bill of exceptions to present to this court for review rulings of the circuit court such as are now complained of. A bill of exceptions must be "prepared as in actions at law," where it is used, "not to draw the whole matter into examination again," but only separate and distinct points, and those of law. Bac. Abr. Bill of Exceptions; 1 Saund. Pl. & Ev., 846. Every bill of exceptions must state and point out distinctly the errors of which complaint is made. It ought also to show the grounds relied on to sustain the objection presented, so that it may appear the court below was properly informed as to the point to be decided. It is needless to say that this bill of exceptions meets none of these requirements. From anything which is here presented, no judge would be presumed to understand that the specific objection made to any one of his find- [390] ings was, that no evidence whatever had been introduced to prove it; or to one of his refusals, that the fact refused was material and had been conclusively shown by uncontradicted testimony. No ground whatever is stated for

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any one of all the exceptions that have been taken. To entitle the appellants to be heard here upon any such objections as they now make to the findings, they should have stated to the court that they considered the facts refused material to the determination of the cause, and that such facts were conclusively proven by uncontradicted evidence. Under such circumstances, it might have been permissible to except to the refusal and present the exception by a bill of exceptions, which should contain so much of the testimony as was necessary to show that the fact as claimed had been conclusively proven. And so if the exception is as to facts that are found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated into the bill of exceptions. In this way the court below would be fairly advised of the nature of the complaint that was made in time to correct its error, if satisfied one had been committed, or to put into the bill of exceptions all it considered material for the support of the rulings.

From this it is apparent we cannot on this appeal consider any of the rulings below which have been presented by the bill of exceptions.

3. As to the sufficiency of the facts found to support the decree:

Upon this branch of the case we have had no more difficulty than upon the others. The case made, may be generally stated as follows:

The libelants, being about to engage in the business of transporting fresh beef by the use of a newly patented process, applied to the claimants for a charter of their steamer for six months, to be put into that trade. The claimants knew for what business the vessel was engaged, and the libelants knew that she was furnished with a tubular boiler. Such boilers are liable to leak, but that does not necessarily interfere with their capacity or fitness for the purposes of navigation. The charter-party contained this clause: [391]

"First. The said party of the first part (the claimants) agrees, the said vessel, in and during the said voyage, shall be kept tight, stanch, well fitted, tackled and provided with every requisite for such a voyage."

No mention was made in the charter, of the special business in which the vessel was to be engaged. She was chartered generally for six months to run between Philadelphia and New York and Galveston, or any intermediate safe port in the United States, or any foreign port not prohibited by the insurance. The only complaint made as to her seaworthiness, is in respect to her boiler, and about this it is found that though to some extent leaking, as boilers of that class are liable to be, it was still efficient and seaworthy. The libelants fitted the vessel with the necessary apparatus for the use of their patented process, and with a full knowledge that her boiler was apt to leak, put a cargo of fresh beef on board to be taken from Galveston to Philadelphia. The vessel was twenty-three days in making that voyage instead of fourteen, which was the usual time of well equipped steamers. The beef was spoiled before it got to Philadelphia, but it is expressly found that this was because of the defective construction and working of the refrigerating room, and the apparatus and machinery connected therewith, for which the claimants were in no respect responsible.

Upon these facts the court below dismissed the libel, which we think was clearly right. That the vessel was, in fact, seaworthy is settled by the findings. All the claimants covenanted for, was that she was provided with every requisite for safe navigation. While they knew that her charterers intended to use her in connection with their contemplated business, it is neither found nor insisted that any higher degree of seaworthiness was required for that kind of transportation than any other; much less that the claimants knew it. Under these circumstances, the language of the charter-party is to be construed only as an agreement that the vessel was seaworthy for the purpose of navigating such a voyage as she was chartered to make, without any regard to what she was to carry. The claimants did not contract that their vessel was in a condition to make her voyages in any particular time, but only to make them safely. They were not applied to for a vessel suitable for carrying fresh beef, but for one suitable for navigation generally between the designated ports and places. Such a vessel, according to the findings, they got. It was their fault alone if they did not apply for what they wanted. They took all the risks of the undertaking, except such as arose from the general unseaworthiness of the vessel when she was delivered into their possession, for after they got her she was to be subject to their entire control within the terms of the charter. If repairs were necessary to keep her in a seaworthy condition, while under the charter the claimants might be chargeable with the expense of making them, it would be the duty of the charterers to see that they were made, or to notify the claimants of what was required. The provision that the claimants were to nominate and the charterers appoint the engineer, and that the appointment of the captain by the charterers, should be subject to the approval of the claimants, did not affect the relation of the parties in this particular. Delays growing out of derangement in the machinery were to be deducted from the charter time, and the pay for the use of the vessel correspondingly reduced, but beyond that the owners were not to be bound if the vessel was actually seaworthy when delivered into the possession of the charterers under the charter. [392]

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—105 U. S., 631; 107 U. S., 500; 108 U. S., 359.

CITY OF HANNIBAL, *Plff. in Err*, v. THOMAS FAUNTLEROY. [408]

(See S. C., 15 Otto, 408-413.)

Evidence of election—proceedings of city council—ratification—tax payers.

1. In order to show that a subscription to railroad stock and the issue of bonds by a city was ratified by

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a majority of its taxpayers, the poll-books of an election held for that purpose, authenticated by the certificate of the judges and clerks of the election, are admissible in evidence.

2. Proceedings of the city council, showing the result of such election reported to it, and its resolution instructing the mayor to issue the bonds, are also admissible to prove the same point.

3. Such proof, together with proof that the city had admitted its liability upon these bonds by making arrangements for the payment of coupons as they fell due, receiving them in payment of taxes, etc., is sufficient to show a ratification of the subscription by a vote of a majority of taxpayers at an election called and held for that purpose.

4. The plaintiff need not show that the persons voting to ratify the stock subscription were all taxpayers and entitled by law to vote.

[No. 251.]

Argued Mar. 28, 1882. Decided Apr. 17, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Messrs. J. M. Krum and **Chester H. Krum,** for plaintiff in error.

Messrs. **James Grant** and *Whit. M. Grant,* for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action brought by the defendant in error, a citizen of Virginia, against the City of Hannibal, a municipal Corporation of Missouri, to recover the amount of principal and interest alleged to be due on certain municipal bonds and coupons. The bonds are dated April 1, 1858, for $1,000 each, and are payable twenty years after date to A. O. Nash, Auditor of said City, or bearer, at the American Exchange Bank, New York, for value received, without defalcation, with interest at the rate of ten *per centum* per annum, payable semi-annually, on the first day of October and April in each year, upon presentation of the annexed coupons severally, until the payment of the principal sum. The bonds purport on their face to have been issued to pay calls on subscription for stock in the Pike County Railroad, Illinois. They contain no other recitals. They were issued, it is claimed, under the authority of an Act of the Legislature of Missouri, passed February 27, 1857, to amend the charter of the City of Hannibal, the 3d section of which reads as follows:

[409]

"Sec. 3. Said city council shall have power to subscribe for and take stock in any railroad terminating at the City of Hannibal or upon the bank of the Mississippi River opposite to said City in the State of Illinois. But before such subscription shall be valid, it shall be ratified by a majority of the taxpayers, at a poll to be opened for that purpose."

The 2d section of the same Act provided that "Said council shall also have power to borrow on the credit of the City and to pledge the revenues and public property for the payment thereof; but a greater rate of interest than ten per cent shall not be paid on any sum borrowed, unless two thirds of the qualified voters of said City, at polls to be opened for that purpose, shall instruct the payment of a greater rate."

It is, therefore, not denied that the bonds are binding obligations upon the municipal corporation, provided the subscription to the stock of the Pike County Railroad, in payment of which they were issued, was lawfully made; and no question is made as to the validity of this subscription, except that it was not ratified, as is claimed, by a majority of the taxpayers, in accordance with the provisions of the 3d section of the amended charter.

It appears that, at a called meeting of the City Council of the City of Hannibal, held on October 22, 1857, an ordinance was duly passed authorizing and directing the subscription of $100,000 stock in the Pike County Railroad, as follows: [410]

"Be it ordained by the City Council of the City of Hannibal, as follows:

Sec. 1. That the Mayor of the City of Hannibal be and is hereby authorized and directed to subscribe for and take for the City of Hannibal, $100,000 stock in the Pike County Railroad, having its western terminus on the bank of the Mississippi River, at a point in the State of Illinois opposite the City of Hannibal, within a one half mile of the western terminus of the Sag City Plank Road; said stock to be paid for in the bonds of the City of Hannibal at their par value, which bonds are to be made payable not exceeding twenty years from the date of their issue, and are to bear ten per cent interest per annum, payable semi-annually.

Sec. 2. That the mayor be and is hereby directed to cause a poll to be opened in said City of Hannibal, for the purpose of obtaining the ratification of the foregoing said subscription of $100,000 stock in said Pike County Railroad by the taxpayers of said City of Hannibal, in accordance with the provisions contained in the 3d section of an Act passed by the General Assembly of the State of Missouri, entitled 'An Act to Amend the Charter of the City of Hannibal,' approved February 27, 1857.

Sec. 3. This Ordinance to take effect from and after its passage."

On the trial of the cause in the circuit court, the plaintiff, recognizing his obligation to prove affirmatively that the bonds in question had been issued under the authority of the law, introduced in evidence the poll books of an election held at voting places in the three wards of the City of Hannibal on the first Monday, the 2d day, of November, 1857, for the purpose of electing a mayor, marshal, recorder and attorney for said City, three councilmen for each ward, and for the ratification of the subscription of $100,000 of stock in the Pike County Railroad. These poll-books contain the name of every voter, with a record of his vote, whether for or against ratification, and are authenticated by the certificate of the judges and clerks of the election, stating the result and specifying in their return, under the head "For ratifying the subscription of $100,000 stock in Pike Co., Railroad," the number of votes cast in favor of and against the ratification. The result, as shown by these poll-books, in the aggregate, was that three hundred and sixteen votes were cast in favor of, and thirty-two against the ratification. At a called meeting of the City Council of the City of Hannibal, on November 4, 1857, it is recorded, that the clerk read to the city council the certificate of the mayor and one judge of the election from each ward in the City, whereby it was shown to the satisfaction of the council that at the municipal election held in the several wards on Monday, November 2, 1857, certain persons named therein, had been duly elected to the several offices therein [411]

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specified, and thereupon it was resolved that certificates be made out and delivered to the officers elect, and at the conclusion of the entry upon the record there is the statement: "For ratification, three hundred and sixteen votes; against thirty-two votes."

At a regular meeting of the city council on December 7, 1857, it is recorded, that, "On motion of Mr. Dowling, resolved, that the mayor be, and he is hereby authorized and instructed to issue the bonds of the City to the Pike County Railroad, in accordance with calls on the capital stock made by order of the board of directors, and in pursuance of an ordinance approved October 22d, 1857."

The stock subscribed for was duly issued to the City of Hannibal, and is still held by it; and the Corporation has continuously exercised the privileges of a stockholder, though it is admitted that the stock has no pecuniary value.

It was also proven that in various ways, prior to the institution of this suit, the City of Hannibal had admitted its liability upon these bonds by making arrangements for the payment of coupons as they fell due, receiving them in payment of taxes due to it, permitting judgment to be rendered against it on account of unpaid coupons, once by consent and once by default; but to the whole evidence on the part of the plaintiff below, it was objected by the plaintiff in error that it was insufficient to establish the liability of the City, because it failed to show a ratification of the subscription to the stock of the railroad company by a vote of a majority of taxpayers at an election called and held for that purpose.

[412] The answer to this objection, however, is found in the provisions of article 1, section 10, of the charter of 1851, of the City of Hannibal, Laws of Missouri, 1851, p. 327, admitted to have been in force at the time, which defined the qualification of voters as follows:

"Sec. 10. All free, white, male citizens, who have arrived at the full age of twenty-one years, and who shall be entitled to vote for state officers, and who shall have resided within the city limits at least six months next preceding any election and, moreover, who shall have paid a city tax or any city license according to ordinance, shall be eligible and entitled to vote at any ward or city election for officers of the City."

It thus appears that no person could lawfully vote at the election held November 2, 1857, for city officers, except taxpayers; and assuming that the list of names contained in the poll books as having voted for or against the ratification of the subscription to the stock in the Pike County Railroad, are those of the same persons who voted for city officers, it follows that they must all have been taxpayers, on the presumption, which certainly must be applied, that they were all legally entitled to vote.

It is argued that the Legislature used the word "taxpayers" in the 3d section of the Act of 1857, in a sense designedly differing from that of "qualified voters," in the 2d section, who are to decide upon the question of the rate of interest on money borrowed in excess of the ten per cent per annum. We see no evidence, however, of such an intention. On the contrary, that supposition would necessitate the conclusion that by the word "taxpayers," the Legislature meant to include persons not otherwise qualified to vote, for example: not free, white, male citizens—minors, women, married and unmarried and non-residents. The reasonable interpretation is, that the question of ratifying the subscription should be submitted to the vote of the taxpayers of the City, having the qualification otherwise of lawful voters; and this included, as we have seen, all the qualified voters of the City.

To allow the present objection to prevail, would require the holder of these bonds, not only to show that the persons voting to ratify [413] the stock subscription were all taxpayers, but also, that they had all the other requisite qualifications of persons entitled by law to vote. In our opinion, the law imposes no such unreasonable burden upon the owner of such bonds. He is bound to show, in the absence of recitals that prevent its denial, that the Corporation issued them, in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact. That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons, all of whom possessed the qualification of voters. Whether each voter was lawfully such, was a question in the first place, in the present case, for the judges of the election who were appointed under the law, for the express purpose of receiving and deciding upon their votes; and in the second place, for the city council to whom the official return of the election and of its result was made, as required, and who were authorized to act upon that result as certified to and verified by themselves, in the very matter of consummating the subscription, which was the subject of the vote. It would be impracticable for any purchaser of the bond, put on inquiry, as to the authority of the city council to make the issue of the bonds in question, to make inquisition into the facts of the election, beyond these returns and records; and it is but reasonable to permit him safely to rest his rights upon them, as they appear. They show the fact, that the subscription to the railroad stock was ratified by a majority of the voters, presumed to be qualified to vote, because permitted by the authorities controlling the election, to do so, at an election held for the purpose, among other things, of deciding that question; and that fact constitutes the condition on which the authority to issue the bonds, by law depends, and is the guaranty of their validity.

We find no error, therefore, in the judgment of the Circuit Court and it is, accordingly, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[550]

CHARLES GUIDET, *Appt.*,

v.

CITY OF BROOKLYN.

(See S. C., 15 Otto, 550-552.)

Void patent.

Re-issued letters patent No. 4106, bearing date August 23, 1870, granted to Charles Guidet for making stone pavement, are void for want of novelty.

[No. 231.]

Argued Mar. 17, 1882. Decided Apr. 17, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This action was brought in the court below, by the appellant against the appellee, for the alleged infringement of re-issued letters patent, No. 4106, issued to the said appellant, August 23, 1870, for an improvement in stone pavements, the original letters patent having been dated January 12, 1869. The court below entered a decree dismissing the bill, and the complainant appealed to this court.

The case is stated in the opinion.

Mr. **George Harding**, for appellant.

Messrs. George Gifford and **William C. DeWitt**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The invention of Guidet covered by his re-issued patent, may fairly be stated thus: "Take stone blocks in the form of parallelopipeds, with the ends sufficiently smooth, and the sides sufficiently rough, and put them together in a street pavement so that the ends will be parallel to the street, and the sides at right angles." How large the blocks should be, how smooth the ends, or how rough the sides, is nowhere stated. All that has been left to the judgment and skill of him who does the work.

[551]

The evidence leaves no doubt whatever in our minds that pavements made of blocks of stone broken into the general form of parallelopipeds, and set on edge with their ends parallel to the street and their sides across it, were in use long before the date of Guidet's invention. This is conceded, in fact, both in the original patent and the re-issue; for in the original it is said "I do not claim broadly as my invention, a pavement composed of blocks made in the form of parallelopipeds"; and in the re-issue, "I am aware that pavements have been produced of blocks made in the form of parallelopipeds." The difficulty had been, undoubtedly, that the spaces between the sides of the blocks, in ordinary use before Guidet's invention were not sufficient to furnish a firm foothold for draught animals, especially after the surfaces had been worn smooth. How to remedy this defect was the problem to be solved. Formerly it had been done, as is said in the re-issued patent, by interposing between the adjoining blocks thin strips of wood or stone. As a substitute for this, Guidet chamfered the edges of the broad sides, and thus got the advantage of placing the blocks close against each other and keeping the pavement firm, while he secured on the surface the necessary open joint to furnish a good foothold. That, as it seems to us, was all there was of his invention, and we are by no means inclined to hold it was not patentable to him. He took the block of stone in ordinary use, and by substituting the chamfered edge on the broad side for the narrow strip of wood or stone, got the space that was needed for the joint, and solidified the pavement by bringing the stones that furnished the surface, which was to be used for travel, firmly together.

But after he got his patent he seems to have found that by selecting blocks sufficiently rough on their sides, the joints could be made open enough for all practical purposes without chamfering, and so in his re-issue he abandoned that feature of his patent, and claimed for rough side surfaces only. In this way, as it seems to us, he left the field of invention and entered that of mechanical skill only. Pavements of stone, in the form of parallelopipeds, being confessedly old, he has really done no more than suggest the best kind of stone to be used in that way. The pavements in Rochester and Buffalo, which it is agreed antedated his invention, were laid in all substantial respects like his. The quality of the stone was different, and the side surfaces were comparatively smoother than his, though to some extent they were rough. He, as has already been seen, does not say what degree of roughness is required. The effect of his specification and claim is, that if blocks are selected with their sides rough enough, joints can be made that will furnish a suitable foothold without the use of strips, and without chamfering. It is true, that in Rochester and Buffalo sand may have been used to some extent to keep the blocks apart, but that was only another way of doing what it is agreed had been done before. What Guidet did was to show that if stone were used with rougher side surfaces than those found in the old pavements, all artificial means of keeping the transverse joints open might be abandoned, and the requisite surface secured. This was simply carrying forward the old idea, and doing what had been done before in substantially the same way, but with better results. The change was only in degree and, consequently, not patentable. Clearly the re-issued patent cannot be sustained.

[552]

The decree is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[622]

NEW YORK GUARANTY AND INDEMNITY COMPANY, *Plff. in Errr.*,

v.

BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

(See S. C., 15 Otto, 622-625.)

Louisiana Act—invalid state bond—compromise.

1. The Louisiana Act No. 11, of 1875, prohibiting the Board of Liquidation from funding, under Act No. 3, of 1874, questionable and doubtful obligations of the State, is not in violation of the Constitution of the United States as impairing the contracts of the State.

2. The *bona fide* holder of an invalid state bond is not entitled to the benefit of a scheme of compromise which the State offers to the holders of its securities that are valid in the hands of the first taker.

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3. The State has the right to say, when it proposes a scheme for the compromise of its debts, what creditors shall be included.

[No. 233.]

Argued Mar. 21, 1882. Decided Apr. 17, 1882.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Messrs. **William W. Howe,** *John H. Kennard,* **William A. Butler,** *T. E. Stillman,* and *T. H. Hubbard,* for plaintiff in error.

Messrs. **James Lingan, Gustave A. Breaux,** and *John McEnery,* for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

[623]

This is a writ of error to the Supreme Court of Louisiana, and the federal question rests on the following facts:

On the 8th of March, 1869, the General Assembly of the State passed Act No. 116, of 1869, to authorize an issue of negotiable state bonds to aid in the construction of the Mississippi and Mexican Gulf Ship Canal. Special provision was made in the Act, for taxation, to meet any liability that might be incurred in this way. Bonds to the amount of $480,000 were put out, purporting on their face to have been issued under the authority thus granted, and the New York Guaranty and Indemnity Company, for all that appears to the contrary, became the *bona fide* holder of $250,000 of this amount.

On the 24th of January, 1874, Act No. 3, of 1874, was passed to provide for funding the obligations of the State by an issue, if necessary, of $15,000,000 of "Consolidated bonds of the State of Louisiana." To accomplish this a "Board of Liquidation" was created, with power to execute the new bonds and exchange them for old at the rate of sixty cents of the new for $1 of the old. If the Board rejected any bond offered for exchange, the holder could apply by petition to some proper court for relief, and if on that petition final judgment should be rendered in his favor against the Board, he would be entitled, on giving up his old bond, to get one of the new on the terms proposed.

On the 14th of March, in the same year, 1874, Act No. 55, of 1874, was passed, which purported to prohibit all state officers from levying or collecting any tax to pay the principal or interest falling due after January 1, 1874, of any of the state debt, unless such levy and collection was specially authorized by some law of the State subsequently adopted, and also prohibiting the setting apart of any funds in the Treasury for any such payment. The same law purported to take away from the courts of the State all power or jurisdiction to arrest or impede its operation by *mandamus,* injunction or otherwise.

On the 17th of March, 1875, Act No. 11, of 1875, was passed, to prohibit the Board of Liquidation from funding, under Act No. 3, of 1874, questionable and doubtful obligations of the State, "Until said bonds * * * shall first, by final decree of the Supreme Court of the State of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the Constitution of this State or of the United States, and for a valid consideration." In this Act the bonds issued in aid of the Mississippi and Mexican Gulf Ship Canal Company were specially designated as questioned and of doubtful validity.

[624]

After this Act was passed, the Guaranty and Indemnity Company, being desirous of funding its bonds under the provisions of Act No. 3, filed its petition in the Fifth District Court of the Parish of Orleans, praying that the bonds "Be decreed to have been issued in strict conformity to law, and not in violation of the Constitution of this State or of the United States, and that they be declared legal and valid obligations against the State of Louisiana, and issued for a valid consideration." No other judgment was asked than such an one as was necessary under Act No. 11, of 1875, to secure the benefit of Act No. 3, of 1874, the funding Act. This petition got, in due course of procedure, to the Supreme Court of the State, and it was there decided that the suit thus begun was not one for the recovery of the money due on the bonds, but was rather in the nature of an inquisition to determine whether the bonds in question were of the class which the State had determined to include in its funding scheme. For this reason the court held that, for the purposes of such an inquiry, the petitioner occupied no better position as a *bona fide* holder than he would if he had been the first taker. Because of this ruling, the present writ of error has been brought.

This statement of the case is sufficient, as we think, to show that the question below was not whether, in an action against the State, properly authorized, to recover the amount due upon the bond, Act No. 11 permitted the State to prove, as against a *bona fide* holder, that the bond was invalid, but whether the *bona fide* holder of an invalid bond was entitled to the benefit of the scheme of compromise which the State had offered to the holders of its securities that were valid in the hands of the first taker. Such being the case, no obligation of the original contract has been impaired. Every legal right which the original taker acquired when the bond was put out still remains. The Guaranty Company may enforce all such rights now in any appropriate manner. All the court below has said is, that as between the State and the first taker the bonds were not valid obligations and that, consequently, they are not entitled to the privileges of the funding laws. The obligation of the State to pay the bonds in money to the *bona fide* holders in accordance with the original promise still remains. The judgment, which has been rendered and which we are now reviewing, is no bar to any proper proceeding for that purpose. The suit which was authorized, and the suit which was actually begun, only related to the right of the holder to come into the compromise which the State offered to certain classes of its creditors. The judgment is, that the bonds do not belong to any of the designated classes. The question here is, not whether, if that inquiry were open to us, we should be of the same opinion, but whether the obligation the State is under to the Company has been impaired by Act 11, of 1875, as thus construed. We think the State had the right to say, when it proposed a scheme for the compromise of its debts, what creditors should be included. That, in our opinion, is all that has been done.

[625]

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It follows that the federal question was decided right below, and the judgment is, consequently, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[691] THE SWIFT AND COURTNEY AND BEECHER COMPANY, *Appt.*,
v.
UNITED STATES.

(See S. C., 15 Otto, 691-696.)

Commission on stamps—construction of statute.

1. Under the Act of July 14, 1870, ch. 255, proprietors of articles named in schedule C, who furnish their own dies, are allowed ten per cent commission on amounts over $500 of stamps purchased by them.
2. The rule, which gives determining weight to contemporaneous construction, put upon a statute by those charged with its execution, applies only in cases of ambiguity and doubt.
3. It is incumbent on the Government, in order to deprive one of his statutory right, not only to show facts from which an agreement to do so may be inferred, but an actual settlement of his claim based upon such an understanding.

[No. 266.]

Argued Apr. 4, 1882. Decided Apr. 17, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **George H. Williams**, for appellant.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellant filed its petition in the Court of Claims for the recovery of certain commis-
[692] sions, alleged to be due to it on purchases of proprietary stamps under the internal revenue laws.

It alleged that it was, during the period covered by the transactions set out, the proprietor, manufacturer and vendor of friction matches; that, as such, at the beginning of its business, it furnished to the Commissioner of Internal Reveuue its own die for stamps, to be used especially for its own proprietary articles; that, during said period, from time to time, and continuously on different days of each and every month, it sent to the Commissioner of Internal Revenue sums of money from $1,000 to $10,000 as suited its convenience, and that said commissioner transmitted to it stamps, as it needed and ordered; so that in the account between it and the commissioner as to said stamps the creditor side showed moneys received by the latter in certain sums and at certain dates, but showed the receipt of no sum less than $1,000, and the debtor side of said account showed that stamps were sent by the commissioner to the appellant in different sums and at different dates, but never in amounts less than $1,000.

It is further averred that upon the whole amount of stamps purchased, during the period referred to, it was entitled to a commission of ten *per centum* in money, amounting to $389,720.40, which the commissioner has refused to allow; and has allowed in lieu thereof $354,291.27 in stamps at their face value; insisting such to be the long established practice of the office, to which he must adhere, till changed by legislation or judicial decision. The appellant, in the petition, in reference to this practice, avers "That the allowances made to it from time to time between May 6, 1870, and December 24, 1878, have been in accordance with the uniform practice of said Internal Revenue Office from its organization, but petitioner avers that at different times prior to 1866 protests were made to the Commissioner of Internal Revenue by and on behalf of the manufacturers of friction matches against such a construction of the statute by him, by which only ten per cent commissions in stamps at their face value were allowed by him upon the amount of money paid by the purchasers, instead of ten per cent upon the whole amount of stamps purchased, and that such facts are and have always been known to petitioner."

It is also averred that the appellant gave the required security for a credit of sixty days upon [693] its purchase of stamps, as provided for in the Internal Revenue Act of June 30, 1864, 13 Stat. at L., 295, which enacted, "That the Commissioner of Internal Revenue may, from time to time, furnish, supply and deliver to any manufacturer of friction or other matches, cigar light or wax tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as may be judged necessary to secure payment therefor to the Treasurer of the United States within the time prescribed for such payment."

The defendant filed a general demurrer, which was sustained and judgment rendered dismissing the petition. To review this judgment the present appeal has been prosecuted.

The Act of July 1, 1862, section 102, to provide internal revenue, etc., 12 Stat. at L., 477, authorized the Commissioner of Internal Revenue to sell to and supply collectors, deputy-collectors, postmasters, stationers or any other persons, at his discretion, with adhesive stamps, upon the payment at the time of delivery of the amount of duties said stamps represent, and thereupon to allow and deduct from the aggregate amount of such stamps the sum of not exceeding five *per centum* as commission, with the proviso, "That any proprietor or proprietors of articles named in schedule C, who shall furnish his or their own die or design for stamps, to be used especially for his or their own proprietary articles, shall be allowed the following discount, namely: on amounts purchased at one time of not less than $50 nor more than $500, five *per centum;* on amounts over $500, ten *per centum.*"

By the amendatory Act of March 3, 1863, 12 Stat. at L., 714, the word "commission" was substituted for "discount" in this proviso.

This section as thus amended was re-enacted as section 161 of the Act of June 30, 1864, 13 Stat. at L., 294, and schedule C enlarged so as to include friction matches. P. 302.

The Act of July 14, 1870, section 4, 16 Stat. at L., 257, continued in force the same provision, directing the proprietors of articles named in schedule C, who shall furnish their own dies, [694] shall be allowed commissions, on amounts over $500, "ten *per centum* on the whole amount purchased."

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It will be perceived, on examining this legislation, that while, in respect to adhesive stamps sold, other than those to proprietors of articles named in schedule C from their own dies for their own use, the rate of the commission to be allowed to the purchaser shall not exceed five *per centum*, but within that limit, is subject to the discretion of the Commissioner of Internal Revenue; while, in respect to those of the latter class, including stamps on friction matches, the rate is fixed by the statute itself, and in the form as expressed in the Act of 1870, where the amounts of purchases are over $500, the commissions are established at ten *per centum* on the whole amount purchased. So that, while in the sale of adhesive stamps of the former description, in the exercise of his discretion as to the rate, the commissioner might lawfully provide that the commissions should be paid only in stamps at their face value; yet, in the sale of stamps to proprietors of friction matches, he was not authorized to diminish the commission by any such regulation but was required to allow and pay in money, ten *per centum* calculated on the amount of stamps purchased, on all sales exceeding $500 in amount.

In the present case the appellant was allowed commissions not on the whole amount of stamps furnished him nor in money, but in stamps at their face value, calculated on the amount of money paid by him. The difference between the amounts, resulting from these two modes of calculating and allowing commissions, is the amount sought to be recovered by the appellant.

There is no serious question raised as to the proper construction of the Internal Revenue Acts upon the point, it being virtually admitted that the contention on the part of the appellant upon the provisions of the statutes is correct.

It is met, however, in the opinion of the Court of Claims, and in argument on behalf of the Government here, that the contrary construction, to pay these commissions in stamp at their face value, has been acted upon by the Commissioner of Internal Revenue from the beginning; has been acquiesced in by purchasers and dealers; and has never been changed by Congress; and as an official practice has thus acquired the [695] force of law; or if not, then, at least, it was a course of dealing, well known to the appellant, and acquiesced in, by which it accepted stamps at their face value in payment of its commissions, which it is not at liberty now to open, question and reverse.

The right construction of the Internal Revenue Acts, upon the point of the allowance of commissions to dealers in proprietary articles, purchasing stamps made from their own dies and for their own use, is too clear to bring the case within the first alternative. The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt. *Edwards* v. *Darby*, 12 Wheat., 210; *Smythe* v. *Fiske*, 23 Wall., 382 [90 U. S., XXIII., 50]; *U. S.* v. *Moore*, 95 U. S., 763 [XXIV., 589]; *U. S.* v. *Pugh*, 99 U. S., 269 [XXV., 323].

And we are of opinion that the averments of the petition, admitted by the demurrer, do not bring it within the operation of the principle invoked in the second alternative. The case made by the petition is not that of successive and independent purchases of stamps, settled for, at the time. when the commissions given by the law were paid by the commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps; and new dealings, of the same character, but separate as to each instance, had, afterwards, upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account. Money was paid on account of stamps furnished or to be furnished, in sums differing in amount, but not less in any case than $500; and stamps were supplied in varying quantities, as ordered, without reference to corresponding and equivalent payments of cash; a bond with satisfactory security, in pursuance of law, having been given and accepted, to secure the Government against loss, in consequence of purchases on credit. The dealing is, undoubtedly, evidence that the appellant was willing to purchase stamps, to be paid for by a credit in account, in lieu of cash for commissions; but it does not prove that he was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the Government, in order to deprive him of his statutory right, not only to show facts, from which [696] an agreement to do so might be inferred, but an actual settlement based upon such an understanding. The allegations in the petition, in our opinion, do not constitute such a bar to the recovery sought, and the demurrer interposed should not, therefore, have been sustained.

For this error, the judgment of the Court of Claims is reversed and the cause remanded, for further proceedings in accordance with law; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 24.

CRANE IRON COMPANY, *Plff. in Err.* [701]
v.
AMOS HOAGLAND ET AL., Comrs. of Drainage, etc..

CHARLES STUART WURTS ET AL., *Plffs. in Err.*,
v.
SAME.

(See S. C., 15 Otto 701-703.)

Writ of error to State Court—practice on—supersedeas.

1. Where a cause in a State Court has been appealed to the Court of Errors of the State and there affirmed, and the *remittitur* sent to the lower State Court, the writ of error is properly directed to the latter court, because at that time the record had been transmitted to it and was then in its possession; but at any time before the *remittitur*, the writ may be directed to the state Court of Errors.

2. In those States where the highest court does not have possession of the record, and does not render a judgment, but decides questions certified by the inferior courts, and merely issues a rescript directing the latter what judgment to render, the case would, perhaps, be different.

3. Where the final judgment was rendered on July 18, 1881, being the judgment rendered by the Court of Errors, and the writ of error was not issued and

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served until the 28th of October, more than sixty days thereafter, it was too late to operate as a *supersedeas*.

[Nos. 1217, 1218.]

Submitted Apr. 10, 1882. Decided Apr. 17, 1882.

IN ERROR to the Supreme Court of the State of New Jersey.

On motion.

The case is sufficiently stated by the court.

Mr. **Jehiel G. Shipman,** for plaintiff in error.

Mr. Justice **Bradley** delivered the opinion of the court:

The controversy in these cases arose out of an assessment of benefits for the drainage of lands in New Jersey. It was decided by the Supreme Court of that State December 1, 1880. The Court of Errors and Appeals affirmed the judgment on the 18th of July, 1881, and the record was remitted August 31, 1881. On receiving the *remittitur* on that day, the Supreme Court entered a rule ordering it to be filed, and the cause to be proceeded with according to law. Writs of error from this court to the Supreme Court of New Jersey were allowed and bonds approved October 27, 1881, and were filed in the clerk's office of the latter court October 28, 1881. The writs of error were properly directed to the Supreme Court because, at that time, the record had been transmitted to that [702] court, and was then in its possession. See, *Atherton* v. *Fowler*, 91 U. S., 148 [XXIII., 267]. But at any time before the *remittitur* the writs might have been directed to the Court of Errors and Appeals, because the judgment of that court was the final judgment in the cause, and until the *remittitur* was made, it had possession of the record in contemplation of law. It is that judgment which is the object of revision here. The plaintiff in error insists that the action of the Supreme Court, on receiving the *remittitur*, was the final judgment. But this is not correct. Such action was not necessary to the jurisdiction of this court. A number of instances might be cited in which, without any *remittitur*, a writ of error from this court has been directed to the Court of Errors of New Jersey. This was the course in the noted cases of *New Jersey* v. *Wilson*, 7 Cranch, 164, and *Bridge Proprs.* v. *Hoboken Co.*, 1 Wall., 116 [68 U. S., XVII., 571], and in the late case of *New Jersey* v. *Yard*, 95 U. S., 104 [XXIV., 352.]

In those States where the highest court does not have possession of the record, and does not render a judgment, but decides questions certified by the inferior courts, and merely issues a rescript directing the latter what judgment to render, the case would, perhaps, be different. But in New Jersey the record itself, or a transcript which stands for the record, is removed to the Court of Errors and Appeals, and a regular judgment is there rendered. For certain purposes, as in England on writs of error from the House of Lords, the judgment of the inferior court pending proceeding in error, is supposed to be in existence. Action upon it may be brought and, on failure to give proper bail in error, execution may be issued. But for all other purposes, when a writ of error goes to an inferior court, the Court of Errors and Appeals obtains possession of the cause and renders a formal judgment therein. If the judgment of the inferior court is reversed, the Court of Errors usually renders such judgment as ought to have been rendered, though it has the power to direct the court below what judgment to give. It is only necessary to open a book of New Jersey reports, containing decisions of the highest court, to ascertain its jurisdiction in this behalf. Thus in 2 Zabriskie, 623, is a judgment in the case of *Demarest* v. *Hopper*, reversing the [703] judgment of the Supreme Court in an action of ejectment, and rendering judgment for the plaintiff; and in the same book, page 725, is another judgment of reversal in the case of *Hopper* v. *Hopper*, coupled with a judgment for the demandant in an action of dower, with a direction to the Supreme Court to award a writ of inquiry to assess the damages, and to issue execution therefor.

We think that the final judgment in these cases was rendered on the 18th day of July, 1881, being the judgment rendered by the Court of Errors and Appeals; and that as the writs of error were not issued and served until the 28th of October, more than sixty days thereafter, they were too late to operate as a *supersedeas;* and, therefore, the rules to show cause must be discharged.

Discharged, accordingly.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—135 Mass., 33.

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA, *Plff. in Err.*,

v.

ALBERT SCHEFFER ET AL., as Executors and Trustees of CHARLES SCHEFFER, Deceased.

Jurisdiction over state judgment.

Where no further proceedings were had in the State Court, except a verdict and motion for new trial overruled, and no judgment was entered on the verdict, there is no final judgment and this court has no jurisdiction of the case.

[No. 273.]

Argued Apr. 11, 1882. Decided Apr. 24, 1882.

IN ERROR to the Supreme Court of the State of Minnesota.

The case is sufficiently stated by the court.

Messrs. **Isaac N. Arnold Van H. Higgins** and *Leonard Swett*, for plaintiff in error.

Mr. **E. C. Palmer,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

A majority of the court is of opinion that there has been no final judgment below in this case. Upon the trial in the District Court of Ramsey County, a verdict was rendered in favor of the plaintiff. Before any judgment was entered on this verdict, a motion was made for a new trial. This motion was overruled and thereupon an appeal was taken to the Supreme Court of the State from "The order * * * denying the application for a new trial." The judgment on this appeal is as follows: "Pursuant to an order of

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court duly made and entered in this cause on the 21st of March, 1879, it is here and hereby determined and adjudged that the order herein appealed from, to wit: of the District Court of the Second Judicial District, sitting within and for the County of Ramsey, be and the same hereby is in all things affirmed." Then follows a judgment for costs in the Supreme Court. No further proceedings appear to have been had in either court, and the record, consequently, shows a verdict and motion for new trial overruled, but no judgment on the verdict. *It follows that the writ of error must be dismissed.*

So ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[77] LEWIS HAMMOCK ET AL., *Appts.*,

v.

FARMERS' LOAN AND TRUST COMPANY.

(See S.C., 15 Otto, 77-94.)

Power of judge to appoint a receiver—construction of state statute—redemption from mortgage sale—railway mortgage.

*1. A judge of a circuit court in Illinois cannot, in vacation, appoint a receiver of a railroad corporation. The possession of a receiver so appointed is not that of the court.

2. Section 49 of chapter 37, Rev. Stat. Ill. 1874, p. 332, is to be construed as if there was no comma between the words "to hear and determine motions" and the words "to dissolve injunctions." Punctuation is no part of a statute.

3. The Statutes of Illinois, giving the right to redeem mortgaged lands sold under decree, do not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty and franchises, so mortgaged, should be sold as an entirety, and without the right of redemption given by statute.

4. The chattel mortgage statute is inapplicable to an ordinary railway mortgage.

[No. 164.]

Argued Dec. 5, 1881. Decided Apr. 24, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

Statement of the case by *Mr. Justice* **Harlan:**

To secure the payment of its bonds, aggregating the sum of $660,000, and issued for the purpose of raising money as well for its mining and manufacturing business, as for the completion and maintenance of its road, the Chester and Tamaroa Coal and Railroad Company, an Illinois corporation, executed, on the 12th day of April, 1871, a deed of trust containing such conditions and provisions as are usually inserted in railway mortgages. It embraced the entire road of the grantor, then made or thereafter to be constructed, from Chester, in Randolph County, to Tamaroa, in Perry County, together with the right of way, and all the real and personal property, then owned or subsequently acquired, and used or appropriated for railroad purposes; also, its privileges and franchises for holding, operating and maintaining the road, together with any income derived from the property, not applied to the construction and repair of the road, the conduct of the business of the company, its current expenses, or the purchase of equipments, tools and machinery. Subsequently, the mortgagor company was consolidated with the Chester and Iron Mountain Railroad Company, the consolidated company taking the name of the Iron Mountain, Chester and Eastern Railroad Company.

From the first day of October, 1874, until the 5th day of June, 1876, the railroad and other property included in the mortgage was in the possession of D. C. Barber, as receiver, in a creditor's suit instituted by one Maxwell in the Circuit Court of the United States for the Southern District of Illinois. On the last named day, [78] in conformity with a stipulation signed by the attorneys in that suit, Barber was discharged as receiver, without being required to render an account of his acts, and the bill of Maxwell was dismissed at his costs. The present transcript does not show the grounds upon which Barber was appointed receiver, perhaps for the reason, disclosed in an affidavit, that the bill filed by Maxwell was not to be found among the files of his suit.

On the day succeeding Barber's discharge as receiver, Hammock, assignee of two judgments, aggregating less than $1,000, with returns of no property, against the Iron Mountain, Chester and Eastern Railroad Company, and suing in behalf of himself and such judgment creditors as might unite with him, presented his bill in equity to the Judge of the Circuit Court of Perry County, Illinois, in vacation, "at Chambers," in Washington County, Illinois, praying the appointment of a receiver of the railroad company and its effects, with authority to hold and administer the same under the direction of the court, and out of the net income arising therefrom to pay the judgments held by complainant and others. The only grounds assigned in the bill for a receiver are: the indebtedness of the company, the returns against it of *nulla bona*, its insolvency, and its refusal to pay the judgments outstanding against it. The Judge, without notice to the company, appointed Thomas M. Sams, receiver, and made an order requiring the railroad company, its officers, servants and agents, to deliver to him all of its property and effects of every kind, upon his presenting the certificate of the clerk of the court that he, Sams, had filed his bond, as receiver, in the penal sum of $15,000, with certain named sureties (Barber, then recently the receiver in Maxwell's suit, being one of them), conditioned that he would account for all property and effects coming to his hands, as receiver, under the order and direction of the court. By the terms of the order, Sams was authorized to use and operate the railroad, and pay all expenses incurred in its operation as far back as October 1, 1874, nearly two years prior to his appointment. The bill of Hammock, with the fore- [79] going order indorsed thereon, was filed in the clerk's office on the 7th of June, 1876, and Sams, having executed the required bond, took possession of the railroad and all the property and effects of the company.

On the 13th day of June, 1876 the Farmers' Loan and Trust Company—without knowledge, as we infer from the record, of the suit in the state court—commenced proceedings in the court below for the foreclosure of the before mentioned mortgage, and to obtain a decree for

*Head notes by *Mr. Justice* HARLAN.

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the sale of all the property embraced by it, in satisfaction of the interest and principal of the bonds thereby secured, the whole amount of which had, under the terms of the mortgage, become due by reason of the continued default of the company in meeting the interest as it matured. The bill, verified under date of June 2, 1876, and the supplemental bill charged that the consolidated company was insolvent; that its entire property was inadequate for the payment of the mortgage debt; that divers persons by defaults and collusions with Barber, late receiver had obtained judgments against the company, and had levied or were about to levy upon its rolling stock and other movable property, with the intent to deprive the trustee and those it represented of the benefit of their security; that the company itself was a party to that fraudulent collusion; that the bill of Maxwell had been dismissed, and Barber, as receiver, discharged, to the end that such levies might be made; that these facts had only then come to complainant's knowledge; and that if time was taken to give notice of an application for an injunction and a receiver, great and irreparable loss would ensue to the trustee and those whose interests it represented.

Upon the filing of the original and supplemental bill, the Federal Court appointed a receiver, with direction to take possession of the mortgaged property, and at the same time, issued an injunction against judgment creditors interfering with or taking possession of it. A few days thereafter the Farmers' Loan and Trust Company filed in the office of the clerk of the Perry Circuit Court its petition to be made a party defendant in the suit of Hammock, also its answer and cross-bill therein, and its petition, accompanied by proper bond, for the removal of the suit into the Circuit Court of the United States. An application was subsequently made by the complainant to the Judge of the State Court, in vacation, to discharge Sams, as receiver, upon the ground, among others, that he was illegally appointed in the vacation of court. That motion was denied, and thereupon the Company made an application, based upon the before mentioned papers, to the Judge, in vacation, to be admitted as a party to Hammock's suit. But in reference to that application, the Judge declined to take action, upon the ground that he could not legally do so in the vacation of his court.

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On the 19th day of July, 1876, the Farmers' Loan and Trust Company, having filed a certified transcript of the proceedings in the Hammack suit, including copies of all the foregoing papers, moved the Federal Court to take jurisdiction of that suit. That motion, *Mr. Justice* Davis and the District Judge concurring, was sustained, and an order made that the Hammack suit proceed in that court as if originally commenced there, and be consolidated with the mortgage suit. It was further ordered that Sams surrender to the receiver of the Federal Court all property in his hands, as receiver, and pay over all funds by him in that capacity collected. That order was immediately executed, and thenceforward, the mortgaged property was in the actual and exclusive custody of the Federal Court by its receiver.

At the November Term, 1876, of the state court a motion was made by Hammock to strike from the files of his suit the answer, cross-bill, and the petition for the removal of the cause, previously filed therein by the Farmers' Loan and Trust Company, upon the ground that they had been so filed without leave of court, and because that Company was not a party to the suit. That motion was sustained on the 4th day of May, 1877, and all of those papers were stricken from the files.

Nothing occurred in the progress of the consolidated cause which need be referred to, except that the court, in response to a suggestion by the Attorney-General of the State, and by consent of parties (all the judgment creditors interested in Hammock's suit having appeared, in some form, in the consolidated cause, saving, however, all questions as to the jurisdiction of the Federal Court) an order was made, under which the receiver surrendered to county collectors the rolling stock and personal property of the company in his hands to be levied on and sold. It was levied on and sold for state, county, school and other taxes assessed in Randolph and Perry Counties upon the property in the receiver's hands for the years 1873 to 1876, inclusive. That portion sold in Randolph County brought $6,053.92, which, after deducting costs of sale, satisfied in full the taxes due in that county on the real and personal estate of the railroad company, and all of the tax on its capital stock, except $999.93. The sale in Perry County netted the sum of $5,165, which satisfied in full the taxes due and collectible in that county on the company's real and personal estate, and all of the capital stock tax, except $852.39.

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A final decree was made on the 11th day of January, 1878, for the sale of the mortgaged property, including the franchises of the company, as an entirety, to satisfy the principal and interest due on the bonds, then amounting to $940,625.40. The sale was directed to be made "Without appraisement and without reference, and not subject to any law or laws of Illinois allowing redemption from mortgage sales, but absolutely without redemption." Henry C. Cole became the purchaser of the entire property at the sum of $50,000. The sale was subsequently confirmed and a deed made to the purchaser, who was let into possession on the 26th day of April, 1878.

On the 17th day of October, 1878, the Wabash, Chester and Western Railroad Company, an Illinois corporation, to which had been conveyed by Cole, after the confirmation of his purchase, the railroad and other property sold under the foregoing decree, represented to the court below, by petition, that Hammock and other judgment creditors, parties to the consolidated cause, had then recently caused Sams, still pretending to be the legal receiver of the property sold in the foreclosure suit, to advertise the same for sale, without redemption, under an order or decree of the Perry Circuit Court, made in Hammock's suit after the execution of the final decree in the foreclosure suit, to wit: on the 11th day of May, 1878; and that unless restrained, such sale would be had in disregard of the decree of the Federal Court. Upon this petition a temporary injunction was issued, and Hammock, Sams and others, were

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required to show cause why they should not be attached for contempt of court.

Upon final hearing, the temporary injunction of October 17, 1878, was, by an order entered on the 17th day of January, 1879, perpetuated, and Sams, Hammock, and their associates were enjoined from taking any steps in execution of the decree of the Circuit Court of Perry County, from selling any part of the railroad property theretofore sold under the decree of the court below, and from interfering with it in any manner.

The present transcript embraces two appeals, one from the several orders and the final decree under which the mortgaged property was sold, and the other from the final order or decree of January 17, 1879.

Mr. **James K. Edsall**, for appellants.

Messrs. **Robert E. Williams** and *Ashbel Green*, for appellee.

Mr. Justice **Harlan**, after stating the facts, delivered the opinion of the court:

Whether the state court or the Circuit Court of the United States first acquired control and possession of the property conveyed in trust by the Chester and Tamaroa Coal and Railroad Company, is the first question to which our attention will be directed. If, when seized under the order of the Federal Court, it was in the custody of the state court, by its receiver, then, it is claimed, all the proceedings in the former, so far at least as their regularity and validity depended upon possession of the property, was in violation of the established principles governing courts of concurrent jurisdiction in their relations to each other. *Taylor* v. *Carryl*, 20 How., 583 [61 U. S., XV., 1028]; *Freeman* v. *Howe*, 24 How., 450 [65 U. S., XVI., 749]; *Hagan* v. *Lucas*, 10 Pet., 400; *Peck* v. *Jenness*, 7 How., 612.

The solution of this question, it must be conceded, depends upon the authority which the Judge of the State could lawfully exercise in vacation; for if, under the laws of the State, he had no power in vacation to appoint a receiver of the property and effects of a railroad company, the order under which Sams took possession was a nullity, and his custody was not that of the court which he assumed to represent. Counsel for appellants admits that, except to the extent expressly permitted by statute, the Judge of the state court could not exercise any judicial functions in vacation. Such, beyond question, is the established doctrine of the Supreme Court of Illinois. In *Blair* v. *Reading*, 99 Ill., 609, the court said: "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation, except such as are expressly authorized by statute." In *Devine* v. *People*, 100 Ill., 290, the language of the court was that "Judges can exercise no judicial functions in vacation, except such as they are especially authorized to do by statute." *Keith* v. *Kellogg*, 97 Ill., 147.

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It is stated by counsel, and our examination verifies the correctness of the statement, that in the few cases in which the Statutes of Illinois make special provision for the appointment of a receiver, the power is conferred upon the court, and not upon the judge thereof. R. S. Ill., 1874, sec. 25, p. 290; *Id.*, sec. 24, p. 553; *Id.*, sec., 88, p. 613.

But the action of the Judge of the state court is attempted to be sustained under the 49th section of chapter 37 of the Revised Statute of Illinois enacted in 1874, p. 332, which is in these words:

"Sec. 49. *Powers of judges in vacation:* The several judges of said courts (judges of the circuit courts, and of the Superior Court of Cook County) shall have power, in vacation, to hear and determine motions, to dissolve injunctions, stay or quash executions, to make all necessary orders to carry into effect any decree previously rendered, including the issuance of necessary writs therefor, to order the issuance of writs of *certiorari*, to permit amendments in any process, pleading or proceeding in law or equity. Any order so made shall be signed by the judge making it, and filed and entered of record by the clerk of the court in which the proceeding is had, and from the date of such filing shall have like force and effect as if made at a regular term of such court. The pendency of a term of court in another county than that in which the suit is pending, or about to be commenced by the same judge, shall not prevent the granting of such order. L. 1871-2, p. 504, secs. 1, 2."

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The succeeding section, sec. 50, provides that "No such order shall be granted in vacation, unless the party applying therefor shall give the opposite party or his attorney of record reasonable notice of his intended application."

We are of opinion that the authority of a judge, in vacation, to appoint a receiver of a railroad corporation cannot be derived from the foregoing section. This precise question has not, that we are aware, been determined in the Supreme Court of Illinois. But what fell from that learned tribunal in the cases already cited leads us to believe that when the question is directly presented for determination it will rule, in accordance with the view we have just expressed.

In the argument before us, attention was called to the fact that between the words, in section 49, "to hear and determine motions" and the words "to dissolve injunctions," there appears a comma; and that was, to some extent, relied on as showing that a judge in vacation could hear and determine motions of every kind, not simply those relating to matters specially defined in that section. While the comma after the word "motions," if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute. *Lord* Kenyon, *Ch. J.*, in *Doe* v. *Martin*, 4 T. R., 65, said that courts in construing Acts of Parliament or deeds should read them with such stops as will give effect to the whole. Sedgwick, Stat. and Const. L., 2d ed., 223, *n. a;* Bouv. Law Dic., 347, 402. The general rule is well illustrated in Barrington, Statutes, 4th ed., 438, *n. x; Price* v. *Price*, 10 Ohio St., 316; *Cushing* v. *Worrick*, 9 Gray, 385; *Gyger's Estate*, 65 Pa., 311; and *Hamilton* v. *The Hamilton*, 16 Ohio St., N. S., 432. In the last case it was said: "But for the punctuation, as it stands, there could be little doubt but that this was the meaning of the Legislature. Courts will, however, in the construction of statutes, for the purpose

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[85] of arriving at the real meaning and intention of the law-makers, disregard the punctuation or repunctuate, if need be, to render the true meaning of the statute." Apart from the general rule upon this subject, there are reasons why the punctuation of section 49 should not control its interpretation. It will be observed that, at the close of that section, is a reference to the laws of Illinois passed at the session 1871-2 of the General Assembly, indicating that section 49 was, in part at least, founded upon an existing or previous statute. One of the rules prescribed by the revision of 1874 for the construction of statutes is that "The provisions of any statute, so far as they are the same as those of any previous statute, shall be construed as a continuation of such prior provisions, and not as a new enactment." R. S. Ill., 1874, p. 1012, sec. 2. Turning, then, to the previous law—the Act of March 7, 1872—we find no comma after the word "motions," but the statute reads, "to hear and determine motions to dissolve injunctions," etc. Sess. L. Ill. 1871-2, p. 504. We are not prepared to hold that the power of a judge in vacation to exercise the important judicial function of appointing a receiver of a corporation, charged with public functions, was conferred by the introduction of a comma into the Revised Statutes of a State, where the established doctrine is that no judicial functions can be exercised by a judge, in vacation, except where expressly or specially authorized by statute.

But if, as the argument of counsel would imply, a judge, in vacation, may, by virtue of the powers conferred by section 49, hear and determine every matter presented by way of motion, and not simply motions relating to the dissolution of injunctions, to staying or quashing executions, to orders carrying into effect decrees previously rendered, to writs of *certiorari*, or amendments in process, pleading, or proceedings in law and in equity—which are the subjects specifically referred to in that section—we are satisfied that an application to dispossess those in control of a railroad corporation, whose road is declared by the Constitution of the State to be a public highway, and to place its entire property in the hands of a receiver, is not, within the meaning of the statute, a motion which may be heard and determined by the judge out of term time. It is rather a proceeding involving the exercise of the highest discretion and embracing a very wide field of judicial investigation and inquiry. The injustice which may result from the exercise of such a power in vacation, is well illustrated in this case by the fact that, while the Judge of the state court did not doubt his power, out of term time, to oust those in the control of a public corporation and appoint a receiver, with authority to carry on the business of a carrier of freight and passengers, he could not, under his view of the statute, determine, in vacation, an ordinary motion to become a party to the suit, made by the [86] trustee in a first mortgage or deed of trust covering the entire property and franchises in question.

It results from what has been said, that the seizure of the property by the receiver of the Federal Court was not an interference with the possession of the state court, or in derogation of its authority. The property was not, in any legal sense, then in the custody of the state court, or of any officer by it appointed. It was, when seized by order of the Federal Court, in the custody of one who assumed, without lawful authority, to represent the state court, but who in fact proceeded under a void order of a judge in vacation.

The Circuit Court of the United States, having thus lawfully acquired possession of the property, prior to any action in reference to it by the state court, the former had the right to retain possession for all the purposes of the suit for foreclosure of the mortgage of the 12th of April, 1871. Under the final decree of foreclosure it was, as we have seen, sold in satisfaction of the mortgage debt, leaving nothing to be applied on the claims of Hammock and other judgment creditors.

We proceed now to inquire whether, in the orders or decrees under which the property has been disposed of, any error has been committed to the prejudice of the substantial rights of appellants. On their behalf it is suggested that the decree was erroneous in that it required the sale of the real estate, covered by the mortgage, to be made absolutely and without the right of redemption allowed by the local statutes in decretal sales of mortgaged lands. The question is one of great importance, and has received, upon our part, all the consideration its importance demands.

By the Statutes of Illinois, in force when the mortgage was made, real estate, taken in exe- [87] cution, if susceptible of division, is required to be sold in such quantities as may be necessary to satisfy the execution and costs. R. S., Ill., 1869, Gross, ed., p. 397, sec. 11. And it is made the duty of the sheriff, or other officer, selling lands or tenements, by virtue of an execution, to give to the purchaser or purchasers, a certificate, in writing, describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when, if the property be not redeemed, the purchaser will be entitled to a deed. *Id.*, p. 380, sec. 15.

It is further provided that the defendant, his heirs, executors, administrators or grantees, might, within twelve months from the sale of his lands or tenements, under execution, redeem the same by paying to the officer who sold it, for the benefit of the purchaser, the sum of money which may have been paid on the purchase, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of ten *per centum* from the time of sale. *Id.*, sec. 16. The right was given to any judgment creditor, after the expiration of twelve, and within fifteen months from the sale, to redeem the property by paying the amount paid by the purchaser, such payment entitling him to have a resale under the execution upon his own judgment. *Id.*, secs. 17, 18. This right, given to judgment creditors, could be exercised as to the whole or any part of the lands or tenements sold, provided the redemption is made in the like distinct quantities, or parcels, in which the same are sold. *Id.*, sec. 19.

If the lands or tenements so sold are not redeemed by the defendant or by a judgment

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creditor within fifteen months from the sale, it is the duty of the officer making it to execute a deed to the purchaser. *Id.*, sec. 25.

The provision in reference to redemption from mortgage sales is that, "Where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may re- [88] deem lands sold under any such decree in the same manner as is prescribed for the redemption of lands in like manner sold upon executions upon judgments issued at common law." *Id.*, p. 382, sec. 27.

The history of the right of redemption, as given by the laws of Illinois, may be traced in Statutes of 1825, p. 151; Rev. Stat., 1829, p. 85; *Id.*, 1833, p. 374; *Id.*, 1845, p. 302. When originally conferred as to sales of land under execution, there were no railroads in that State, and very few, if any, when it was first (in 1845) extended to decretal sales of mortgaged lands.

In *Brine* v. *Ins. Co.*, 96 U. S., 627 [XXIV., 858], we held that the right of redemption given by the Illinois Statutes constituted a rule of property which the Federal Court, sitting in equity in that State, is bound to recognize and enforce. The property there in controversy was a lot of ground in the City of Chicago, owned by a private person, and which had been conveyed in trust to secure a loan of money by an insurance company.

When the mortgage by the Chester and Tamaroa Coal and Railroad Company was made, there was in force a general statute, passed in 1855, conferring upon any railroad company organized or incorporated under the laws of Illinois, the power to mortgage all or any portion of its property and franchises to secure the payment of money borrowed to aid in the construction, completion or operation of its road. Gross, ed., p. 533; L. of Ill., 1855, p. 304.

And by the State Constitution adopted in 1870, railroads thereafter constructed were declared to be public highways, free to all for the transportation of their persons and property thereon, under such regulations as should be prescribed by law. Art. 11, sec. 12.

The question is, therefore, presented, for the first time in this court, whether the statutory provisions giving the right to redeem, as well lands or tenements sold under execution, as mortgaged lands sold under decrees of courts of equity, has any application to the real estate of a railroad corporation which, with its franchises and personal property, is mortgaged, as an entirety, to secure the payment of money borrowed for railroad purposes.

Undoubtedly, in all such cases, the chief value of the real estate comes from the right or fran- [89] chise to hold and use it, in connection with the personal property of the corporation, for railroad purposes. It is equally true, not only that the bonds, to secure which the mortgage is given, could not be negotiated in the markets of the country did not the mortgage embrace, as an entirety, the franchises and all the real and personal property of the corporation used for railroad purposes, but that a sale of the real estate, franchises and personal property, separately, might, in every case, prove disastrous to all concerned, and defeat the ends for which the corporation was created, with authority to establish and maintain a public highway.

It is, nevertheless, contended by counsel that, as the statute attaches to decretal sales of mortgaged lands the right of redemption, that right exists as well in cases of mortgages, covering the entire property and franchises of a railroad corporation, as where the land is owned and used by private persons for exclusively private purposes.

In other words, for to that result the argument would lead: the court, in decreeing the sale of the mortgaged property and franchises of a railroad corporation, has no discretion, if the corporation or its judgment creditors so demand, except to order the sale of the real estate separately, in parcels when susceptible of division, and subject to redemption, leaving the franchises and personal property to be sold absolutely and without redemption. Thus one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property. If the railroad company should redeem the real estate, it could not employ it to any valuable end; for its franchise, to be a corporation and to use its real estate for railroad purposes, will have been sold to another, and there is no right under the statute to redeem the franchise, it not being real estate, but, rather, a power or privilege, partaking more or less of sovereignty, and which may not be exercised without a special grant. 1 Redfield, Law of Railways, 94. Consequences equally injurious would flow even from the sale, as an entirety, of the real and personal property and franchises of the corporation, if the right was reserved to the company, or its creditors, to redeem the realty. Individuals or associations desiring railroad property would not pur- [90] chase when they could not know, until the expiration of fifteen months from the confirmation of the sale, whether they were to have all for which they might bid. During that period of uncertainty, the property would necessarily depreciate in value for the want of repairs and betterments essential to its preservation. A construction of the statute which leads to such results ought not to be adopted, if it can be avoided. And we think it can be, without contravening the spirit of the statute or the public policy which suggested its enactment.

We are of opinion that mortgaged real estate, to which is attached the right of redemption, is such and such only as could at law be levied upon and sold on execution. The right does not extend to real estate of a public corporation, mortgaged with its franchise to acquire, hold and use property for public purposes, and whose chief value depends upon its being so used and appropriated. The difference between real estate, so acquired, held and used, and real estate which may, at law, be sold under execution, is well illustrated in *Gue* v. *Tide Water Canal Co.*, 24 How., 262 [65 U. S., XVI., 636]. In that case it appeared that an execution was levied upon a house and lot, sundry canal locks, a wharf-boat and several lots, the property of the canal company, chartered under the laws of Maryland for the construction of a canal from Havre de Grace, in that State, to the Pennsyl-

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vania line. The property so levied upon was admitted to be necessary to the uses and working of the canal, which was a public improvement, and a great thoroughfare of trade. It was of little value apart from the franchise to take tolls, and if sold separately under execution, the franchise to take tolls, said *Ch. J.* Taney, speaking for the court, would not have passed to the purchaser. It was, consequently, ruled that the real estate there in controversy could not be seized and sold under *fieri facias* and, consistently with the rights of stockholders and creditors, could not be sold separately from the franchise from which was derived its chief value.

The laws of the State of Illinois having permitted the Chester and Tamaroa Coal and Railroad Company to mortgage its franchises and property as an entirety, it was, we think, the duty of the court to decree the sale, as an entirety, of the whole property, so mortgaged, [91] without reference to the local statutes upon the subject of redemption. Real estate, thus mortgaged with the franchises of the company, is of necessity relieved from the operation of that statute. There may possibly be cases in which real estate, of an ordinary kind, owned and mortgaged by a railroad corporation, cannot be sold by decree of court, except subject to the right of redemption; as when it is not used for necessary railroad purposes, or when it is mortgaged separately from its franchises and other property. What may be the operation of the statute in such cases we do not now decide. All that we do decide is, that, by the laws of Illinois, the real estate, franchises and other property of a railroad corporation, mortgaged as an entirety, may be sold as an entirety, under the decree of a court of equity, without any right of redemption in the mortgagor or in judgment creditors as to such real estate.

The construction we have given to the statute is not inconsistent with the provision of the State Constitution which declares that "The rolling stock and all other movable property belonging to any railroad company or corporation in Illinois, shall be considered personal property, and shall be liable to execution and sale in the same manner as personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale." Art. 11, sec. 10.

When the mortgage of April 12, 1871, was executed, there was no levy upon the movable property of the company and, consequently, the rights of the mortgagee were superior to any lien arising from any subsequent levy, by execution, upon the movable property. The State Constitution did not forbid the creation, by mortgage, of such superior lien.

So far from that section militating against the construction we have given the statute, it rather fortifies it. It furnishes a strong implication that the right to levy an execution upon the movable property of a railroad corporation was intended to be restricted to that kind of corporate property. It is a partial modification of the general rule that the property of a railroad [92] corporation, used for necessary railroad purposes, cannot be seized and sold under an execution at law.

The next question to be considered is that which relates to the distribution of the proceeds of the sale of the mortgaged property. The argument, upon this branch of the case, in behalf of the appellants, briefly stated, is this: that, by the laws of the State in force when the mortgage of April 12, 1871, was executed, a mortgage of personal property, certified by a justice of the peace in the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where the mortgagor resides, shall, "If *bona fide*, be good and valid from the time it is so recorded, for a space of not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor, provided, that such conveyance shall provide for the possession of the property so to remain with the mortgagor." Gross, ed. 1869, p. 67; that more than two years having expired, after the execution of the mortgage of April 12, 1871, and before the suit for foreclosure—the property mortgaged remaining in the possession of the railroad company until seized in Hammock's suit—the judgment creditors, by virtue of their suit in the state court, acquired a lien, at least upon the rolling stock and other movable property covered by the mortgage, superior to any claim on the part of the mortgagee and those it represented; and that since the personal property was surrendered and the proceeds of its sale applied in discharge of taxes upon the real and personal property and capital stock of the corporation, the court, upon principles of equity, should have appropriated to the judgment creditors so much of the proceeds of the decretal sale as was equal to the taxes on real estate paid from the proceeds of the sale of personal property by the collectors.

We are of opinion that the statutory provisions in regard to chattel mortgages (Gross, ed., p. 66) do not embrace mortgages by a railroad corporation, in connection with its real estate and franchises, of its personal property used and appropriated for railroad purposes. The statute provides a mode by which possession of the mortgagor of personal property should not defeat the mortgage, *viz.*: the acknowledgment and record of the mortgage. The acknowledg- [93] ment is required to be made before a justice of the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where he resides. These directions are wholly inapplicable to a railroad company, whose line of road might pass through several justices' districts and extend through several counties. And, if the construction contended for be sound, a railway mortgage security, so far as the personalty of the corporation is concerned, would cease to be of any value after the expiration of two years from its execution, unless the mortgagor, before the expiration of that time, takes possession of it; the authority to do which, in advance of the maturity of the mortgage debt and when there has been no default of the corporation in meeting its interest, would render the negotiation of the mortgage bonds difficult if not impossible. Clearly the chattel mortgage statute has nothing to do with the present case.

What we have said renders it unnecessary to consider the other branches of the proposition last stated, and disposes of all questions of im-

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portance upon the merits, arising on the appeal from the final decree ordering a sale of the mortgaged property, and directing a disposition of the proceeds arising therefrom.

We have seen that the Farmers' Loan and Trust Company, in vacation, filed in the clerk's office of the state court a petition to be made a party to the creditor's suit of Hammock, with an answer and cross-bill, and also a petition for the removal of that suit into the Federal Court, accompanied by the required bond; and that the Judge of the state court, in vacation, declined to act upon the petition to be made a party, or to recognize the right of removal. Whether the cause was, under these circumstances, properly docketed in the court below, as one legally removed under the Act of Congress, or whether the Federal Court exceeded its authority in the final order of injunction, made on the 17th day of January, 1879, upon the petition of the Wabash, Chester and Western Railroad Company, are questions about which there is a difference of views among those members of the court who heard the cause and participated in its decision. We, therefore, forbear to make any expression of opinion upon them; and it is not at all important to the parties that we should do so. The object of the suit in the state court was to reach the property of the railroad company, and from it or from the income to be derived therefrom obtain satisfaction of the judgments against the corporation. Whether that suit was or not, under the Act of Congress, legally removed into the Federal Court, the entire property, we have seen, passed lawfully into the custody of the latter court, and by proceedings therein, to which the judgment creditors were parties and by which they are concluded, it has been all sold, and the proceeds adjudged to be rightfully distributed in satisfaction of the mortgage debt. It would, consequently, serve no valuable purpose for the appellants, were it now decided that the suit commenced in the state court was not legally removed into the Federal Court, or that the order of January 17, 1879, was beyond the power of that court to make. [94]

The decrees appealed from are, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[224] JULIA P. WARREN, Executrix of MOSES WARREN, Deceased, *Plff. in Err.*,

v.

JOSEPH M. STODDART.

(See S. C., 15 Otto, 224-230.)

Performance of contract—damages.

1. One party to a contract is not obliged to fulfill it when the other has refused to perform it and has put an end to it.
2. Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.

[No. 274.]

Argued Apr. 11, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Statement of the case by *Mr. Justice* **Woods**:

The defendant in error, J. M. Stoddart, was a book publisher, carrying on business in the City of Philadelphia, under the name of J. M. Stoddart & Co. In 1878 he undertook to reprint and sell in the United States a new edition, consisting of twenty-one volumes of the Encyclopædia Britannica, which A. & C. Black, of Edinburgh, Scotland, were then bringing out.

Stoddart's plan was to sell the work by subscription only; the subscriptions were to be obtained by agents and canvassers, to whom certain territory was to be allotted. It was expected that the work would be printed and published at the rate of about three volumes per year.

Moses Warren, the plaintiff in error, was an agent in the City of Chicago for the sale of subscription books, that is, books sold only by subscription. On February 24, 1877, Stoddart and Warren entered into a contract in writing, whereby Stoddart appointed Warren his general agent for the sale of his American reprint of the encyclopædia in certain territory therein named. The contract was as follows: [225]

"PHILADELPHIA, Feb. 24, 1877.

Agreement entered into this day between J. M. Stoddart & Co., of Philadelphia, Pa., and Moses Warren, of Chicago, Ill.:

The said J. M. Stoddart & Co. agree to give the said Moses Warren a general agency for the sale of the American reprint of the Encyclopædia Britannica in the following territory."

Here follows a description of the territory, consisting of several States and parts of States, and a list of the prices at which Stoddart & Co. agreed to furnish Warren with the books in various styles of binding. The contract then proceeds:

"Said J. M. Stoddart & Co. also agree to give to said Moses Warren the exclusive right to sell the Encyclopædia Britannica within the above named territory, during such time as said Warren shall faithfully perform his part of the agreement as hereinafter stated.

1. Said Warren agrees to use his best endeavors to promote the sale of the———Britannica in the above-assigned field.

2. To send to J. M. Stoddart & Co. a weekly report of the number of orders taken the week previous.

3. To fill no orders outside of his assigned field.

4. To leave no volumes with booksellers, to sell or display in their stores.

5. To furnish no volumes at less than the regular retail price.

6. To remit on the 7th day of the month one half the amount of monthly statement for previous month, and to remit on the 26th day of the month the remaining one half of said monthly statement.

Witness our hand and seal on the day and date above mentioned.

J. M. STODDART & Co. [SEAL.]
MOSES WARREN. [SEAL.]

Warren at once entered upon the performance of this contract, and by April 20, 1878, had obtained and reported to Stoddart subscriptions for 1,733 sets of the work, and had delivered to subscribers a portion of the volumes of the work [226]

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which had been issued up to that time; on an average less than four volumes to each subscriber.

In the latter part of the year 1877 or early in 1878 the Scotch publishers of the encyclopædia and the house of Scribner & Armstrong, of New York, formed a plan to issue in this country an edition of the encyclopædia, to compete with the reprint of Stoddart, by striking off sheets from the original stereotype plates and engravings of the Scotch edition and sending them to this country to be bound and sold by subscription, on substantially the same plan as that which had been adopted by Stoddart to put his reprint into circulation.

Sometime in May, 1878, Scribner & Armstrong commenced negotiations with Warren, which resulted in a contract between them, dated May 14, 1878, by which Scribner & Armstrong constituted Warren their agent, with the exclusive right to sell, until its publication was completed, their edition of the encyclopædia within the same territory substantially as that mentioned in the contract between Stoddart and Warren, and agreed to furnish him with copies of the encyclopædia at prices therein named. Warren stipulated on his part, that from and after the date of the contract he would not canvass for any other encyclopædia, or any other edition of any encyclopædia, but that he "Should have the privilege of completing orders already taken for the reprint edition of Stoddart to all subscribers therefor."

After the making of this contract, Warren refused to canvass further for Stoddart's reprint edition. Whereupon Stoddart refused to furnish Warren, except for cash on delivery, the books with which to fill the orders which he had obtained for Stoddart's reprint edition.

Upon this point the evidence was as follows: On June 5, 1878, Warren sent an order to Stoddart requesting him to forward a certain number of books to be furnished subscribers, to which Stoddart replied by letter, dated June 6, 1878, that "As to all future orders, for the present, they will be filled when cash accompanies the orders."

On June 10, 1878, Warren wrote to Stoddart as follows: "I am desirous of delivering reprint [227] fast as possible on my orders heretofore taken for same. If my orders for stock are filled they shall be paid for according to contract. Do you intend to fill my orders on that basis?"

To this letter Stoddart replied by telegraph, as follows: "Will fill order when cash is received in accordance with our letter of June 6." There is no evidence that Stoddart ever refused to fill a cash order, nor was it pretended that Warren after that date, ever sent an order to Stoddart with the cash to pay for the books ordered.

After the refusal of Stoddart to supply Warren with the books except for cash, the latter induced 1,253 of the subscribers to Stoddart's reprint edition to exchange the subscription to the reprint for a subscription to the Scotch edition, and he claimed that he expended in obtaining their exchange an average of $4 for each subscription, making a total of $5,012. He also claimed that the Stoddart reprint volumes taken back from said subscribers were worth $12,206 less than the amount paid by him to Stoddart for them, and less than what he could sell them for in the market. Warren also claimed that he lost his profits on four hundred and eighty orders which were not exchanged, amounting to the sum of $20,073.

This suit was brought by Stoddart to recover of Warren the sum of $2,976,53 for books furnished him to supply his subscribers. It was not disputed by Warren that the amount sued for was due and owing from him to Stoddart. But Warren, by way of set-off, averred the making of the contract with Stoddart above set forth, and claimed that he had been damaged by the refusal of Stoddart to perform the contract, in the sum of $30,000.

Upon the trial of the case in the circuit court, the Judge instructed the jury that the defendant's claim for damages could not be allowed as against the plaintiff's claim in the suit, and that the plaintiff was entitled to a verdict for the full amount sued for by him and admitted to be due, namely: $2,976.53. The jury returned a verdict accordingly, on which judgment was entered. This writ of error is prosecuted to reverse that judgment.

Messrs. **Van H. Higgins,** *Leonard Swett* and **Isaac N. Arnold,** for plaintiff in error:

The agreement is to furnish the work for every order taken and reported, whether the agency continued or not. The right under the contract attached as fast as Warren procured subscribers and reported them. Upon reporting the subscriptions to Stoddart, by the terms of the agreement, Warren might then order the books, so far as they had been published, and Stoddart was bound to furnish them, by the terms of the agreement. Now, where a right of action has vested in a party, on account of his having partially performed a contract, such right of action would not be devested by a subsequent default, if there had been one.

Taylor v. *Laird*, 1 Hurl. & N., 266; *Stubbs* v. *Holywell R. Co.*, L. R., 2 Exch., 311; 2 Chit. Cont., 11th Am. ed., 848, see, *note; Moore* v. *Caruthers*, 17 B. Mon., 678; *Cunningham* v. *Morrell*, 10 Johns., 203; *Bean* v. *Atwater*, 4 Conn., 4; *McLure* v. *Rush*, 9 Dana, 64; *White* v. *Atkins*, 8 Cush. (Mass.), 367.

The simple point now appears to be, that as Warren did not agree to canvass for any specified time, that he has not violated any express terms of the contract. Can the court say that there is any implied contract which Warren has violated? The question to be determined is, whether the contract upon which the action is brought involves an implied agreement on the part of Warren, that he will continue to canvass the territory given him for any specified time, and whether he has so violated such implied agreement as to forfeit all his rights under the contract sued on.

See, *Stirling* v. *Maitland*, 5 Best & S., 840; *Rhodes* v. *Forwood*, English Reports, Moak's *Notes*, Vol. 15, 130; *Coffin* v. *Landis*, 46 Pa., 426; *Peacock* v. *Cummings*, 46 Pa., 434.

As to all new business, either principal or agent could terminate the agency at the pleasure of the party; as to all business of the agency which had been partially executed, the principal could not terminate the agency without indemnifying the agent, if there had been an agency as to the sale of the books to Warren.

Story, Ag., sec. 466; Dunlap's Paley, Ag., 183, 184, and *notes; U. S.* v. *Jarvis*, Daveis' D. C., 274; *Butler* v. *Smith*, 35 Miss., 459.

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Now, Warren never proposed to terminate the entire contract between himself and Stoddart. He only proposed to fill and perform the contract so far as the parties had acted under it; but as to future or new business, he did not propose to act further under the contract. And if the agent was not bound to continue in the service of his principal, Warren did only what he had a perfect right to do.

He owed no allegiance to Stoddart, other than the allegiance called for by the contract. He was bound to serve, or canvass faithfully, while he did canvass. But he was not bound to canvass longer than his interests would be promoted by it, or longer than he thought best. He did not forfeit all his rights by failing to do what Stoddart required him to do, but what he had not agreed to do.

If counsel are correct in their view of this case, then the court below was clearly wrong in its construction of the contract in controversy.

But it is believed that if there had been an express contract in this case, that Warren should continue to canvass during the entire publication of the work, that it would not have constituted a condition precedent, so as to defeat Warren's right of action under it. So soon as Warren obtained a single subscriber under that contract, and reported that subscriber to Stoddart, he (Warren) had done all that he was required to do to entitle him to order the entire work to fill that particular subscription, as fast as it might be published. He could order the first volume immediately, and every succeeding volume as it was published; and in case Stoddart refused to deliver such volume, Warren could have immediately sued Stoddart for a breach of the contract.

Taylor v. *Laird*, 1 Hurl. & N., 266; *Stubbs* v. *Holywell R. Co.*, L. R., 2 Exch., 311, and cases cited *ante; Phila., etc., R. R. Co.* v. *Howard*, 13 How., 308; *Tyler* v. *Ames*, 6 Lans., 280.

That one refusal was sufficient to entitle Warren to maintain this action, seems to be established by the case in 13 How.; by the case of *Hochester* v. *DeLatour*, 20 Eng. L. & E., 157; *Cort* v. *Ambergate R. R. Co.*, 6 Eng. L. & E., 230; *Howard* v. *Daly*, 61 N. Y., 362; 3 Pars. Cont., 188, 189; see, 2 Smith, L. C., 53, and cases there cited; see, *Fox* v. *Kitton*, 19 Ill., 519; see cases cited in 83 Ill., p. 49; *Lyon* v. *Culbertson*, 4 Eng. Law Rep., Moak's *Notes*, 406; *Roper* v. *Johnson*, L. R., 8 C. P., 167. Stoddart's refusing to deliver the books, except upon the terms of payment in cash, when, by the terms of the contract, he was entitled to a credit for the same, was equivalent to an absolute refusal, because Stoddart could not be justified in imposing new terms and conditions to his contract to sell the books to Warren. He might just as well have required him to pay double the price as to have imposed any other new terms or conditions to the contract. Refusal by Stoddart, except upon a condition Warren was not bound to accept, has the same effect as an absolute refusal, and the plaintiff was entitled to treat it as an entire repudiation by Stoddart of his agreement.

Per Steele, *J.*, in *Safford* v. *Kinsley*, 40 Vt., 506 and 513; to the same effect is the case of *Martin* v. *Eames*, 26 Vt., 476-481, per Isham, *J.*

The leading case in this country upon the subject of a breach of a continuous contract like this, is the case of *Masterton* v. *Brooklyn*, 7 Hill (N. Y.), 62. The doctrine of this case has been recognized and affirmed in this court.

See, *Philadelphia, etc., R. R. Co.* v. *Howard*, 13 How., 308-344; *U. S.* v. *Speed*, 8 Wall. 85 (75 U. S., XIX., 452); see, also, *Hochster* v. *DeLatour*, 20 Eng. L. & E., 157; *Chamber of Commerce* v. *Solitt*, 43 Ill., 519; *McPherson* v. *Walker*, 40 Ill., 372; *Wolf* v. *Willitts*, 35 Ill., 95-102; *Fox* v. *Kitton*, 19 Ill., 533; *Roper* v. *Johnson*, L. R., 8 C. P., 167, Eng. Rep., 4 Moak's Notes, 397.

A refusal to perform by Stoddart was equivalent, for the purpose of sustaining an action for the breach of a contract, to an actual performance by Warren. The damages, however, in such case will be different. In the case of actual and complete performance, the damage is a contract price; in case of a refusal to perform, the damage is the value of the work actually performed and the actual loss sustained by the plaintiff by not being permitted to perform the rest of the contract.

Phila., etc., R. R. Co. v. *Howard*, 13 How., 308; *Clark* v. *The Mayor*, 4 N.Y., 339; *Derby* v. *Johnson*, 21 Vt., 18-22; *Shannon* v. *Comstock*, 21 Wend., 457; *Clark* v. *Marsiglia*, 1 Den., 317.

The cases are collected on the subject in Smith, L. C., p. 53. In our case the measure of damages would seem to be the difference between the contract price and the subscription price, less the cost of delivering the books and collecting the pay for the same, to which should be added the depreciation upon the four volumes delivered, by reason of their being a broken set. The real measure of damages to which Warren is entitled, would seem to be the benefits or profits which he would have received from the actual performance of the contract by Stoddart.

1 Sedg. Dam., 7th ed., top, p. 177, marg. p. 74; *France* v. *Gaudet*, L. R., 6 Q. B., 199; *Bories* v. *Hutchinson*, 18 C. B. (N. S.), 445; *McHose* v. *Fulmer*, 73 Pa., 365; *Van Arsdale* v. *Rundel*, 82 Ill., 63.

Damages can be recovered for the loss of a subcontract;

True v. *International Tel. Co.*, 60 Me., 9;

And for the expense of performing a subcontract;

Hinde v *Liddell*, L. R., 10 Q. B., 265;

They can be given in actions on contract where notice is previously given of the subcontract.

Booth v. *Spuyten Duyvil Rolling Mill Co.*, 60 N. Y., 487; *Die Elbinger* v. *Armstrong*, L. R., 9 Q. B., 473; *Ill. Cent. R. R. Co.* v. *Cobb*, 64 Ill., 128-143; *Griffen* v. *Coleman* (114 Eng. C. L.); 4 H. & N., 265; *Smeed* v. *Foord*, 102 Eng. C. L., 600.

No counsel appeared for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

The only question in the case is whether or [228] not the instruction of the court to the jury, to the effect that, on the facts, the plaintiff in error was entitled to no damages, is correct. This will depend upon the construction which is to be put on the contract between Stoddart and Warren, of February 24, 1877.

The contract is indefinite as to the time during which it was to continue in force. It is probable that the parties supposed the contract would continue until the twenty-one volumes

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were published or at least until the territory named in the contract had been thoroughly canvassed But no time was mentioned in the contract nor did it make any provision with respect to the unfilled orders in case of its termination before the publication was completed, and we are left to construe it and settle the rights of the parties under it as they have made it.

The complaint of Warren is, not that Stoddart refused to furnish him with the books necessary to fill the orders he had taken, nor that he refused to furnish the books at the price fixed by their contract. His sole complaint is that Stoddart refused to furnish the books on a credit of about thirty days, which Warren insists the contract provided for, and demanded the cash

He claims that after he had stopped canvassing for the reprint of Stoddart, and had made a contract with and entered into the service of a rival publisher of the same work, and had begun in the interest of the rival publisher a canvass of the same territory which had been allotted to him exclusively by his contract with Stoddart, he had the right, upon the refusal of the latter to furnish the books on thirty days' credit, to obtain a cancellation of the orders he had taken for Stoddart's reprint, and substitute therefor orders for the rival edition, and charge the expense of the substitution to Stoddart.

We think it entirely clear that he had no such right. There was no express provision in the contract between Warren and Stoddart which required the latter to furnish the books on credit, and we think that the provision of the contract that Warren should remit on the [229] seventh day of the month one half the amount of monthly statement for previous month, and on the twenty-sixth day the remaining half, was not continued in force after Warren had terminated the contract, and abandoned the service of Stoddart under it.

Although the contract fixed no time during which it was to continue in force, yet we think that when either party terminated it, the other was no longer bound by its provisions. It gave Warren the exclusive right to sell the books within certain territory, and by it Stoddart agreed to furnish them to him at stipulated prices and on stipulated terms. On his part Warren agreed to use his best endeavors to promote the sale of the work in the field exclusively assigned to him. These clauses of the contract were reciprocal, and the performance of one was the consideration for the performance of the other. When Warren ceased to canvass for Stoddart's books he had no right to demand the books at the prices or the terms mentioned in the contract.

But even conceding that the provision referred to remained in force after Warren had declined to go on under the contract, it does not follow that upon the refusal of Stoddart to give Warren a credit of thirty days upon the books, the latter could obtain a cancellation of the orders he had taken for Stoddart's reprint and substitute orders for the Scotch edition and charge the expense of so doing to Stoddart. The claim that upon a simple refusal of Stoddart to allow him thirty days' credit upon the books as he ordered them, he could go on and substitute other orders for another book and charge Stoddart with the expense of substitution, amounting to $30,000, is, to say the least, a remarkable one. The damage sustained by Warren because he did not get the thirty days credit which he thinks he was entitled to is not to be measured in that way.

The rule is, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. *Wicker* v. *Hoppock*, 6 Wall., 94 [73 U.S., XVIII., 752]; *Miller* v. *Mariner's Church*, 7 Greenl. (Me.), 56; *Russell* v. *Butterfield*, 21 Wend., 304; *Ketchell* v. *Burns*, 24 Wend., 457; *U. S.* v. *Burnham*, 1 Mason, 57; *Taylor* v. *Read*, 4 Paige, 571. [230]

The course pursued by Warren was not necessary to his own protection. He might either have paid Stoddart cash for the books required to fill his orders, or have allowed Stoddart to fill the orders and divide the profits of the business between them, on equitable terms The law required him to take that course by which he could secure himself with the least damage to the defendant in error. Instead of this he, unnecessarily, destroys a valuable interest of Stoddart in the business in which they were jointly engaged, and then seeks to charge him with the great expense and damage which he brought on himself in so doing.

If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders. As no proof was given to show that Warren had ever paid cash for any books ordered by him, he would only be entitled, in any view of the case, to nominal damages.

But, as we have already said, Stoddart was not bound by the contract to furnish the books on credit after Warren had gone over to a rival publisher and refused to go on under his contract. We think, therefore, that the court below was right in saying to the jury that Warren was entitled to no damages at all.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

BOARD OF SUPERVISORS of the COUNTY OF ALBANY, *Plff. in Err.*. [316]

v.

EDWARD N. STANLEY

(See 15 Otto, 316-318.)

Modifying judgment—taxation of bank shares—new trial.

1. This court may modify its order for judgment absolute in a case, so far as to permit a trial in the circuit court on issues not decided by that court in the former trial.

2. The shares of a national bank are not relieved from taxation because a single bank of the State has been favored by mistake or by intention.

3. If the assessors, in levying a tax, habitually and intentionally or by some fixed rule, assessed the shares of national banks higher in proportion to their actual value than other moneyed capital gen-

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erally, then there is ground for recovery of such tax by such banks, paid by them, as illegally assessed, and a new trial as to that should be granted, when such ground of recovery is alleged and has not been disposed of on the former trial.

[No. 847.]

Submitted Apr. 10, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is sufficiently stated by the court. See, *ante*, 1044.

Messrs. **Matthew Hale** and **Wager Swayne**, in support of motion.

Mr. Justice **Miller** delivered the opinion of the court:

Since the opinion in this case was delivered, a suggestion has been made to modify the order of the court for judgment so far as to permit a trial in the circuit court, on issues not decided by that court, in the former trial.

The conclusions of law found by the circuit court, if sound, disposed of the whole case, and the facts found were sufficient to meet that view. As our opinion differed in one important point from that on which the circuit court acted, it became a question whether the facts found were still sufficient to dispose of the whole case.

[317] In a bill of exceptions, signed by the Judge and found in the record, it is said: "There was evidence given in the case upon the subject of other allegations contained in the complaint, but the court did not pass upon such allegations, as the following admission and the decision of the court herein duly show." Then follows a stipulation, signed by counsel for each party, that the case was decided solely upon the invalidity of the New York Statute, and that other allegations contained in the complaint had not been passed on.

Under these circumstances, we should have little difficulty in directing the court below to grant a new hearing as to such issues, if we could find in the record any material issue in regard to which the court made no finding.

Attention has been called to the following language, which is a part of each count in the complaint:

"And the plaintiff also says, upon information and belief, that the assessment of said shares of stock in said banking association by said board of assessors, was at a greater rate than was assessed by said board of assessors upon shares of stock in a bank organized under the laws of the State of New York, located in said Sixth Ward, and was at a greater rate than was assessed by said board upon other moneyed capital in the hands of individual citizens of the State of New York, and that for these reasons said assessment of said shares of stock, and the levy of tax thereunder, were illegal and void."

If this is a *sufficient* allegation of a distinct ground of recovery, it seems just that the plaintiff should have a hearing on it, as the defendant took issue on it and it has not been disposed of.

We have, however, much difficulty in finding a solid ground of recovery in this statement. It is divisible into two parts: 1. That the shares of the national bank were assessed at a greater rate than was assessed on shares of a bank organized under the laws of the State of New York, located in said Sixth Ward.

We are quite clear that the shares of the plaintiff are not relieved from taxation because a single bank of the State has been favored by mistake or by intention.

For errors of this kind the Statutes of New York provide the correction, which should be taken in time, and we should be very reluctant to hold that when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated. [318]

The other branch of the allegation is, that the assessment of the shares of the Exchange Bank "Was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York."

If by this it is supposed that a few individual instances may be shown, of partial assessments favoring citizens, as compared with the national banks, we think it is erroneous. But if it is intended to allege that, apart from the question of the right of the shareholder to deduct for his debts—a question which, in this case *was disposed of* and was in issue—it can be proved that the assessors habitually and intentionally or by some rule prescribed by themselves or by some one whom they were bound to obey, assessed the shares of the national banks higher in proportion to their actual value than other moneyed capital generally, then there is ground for recovery, and a hearing as to that should be granted.

As we have said, it may be well doubted if plaintiff intended to allege this or to rely on proving it.

But as it is a question of pleading under the New York Code, and as no injustice can occur by leaving the matter to the court below, *the judgment will be so far modified as to permit the court below, in its discretion, to hear evidence on that point and if necessary, to allow an amendment of the pleading to present it properly.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[328]

AMERICAN LIFE INSURANCE COMPANY, *Plff. in Errr.*,
v.
TOWN OF BRUCE.

(See S. C., 15 Otto, 328-333.)

Estoppel by recitals in bonds.

Where the recitals in town bonds imported that nothing remained to be done, in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers, the town is estopped, as against a *bona fide* holder, to plead that conditions of which purchasers had no notice have not been performed.

[No. 41.]

Argued Apr. 20, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. G. L. Fort, Thomas P. Bonfield,

NOTE.—*Recitals in negotiable bonds or securities; evidence of the facts recited; estoppel by; recitals in.* See *note* to Mercer Co. v. Hackett, 68 U. S., XVII., 548.

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Henry Hazlehurst and *Isaac Hazlehurst*, for plaintiff in error.

Messrs **Philip Phillips**, *Samuel Richolson* and *W. Hallett Phillips*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court.

This action involves the liability of the Town of Bruce, in the State of Illinois, upon sundry interest coupons, attached to bonds, in the ordinary form of negotiable municipal bonds. On the first day of December, 1870, and by the constituted authorities of the Town, they were delivered to the Plymouth, Kankakee and Pacific Railroad Company in payment of a subscription to the capital stock of the Kankakee and Illinois River Railroad Company. The latter company, after organization, became consolidated with the former, and hence the delivery to the consolidated company. The bonds upon their face recite that they are "Issued by virtue of the law of the State of Illinois, entitled 'An Act to Incorporate the Kankakee and Illinois River Railroad Company,' approved April 15 1869, and 'An Act to Fund and Provide for Paying Railroad Debts of Counties, Townships, Cities and Towns, in force April 16th 1869;' and we, the supervisor and town clerk of the Township of Bruce, do hereby certify that a special election was held in said Township on the 7th day of September, 1869, at which special election a majority of the legal voters, participating at the same, voted 'for [329] subscription' to the capital stock of the Kankakee and Illinois River Railroad Company in the sum of $25,000 and to issue bonds of said Township therefor; and said special election was by the proper authorities, then and there duly declared carried 'for subscription,' and that all the other requirements of the law in relation to said special election were duly complied with."

The Act of April 15, 1869, is the charter of the railroad company. By the 16th section thereof it is made the duty of the supervisor or clerk of any town or township, declaring by a majority of its voters in favor of subscription to the capital stock of the railroad company, to make the subscription, receive the proper certificates and execute bonds therefor, which shall be delivered to the president or secretary of said railroad company for the use of said company, and shall be a pledge upon the revenue of said territories respectively. Sess. Laws Ill 1869, Vol. 3, p. 1.

The coupons in suit, before their maturity, to wit. on the 19th June, 1871, together with the bonds to which they are severally attached, were purchased by plaintiff in error from one Alexander Whillden, the lawful and *bona fide* holder thereof, for the sum of $9,500 cash in hand paid. Neither Whillden nor the Insurance Company had any notice, at the time, of any irregularity, invalidity or informality in the making issuing or delivery of the bonds.

It is not seriously disputed, either in the pleadings or in argument, that the Acts of Assembly referred to in the bonds gave ample authority for subscription by the Town to the capital stock of the Kankakee and Illinois River Railroad Company, to be paid for in bonds of the Town, provided a majority of legal voters, at an election previously called and held for that purpose, expressed their approval of such subscription and its payment in that mode But the contention of the Town is: 1. That, by the 7th section of the Act of April 16, 1869, it is provided that "Any county, township, city or town shall have the *right*, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been com- [330] plied with." 2. That, in pursuance of the authority thus given, the Town voted to make a subscription of $25,000, to be paid for in bonds, subject to the following conditions, distinctly set forth in the notice under which the election was held, and assented to by the railroad company, *viz.:* that the road be so constructed as to pass through the Town, making Streator a point in a northwesterly direction towards Bureau Junction; that a depot be located and maintained in the Town of Bruce; that the bonds be delivered in sums of $1,000 for every mile of road graded, as the work progresses, and $1,000 for every mile of ties laid, and the balance when the road-bed is ready for the iron; and that no further calls or assessments shall be made upon the Town or upon the subscription to stock over the amount aforesaid; *Provided, nevertheless*, That the subscription be void and of no effect unless an agreement, by the railroad company for said iron and rolling stock with responsible parties, shall be made on or before one year from the day of the election, and the railroad company shall have formed satisfactory arrangements to connect said railroad with some eastern terminus. 3. That the conditions thus prescribed have never been complied with in these respects; more than one year elapsed after the election and yet no agreement had been made on or before September 7, 1870, by the original or consolidated company, with any party for the iron or the rolling stock of the railroad; the road was never so constructed as to pass through the Town of Bruce; it was not constructed when the bonds were issued and has never been constructed at any time since; no depot has ever been located or maintained in the Town: the ties were never laid for any one mile of the railroad within the Town; and no part of the railroad for the line of railroad of the Kankakee and Illinois River Railroad Company, or of the original line of the original Plymouth, Kankakee and Pacific Railroad has ever been constructed.

These facts are set out in detail in the special plea of the Town. As against a *bona fide* holder, for value, of the bonds and their cou- [331] pons, do they constitute a defense? Or, to state the question more distinctly: can the Town, after the bonds have been signed, sealed and delivered by its constituted authorities to the railroad company, and have passed into the hands of *bona fide* holders for value, escape liability by showing that the conditions or some of them imposed by popular vote have not been complied with upon the part of the railroad company?

The statute did not make it obligatory on the Town to impose conditions, upon the performance of which its liability should depend. It conferred simply the right to do so, leaving

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the Town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute, the Town could issue and deliver bonds for the subscription in advance of the construction of any part of the road. But when conditions were prescribed, good faith, and the obligations which everywhere arise out of negotiable securities, required—if the Town intended to rely upon them—that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals, that the Town had exercised its statutory right to impose conditions upon its liability. The officers, both of the Town and the railroad company, knew, however, that bonds could not have been negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the Town and the officers or agents of the company, cooperated in putting out bonds negotiable in form and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals, full of everything necessary to induce the public to buy the bonds. The statement, on the face of the bonds, that they were issued by virtue of the Statutes of April 15, 1869, and April 16, 1869—the first of which contains *an absolute requirement that the bonds be issued and delivered upon the subscription being voted*, while the second gives the *right*, but does not make it imperative, to impose conditions—and the further statement that the people had voted for subscription *and to issue township bonds therefor*, fairly imported that [332] nothing remained to be done in order to make the bonds binding obligations upon the Town in the hands of *bona fide* purchasers. Under these circumstances, the Town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions, the fact of the existence of which was withheld from the public for one of two reasons, either to facilitate their negotiation in the markets of the country, or in reliance upon the railroad company meeting the prescribed conditions. It should not now be heard to make a defense inconsistent with the representations contained in the recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed.

But this conclusion, it is contended, is in the face of the express declaration in the Act of April 16, 1869, that subscriptions or donations made and bonds issued, upon conditions, Shall not be valid and binding until such conditions precedent shall have been complied with.' And in support of that contention counsel cite *Eagle* v. *Kohn*, 84 Ill., 292, in which case one of the Justices dissented and another did not sit. That case involved the liability of the Town of Eagle upon certain coupons of bonds issued to the same railroad company. The defense was there, as here, non-compliance with certain conditions which had been attached by popular vote to the subscription. The court, construing the before mentioned Act of April 16, 1869, held that there was *no want of power* to make the subscription and to issue bonds; that, if the Town so willed, *the subscription could be made and bonds issued in advance of compliance with any conditions imposed by popular vote;* that, aside from the statute, innocent purchasers for value would enjoy the protection accorded to *bona fide* holders of negotiable paper, and would not be affected by non-compliance with such conditions; that such holders could not be required to take notice of the conditions nor of any resolution relating to them upon the records of the railroad company; but that, in view of the express provision of the statute that the bonds should not be "valid and binding until such conditions precedent shall have been complied with," non-compliance therewith is a good defense, even against purchasers in good faith for value. The decision in that case was made several years after [333] the bonds had been put on the market, but being a construction of a local statute, it is insisted that the Federal Court is bound to accept it as controlling in the present case. We waive discussion as to the soundness of the conclusion reached by the state court, or any extended examination of the authorities bearing upon the general question, whether the Federal Court is concluded by the construction given by the state court to a local statute, under which rights have accrued to citizens of other States before that construction was given. We do this because the present case is distinguishable from *Eagle* v. *Kohn* in this: that it does not appear, from the report of the latter case, that the Town had, by the recitals in its bonds, estopped itself from asserting, as against a *bona fide* holder, the non-performance of conditions imposed by popular vote. Had the Town of Eagle represented, in express words, upon the face of the bonds, that no conditions whatever were prescribed by the people, or that the subscription was unconditional, the state court would not, we suppose, adjudge that the Town, as against a *bona fide* holder, could take shelter behind the statutory provision in question. In the present case, the Town of Bruce did not make, in express terms, a representation of that character. But, in effect, by the recitals in its bonds, it did represent to the public that the bonds were issued in all respects in conformity to law, and that nothing remained to be done which was essential to its liability thereon. The Town having power, under the statute, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, what was said in *Brooklyn* v. *Ins. Co.*, 99 U. S., 870 [XXV., 418], may be repeated here: "It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise."

The judgment is reversed, with directions for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[334]

EMILY SULLIVAN ET AL., *Plffs. in Err.*,

v.

H. BURNETT ET AL.

(See S. C., 15 Otto, 334–342.)

Missouri law as to aliens—intention to become citizen—law not retrospective.

1. The law of Missouri of 1865 conferred the same capacity of acquiring, holding and alienating real estate as is enjoyed by citizens of the United States upon aliens residing in this country who had made a declaration of intention to become citizens of the United States, and those, whether they had made such declaration or not, who resided in that State.

2. The Act of 1855, of that State, declared that an alien who did not reside in Missouri or in this country, with an intention to become a citizen of the United States, and who could not, therefore, inherit, might, within a limited period, sell and convey to one who could take and hold.

3. The Act of 1872 is not retrospective, and is applicable alone to future acquisitions, by aliens, of real estate in Missouri.

[No. 225.]

Argued Mar. 15, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated in the opinion of the court. The following are the statutes therein referred to:

Gen. Statutes of Missouri, 1865, title XXVIII., chapter 110, p. 448.

[335] Sec. 1. All aliens residing in the United States, who shall have made a declaration of their intention to become citizens of the United States by taking the oath required by law, and all aliens residents of this State, shall be capable of acquiring real estate in this State by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States.

Sec. 2. It shall be lawful for every alien who, except for his alienage, would be capable of acquiring real estate by devise or descent from any person thereafter dying, capable of holding at the time of his death real estate in this State, to sell and convey the same in the manner provided by law for the conveyance of real estate, any real estate which he may acquire by virtue of this section, to any other person capable of holding real estate by virtue of the laws of this State; and such sale and conveyance when executed and delivered in the manner provided, shall have the effect to pass all the title to any real estate which such alien may have acquired, to the same by descent or devise.

Sec. 3. All such sales and conveyances shall be null and void, unless made in good faith within three years next after the final settlement of the estate of the ancestor or devisor; provided any such real estate be in litigation between such alien and any other per[illegible]; then such real estate or so much thereof as shall have been in litigation, shall be sold and conveyed within three years after the termination of such litigation.

Sec. 4. When any such real estate is or shall be held under any lease, or any grant or devise of any estate other than fee simple, to any person other than such alien, or charged with the liability for any debts, expenses, the education, support or maintenance of any person, and such lease, grant, devise or charge is or shall be, by or under any person, under or through whom such alien does or shall derive title to such estate, the three years within which, under this chapter, a sale may be validly made of such estate by such alien or his representatives, shall not be deemed to have commenced before the determination of every such charge, liability, leasehold or other estate of, or in favor of, any such person aforesaid other than such alien, nor before the final settlement of the estate of any such person aforesaid, in whose favor any such charge or liability does or shall exist, when such charge or liability shall not have ceased to exist before the death of such person.

Sec. 5. If any such alien be a minor by the laws of this State, his guardian or curator duly appointed and qualified as directed by law, shall have power to sell and convey, within the time limited by the 3d section of this chapter, any real estate which such minor may acquire by virtue hereof; and it shall be the duty of such guardian or curator, upon the receipt of the purchase money thereof, to account for the same to the court having jurisdiction of his guardianship or curatorship.

Act of March 30, 1872. [336]

Sec. 1. Aliens shall be capable of acquiring by purchase, devise or descent, real estate in this State, and of holding, devising or alienating the same, and shall incur the like duties and liabilities as if they were citizens of the United States and residents of this State.

Sec. 2. Any female born in the United States, owning real estate or any interest therein in this State, who shall marry an alien and reside in a foreign country may, at any time, notwithstanding such marriage or residence, convey such real estate or any interest therein by deed, or may at any time devise the same by last will; provided the same be done in either case in conformity with the general laws of this State concerning the conveyance of real estate by deed, and the making of wills.

Sec. 3. Chapter 110, of title 28, of the General Statutes of Missouri, being chapter 5 of Wagner's Missouri Statutes, and an Act entitled "An Act to Amend Chapter 110, of Title 28, of the General Statutes, Concerning Real Property and Its Alienation," approved March 13, 1867, is hereby repealed.

Sec. 4. This Act shall take effect on the 4th day of March, in the year 1872.

Ch. 129, Gen. Stat., 517,

Of Descents and Distributions.

Sec. 1. When any person having title to any real estate of inheritance, or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower in the following course: First. To his children or their descendants, in equal parts. Second. If there be no children or their descendants, then to his father, mother, brothers and sisters and their descendants, in equal parts. Third. If

NOTE.—*Alienage; effect of as to title to real estate.* See *note* to Governeur v. Robertson, 24 U. S. (11 Wheat.), 332.

Lex loci rei sitæ *governs title to lands by deed or devise.* See *note* to Clark v. Graham, 19 U. S. (6 Wheat.), 577; and *note* to Darby v. Mayer, 23 U. S. (10 Wheat.), 465.

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there be no children or their descendants, father, mother, brother or sister, nor their descendants, then to the husband or wife. If there be no husband or wife, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts. Fourth. If there be no children or their descendants, father, mother, brother, sister or their descendants, husband or wife, grandfather, grandmother, uncles, aunts or their descendants, then to the great-grandfathers, great-grandmothers and their descendants, in equal parts, and so in other cases without end, passing to the nearest lineal ancestors and their children and their descendants, in equal parts.

Sec. 8 In making title by descent, it shall be no bar to a demandant that any ancestor, through whom he derives his descent from the intestate is or has been, an alien.

Messrs. **Leroy B. Valliant** and **Willoughby N. Smith,** for plaintiffs in error.

Messrs. **Gustavus A. Finkelnburg** and *E. C. Kehr*, for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action, under the local law equivalent to an action of ejectment, involves the title to certain real estate in the City of St. Louis, of which Edward Sullivan, an intestate naturalized citizen of the United States, was the owner and in possession at the time of his death in the year 1866.

[337] The appellants, plaintiffs below—a sister and the son of a deceased brother of the intestate—were, at the death of the latter, as well as at the commencement of this action, residents of Ireland and subjects of the United Kingdom of Great Britain and Ireland. The defendants, it is sufficient to say, hold whatever title passed to a female lunatic, foreign-born and a first cousin of the intestate, residing at his death, in Maryland, but who, so far as the record discloses, never made a declaration of her intention to become a citizen of the United States; also, whatever title passed to the children of Annie Murta and Mary Murta, foreign born first cousins, who, like the plaintiffs, were, at the death of the intestate, alive, residents of Ireland, and subjects of the United Kingdom of Great Britain and Ireland. But their children, also foreign born, were, at the death of Edward Sullivan, naturalized citizens of the United States, one of them a resident of the State of Missouri.

The controlling question relates to the claim of appellants to an interest in the property in controversy

The local statutes to which, as bearing upon the case, our attention has been called, are chapter 110 of the Revised Statutes of Missouri, 1865, sections 1 and 8 of chapter 129 of the same revision, and an Act of the General Assembly of that State approved March 30th, 1872. As these statutes may be printed at large by the reporter they will not be here copied. The 1st section of chapter 110 of the revision of 1865 is a reproduction of previous statutory provisions which had been in force from a very early period after the admission of Missouri into the Union R. S. Mo., 1825, p. 126; *Id.*, 1835, p. 66 Rev Code of Mo., 1845, p. 113. That section conferred upon two classes of aliens the same capacity of acquiring real estate, in Missouri by descent or purchase, and of holding and alienating the same, as is enjoyed by citizens of the United States; those, residing in this country, who have made a declaration of intention to become citizens of the United States, by taking the required oath, and those, whether they have made such declaration or not, who reside in the State of Missouri. Aliens not belonging to one or the other of those classes were [338] left subject to the operation of the common law rule, recognized as in force in Missouri, that an alien, for the want of inheritable blood, could not take land by descent. *Wacker* v. *Wacker*, 26 Mo., 426; Bl. Com., Book II., 249; *Orr* v. *Hodgson*, 4 Wheat., 453. The 2d, 3d, 4th and 5th sections, of chapter 110, as to their substantial provisions, are brought forward from an Act approved February 22, 1855, which declares it to be "Lawful for every alien who, except for his alienage, would be entitled to any real estate by devise or inheritance from any person hereafter dying, capable at the time of his death of holding real estate situate in that State, to legally sell, for his own use, and convey the title thereof to any person capable of holding real estate situate within that State; *Provided*, He make such sale and conveyance within three years next after the death of him from whom he shall claim such devise or inheritance." When the minor is an alien, such sale and conveyance is authorized to be made by his guardian. Sess. Laws Mo., 1855, p. 4.

It is quite clear that, upon the death of Edward Sullivan, neither of the plaintiffs took by descent any interest in his real estate, for the reason suggested by the very words of the statute, and fortified by the policy which dictated its enactment, that they were and are alien nonresidents of the United States. This construction must be adopted, unless the object of the Act of 1855 was, for purposes of descent, to obliterate all distinction between aliens residing in and those residing out of the United States. But no such interpretation is admissible, especially in view of the fact that the statute enacted previous to as well as that of 1855, upon this general subject, were embodied in the same chapter of the general revision of 1865. The section declaring it lawful for an alien to sell and convey, within a prescribed time, to one capable of holding, real estate which, except for his alienage, he would have been capable of acquiring by devise or descent, has reference to cases not embraced by the 1st section of chapter 110, that is: to cases in which the property would vest at once in the State for the want of some person who could, at common law or under the statute, inherit. Aliens, of the class described in the 1st section of chapter 110, could [339] not inherit at common law, but by statute they were permitted to take by descent or purchase, holding, or selling and conveying, as it suited their convenience to do either. In all those respects, aliens, embraced by that section, were placed upon the same footing of equality with citizens of the United States. But to an alien who did not have capacity to inherit by virtue of residence in Missouri, or of residence in the United States accompanied by a formal declaration, under oath, of intention to become a citizen, the right was given by the Act of 1855, continued and enlarged in section 2 of chapter 110 (not to inherit and hold, as a native, or naturalized citizen could, but), to take and sell and con-

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vey to one who could hold. Until the Law of 1855 was enacted, the right of the State to take the real estate of one who left no person in existence capable of acquiring it, by descent, accrued immediately upon the death of the owner. Impelled by a sense of justice or to meet the hardships of cases likely to arise in a new State receiving large accessions to its population from Europe, Missouri, as a partial waiver or suspension of its rights and for no other purpose, declared by the Act of 1855 that an alien who did not reside in Missouri, or in this country with an intention to become a citizen of the United States, and who could not, therefore, inherit, might, within a limited period, sell and convey to one who could take and hold.

That statute, plainly, had no reference to those aliens upon whom had already been conferred, by statute, the capacity to inherit and hold, or to sell and convey, in the same manner as citizens of the United States.

But the contention of counsel for appellees is, that the children of Annie and Mary Murta could not take this property, nor any interest in it, because their alien non-resident mothers, through whom was traced their relationship to the deceased, were alive at the death of the latter; and since the parents were incapable of taking, for the reasons we have given, their children could not take. Upon the basis of that conclusion, counsel advanced to the further proposition that, if neither appellants nor the Murta children could take by descent, the property upon the death of the intestate escheated to the State, and the right of appellants to take as the nearest of kin was subsequently recognized and established by the Act of March 30, 1872, the 1st section of which declares that [340] "*All* aliens shall be capable of acquiring by purchase, devise or descent, real estate in this State, and of holding, devising or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this State."

Although that statute was enacted within three years after the final settlement of Edward Sullivan's estate, and although its object was, undoubtedly, to remove the disabilities of aliens, of every class, whether resident or non-resident, to acquire real estate in Missouri by purchase, descent or devise, we are of opinion that neither of the propositions just stated can be successfully maintained. The Murta children, we have seen, were naturalized citizens of the United States, one of them being also a resident of Missouri. At the time descent was cast, they were the nearest of kin of the class of aliens who, by the 1st section of chapter 110, were capable of acquiring real estate in Missouri by descent or purchase. Their right to take by descent was not, as we think, affected by the fact that their respective mothers were, when the intestate died, alive, and alien non-residents of this country, incapable themselves of inheriting the estate. The 8th section of the chapter (129) on descents and distributions, declares that "In making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the estate is or has been an alien." This language would seem to embrace as well the case of one whose alien progenitor, through whom is traced relationship to the intestate, was living when descent was cast, as the case where such progenitor was then dead. This view is controverted by plaintiffs in error, on the authority of *McCreery* v. *Somerville*, 9 Wheat., 354, where this court had occasion to determine the meaning of the Statute of 11 and 12 William III., ch. 6, which, it is claimed, is, upon the present point, identical with the foregoing section in the Missouri Statute of Descents and Distribution. It was there ruled that the English statute (in force in Maryland, from which State the case came) removed the common law disability to claim title through an alien ancestor, but did not apply to a living alien ancestor so as to create a title by heirship, where none would exist by the common law if the ancestor were a natural-born subject. We remark, in reference to that case, that the English statute is not accurately quoted in the opinion of the court, as an examination of 10 British Stat. at L., 319, [341] Pickering's ed., will show. But without deciding that the words omitted ought to have produced a judgment different from that rendered, we are of opinion that the present case is not governed by *McCreery* v. *Somerville*. The Statute of Missouri which permits the demandant to inherit from an intestate, notwithstanding his ancestor, through whom he derives his descent, is or has been an alien, must be interpreted as well in connection with other provisions conferring upon aliens the capacity to inherit real estate, as with reference to the public policy which manifestly induced such legislation. These provisions, in terms, make an alien resident in Missouri, or an alien resident elsewhere in this country, intending to become a citizen, capable of inheriting real estate by descent or purchase. In making title by descent it may be that his ancestor is or was an alien, without inheritable blood, either at common law or by statute. That fact would ordinarily constitute an insuperable difficulty in the way of his taking or holding the estate. But the statute elsewhere interposes in his behalf and says that he shall not be barred in tracing his descent from the intestate, by reason of the fact that *any* ancestor either *is* or has been an alien; language broad enough to include a living as well as a dead progenitor.

Unless the statute be so construed, it would result that, while an alien residing in Missouri, having no purpose to become a citizen of the United States, could, under the then existing law, if the nearest of kin, inherit and hold as fully as if he were a citizen of the United States, a naturalized citizen, actually residing in Missouri, would be barred from taking and holding by the fact—wholly unimportant in view of the policy of the State—that his parent or ancestor, through whom he must trace relationship to the intestate, was, when descent was cast, alive and an alien non-resident of the country, or a resident of the United States, outside of Missouri, with no intention to become a citizen. We are not satisfied that such an interpretation of the statute would be consistent with the intention of the Legislature and, therefore, reject it as unsound.

But should we be in error in this construction, there is another ground upon which the [342] claim of appellants must be denied.

We have ruled that when descent was cast

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neither of the appellants had capacity to inherit and if, as contended, the Murta children were also barred by the fact that their respective alien mothers were then living, it would result, as counsel concede, that the property escheated to the State immediately upon the death of Edward Sullivan. This, upon the ground that the legal title could not be in abeyance. 2 Fearne, Remainders, 20. In that contingency, neither appellants nor appellees could claim any interest in the property, by virtue of the Act of 1872. The Constitution of Missouri forbids the General Assembly from passing any law retrospective in its operation. Art. 1, sec. 28. And if that inhibition does not prevent the State from releasing, under the authority of a statute and for the benefit of individuals, any right of property it may have acquired by escheat, it is sufficient to say that the Act of 1872 contains no language clearly indicating an intention to make it retrospective. It is, consequently, applicable alone to future acquisitions by aliens of real estate in Missouri.

We perceive no error in the judgment, and it is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—6 Sawy., 203.

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[342] CITY OF OTTAWA, *Plff. in Err.*,
v.
FIRST NATIONAL BANK OF PORTSMOUTH, NEW HAMPSHIRE.

(See S. C., 15 Otto, 342-346.)

Recitals in bonds—Illinois law.

1. Where a city had power, the voters consenting, to issue negotiable securities for municipal purposes, a recital upon the face of the bonds that the ordinances under which the bonds in question were issued provided for a loan for municipal purposes, estops the city as against a *bona fide* holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes.

2. By the law of Illinois, municipal bonds payable to bearer or to some person or bearer are negotiable by delivery, so that the holder can sue thereon in his own name, although they have not been previously assigned or indorsed by the named payee.

[No. 1048.]

Submitted Jan. 9, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. **Lawrence**, *Campbell & Lawrence* and *M. T. Maloney*, for plaintiff in error.

Mr. **G. S. Eldredge**, for defendant in error.

[343] *Mr. Justice* **Harlan** delivered the opinion of the court:

The bonds in suit constitute a portion of the issue of $60,000 referred to in *Hackett* v. *Ottawa*, 99 U. S., 86 [XXV., 363]. Like those held by Hackett, they were purchased before maturity and without notice of any circumstances or facts impeaching their validity.

As in that case, so here, the bonds recite that they were issued in virtue of the power conferred by the charter of the City upon its council—the majority of voters, attending at an election for that purpose, assenting—to borrow money on its credit and to issue bonds, pledging its revenue for the payment thereof; and also, in pursuance of two ordinances of the city council, one passed June 15, 1869, entitled "An Ordinance to Provide for a Loan for *Municipal* Purposes," duly ratified by popular vote, and the other, entitled "An Ordinance to Carry into Effect the Ordinance of June 15, 1869, entitled 'An Ordinance to Provide for a Loan for *Municipal* Purposes.'" The defense in the Hackett case was, that the bonds were not issued to effect a loan for municipal purposes, but were issued and delivered as a donation to one Cushman or to the Ottawa Manufacturing Company, a private corporation, to be used in aid of a merely private enterprise, and not for legitimate municipal purposes. Upon that ground, it was contended they were void for the want of authority to issue them. Waiving any direct decision of the question, much elaborated by counsel, as to what, under the Constitution of the State, as interpreted by the Supreme Court of Illinois in numerous cases, was to be regarded as a municipal or corporate purpose, for which the city could lawfully exercise the power of borrowing money and issuing bonds, we there adjudged the defense to be insufficient for these reasons: the city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes; if the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances provided for a loan for municipal purposes; such a representation, by the constituted authorities of the city, would naturally [344] avert suspicion of bad faith upon their part, and induce purchasers to omit an examination of the ordinances themselves and, consequently, the city was estopped, as against a *bona fide* holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes. Upon these grounds, the main defense in this suit must, also, be adjudged insufficient.

There is, however, one question raised in this case which was not made or determined in *Hackett* v. *Ottawa*. The bonds in suit are made payable at the St. Nicholas National Bank in the City of New York to W. H. W. Cushman or bearer, and were taken by defendant in error without any written assignment or indorsement by Cushman, the named payee. The City paid the interest maturing on the 2d days of August 1870 and 1871.

The contention of counsel is, that an assignment or indorsement of the bonds by the payee named therein, although they are also made payable to bearer, is, by the laws of Illinois, where the original contract was made, a prerequisite to pass the legal title, and to authorize a suit by the holder in his own name. This precise question arose in *Roberts* v. *Bolles*, 101 U. S., 120 [XXV., 881], involving the validity of certain municipal bonds, payable to a railroad company or bearer, and on which there appeared no assignment or indorsement by the

NOTE.—*Negotiability of railroad bonds.* See *note to* White v. Vt. & Mass. R. R. Co., 62 U. S., XVI., 221.

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company. Upon examination of the decisions of the Supreme Court of Illinois, we there reached the conclusion that, by the repeated adjudications of that learned tribunal, municipal bonds payable to bearer, or to some named person or bearer, were excepted from the rule announced in *Hilborn* v. *Artus*, 4 Ill., 344, and *Roosa* v. *Crist*, 17 Ill., 450, in which it was, in effect, held that notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name.

Counsel in the present case insist that our ruling in *Roberts* v. *Bolles*, resulted from a misapprehension of the settled course of decisions in the state court; and we are asked to reconsider the question in connection with some cases in that court to which our attention was not then called. Those specially relied on to establish the error of our conclusion in that case are [345] *Garvin* v. *Wiswell*, 83 Ill., 217, and *Turner* v. *R. R. Co.*, 95 Ill., 134.

The first of those cases related to a county order executed by a board of supervisors, directing the treasurer of the county, on a day named, to "Pay to John Murphy or bearer" a certain sum "out of the funds appropriated for bounties to volunteers, with interest at the rate of eight per cent per annum from this date, upon the presentation of the annexed coupons"; an instrument of writing not negotiable, in the sense of the law merchant, so as to exclude defenses or evidence of invalidity, even when held by a *bona fide* purchaser. *Wall* v. *Monroe Co.* [*ante*, 430].

The case in 95 Ill. relates to a certificate of indebtedness issued by a receiver appointed in a suit against a railroad company, and which certificate, the state court expressly held, did not possess the qualities of negotiable or commercial paper. It also appears, in that case, that the certificate was made payable to a named person "or bearer," when the order of court, printed thereon, directed it to be made payable to such person "or order."

The language of those two cases must be construed in connection with the particular kind of instrument to which the court referred. While in each may be found general statements which seem to justify the position of counsel, we do not understand those cases to determine anything necessarily inconsistent with the conclusion reached in *Roberts* v. *Bolles*, *viz.:* that by the law of Illinois municipal bonds, whether payable to bearer, or to some person *or* bearer, are negotiable by delivery, so that the holder, even in the courts of Illinois, can sue thereon in his own name, although they have not been previously assigned or indorsed by the named payee.

Notwithstanding the criticism, by counsel, of the opinion in *Johnson* v. *Stark Co.*, 24 Ill., 75, we are not satisfied that the Supreme Court of Illinois has intended, in any subsequent case, to qualify what was there said by *Mr. Justice* Walker in reference to municipal bonds and coupons issued to railroad companies: "It [346] seems to be the well settled doctrine that state, county, city and other bonds and public securities of this character, are negotiable by delivery only, without indorsement, in the same manner as bank-bills, especially when they are payable to bearer." In that case the coupon was not payable either to order or to bearer, but the promise was to pay the amount named "on this coupon." The court ruled that the holder of the coupon could sue and recover in his own name.

The bonds in suit, it will be observed, are payable at a bank in New York. According to the general rules of commercial law, as recognized in that State, the holder of negotiable securities, payable to a named person or bearer, whether they are indorsed or not by such payee, acquires, by delivery merely, the legal title and the consequent right to sue thereon in his own name. 3 Kent, Com., 78; *Brush* v. *Reeves*, 3 Johns., 439; *Dean* v. *Hall*, 17 Wend., 214. Whether the nature and extent of the rights acquired by the Bank are determinable by the law of New York, the place of performance, or whether the general rule that a contract is to be expounded by the law of the place where it is to be executed, *Cox* v. *U. S.*, 6 Pet., 200; *Andrews* v. *Pond*, 13 Pet., 77; *Bell* v. *Bruen*, 1 How., 169, can be applied to an Illinois municipal corporation whose bonds, without express legislative authority, have been made payable elsewhere than at its own treasury, *Prettyman* v. *Tazewell Co.*, 19 Ill., 406; [*People* v. *Tazewell Co.*], 22 Ill., 151; [*Johnson* v. *Stark Co.*], 24 Ill., 91; [*Pekin* v. *Reynolds*], 31 Ill., 531; [*Sherlock* v. *Winnetka*], 68 Ill., 535, are questions which need not be now determined. It is sufficient in this case to say, that the ground first alluded to, upon which the plaintiff denies the right of the Bank, the holder for value of its bonds, to sue in its own name cannot be maintained.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

Cited—108 U. S., 115.

ST. ANNA'S ASYLUM FOR THE RELIEF OF DESTITUTE FEMALES AND HELPLESS CHILDREN OF ALL RELIGIOUS DENOMINATIONS, *Plff. in Err.*, [362]

v.

CITY OF NEW ORLEANS.

(See S. C., 15 Otto, 362-370.)

Tax on New Orleans Corporation—unconstitutional.

1. The imposition of a tax by the City of New Orleans on the property of St. Anna's Asylum in that City, contrary to the express terms of its charter, and without any provision for compensation or indemnity, was not a legitimate exercise of the power of dissolution of corporations reserved in the Code.

2. Section 118 of the Louisiana Constitution of 1868, and the legislative Act, by virtue of which the said tax was imposed, as construed and applied to the circumstances of this case, are in violation of the 10th section of article I of the Constitution of the United States.

[No. 218.]

Submitted Mar. 9, 1882. Decided Apr. 24, 1882.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Messrs. **Edwin T. Merrick** and **George W. Race**, for plaintiff in error.

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Mr. **Henry C. Miller,** for defendant in error.

[363] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case comes before us on a writ of error to the Supreme Court of the State of Louisiana, for the purpose of reviewing the judgment of that court, which sustained the validity of a certain tax imposed by the authorities of the City of New Orleans upon the property of "St. Anna's Asylum for the relief of destitute females and helpless children of all religious denominations."

The plaintiff in error is a charitable institution, incorporated by an Act of the Legislature of Louisiana, approved April 29, 1853, for the purposes indicated by its name. The charter gave the Corporation perpetual succession and power to take, purchase, possess and enjoy all kinds of property whatever, real or personal, by gift, grant, sale, bequest, exchange, or by any other mode of conveyance or transfer whatsoever; and the same to sell, convey or dispose of, under the restrictions therein provided; and directed that they should administer the same for the furtherance of the object of the incorporation and in accordance with the conditions of the charter; with a provision, that all acceptances of immovable property and all alienations of immovable property and stocks, should be signed by the president and treasurer, after the declared will of a majority of the board of directors had been duly inscribed on the minutes of the Corporation. It appointed a first board of directors, and provided for annual elections thereafter, and for the appointment of a president and other officers, and declared that the president and directors should superintend, manage and control the affairs and interests of the Corporation.

The 6th section declared as follows:

"Sec. 6. Be it further enacted, etc., That the said Corporation shall enjoy the same exemption from taxation as was enacted in favor of the 'Orphan Boys' Asylum of New Orleans' by the Act approved March 12, 1836, entitled 'An Act for the Relief of the Orphan Boys' Asylum of New Orleans.'"

The Act relating to the Orphan Boys' Asylum of New Orleans, referred to in this section, declared as follows:

"That, from and after the passage of this [364] Act, all the property, real and personal, belonging to the Orphan Boys' Asylum of New Orleans be and the same is hereby exempted from all taxation either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding."

The proofs show that under the charter thus granted the Corporation was duly organized, and by means of donations, erected an asylum and has always fulfilled the objects of its organization. The property on which the tax in question was imposed was procured in 1874, and was assessed in the tax list at $90,000. The following admission with regard to it, appears in the record:

"Now, therefore, it is admitted, as was done in the lower court, that the defendant acquired said cotton press, mentioned in the tax bill and answer filed by defendant, after 1874, by devise, bequest and legacy from Dr. W. N. Mercer, and that it was the owner of the same when said assessment of $1,350 of city taxes was made by the City; that no inmates of the asylum are kept upon the premises, and that the revenues of the cotton press on which said assessment is made are applied to the keeping and maintaining the objects of charity mentioned in the defendant's Act of incorporation, *viz.:* to the support and maintenance and relief of destitute females and helpless children of all religious denominations, as intended by the charter; and that said Asylum is and has been since its organization in active and efficient operation, as shown by the evidence, in the City of New Orleans."

The proofs further show that the Corporation largely relies on the rents of this property for enabling it to carry on its benevolent work.

The tax in question was imposed in 1876 under the supposed authority of the Constitution of 1868, and legislation adopted in pursuance thereof. The 118th article of that Constitution declared as follows:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes."

In conformity with this provision, the Legislature of Louisiana, in 1871, passed a law de- [365] claring that all taxes levied by the City of New Orleans shall be assessed equally upon every description of property, both real and personal; but, by another Act, passed at the same session, it was declared that public hospitals, asylums, poor-houses, and all other charitable institutions for the relief of indigent and afflicted persons, and the lots of ground appurtenant thereto and used therewith, and all their furniture and equipments, so long as the same shall be used for that purpose only, shall be exempt from taxation.

The Corporation resisted the payment of the tax, and the usual proceedings for its collection were instituted in the Third District Court for the Parish of Orleans. The Corporation filed an answer setting up the exemption from taxes contained in its charter, and claiming that it was a contract, and contended that the Constitution of 1868, and the statute passed in pursuance thereof, impaired the obligation of said contract, in violation of the 10th section of article I. of the Constitution of the United States. The court below gave judgment in favor of the City, and an appeal was taken to the Supreme Court of Louisiana, and the judgment was affirmed. We are now called upon to review this decision.

The language of the exemption is so explicit and so broad, and comes in after so many allusions to property which it is supposed the Corporation might acquire, other than that which would be directly used for food and shelter to the destitute and helpless persons under its care, that no doubt can be entertained as to its literal application to all the property of the Society which it would be lawful and proper for it to possess. The funds on which it relies for carrying on its work, however invested, whether in stock, real estate, or otherwise, no less than the asylum building itself, are clearly embraced

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in the terms of the exemption; and to exclude them from its operation would require the insertion or addition of words which the Legislature did not see fit to express. Undoubtedly, if the Corporation should acquire property not needed or used for carrying on the Institution, it would be an act outside of the objects and pur-
[366] poses of the charter, and *ultra vires;* and, as to such property, it could not, in its own wrong, justly claim the benefit of the exemption. But the property in question is not obnoxious to this objection; it directly contributes to the support of the Institution, and is held for that purpose alone.

Indeed, it is not on any assumption that the language of the exemption does not extend to the property taxed that the Supreme Court of Louisiana bases its judgment. The main ground upon which it relies is, that the charter was granted and accepted under a standing law of the State, by which the Legislature was authorized to abrogate the charter of any corporation; and it was argued that the power to abrogate included the lesser power to alter and amend. This law is contained in the 438th article of the Civil Code adopted in 1825, being a modification of a similar article in the Code of 1808, book I., title X., chapter III. In the Code of 1825 it reads as follows: "Chapter III *Of the dissolution of corporations.* Art. 438. A corporation legally established may be dissolved: 1. By an Act of the Legislature, if they deem it necessary or convenient to the public interest; *Provided*, That, when an Act of incorporation imports a contract, on the faith of which individuals have advanced money or engaged their property, it cannot be repealed without providing for the re-imbursement of the advances made, or making full indemnity to such individuals: 2. By the forfeiture of their charter, when the corporation abuse their privileges, or refuse to accomplish the conditions on which such privileges were granted, etc."

The counsel for the plaintiff in error contends that this article has reference only to the absolute dissolution of a corporation and not to a mere alteration of its charter; and, from its correlation to other parts of the title, this seems to be a very probable view of its office. But if it be construed in the large sense contended for by the counsel of the City, the qualification with which it is accompanied in the proviso, is very important and not to be ignored. This qualification requires re-imbursement or indemnity to those who have made advances upon the faith of the charter of incorporation. Nothing of the kind has been attempted in this case. As the Corporation has not been dissolved but is continued in existence and still represents those
[367] who contributed to its establishment, the Corporation itself is the only proper party to receive indemnity; and no indemnity short of the amount of the tax imposed would be adequate. The indemnity and the tax would mutually balance or neutralize each other. In other words, proper indemnity would require a revocation or nullity of the tax.

It is suggested, however, by the Supreme Court, in its opinion, that the reserved power contained in the Code has no application to this case because the property upon which the tax in question was imposed was acquired by gratuitous donation after the adoption of the Constitution of 1868 and, consequently (as the court infers), after the repeal of so much of the charter as exempted from taxation the property not employed within the limits of exemption allowed by that Constitution. "When a case of prior acquired property," says the court, "presents itself, it will be time enough to express our opinion thereon." But this argument presupposes the existence of a right to repeal the provisions of the charter as to future acquisitions, without qualification or condition. This seems to us a begging of the question at issue. The contract did not apply only to property in existence when the charter was granted, nor only to that which was in existence when the Constitution of 1868 was adopted; but to all that might afterwards be acquired in the due fulfillment of the purposes of the Institution. If the present Asylum should be destroyed and a new one erected on a different piece of ground, the argument of the court would be equally applicable to such newly acquired property as to the property in question. The Constitution itself did not exempt any property. It only gave the Legislature the power, to be exercised or not, in its discretion, to exempt property actually used for church, school and charitable purposes. The Legislature has seen fit to make this exemption; but it was not obliged by the Constitution to do so. The argument of the Supreme Court would go to the extent of declaring that the abrogation of the contract, effected by the Constitution of 1868, was valid as to all after acquired property, whether indemnity was provided or not; and this amounts to saying that the Legislature or people of Louisiana had absolute power to pass a law impairing the obligation of the contract, without any condition or [368]
qualification whatsoever.

We cannot concur in this view. We think that the power of abrogation, or alteration, was qualified by the duty of providing indemnity to the full extent of the damage or burden caused by such change. This conclusion seems to us so obvious as to require no extended argument in its support.

This opinion might be extended by an examination of authorities. We might refer to the case of *The Home of the Friendless* v. *Rouse*, 8 Wall., 430 [75 U. S., XIX., 495], which is almost on all fours with the present case. We might go back to the case of *Dartmouth Coll.* v. *Woodward* [4 Wheat., 518], and the cases since decided, and review all the reasons on which they were grounded; we might dilate on the legislative reasons for granting immunity from taxes to such charitable institutions as that of the plaintiff in error, prominent among which would doubtless be the fact, that the support and maintenance extended to the objects of the charity relieves the State from a burden which would involve a much larger amount of taxation than that which it waives by granting the exemption. But such a review would be but a repetition of what has been said before, and much of it would be out of place.

It is proper, however, that we should notice one or two cases which the counsel for the City suppose to be favorable to their views, and on which they place considerable reliance. These are, the cases of *Tucker* v. *Ferguson*, 22 Wall., 575 [89 U. S., XXII., 816], and *R. R. Co.* v. *Supervisors*, 93 U. S., 595 [XXIII., 814]. We

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think that they do not apply to the case now under consideration. In the first place, the Constitutions of Michigan and Wisconsin, in which States those cases arose, reserved to their Legislatures, respectively, the power to alter, amend and repeal charters of incorporation. In the next place, in those cases, the exemption granted was held to be gratuitous on the part of the State, no consideration passing therefor from the companies. It was no part of their charters of incorporation, and, therefore, formed no consideration for their acceptance. Whereas, in the present case, the exemption was expressed in the charter itself, and was one of the inducements offered for its acceptance, and for making donations for the establishment of the Institution.

[369] It is also said that, in order to constitute a contract, the grant ought to be clear and free from all ambiguity and doubt, and not susceptible of a different construction. We think it is so in this case. The contract is not a matter of inference or presumption. It is distinctly expressed in the Act of incorporation. Indeed a clearer case could hardly be made. The addition of a declaration, that the exemption given should not be withdrawn, would not have added to its force.

We are well aware of the forcible language which has been used in previous cases in reference to the importance to the State of the governmental function of taxation; the caution that ought to be exercised in maintaining a claimed exemption from taxes; the clearness and certainty which the grant should exhibit. We concur in all that has been said by this court and many state courts on the subject. But, where the language is clear and the intention to grant the exemption apparent, the court has never hesitated to give it force and effect. And, as before said, we think it difficult to conceive a grant more clearly expressed than that in the present case; and, unless we are disposed to reverse the previous decisions of this court, we cannot hesitate what judgment we ought to give.

We are of opinion that the imposition of the tax in question, contrary to the express terms of the charter and without any provision for compensation or indemnity, was not a legitimate exercise of the power of dissolution reserved in the Code; and that the 118th section of the Constitution of 1868, and the legislative Act by virtue of which the said tax was imposed, as construed and applied to the circumstances of this case, are in violation of the 10th section, of article I., of the Constitution of the United States.

Our conclusion is, *that the judgment of the Supreme Court of Louisiana must be reversed and that the cause be remanded, with instructions to reverse the judgment of the Third District Court of the Parish of Orleans, and to render judgment in conformity with this opinion.*

Mr. Justice **Miller**, dissenting:

[370] I dissent from this judgment, because I understand that no statute shall be held to grant exemption from taxation unless its language imperatively requires it.

I do not think that the language of the statute, under which the exemption is claimed in this case, requires that all property acquired by the Institution after the passage of the Act shall be exempted, especially in regard to a cotton-picking machine, which can only be of value as it is used in a business operation in competition with others who must pay heavy taxes.

Mr. Justice **Field** concurs with me in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*, [418]

v.

LEWIS RINDSKOPF ET AL.

(See S. C., 15 Otto, 418–422.)

Bill of exceptions—assessment on spirits—proofs.

1. The bill of exceptions should not set forth the charge of the court below in full; only the parts to which the exceptions relate should be given.
2. The assessment of the Commissioner of Internal Revenue, of the amount due as taxes upon the spirits distilled between the dates mentioned, establishes only a *prima facie* case of liability against the distiller.
3. He and his sureties are at liberty to show that no spirits, or a less quantity than that stated by the commissioner, were distilled within the period mentioned and thus, entirely or in part overthrow the assessment.

[No. 881.]

Argued Mar. 16, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

Statement of the case by *Mr. Justice* **Field:**

This is an action against the principal and sureties on a distiller's bond for $7,000, executed March 23, 1875. The principal was then engaged in the business of a distiller within the First Collection District of Wisconsin. The condition of the bond provided, among other things, that he should "Comply with all the provisions of law in relation to the duties and business of distillers." The complaint alleges as a breach of these conditions the non-payment of the tax due on 3,640 gallons of spirits distilled by him at his distillery between the 25th of April and the 1st of May, 1875, amounting to $3,276. It also alleges that the Commissioner of Internal Revenue assessed the tax against [419] him on the special list for October of that year; and that the assessment was returned to the collector of the district, who demanded payment of the tax, which was refused.

The answer contained a general denial, and also set up as a special defense, that on the first of November, 1875, the Commissioner of Internal Revenue made an assessment upon the distiller to the amount of $7,117.70, for spirits alleged to have been manufactured at his distillery in the month of April, 1875, and removed therefrom without payment of the tax thereon, and with intent to defraud the Government; that this assessment was returned to the collector of the district, who demanded payment of the tax; that afterwards, in May, 1876, the plaintiffs brought a suit in equity to enforce its collection; that the distiller was served with process and answered the complaint, averring that the assessment was illegal and void; that

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that suit was still pending; and that the assessment mentioned in the complaint here was upon the same spirits for which the above assessment of $7,117 was made.

A supplemental and amended answer repeated these allegations, and added that the equity case was heard in April, 1879, when the assessment was adjudged to be illegal and the bill was dismissed. The answer pleads the decree entered in bar of the present action.

The case was tried at the January Term of the court in 1880. There is no statement of the evidence or of its purport in the record, except as appears in the charge given to the jury. The bill of exceptions states that the plaintiffs offered evidence tending to maintain the issues on their part, "as is generally stated in the charge of the court hereinafter contained;" and that the defendants offered evidence tending to maintain the issues on their part, "as is in like manner stated in the charge of the court." Then follows the charge at length, at the end of which particular parts of it are indicated to which exceptions were taken, and among others the following: "To all that portion of said charge which defines and sets forth the legal force and effect of an assessment, and the means whereby it may be attacked and overcome; to all of that portion of said charge which touches the entirety of the assessment and affirms that the plaintiffs must recover the exact amount of the assessment or nothing." [420] That portion of the charge to which reference is thus made is found in different passages, which are as follows: after speaking of the power of the Commissioner of Internal Revenue to make an assessment, the court said:

"When, therefore, an assessment has been made by this officer it is to be presumed until such presumption is overcome by proof to the contrary that it was made upon sufficient evidence, and it is not necessary that the evidence upon which the commissioner acted should be laid before the jury. In other words: the jury have a right to presume, until the contrary appears, that when the commissioner made the assessment in question he had before him proofs which were sufficient to satisfy a just and fair-minded person that such assessment ought to be made; and before the jury can disregard the assessment they should be convinced by the evidence that the commissioner acted in making it in a manner unjust to the defendant distiller and unwarranted by the actual facts. Such an assessment is not, however, conclusive evidence of the liability of the distiller; it is open to attack; it is *prima facie* proof only of such liability, and *prima facie* evidence is such evidence as is sufficient, when unassailed, to establish a given fact, and it remains sufficient for that purpose until it is rebutted and overcome. * * * Upon introduction of the assessment in evidence a *prima facie* case of liability on the part of the defendant, Lewis Rindskopf, is made. The burden of proof then falls upon the defendants, who may proceed to introduce evidence to overcome the assessment by showing that the defendant, Lewis Rindskopf, did not, during the period covered by the assessment, manufacture and remove from his distillery spirits upon which the tax was not paid.

And upon it being so made to appear, the burden of proof then shifts to the plaintiffs, and it then becomes incumbent on the plaintiffs, to maintain and establish the correctness of the assessment by sufficient and competent evidence. * * * The order of proof which has been maintained upon the trial is in consonance with the rules of law applicable to such a case, which have just been stated."

And, after commenting upon the general character of the evidence in the case, the court further said:

"In passing upon the validity of this assessment, and in determining the question of liability on account of it, it is to be taken and [421] considered in its entirety; either the Government is entitled to recover the exact amount of the assessment, namely: the sum of $3,276, or it is not entitled to recover any sum whatever. The court and jury upon an investigation of the justness and validity of the assessment have no right to exercise the powers committed to the commissioner, but our right is limited to an inquiry into the question as to whether the assessment which has been made embraces or represents a just and valid demand against the defendant distiller, and as the result of such investigation it must either wholly stand or wholly fall."

In support of the special defense, founded upon the decree in the equity case, that the assessment of November 1 was invalid, the defendants produced the record of the assessment and of the suit, which was admitted in evidence against the objection of the attorney of the Government; the court stating that proper instructions would be given to the jury in relation to the same. No proof was offered that the assessment covered the spirits for which the first assessment was made; and the court instructed the jury that without such proof the record would not be a bar to the prosecution of this action.

The jury found for the defendants, and upon their verdict judgment was entered; to review which the case is brought to this court on writ of error.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **Cottrill** *& Cary* and *Abraham &* **Mayer,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The bill of exceptions in this case sets forth the charge of the court below in full, in disregard of our frequent condemnation of this practice. Only such parts should have been given as would point the exceptions; all else is unnecessary and produces only inconvenience. We repeat of this practice what we said of another practice not uncommon, and equally objectionable, that of inserting the entire evidence in the record: "If counsel will not heed our admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should [422] withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions." *Lincoln* v. *Claflin*, 7 Wall., 137 [74 U. S., XIX., 108].

The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits dis

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tilled between the dates mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; but every material fact upon which his liability was asserted was open to contestation. The distiller and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment. They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller's liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due. The court, therefore, erred in instructing the jury that the assessment was to be taken and considered in its entirety, and that the Government was entitled to recover the exact amount assessed or not any sum. In other respects, the charge as given above correctly presents the law.

There may, undoubtedly, be cases where an assessment must stand as an entirety or not at all; as, where an erroneous rate has been adopted by the officer; or where it is impossible to separate from the property assessed, the part which is exempt from the tax; or where its validity depends upon the jurisdiction of the commissioner. The present case does not fall within either of these classes. Here the question is as to the quantity of spirits produced on which taxes were not paid.

The decree in the equity suit was properly held not to be a bar to the prosecution of this action in the absence of proof that the assessment which it adjudged invalid covered the spirits upon which the assessment here was made. The instruction to the jury deprived it of any weight as evidence with them.

The judgment must, therefore, be reversed and the case remanded for a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[454] CITY OF LOUISIANA, Mo., *Plff. in Err.*,
v.
ELIZABETH W. TAYLOR.

(See S. C., 15 Otto, 454-459.)

Missouri Constitution—effect of—railroad law.

1. The Missouri Constitution of 1865, is a limitation merely upon the power of the Legislature for the future, to grant to municipal corporations authority to become stockholders in companies, except upon the terms expressly mentioned.
2. All previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision.
3. The general railroad law of that State does not revoke any previous grants of similar authority.

[No. 264.]

Submitted Apr. 3, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Messrs. **James O. Broadhead** and **David P. Dyer**, for plaintiff in error.

Messrs. **Clinton Rowell** and **Thomas K. Skinker**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The defendant in error, a citizen of Illinois, brought this action against the plaintiff in error, a municipal Corporation of Missouri, to recover the amount alleged to be due upon certain bonds and coupons issued by the latter in payment of a subscription to the capital stock of the Louisiana and Missouri River Railroad Company, a corporation authorized by law to construct, and which has constructed in pursuance thereof, a railroad from the City of Louisiana to the Missouri River. The bonds sued on were dated, some in September, others in October and in November, 1869, and matured on January 1, 1876, 1877 and 1878, and together with coupons, falling due since January, 1876, remain unpaid. All coupons maturing previously, together with the principal of a portion of the whole issue of bonds, had been paid by taxes regularly levied and collected by [455] the proper authorities of the City, from the year 1867 to 1876. Certificates of the stock in the railroad company were issued in pursuance of the subscription, and were accepted by the City, which has ever since exercised its rights as a stockholder.

The defense was that the bonds were void for want of power in the municipal Corporation to issue them.

There was a judgment in favor of the plaintiff below, to reverse which this writ of error is prosecuted.

Each of the bonds sued on contains a recital that it "Is issued by the City of Louisiana under authority of the General Assembly of the State of Missouri, entitled 'An Act Incorporating the Louisiana and Missouri River Railroad Company,' approved March 10, 1859; also an ordinance of the City Council of the City of Louisiana, No. 502, passed June 12, 1866."

The reference to the railroad charter is to the 29th section of the Act of incorporation, which reads as follows:

"Sec. 29. It shall be lawful for the county court, of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it and receive its dividends; and any city, town or incorporated company may subscribe to the stock of said railroad company and appoint an agent to represent its interests, give its vote and receive its dividends, and may take proper steps to guard and protect the interests of said city, town or incorporation."

The 10th section of the Act incorporating the City of Louisiana, passed February 16, 1865, was as follows:

"The City shall have power to subscribe for stock in any incorporative railway company connecting with the City of Louisiana, or give any bonus to any institution of learning, by submitting an ordinance making the appropriation, or authorizing the issue of bonds for any

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such purpose, to a vote of the qualified voters of the City, at any general election held in the City, or at any special election expressly ordered, at which election the majority of the votes cast shall be for such ordinance; *Provided*, The debt of the City shall never exceed $150,000."

[456] In pursuance of this provision of the city charter, the city council, on June 12, 1866, passed ordinance No. 502, recited in the bonds in suit, providing for an election to be held on the first Tuesday in July, 1866, on the proposition to subscribe for stock in the Louisiana and Missouri River Railway Company, for an amount not exceeding $50,000.

The election, provided for by this ordinance, was in fact held, the result of which was, that 176 votes were cast in favor of the proposition to 46 votes in the negative.

Thereupon, the city council passed an ordinance authorizing the subscription of $50,000 to the capital stock of the railway company, and the issue of bonds for the payment of the same. The subscription was made and the bonds delivered.

The Constitution of Missouri that went into operation July 4, 1865, contained the following provision: "Sec. 14. The General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

It also contained this provision:

"Art. II., sec. 3. All statute laws of this State now in force, not inconsistent with this Constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly."

At its first session after the adoption of this Constitution, the General Assembly of Missouri passed a general railroad law, R. S. Missouri, 1865, p. 372, which it is claimed went into effect March 19, 1866, and which contained the provision following, to wit:

"It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town to take stock for such city, county or town, in, or to loan the credit thereof to, any railroad company duly organized under this or any law of this State; *Provided*, That two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

At the same session of the Legislature, it was [457] also enacted, R. L. Missouri, ch. 224, sec. 6. p. 882, that "All Acts and parts of Acts of a private, local or temporary nature, or specifically applicable to particular cities or counties, in force on the first day of November, A. D. 1865, not repealed by or repugnant to the provisions of the general statutes or some Act of the present General Assembly, shall continue in force or expire, according to their respective provisions or limitations."

These are all the statutory provisions, supposed by counsel for the respective parties to have any material bearing upon the question at issue.

The power to subscribe to the capital stock of the railroad company is expressly given to the City of Louisiana, by the 29th section of the charter of the former. Whether that grant of power carries with it the incidental authority to pay its subscription by an issue of bonds, or whether, upon a fair construction of the terms of that section, the exercise of such an authority is within the meaning of the law, it is not necessary for us to discuss or decide; for whatever might be a proper construction of the section, if it stood by itself, we think it must, at the time when the bonds in suit were issued, be interpreted, in connection with the 10th section of the city charter, which had in the meantime been enacted. That section, in explicit terms, recognized and thereby conferred upon the City, the power to issue bonds in payment of its subscription to the stock of any railway company connecting with it, upon condition, however, of the approval of the ordinance authorizing the issue, by a majority of the votes cast at an election held for that purpose; and we think that limitation must be taken, thereafter, as imposed upon the power granted to the City in the railway charter. Such was, in fact, the construction put by the City upon its own powers, for the bonds in suit purport to be issued in pursuance of authority conferred by a majority of the votes cast at such an election, approving the ordinance passed to that end.

The ordinance submitted to the vote of the electors at that election, authorizing the issue of the bonds, was, we think, in all respects in conformity with the law, and sufficient. But it is contended by the plaintiff in error that the provision of the city charter, in accordance with which it was passed, had been repealed before [458] the vote was taken and the subscription made.

It has been repeatedly held by the Supreme Court of Missouri, in decisions approved and followed uniformly by this court, that such repeal is not the direct and immediate result of the Constitution itself; that, on the contrary, the prohibition contained in that instrument is a limitation merely upon the power of the Legislature for the future, so that it should not thereafter grant authority to municipal corporations to become stockholders in companies except upon the terms expressly mentioned, and that all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision. *Callaway Co.* v. *Foster*, 93 U. S., 570 [XXIII., 912]; *Scotland Co.* v. *Thomas*, 94 U. S., 682 [XXIV., 219]; *Henry Co.* v. *Nicolay*, 95 U. S., 619 [XXIV., 394]; *Ray Co.* v. *Vansycle*, 96 U. S., 675 [XXIV., 800]; *Schuyler Co.* v. *Thomas*, 98 U. S., 169 [XXV., 88]; *Cass Co.* v. *Gillett*, 100 U. S., 585 [XXV., 585.]

It is argued, however, that the repeal of the provision in question was effected by the 17th section of the general railroad law, which it is claimed took effect March 19, 1866, before the passage of the ordinance No. 502, June 12, 1866.

But this position, in our opinion, is also untenable. The Act in question is an enabling statute, passed in execution of the powers authorized by the Constitution, then recently adopted. It was general in its provisions, conferring power upon any county, city or town to take stock in or to loan its credit to any railroad company, duly organized under any law of the State, upon the assent of two thirds of the qualified voters thereof. It does not revoke any

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previous grants of similar authority. It repeals no existing provisions of law. It contains no words of prohibition. The 6th section of chapter 22 of the same session, "of the general statutes and their effect," etc., R. S. Missouri, 882, expressly continues in force "All Acts and parts of Acts of a private, local or temporary nature, or specifically applicable to particular cities or counties, in force on the first day of November, A. D. 1865, not repealed by or repugnant to the provisions of the general statutes or some Act of the present General Assembly," until they [459] expire, according to their respective provisions or limitations. There is no repugnancy between the 10th section of the charter of the City of Louisiana and the 17th section of the general railroad law. One is a definite, express and special provision, in reference to such railways only as connect with the City; the other has relation to possible proposals for subscription to the stock of any railroad company, whether its railroad connected with the City or not. The subjects of the two statutes are not the same; and there is no such inconsistency between them as that both may not stand and operate. It would not be legitimate to construe the 17th section of the general railroad Act as if it forbade everything it did not authorize; and it is only by such a construction that the repugnancy with the 10th section of the charter of the City can be made to arise.

The very question mooted here was decided by the Supreme Court of Missouri in the case of the *State.* v. *Macon Co. Ct.*, 41 Mo., 453, at the October Term, 1867. It was there said by the court: "There is no such inconsistency between the Acts that they may not both stand and be carried into operation. A general prohibition against subscribing for stock in any corporation may well subsist, with a permission to subscribe for stock in a particular corporation. Besides, the 17th section of the general railroad law, with which the enabling Act is supposed to conflict, uses no negative words. It uses words to express and permit future Acts, and there is nothing to show that it intended to operate on existing or past laws even by implication. It was framed after the Constitution was adopted, and the conclusion is undeniable that it was intended simply to make the law conform to and carry out the 14th section of the 11th article of that instrument."

This decision is upon the very point and is a judgment of the Supreme Court of the State in a case which, in its circumstances, we find it impossible to distinguish from the present. Its authority was confirmed by the decision of the same court in *Smith* v. *Clark Co.*, 54 Mo., 58.

This view of the case disposes of all objections to the judgment of the Circuit Court. *It is, accordingly, affirmed.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 104.

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[611] UNITED STATES,

v.

SELAH C. CARLL.

(See S. C., 15 Otto, 611-613.)

Insufficient indictment for uttering forged obligation.

See 15 OTTO.

*An indictment on section 5431 of the Revised Statutes, alleging, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter and publish a falsely made, forged, counterfeited, and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited and altered, is insufficient, even after verdict.

[No. 1202.]

Argued Apr. 10, 1882. Decided Apr. 24, 1882.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

Statement of the case by *Mr. Justice* **Gray**:

This was an indictment, found in the Circuit Court, on section 5431 of the Revised Statutes, by which it is enacted that "Every person who, [612] with intent to defraud, passes, utters, publishes or sells any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be punished by a fine of not more than $5,000, and by imprisonment at hard labor not more than fifteen years."

Each count of the indictment alleged that the defendant, at a certain time and place, "Feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter and publish upon and to the said Bank of the Metropolis a falsely made, forged, counterfeited and altered obligation and security of the United States" (which was set forth according to its tenor), against the peace, and contrary to the form of the statute.

The defendant, having been tried before *Judge* Benedict, and convicted by the jury under instructions which required them to be satisfied of the facts alleged, and that the defendant, at the time of uttering the obligations, knew them to be false, forged, counterfeited and altered, moved in arrest of judgment for the insufficiency of the indictment. At the hearing of this motion before *Judge* Blatchford and *Judge* Benedict, they were divided in opinion upon the question, stated in various forms in their certificate, but in substance this: whether the indictment, setting forth the offense in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited and altered, was sufficient, after verdict, to warrant judgment thereon.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.* for United States.

Messrs. **William C. Roberts** and *Benjamin E. Valentine,* for defendant.

Mr. Justice **Gray** delivered the opinion of the court:

In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the [613] court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *U. S.* v. *Cruikshank*, 92 U. S., 542 [XXIII., 588]; *U. S.* v. *Simmons*, 96 U. S., 360 [XXIV., 819]; *Com.* v. *Clifford*, 8

*Head note by *Mr. Justice* GRAY.

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Cush., 215; *Com.* v. *Bean*, 11 Cush., 414; *Com.* v. *Bean*, 14 Gray, 52; *Com.* v. *Filburn*, 119 Mass., 297.

The language of the statute on which this indictment is founded, includes the case of every person who with intent to defraud utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

This indictment, by omitting the allegation, contained in the indictment in *U. S.* v. *Howell*, 11 Wall., 432 [78 U. S., XX., 195], and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a "defect or imperfection in matter of form only," within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be,

Answered in the negative.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 661.

AUSTIN CORBIN, *Appt.*,

[659] *v.*

COUNTY OF BLACK HAWK, IOWA, ET AL.

(See S. C., 15 Otto, 659-667.)

Jurisdiction as to amount—suit to recover the contents of a contract—by assignee—proper averment.

1. Where the assignee of several contracts for land tendered the amount due on them and brought an action to compel a conveyance, the matter in dispute is the amount so tendered and not accepted, and if that exceeds $5,000, this court has jurisdiction.

2. A suit for the specific performance of contracts, or to enforce them, or to realize the fruits of the rights secured by them, is one to recover the contents of the contracts.

3. Where the suit is brought to enforce the contract contained in a chose in action, the assignee is disabled to sue, unless the suit might have been brought in the court if no assignment had been made.

4. The bill in such case should contain an averment, showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made.

[No. 271.]

Argued Apr. 20, 1882. Decided Apr. 24, 1882.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. **John D. Campbell**, for appellant.

Messrs. **Parsons** & *Runnells*, for appellees.

Mr. Justice **Blatchford**, delivered the opinion of the court:

This case comes into this court on an appeal by the plaintiff below from a decree dismissing the amended and substituted bill of complaint, on demurrers thereto for want of jurisdiction. The defendants are the County of Black Hawk, in the State of Iowa, the Auditor and the Treasurer of that County, and thirty other individuals. The original bill was filed in November, 1874. The citizenship of the plaintiff, as a citizen of New York, and that of all the defendants, as citizens of Iowa, is properly alleged. The bill avers that, in 1857, one John Kerr, as School Commissioner of said County, being thereunto duly authorized by the laws of Iowa, made eleven several contracts in writing in respect to the sale of land, four with one person, and one with each of seven other persons. A copy of one of the contracts is made part of the [660] bill, each of them being averred to be in like words and figures, except the name of the purchaser, the description of the land, and the amounts of money mentioned. Such copy is in these words:

"SCHOOL-FUND COMMISSIONER'S OFFICE,
Black Hawk County, July 10, 1857.

Contract made and entered into between John Kerr, as School-fund Commissioner for the County of Black Hawk, Iowa, and Abraham Carey, of the County of Black Hawk and State of Iowa, to wit:

The said John Kerr, School-fund Commissioner, as authorized by law, has bargained and sold, and by these presents does bargain and sell, to the said Abraham Carey the following described tract or parcel of land, being a portion of section numbered sixteen (or lands in lieu thereof), granted to the State for the use of schools by an Act of Congress entitled 'An Act Supplemental to the Act for the Admission of the States of Iowa and Florida into the Union,' approved March 3, 1845, to wit: Lot No. 10, being the west ($\frac{1}{2}$) half of the southeast ($\frac{1}{4}$) quarter section sixteen (16), township eighty-nine (89) north, of range fourteen (14) west, containing eighty acres.

The price agreed upon is nine and $\frac{5}{100}$ dollars per acre, amounting to the sum of seven hundred and twenty-four dollars, the one fourth part of which, to wit: one hundred and eighty-one dollars, has been paid in cash to the said school-fund commissioner, and the balance, to wit: five hundred and forty-three dollars secured by a promissory note bearing even date herewith and payable on or before ten years from date, bearing interest at the rate of ten *per centum* per annum, payable annually, on the first day of January, at the office of the said school-fund commissioner, in Black Hawk County.

Now, if the said Abraham Carey, his heirs, executors or administrators, shall pay or cause to be paid the interest on said note as the same falls due, together with the principal within the time specified, then he will be entitled to receive from the Governor of the State of Iowa a patent for the land herein described. In case of failure to make any of the payments aforesaid punctually as stipulated, all previous payments shall be considered forfeited, and the land subject to be sold by the school-fund commissioner, or the payment of the money enforced according to law, at the option of said commissioner.

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In testimony whereof the parties have hereunto set their hands and seals the day and year first above written.

[661]

(Signed) JOHN KERR, [L. S.]
School-Fund Commissioner of Black Hawk Co.
In presence of, ABRAHAM CAREY.
D. J. COLEMAN."

The bill alleges that the cash payment specified in each contract was made; that the promissory note specified in each contract was made and delivered; that a record of each sale was duly made, as provided by law; that each of the several persons to whom the lands were sold "made divers payments of money upon their several notes," which payments were credited upon the notes by the proper officers of the County, but the plaintiff cannot set forth particularly the dates and amounts of the payments; that the notes and the amounts due thereon are held by the County as valid claims against their makers; that, by the said premises, the several purchasers became the owners of the several tracts of land; that the legal title to the lands remained vested in the County; that, on the payment of the balance of said moneys, the County was bound to cause the lands to be conveyed to the several purchasers, or their assigns; that afterwards, the several purchasers, for money considerations, respectively made and delivered to the plaintiff certain "conveyances," a copy of one of which is made part of the bill, each of the others being averred to be in like substance and effect, except the name of the grantor and the description of the lands conveyed; that the "conveyances" were duly filed in the office of the auditor of the County; and that thereby the plaintiff became the owner of the several contracts and the several tracts of land. Such copy is in these words:

Know all men by these presents that I, Wm. H. McClure, in consideration of the sum of one hundred dollars in hand paid to me by Austin Corbin, of Kings County, State of New York, the receipt whereof is hereby acknowledged, do hereby sell and convey to the said Austin Corbin all the interest in the following described land, *viz.:* Lots numbers (3) three, eleven (11), and twelve (12), being the north half of the north-east quarter, and the east half of the southeast quarter of section sixteen (16), township eighty-nine (89) north, of range number fourteen (14) west of the fifth principal meridian, in Black Hawk County, Iowa, which was conveyed to me by a contract, now on file in the office of the County Auditor of Black Hawk County, Iowa, made by and between John Kerr, School-Fund Commissioner of said County, and Wm. H. McClure, for the conveyance of said lands; and I hereby sell and assign to said Corbin all my rights under said contract, convenanting with him that I have not sold, assigned, or transferred the same to any person or persons.

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In witness whereof I have hereunto set my hand this 1st day of July, 1871.

In presence of, WM. H. MCCLURE.
DAN'L W. FOOTE."

Endorsed on back as follows:

"This assignment filed in my office this 1st day of July, A. D. 1871.
D. W. FOOTE, *Auditor.*"

The bill further alleges the willingness of the plaintiff to pay to the County the amount remaining unpaid on the notes, being the balance of the purchase money of the several tracts of land; that, in January, 1872, he offered to pay it to the auditor of the County; that in October, 1874, he tendered to the Auditor and to the Treasurer $16,197.69, as and for the payment of the balance remaining unpaid on the purchase money of the several tracts of land, and all interest thereon; that said sum was more than sufficient to pay said balance; that said officers failed to accept the money so tendered, and refused to state whether they accepted or refused to accept it; that the plaintiff then and there became entitled to demand the issuance of certificates of the payment of the moneys provided to be paid in said several contracts, and then and there did demand the issuance of the same, which was refused; that the plaintiff brings into court for the use of the defendants the amount so tendered, to wit: $16,197.69, for the purpose of completing and perfecting the said tender and to enable the defendants to accept the same, if they elect so to do, at any time; that, in case said moneys should be found insufficient in amount for said purposes, the plaintiff offers to pay and bring into court such further sum as may be found to be necessary; that the said several contracts are valid and subsisting; that the said County has never undertaken to rescind them, or given notice of an intention to do so, or commenced suit to enforce payment of the purchase money or to foreclose the equities of the plaintiff or of his grantors; that no forfeiture of said contracts could lawfully be made by said County; that the defendants, other than the County and its said two officers, severally claim to have some title to or interest in said lands, or some part thereof; that, pursuant to said last mentioned sales of said lands, patents have been issued for said lands or some of them, to said defendants or some of them, by the Governor of the State of Iowa, but the plaintiff cannot more particularly state the facts in respect to the issuance of said patents; that the plaintiff is the lawful owner of said several tracts of land; and that the issuance of said patents has vested the legal title to said premises in the patentees therein named. The prayer of the bill is that the said subsequent sales of the said several tracts of land, and the said patents, and all conveyances of said lands by said patentees, be decreed to be void and of no effect as against the estate of the plaintiff; that the title of the plaintiff to said premises be forever quieted as against said defendants claiming any interest in said lands; that each of them be enjoined from setting up any interest in said premises under said sales and the patents issued thereunder; that the said patentees and their several grantees be decreed to hold the legal title to said lands, as the trustees of and for the plaintiff; and that they be compelled to convey the same to the plaintiff upon such terms as to the court may seem just and equitable. Three separate demurrers were filed to the amended bill, one by the County of Black Hawk, one by its Auditor and its Treasurer, and one by the remaining defendants. In each of the demurrers one of the causes of demurrer assigned is, that it does not appear upon the bill that the circuit court has jurisdiction of the alleged causes of action or of the parties, or that the plaintiff's several assignors could have maintained actions in the circuit court against the demurring defendants

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upon the said several contracts. The decree of the circuit court states that it declined to hear argument upon any of the questions raised by the demurrers except the question of jurisdiction, that it had heard arguments as to that question, and that the ground of the dismissal of the amended bill is, that the court has no jurisdiction of the cause.

[664] The first point taken by the appellees is, that the appeal ought to be dismissed for want of jurisdiction in this court, on the ground that the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs. The view urged is, that the interest of each of the appellees who is alleged to have an interest in some of the lands in question is several; that each several interest is not shown to exceed the value of $5,000; and that the County of Black Hawk and its officers are not necessary or more than formal parties to the suit. But the allegations of the bill, which must be taken as true for the purposes of this case, are, that although, under the contracts, the patents for the lands are to be issued by the Governor of the State, the notes and the amounts due thereon are held by the County, the money is to be paid to the County, and the tender was made to the officers of the County who are defendants. The matter in dispute between the appellant and the County is the sum of $16,197.69, which he tendered to its officers and which they did not accept. Under the contracts, the purchaser is entitled to receive a patent from the Governor only on paying the notes, which are alleged to be held by the County. To obtain the relief asked for in the bill, the plaintiff must first pay the said sum to the County in discharge of said notes. His title cannot be quieted, as prayed for, as against the adverse claimants of the lands, until his contract obligations to the County are fulfilled. Therefore, the County and its said officers are real parties to the suit, and the matter in dispute as to them is the sum so tendered.

Although the amended bill in the record was filed in July, 1878, the counsel for the respective parties have stipulated in this court, in open court, that the suit in the circuit court was originally begun in November, 1874. The question of the jurisdiction of the circuit court is, therefore, to be determined under that clause of section 629 of the Revised Statutes which provides that "No circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." There can be no [665] doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands in question. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. The only question for consideration is, whether the suit is one to recover the contents of the contracts.

The appellant contends that the suit is not one to recover the contents of a chose in action; that it is not even founded upon the contracts; and that it is only a suit to determine the validity, force and effect of certain transactions which occurred subsequently to the making of the contracts, whereby certain rights are claimed to have arisen adverse to those existing under the contracts. It is urged that the appellant does not prosecute the suit in his character of assignee, but prosecutes it because a cause of action has accrued to him through the act of the county officers in refusing to accept the tender, and through the assertion by the other individual defendants of an adverse title to the lands. But we cannot take this view of the case. The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to re-instate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the County or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money, contained in a promissory note, is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise. The promise to receive [666] the money, stipulated in these contracts to be paid by the purchasers as a foundation for their right to receive patents, is, so far as this suit is concerned, the essence of the contracts; and a suit to compel the acceptance of that money is a suit to enforce such promise and, therefore, is a suit to recover the contents of the contracts. This principle was settled in the early case of *Sere* v. *Pitot*, 6 Cranch, 332, under section 11 of the Judiciary Act of 1789 [1 Stat. at L., 73], which is re-enacted in section 629 of the Revised Statutes. There the plaintiffs were the general assignees of the effects of an insolvent debtor, by operation of law. It was contended that the statute applied only to a voluntary assignment of a particular chose in action, and that the word "contents" did not apply to accounts or unliquidated claims, but was confined to transferable paper. But the court held that the statute intended to except suits in virtue of equitable assignments, as well as suits in virtue of legal assignments, and to exclude from the Federal Courts the assignee of all the open accounts of a merchant, as well as the same person when the assignee of a particular note. The court say: "The term 'other chose in action' is broad enough to comprehend either case, and the word 'contents' is too ambiguous in its import to restrain that general term. The 'contents' of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account." Following

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out this principle, the obligation or the promise contained in a contract is its contents, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents.

In *Deshler* v. *Dodge*. 16 How., 622, 631, it is said by the court, that the statute in question applies to cases "In which the suit is brought to recover the contents or to enforce the contract contained in the instrument assigned;" and that where the suit is brought to enforce the contract contained in the chose in action, the assignee is disabled, unless the suit might have been brought in the court if no assignment had been made. Again; in *Bushnell* v. *Kennedy*, 9 Wall., 387 [76 U. S., XIX., 736], it is suggested by the court that the restriction applies to rights of action founded on contracts [667] which contain within themselves some promise or duty to be performed, and that such contracts may be properly said to have contents.

The amended bill in this case contains no averment showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made; and it is well settled that this is necessary. *Turner* v. *Bank*, 4 Dall., 8; *Mollan* v. *Torrance*, 9 Wheat., 537; *Bank* v. *Moss*, 6 How., 31; *Bradley* v. *Rhines*, 8 Wall., 393 [75 U. S., XIX., 467].

We are, therefore, of opinion that the Circuit Court had no jurisdiction of this suit, *and that its decree must be affirmed, with the modification that the dismissal of the bill is without prejudice to the right of the plaintiff to bring any suit he may be advised, in the proper court.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U S., 354.

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[709] JAMES S. MARSH ET AL., *Plffs. in Err.*,

v.

JOHN McPHERSON.

(See S. C., 15 Otto 709–718.)

Damages for breach of contract—evidence to reduce—failure to deliver—defective articles.

1. Under a contract for the sale of machines, if the vendee accepts the machines after the time when they should have been delivered, or if, after receiving them and finding them defective, he permits repairs to be made and accepts the benefit of them, he cannot recover damages for a breach of the contract to the same extent as if nothing had been done to make good his loss.

2. Any circumstance, otherwise competent in evidence to reduce the damages, may be proven on the trial for that purpose, although it may not have come into existence until after the commencement of the action.

3. If there has been a total failure to deliver any of the machines specified, the damage to which the plaintiff is entitled is the amount of money with which, at the time of the breach he could have supplied himself by purchase from others, with the same number of similar articles of equal value.

4. Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price.

[No. 282.]

Argued Apr. 13, 1882. Decided Apr. 24, 1882.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The case is stated by the court.

Messrs. **Jefferson H. Broady** and *A. J. Poppleton*, for plaintiffs in error.

Mr. **John L. Webster**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought January 15, 1878, by the defendant in error against the plaintiffs in error, to recover damages for the breach of a contract under seal for the sale of certain real and personal property. On October 16, 1877, the parties entered into a written agreement, by which McPherson agreed, in consideration of the covenants of the parties of the second part, to sell and convey to them certain described real estate in Nebraska and, in addition thereto, one half the stock of goods in a store belonging to him, on a parcel of the real estate. The plaintiffs in error, parties of the second part, [710] covenanted on their part, to pay for the said real estate as follows: for one parcel, $18,190.37, in combined reapers and mowers and self-rakers, known as the Valley Chief, to be taken, those designated as No. 1 at $175 each, and No. 2 at $170 each; to be delivered, 86 machines of No. 1, and 20 of No. 2, at certain named points in different parts of the State and in Kansas, "All the said machines to be delivered in good condition, and free of all incumbrances of taxes and of charges for freight, each machine to have two smooth sickles and one sickle-edge sickle." In the agreement, the freight on each machine from the manufactory at Lewisburg, Pennsylvania, was estimated at $25, and in all cases when it fell below that sum the difference was to be accounted for and paid. The store property was to be paid for in cash and notes, and the remainder of the real estate, at $3,600, in machines of another description at $175 each, "to be delivered in good condition, free of incumbrances," as before in respect to the others, at certain other named places, being eleven machines at Beatrice, Nebraska, and the remainder of this lot on board cars at the factory at Lewisburg, consigned to the party of the first part or to his order.

At the time of the execution of this agreement, the machines, it is alleged, were in the possession of the agents of the party of the second part, at the various points, and that they were not in good condition, were subject to incumbrances and charges, and that the defendants failed and refused to deliver them, although the party of the first part had fully performed his covenants, by conveying the real estate and delivering the goods, as required by the contract. It is averred in the petition that the machines, in the condition required by the contract, were worth the amount of the agreed value of $21,775, to recover which, with an additional sum for an ascertained difference of freight, the suit is brought. It was begun in the state court, and the defendants below having appeared to the action, being citizens of Pennsylvania, and the plaintiff a citizen of Nebraska, the cause was removed for trial into the circuit court.

The defendants, in their answer, admitted the execution of the agreement set out in the petition, but alleged that it was fully executed, fulfilled and superseded by a subsequent agreement in writing between the parties, indorsed

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on it, and dated Nov. 5, 1877, in the words following, to wit:

[711] "BROWNVILLE, NEBRASKA,
November 5th, 1877.

The above contract is this day executed by the said parties thereto as follows: The within named real estate is conveyed by said first party (McPherson) to said second parties (Marsh and Marsh); also one half of said stock of goods at an invoice in the sum of four thousand and two hundred and forty-three and 10-100 dollars, making price of the half, four thousand two hundred and forty-three and 10-100 ($4,243.10) dollars, is delivered by McPherson to said parties, Marsh and Marsh.

The said second parties, Marsh and Marsh, hereby acknowledge payment of all said machines named in the list within named, aggregating eighty-six number ones, twenty number twos, and hereby deliver all thereof to said first party at the places named in said within list (except there is two instead of one at Donnebrag, and three instead of four at Wahoo, which change is consented to by the parties), free and clear of all liens, charges or taxes, up to and including taxes for the year 1878, as per within contract. Said second parties also hereby deliver to said first party eleven of said machines within named, called Marsh number four, as provided for within and on the within named terms therefor, at Beatrice. On this, eleven machines number four, there is two hundred and seventy-five dollars freight in favor of said second parties, to whom said first party shall account therefor as hereinafter stated.

The balance of $259.63 on the said list of number ones and number twos, and the said eleven number fours, amounting to $1,925, is applied on the purchase price of said lands in Sonora Island, leaving balance of $1,415.37, for which said second parties shall deliver, as provided for within, eight of said machines number four on board the cars in Pennsylvania, at place within named, leaving still a balance on said purchase price of island real estate of $15.37 in favor of said first party, to whom the second parties shall account. As soon as the amount due said first party on freights of said number ones and twos are ascertained, the same, with the said $275 due second parties, and said $15.37 due said first party, shall be settled and adjusted by the parties. Said eight number fours to be delivered within thirty days after notice to second parties. Said second parties hereby warrant that said eighty-six number ones and twenty number twos and eleven number fours are now at the places above named in condition for delivery as above and within provided for, and that said eight number fours shall be delivered as above stated, and shall
[712] stand good to said first party for any breaches or failures of such warranty and promise.

On said store goods one thousand dollars is paid to said first party, the receipt of which is hereby acknowledged, and the balance shall be paid according to the within contract.

JOHN MCPHERSON.
JAMES S. MARSH.
E. C. MARSH."

On the said contract the following agreement was indorsed by plaintiff, to wit:

"Received of said second parties, Marsh and Marsh, in full payment and settlement of said balance due for said store goods, after said payment of one thousand dollars, the following described notes of this date, made by James S. Marsh to my order, to wit: one for $1,056,44, one for $915.72, one for $685.47, and one for $585.47, in all four several promissory notes for said amounts, all due December 1, 1877, with interest at ten per cent per annum after maturity.

November 7, 1877. (Signed)
JOHN MCPHERSON.

Witness: WM. H. HOOVER."

The defendants also alleged performance of the contract and aver "That the said transactions between plaintiff and defendants were neither sales of the said plaintiff's lands and goods nor sales of defendant's machines, but were barters of the property of one in exchange for the property of the others, in which the prices fixed were largely in excess of cash prices; so much so that neither would have bought the property of the other for cash at such prices, and that the naming of the prices in the transaction was nothing more than a matter of convenience in executing the exchange."

The defendants further aver as to the eight Marsh No. 4 reapers to be delivered on board cars at Lewisburg, Pennsylvania, three had been delivered, and that as to the remainder, they have been ready and willing to do so, on the order of the plaintiff, but that he has neglected to do so, but that they hold the same for him.

The answer also contains the following:

"Defendants admit that after the making of said agreement in November, 1877, defendants told plaintiff that they (the defendants) would visit each of the points named in said writing, [713] where said machines then were and at which places they were delivered as stated in said writing, and if any agents were not settled with or any liens or charges were claimed against any of said machines, would make settlement with their said agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all unpaid claims and liens of any and *of every* kind and sort upon each and all of said machines, and put in good repair each and all of the said machines, so as to have the same conform to the conditions of said agreement and warranty in writing, but deny that they ever so stated until after said writing of November, 1877, or that they told plaintiff that they would do so at once, but aver that they stated that they would do so in a reasonable time to have them so repaired and in good condition for the first season and time for selling reapers and mowers; which season, defendants aver, was the latter part of the spring of 1878, continuing from thence through the summer of 1878, and aver that said promise was to so repair and fit up said reapers and mowers ready for the harvest of small grains in the year 1878, and for the sales for such harvest, which time commenced about May, 1878, and continued during such harvest; all of which was agreed to between the parties hereto as satisfactory, as making good the warranty of defendants in said agreement dated November 5, 1877, all of which said promises these defendants have fully performed and complied with, and have

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previous to said time and previous to the commencement of the reaper and mower trade for 1878, and previous to April 1878, visited each of the points named in said writing, dated October 6, 1877, where said machines then were, and made settlements with their agents then and there having charge of said agricultural machines, where settlements had not already and heretofore been made with such agents, and paid off and discharged all claims and liens of every kind and sort upon each and all of said machines, and put in good condition and repair each and all of said machines, wherever any such claims or liens were unpaid and wherever any of said machines were not in good condition or were out of repair, and had all said machines as aforesaid [714] discharged of all claims and liens of any and every sort, and in good repair and condition for the 1878 market, in due time for such market and pursuant to such promise."

The cause was tried by jury, and there was a verdict and judgment for the plaintiff, to reverse which this writ of error is prosecuted.

There are thirty-three assignments of error, based on exceptions to the rulings of the court, upon questions of evidence and upon instructions to the jury, either given or asked and refused; but it will not be necessary to refer to them in detail.

The chief issues between the parties, raised by the pleadings and maintained in evidence, were, whether there had been a delivery of possession by Marsh & Marsh to McPherson of the machines; and whether there had been a breach of warranty, that they were in a good condition at the places named, and free from all liens and charges.

Upon the point whether there had, in fact, been a delivery of actual possession by the defendants to the plaintiff, of all or of any of the machines, there seems to be some confusion. The bill of exceptions, of course, and properly, does not set out all the evidence, but the court, in its general charge, stated to the jury, "That the plaintiff admits that all the machines had been delivered to him." From the context, it would appear that the contract of November 5, 1877, is treated as an admission to that effect, as to all machines that were in fact at the places named, without respect to their condition; based, no doubt, upon the expression contained in the instrument, by which it is declared that said second parties, Marsh and Marsh, hereby acknowledge payment of all said machines, etc., and hereby deliver all thereof to said first party at the places named in said within list, etc., free and clear of all liens, charges, or taxes, etc. The contract undoubtedly had the effect to pass the title to the machines from Marsh & Marsh to McPherson, and the right of possession; but whether the purchaser obtained actual possession could not be conclusively inferred from the contract merely. If the declaration in that instrument, of the fact of delivery, could have that effect, it would be equally conclusive that they were free of incumbrances, for that is [715] also stated in the same connection. It might have been that the machines were in the places mentioned in the contract and in the condition required; yet the defendants might have refused to deliver actual possession; if so, they would, of course, be liable in damages.

The bill of exceptions recites that "During the trial, evidence having been admitted tending to prove that many of the machines named in the contracts copied in the pleadings were not in as good condition as called for in the said contracts and were not supplied with all the pieces specified in the contracts, and that in some instances the whole machine was missing, and what the values of such deficient or impaired machines in the condition in which they then were and the difference in their values, in such condition, and the condition called for by the contract, and also on the part of the defendants that defendants had made repairs on some machines and supplied deficiencies and missing machines since the commencement of this action, and the value thereof," the court, at the request of the plaintiff, gave to the jury the following instruction:

"The jury is instructed that they are not permitted to take into account or make any allowance or reductions from the damages of the plaintiff for repairs of any kind made upon the machines or supplies furnished for them after November 5, 1877, all such acts on their part being without authority; and the plaintiff is entitled to recover the full measure of his damages as if no such repairs had ever been made."

This charge is clearly erroneous. In the first place it assumes the fact that the acts referred to, of making repairs and furnishing supplies, were without authority. It would not be denied, we assume, that, if authorized, they would have to be considered; and whether authorized or not was, at least, one of the questions of fact involved in the issues to be tried, on which it was the duty of the jury to pass. For the defendants had set up in their answer what they claimed to be an agreement with the plaintiff, by which they were to have until the spring of 1878 in which to make good their warranty as to the condition of the machines. Whether this agreement for an extension of time, not acted on, could be pleaded as a bar to the action for a breach of the contract, is not the question. It was, if proved and if repairs were actually made in pursuance of it, certainly good as proof that they were made with the consent and authority of the plaintiff. [716] And as the bill of exceptions recites that evidence was offered to maintain the issues, by both parties, it is not to be assumed that there was none in support of this claim.

But, independent of this alleged agreement, it was certainly competent for the defense to show that, after the date of the second contract, the machines were put in the good condition required by it, and were then delivered to and accepted by the plaintiff; for if the plaintiff accepted the machines after the time when they should have been delivered or, after they were received by him, permitted repairs to be made or supplies to be furnished and accepted the benefit of them, he certainly cannot claim that he has been damaged by a breach of the contract to the same extent as if nothing had been done to make good his loss.

It is a rule of law, without exception so far as we are aware, that any circumstance, otherwise competent in evidence to reduce the damages, may be proven on the trial for that purpose, although it may not have come into existence until after the commencement of the action.

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The court, also, at the request of the plaintiff, gave to the jury the following charges:

10 "The jury is instructed that the plaintiff is entitled to recover for any machines which were not at the places named at the time of the making of the contract of November 5, 1877, the price of said machines as fixed in the contract; and if you find that the defendants failed to deliver any of the machines to be delivered at Lewisburg, Penn., after demand made by plaintiff, the plaintiff is entitled to recover the contract price of such machines." And, also,

11. "On such machines as were delivered to the plaintiff, he is entitled to recover for any defects in quality or condition, and the measure of his damages is the difference between the value of such machines in the condition in which they then were and the contract price."

And refused to give, on the request of the defendants, the following:

"The jury is instructed that if they find there was any breach of the warranty named in the contract of November 5, 1877, that the measure of damages for such breach is the difference in the value of such machines as they actually were and as they were warranted to be, less the benefit to the property by what the defendants have done to make good such warranty." [717]

During the trial, the defendants offered to prove the market value of such machines in good condition for cash, and the difference between that and the value of the machines in the condition in which they were delivered; but this offer was rejected.

In its general charge, the court stated the rule of damages very clearly and correctly, in the following language: "The extent of the damages in this case will be the difference that it would cost to put the machines in good condition, so as to comply with the contract, and also the value of those that were not then at the time and place stated in the contract." Standing alone, this instruction would have been unexceptionable. But in the rulings noted above, in giving the 10th and 11th instructions, asked by the plaintiff, and refusing to give that asked by the defendants, and in rejecting the evidence offered on the point, there was substantial error.

The price fixed in the contract, at which the plaintiff agreed to take the machines, whether the transaction is viewed as an exchange of property at assumed valuations, or as a purchase and sale for money, is not conclusive, between the parties, upon the question of damages, recoverable for a breach. If there had been a total failure on the part of the defendants below, to comply with the contract, and they had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which, at the time of the breach, he could have supplied himself by purchase from others, with the same number of similar articles of equal value. If the market price had in the meantime advanced, the recovery would be for more or, if it had fallen, it would be for less than the contract price; the rule to measure the loss, in such cases, being the difference between the contract and the market price The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs; and, as to freedom from liens, the cost of removing them, if that be the difference in actual value, between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference, in the actual circumstances of the case, is shown to be, is the true rule and measure of damages. Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price. *Benjamin* v. *Hillard*, 23 How., 149–167 [64 U. S., XVI., 518–522]. [718]

For these errors, the judgment of the Circuit Court is reversed and the cause remanded, with instructions to grant a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

C. E. MITCHELL, Admr. *de bonis non* of CLAIBORNE S. BARRON, Deceased, *Appt.*, [430]

v.

JOHN H. DOWELL ET AL., Late Partners as J. H. DOWELL & Co.,

JOHN H. DOWELL ET AL., Late Partners as J. H. DOWELL & Co., *Appts.*

v.

C. E. MITCHELL, Admr. *de bonis non* of CLAIBORNE S. BARRON, Deceased.

(See S. C., 15 Otto, 430–432.)

Equity jurisdiction.

Where a cause of action cognizable at law is entertained in equity, on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.

[Nos. 221, 467.]

Submitted Mar. 9, 1882. Decided May. 8, 1882.

APPEALS from the Circuit Court of the United States for the Eastern District of Arkansas.

Statement of the case by *Mr. Justice* **Woods:**

These are cross appeals from the same decree and they bring up the same record. The original bill was filed on August 22, 1877, by John H. Dowell and H. M. Mandeville, lately partners under the name of J. H. Dowell & Co., against one Askew, as administrator of the estate of Claiborne S. Barron, deceased; Margaret Barron, his widow; his three children, and William H. Brazell. Askew resigned pending the suit, and C. E. Mitchell, the administrator *de bonis non*, was made party defendant in his stead.

The object of the bill was to foreclose a mortgage executed by William H. Brazell as surviving partner of the late firm of Barron & Brazell, in the name of said firm, on certain real estate in the State of Arkansas, to secure three notes for $2,851 each, also executed by Brazell in the name of the firm and as surviving partner thereof.

It appeared from the evidence, that in the

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year 1873 the complainants were cotton factors and commission merchants in St. Louis, and on [431] October 4, of the same year Barron and Brazell formed a partnership under the name of Barron & Brazell, to continue two years, and at once began business.

The complainants became the factors and commission merchants of Barron & Brazell. On October 4, 1875, the day upon which the partnership expired by its own limitation, Barron died. His firm was on that day indebted to complainants for advances in the sum of $15,989. Brazell, as surviving partner, was left in possession of the assets of the late firm, consisting of a large stock of goods and a large number of notes and accounts. With these assets Brazell continued business in the firm name, until the making of the notes and mortgage which are the basis of this suit.

On April 15, 1876, upon an accounting and settlement between the complainants and Brazell, there was found to be due the former the sum of $8,456. Thereupon, Brazell, in the name of the late firm of Barron & Brazell, made and delivered to complainants three notes, which in the aggregate amounted to the sum so found due, and to secure the same executed a mortgage on a parcel of real estate in the Town of Hope, in the State of Arkansas, the legal title to which had been in Barron at the time of his death.

The defenses made to the bill were: (1) That there was nothing due from the late firm of Barron & Brazell on the notes which the mortgage was given to secure; and (2) That neither Brazell nor the firm of Barron & Brazell had any title to the real estate conveyed by the mortgage but that it had been the individual property of Barron, and on his death descended to his heirs, and that the mortgage executed upon it by Brazell after Barron's death was, therefore, void.

Upon final hearing, the circuit court was of opinion that the amount specified in the notes, to secure which the mortgage was executed, was due to the complainants from Brazell and the estate of Barron, his late partner; but was also of opinion that the real estate described in the complainants' bill, and alleged to be partnership property of the late firm of Barron & Brazell, had never been the property of the partnership, but had been the individual property of Barron, and that the title thereto was in his heirs, and that Brazell, as surviving partner, "Had no right or authority to execute said mortgage on said property, and that said mortgage deed was void and of no effect."

Thereupon the court decreed that "So much of complainants' bill as prays a decree of foreclosure of said mortgage be denied," and rendered a decree against the administrator of Barron's estate and Brazell for the amount due on the notes purporting to be secured by the mortgage.

The complainants and the administrator of the estate of Barron have both appealed from this decree.

Messrs. **Solomon F. Clark** and **Samuel W. Williams,** for appellant.

Messrs. **W. F. Henderson** and **Augustus H. Garland,** for appellees.

[432] *Mr. Justice* **Woods** delivered the opinion of the court:

Without going into a discussion of the evidence on the subject, we declare our opinion to be that the circuit court was right in holding that the title to the property described in the mortgage executed by Brazell in the name of the late firm of Barron & Brazell had never been either in the late firm or in Brazell, but was in Barron, the deceased member of the firm, at the time of his death, and that at the date of the mortgage the title of the mortgaged premises was in the heirs of Barron.

When this fact was established by the evidence and found by the court below, its jurisdiction, sitting as a court of equity, to proceed any further in the cause was lost, and it was without authority to render a decree upon the notes which the invalid mortgage was intended to secure.

When the court found there was no mortgage, there was nothing left for it to act upon but the promissory notes, and on that cause of action there was a plain, adequate and complete remedy at law, and it should have dismissed the bill without prejudice to an action at law.

The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law. *Russell* v. *Clark*, 7 Cranch, 69; *Price's Pat. Candle Co.* v. *Bauwen's Pat. Candle Co.*, 4 Kay & J., 727; *Baily* v. *Taylor*, 1 Russ. & M., 75; *French* v. *Howard*, 3 Bibb, 303; *Robinson* v. *Gilbreth*, 4 Bibb, 184; *Nourse* v. *Gregory*, 3 Litt. (Ky.), 378.

We are of opinion, therefore, that *the decree of the Circuit Court should be reversed and the cause remanded, with directions to dismiss the bill without prejudice to an action at law on the notes which the invalid mortgage purported to secure; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NEWPORT AND CINCINNATI BRIDGE COMPANY, *Appt.*, [470]
v.
UNITED STATES.

(See S. C., 15 Otto, 470-509.)

Bridges over navigable rivers—the Ohio River—power of Congress—withdrawing license—obstruction of navigation—damages for alteration.

1. The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States, is in Congress.
2. The Ohio is one of the navigable rivers of the United States.
3. The power of Congress, in respect to legislation for the preservation of interstate commerce, is free from state interference. When therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an un-

NOTE.—*Bridges; different kinds; legislature has power to grant right to erect; duty to repair.* See note to Weightman v. Washington, 66 U. S., XVII., 52.

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lawful structure, no legislation of a State can make it lawful.

4. When Congress, by Resolution, gave a license to erect and maintain a bridge across the Ohio River the Bridge Company, by accepting its provisions, became subject to the reservation of power in Congress contained in the Resolution, to withdraw the license and to direct necessary alterations of the bridge.

5. The license of Congress could be withdrawn without its being judicially ascertained that the bridge, as authorized, either did in fact or would if built, substantially and materially obstruct free navigation.

6. If, in the judgment of Congress, the public good requires the bridge to be removed, or alterations to be made in its structure, the United States is not liable to make compensation to the Company for the loss incurred by what was directed, although the bridge, as far as it had progressed, was "constructed so as to substantially comply with the provisions of law relating thereto."

[No. 32.]

Argued Mar. 2, 1881. Ordered for Reargument Mar. 30, 1881. Reargued Mar. 3, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

Statement of the case by *Mr. Chief Justice* **Waite:**

On the 5th of February, 1868, the General Assembly of Kentucky passed an Act to incorporate the Newport and Cincinnati Bridge [471] Company, with power to build a bridge across the Ohio River between Newport and Cincinnati. This charter provided "That the said bridge shall be constructed so as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize."

On the 3d of April, in the same year, the General Assembly of Ohio enacted a statute authorizing the creation and organization of corporations to build bridges across the same river. This Act, in order that the bridges to be built might not obstruct navigation, provided that they should be erected "In accordance with the provisions of an Act of Congress, approved July 14, 1862, entitled 'An Act to Establish Certain Post-Roads,' or of any Act that Congress may hereafter pass on the same subject." Its 11th section is as follows:

"Sec. 11. That any such company may fix or change the span and altitude of any bridge which it may erect and construct across the Ohio River; *Provided*, That the span of any such bridge be not less than three hundred feet in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans; and the height of the bridge in the center of the span over the main channel, shall not be less than one hundred feet above the surface of the water at low water, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high water-mark as may be provided in any Act of Congress now in force, or which may hereafter be passed; but this section shall not apply to any bridge built with a draw, in accordance with the provision of an Act of Congress approved July 14, 1862, entitled 'An Act to Establish Certain Post-Roads,' or any Act that Congress may hereafter pass upon the subject."

On the same day this Act was passed, the Newport and Cincinnati Bridge Company was organized under it in Ohio to build a bridge between Cincinnati and Newport. Afterwards, on the 16th of April, 1868, the Kentucky and Ohio Companies, pursuant to provisions in their respective charters, were consolidated, and became one corporation, with the general powers which the divisional companies originally possessed.

The material provisions of the "Act to Establish Post-Roads," passed July 14, 1862, ch. 167, [472] secs. 3 and 4, 12 Stat. at L., 570, are as follows:

"Sec. 3. *And be it further enacted*, That it shall be lawful for any other railroad company or companies whose line or lines of road may now or shall hereafter be built to the Ohio River above the mouth of the Big Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.

Sec. 4. *And be it further enacted*, That any bridge erected under the privileges of this Act may, at the option of the company or companies building the same, be built either as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans; *Provided*, That, if the said bridge shall be made with continuous or unbroken spans, it shall not be of less elevation than ninety feet above low water-mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge covering the main channel of the river be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall be parallel with the current of the river as near as practicable; *And provided also*, That if any bridge built under this Act shall be constructed as a drawbridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length; and said span shall not be less than seventy feet above low water-mark, measuring to the bottom chord of the bridge; and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or first pier of the draw; *And provided also*, That said bridge shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under the permanent spans of said bridge, except that said draw shall not be required to be opened when engines or trains are passing over said bridge, or when passenger trains are due; but in no case shall [473] unnecessary delay occur in the opening of said draw after the passage of said engines or trains."

On the 3d of March, 1869, Congress passed the following Joint Resolution:

"Joint Resolution giving the assent of the United States to the construction of Newport and Cincinnati Bridge:

Be it resolved, by the Senate and House of Representatives of the United States of America in

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Congress assembled, That the consent of Congress be and the same is hereby given to the erection of a bridge over the Ohio River from the City of Cincinnati, Ohio, to the City of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a Corporation chartered and organized under the laws of each of the States of Kentucky and Ohio; *Provided*, That such bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an Act, entitled 'An Act to Establish Certain Post-Roads,' approved July fourteenth, eighteen hundred and sixty-two. That said bridge, when completed in the manner specified in this Resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States; but Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this Resolution, or to direct the necessary modifications and alterations of said bridge."

After the passage of this Resolution, the consolidated Company began the erection of a drawbridge with a pivot draw, and expended a large amount of money in the undertaking, but on the 3d of March, 1871, before the structure was completed, Congress passed the following Act:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:*

Sec. 5. That it shall be unlawful for the Newport and Cincinnati Bridge Company, or any other company or person, to proceed in the erection of the bridge now being constructed over the Ohio River, from the City of Cincinnati, Ohio, to the City of Newport, Kentucky, and the approaches thereto, unless the said bridge shall be so constructed that the channel span of four hundred feet, as now located, shall [474] have under said span a clear headway at low water, of one hundred feet below any point of said channel span, and in such case no draw shall be required in said bridge; all the other spans of said bridge, which cover the Ohio River at low water-mark, shall have a clear headway of not less than seventy feet above low water-mark; and the other spans of said bridge, extending to each shore, may be made of less elevation than seventy feet above low water-mark, to accommodate a regular grade for the approaches to said bridge.

And when the foregoing requirements shall have been complied with by the said Newport and Cincinnati Bridge Company, the location of said bridge, its structures and approaches, shall thereupon be deemed to be legalized, and declared to be lawful structures, and shall be recognized and known as a post-route.

The plans for changes in said bridge made necessary by this Act shall be submitted by said Company to the Secretary of War for his approval. And in the event of the Bridge Company making the changes provided for in this Act, it shall be lawful for said Company, after they shall have made the changes in said bridge and the approaches thereto, as herein provided, to file their bill in equity, against the United States in the Circuit Court of the United States for the Southern District of Ohio, and full jurisdiction is hereby conferred upon said court to determine: first, whether the bridge, according to the plans on which it has progressed, at the passage of this Act, has been constructed so as to substantially comply with the provisions of law relating thereto; and, second, the liability of the United States, if any there be, to the said Company, by reason of the changes by this Act required to be made, and if the said court shall determine that the United States is so liable, and that the said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as hereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by this Act to be made.

And the said court is hereby further authorized and required to proceed therein to final decree, as in other cases in equity. And it shall be lawful for either party to the said suit to appeal from the final decree of the said Circuit Court to the Supreme Court of the United States, as in other cases, and the Supreme Court shall thereupon proceed to hear and determine the said case, and make a final decree therein; and thereupon if such decree shall be in favor of said Company, the Secretary of the Treasury [475] of the United States shall, out of any moneys in the Treasury not otherwise appropriated, pay to the said Company such sum of money as shall by the said Supreme Court, be so decreed to be paid to the said Company; *Provided, nevertheless*, That no money shall be paid by the Secretary of the Treasury to the said Company until the Supreme Court of the United States, upon appeal taken as aforesaid, shall render a final decree in the case in favor of said Company."

The Company promptly yielded to these new requirements, and, having completed its bridge on the altered plan, brought this suit in equity against the United States in the Circuit Court for the Southern District of Ohio, to recover the increased cost. After hearing, the circuit court dismissed the bill, and from that decree this appeal was taken.

Mr. **William M. Ramsey,** for appellant.

Messrs. **Samuel F. Phillips,** *Solicitor-Gen.* and **Benjamin H. Brewster,** *Atty-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The first question which presents itself is, whether on the face of the several Acts of Congress, any liability rests on the United States to pay the Bridge Company the cost of the change that was directed in the plan of its bridge. It cannot be denied that but for the Act of 1871 [16 Stat. at L., 572], a bridge built according to the original plan would have been a lawful structure which the Company could have maintained until Congress withdrew its assent, or required alterations to be made. The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign

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Nations and among the States. *Wilson* v. *Black Bird Cr. M. Co.*, 2 Pet., 252; *The Wheeling Bridge*, 18 How., 421 [59 U. S., XV., 435]; *Gilman* v. *Philadelphia*, 3 Wall., 729, 731 [70 U. S., XVIII., 101]; *The Clinton Bridge*, 10 Wall., 462 [*Gray* v. *R. R. Co.*, 77 U. S., XIX., 970]; *R. R. Co.* v. *Fuller*, 17 Wall., 569 [84 U. S., XXI., 714]; *Pound* v. *Turck*, 95 U. S., 464 [XXIV., 527]; *Wisconsin* v. *Duluth* 96 U. S., 387 [XXIV., 672]. That the Ohio is one of the navigable rivers of the United States must be conceded It forms a boundary of six States and the commerce upon its waters is very large.

No question can arise in this case upon what [476] the States have done, for both Ohio and Kentucky required the Company to comply with the regulations of Congress. Neither are we called on to determine what would have been the rights of the Company if in the original license no power of future control by Congress had been reserved. The Joint Resolution on which the Company relies contains this distinct provision: "But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this Resolution, or to direct the necessary modifications and alterations of said bridge." An examination of the legislation of Congress in reference to the bridging of streams shows this to have been at that time a new provision. It had appeared but once before, and then in an Act passed at the same session of Congress, February 19, 1869, ch. 37, 15 Stat. at L., 272, authorizing a bridge across the Connecticut at Middletown.

The first enactment by Congress on this general subject is found in the Act making appropriations for the Postoffice Department, August 31, 1852, ch. 111, secs. 6 and 7, 10 Stat., at L., 112, which declared the bridge across the Ohio at Wheeling, then existing, to be a lawful structure. This Act simply gave the bridge company leave to maintain a bridge already built, and reserved no power of future control. Next followed, ten years after, the Act of July 14, 1862, ch. 167, 12 Stat. at L., 569, which legalized a bridge then in the course of construction across the Ohio at Steubenville, and contained the general provisions as to bridging the Ohio above the mouth of the Big Sandy referred to in the Joint Resolution of March 3, 1869. In this Act, also, there was no reservation of power by Congress. The next was an Act of February 17, 1865, ch. 38, 13 Stat. at L., 431, by which the Act of July 14, 1862, was amended so as to authorize the erection of a bridge across the Ohio at Louisville. In this, too, there was no reservation of power, but specific directions were given as to the height of the bridge, the number and location of draws, and the length of spans, and it was expressly provided that all should be so constructed as not to interrupt navigation. The same day another Act was passed, ch. 39, 13 Stat. at L., 431, by which [477] a bridge across the Ohio between Cincinnati and Covington, then being built in accordance with the laws of Ohio and Kentucky, was declared to be a lawful structure and no power reserved. There was no further legislation of this character until the Act of July 25, 1866, ch. 246, 14 Stat. at L., 244, which authorized eight bridges across the Mississippi at and above St. Louis, and one across the Missouri. This Act provided that "In case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches," and section 13 was as follows: "That the right to alter or amend this Act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved." On the 27th of February, 1867, an Act was passed, ch. 98, 14 Stat. at L., 412, to legalize the Clinton Bridge across the Mississippi, and on the 21st of February, 1868, ch. 10, 15 Stat. at L., 37, the Act of July 25, 1866, was extended so as to include a bridge over the Mississippi at La Crosse. On the 6th of July in the same year, ch. 134, 15 Stat. at L., 82, a bridge across Black River in Ohio was authorized. Afterwards, on the 20th of July, ch. 179, *id.*, 121, two other bridges were authorized across the Missouri. In all these Acts the power of alteration and amendment was reserved in the exact language employed in the Act of 1866.

This brings the history of congressional legislation on the subject of bridging the public waters of the United States down to the session of Congress when the Joint Resolution in favor of the Newport and Cincinnati Company was passed, and when, as has already been seen, the peculiar form of reservation which appears in that Resolution was for the first time introduced. Two licenses were granted at that session which contained this reservation; one to cross the Connecticut, ch. 37, 15 Stat. at L., 272, and the other the Joint Resolution now in question. On the same day the Joint Resolution was adopted, an Act was passed to legalize the bridge across the East River, between New York and Brooklyn, in which "power at any time to alter, amend or repeal" was in express terms and without any limitation reserved. Ch. 139, 15 Stat. at L., 336.

From this it seems to us clear that the peculiar language of the reservation now in ques- [478] tion was intended to have a special signification. It had been considered enough before to provide that, "To prevent or remove all material obstructions to navigation," the "right to alter or amend," expressed in the usual form, be reserved. But when power was given to build a bridge below the Big Sandy, such as had before only been built above, it was deemed expedient, in the interest of commerce, to be more specific, and by reserving the power to withdraw the assent of Congress to what might prove to be an obstruction to navigation, to imply at least a reservation of power to make that unlawful which; while the assent continued, would be lawful. That this is what was intended by the language used may fairly be inferred from earlier legislation on the same general subject. Thus, as early as 1805, ch. 30, 2 Stat. at L., 330, Congress, in authorizing the grant of leave to a bridge company to build a bridge across a mill-pond and marsh in the navy yard at Brooklyn, N.Y., provided, "That if, at any future time, it shall appear to the President of the United States, that the property of the United States is injured by such

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bridge, he may revoke the permission granted by him for erecting the same." Afterwards, in 1855, 10 Stat. at L., 680, ch. 198, sec. 2, the Secretary of the Navy was authorized to permit another bridge company to connect its bridge with the navy yard at Kittery, Me., and to have a right of way through the yard to the bridge; but it was provided that the bridge and the right of way might be discontinued at any time by the Secretary. It surely could not be claimed that if, under the power reserved in these cases, the President had revoked the permission given in respect to the bridge at the Brooklyn yard, or the Secretary had discontinued that at Kittery, the United States would be either legally or morally bound to make good the loss sustained by the companies, or either of them, on that account. And the reason is that the language in which the power reserved was expressed, clearly implied that all the risks of revocation and discontinuance were to be assumed by those to whom the grants thus limited were made. So here, in assenting to an untried experiment, and one which might prove to be materially detrimental to the navigation of an important stream, Congress thought proper [479] to reserve the right to withdraw its assent, revoke its permission, if what might possibly happen should, in fact, come as the consequence of the new authority which was granted. To "withdraw assent," is the same as to "revoke permission," and what would be implied from one form of expression will be under like circumstances from the other It is true, in the case of the navy yards, Congress had absolute jurisdiction, and the States were excluded altogether. But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on state authority alone necessarily assume all the risks of legitimate congressional interference. In the present case, both the Ohio and Kentucky divisional companies were, by express provisions in their respective charters, subjected to this paramount controlling power. The consolidated company was, therefore, prohibited from obstructing navigation more than the laws of the United States authorized, and was required to build its bridge in accordance with the provisions of the Act of 1862, or any other law that Congress might thereafter pass on the subject. Hence, the Joint Resolution of 1869 became, by the operation of both congressional and state enactments, the law on which the rights of the Company depend. It was the paramount license for the erection and maintenance of the bridge; and the Company, by accepting its provisions, became subject to all the limitations and reservations of power which Congress saw fit to impose.

From this, we conclude that the withdrawal by Congress of its assent to the maintenance of the bridge, when properly made, is, for all the purposes of this case, equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of the several States, upon the subject. If modifications are directed, assent is, in legal effect, withdrawn, unless the required changes are made.

It is contended, however, that under the terms [480] of the reservation, the assent of Congress could not be withdrawn until it had been in some way judicially ascertained that the bridge, as authorized, either did, in fact, or would if built, substantially and materially obstruct free navigation. Such, we think, is not the fair meaning of the language employed. In the case of *The Wheeling Bridge*, 13 How., 519, it was judicially settled in this court that a bridge as constructed did illegally interfere with navigation; but when afterwards Congress, in the exercise of its constitutional authority to regulate commerce, legalized the structure by a legislative enactment, the court held, in [*The Wheeling Bridge*], 18 How., 421 [59 U. S., XV., 435], that this Act of legislative power removed the objection to the further continuance of the bridge, because, in the opinion of the Legislative Department of the Government, the obtruction which had been erected was no more than those interested in navigation should submit to for the general good. It is to be observed that the question now under consideration is not whether the Bridge Company has failed to comply with the requirements of the Joint Resolution, but whether those requirements are all that the due protection of free navigation demands. The first is, undoubtedly, a proper subject for judicial inquiry, but the last, as we think, belongs to the Legislature. Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered, unless it was manifestly so intended. Every doubt shall be resolved in favor of the Government. As Congress can exercise legislative power only, all its reservations of power, connected with grants that are made, must necessarily be legislative in their character. In the present case the reservation is of power to withdraw the assent which was given, and to direct the necessary modifica- [481] tions and alterations. This was to be done in case the free navigation of the river should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the Joint Resolution made sufficient provision for the protection of commerce. There is nothing to indicate that any different inquiry was to be instituted to determine whether the assent that had been given should be withdrawn, and as the withdrawal involved an Act legislative in its character, the necessary presumption is that the inquiry on which it was to be predicated, would be legislative also. No provision is made for instituting proceedings to have the question determined judicially; and even if the courts should determine that the bridge did substantially and materially obstruct navigation, Congress could not be compelled to withdraw its assent to the further continuance of the structure. This is evident from the *Wheeling Bridge*

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Case [*supra*], where, as has been seen, congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this court requiring the abatement of what, but for this assent, would have been, in the judgment of the court, a public nuisance. The withdrawal of assent, therefore, has been left to depend on the judgment of Congress in the exercise of its legislative discretion. For this purpose Congress must make its own inquiries, and determine for itself whether the obstruction that has been authorized is so material and so substantial as to justify, under all the circumstances of the case, an exercise of the power which was reserved as a condition of the original grant made.

It is next insisted that if, in the judgment of Congress, the public good required the bridge to be removed or alterations to be made in its structure, just compensation must be made the Company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation. In the present case, the Bridge Company asked of Congress permission to erect its bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge was found to be detrimental to navigation. This condition was an essential element of the grant, and the Company in accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the Company got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared, in express terms, on the face of the grant by which it was created. In the use of the franchise thus granted, the Company might and it was expected would acquire property. The property thus acquired Congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever, in the judgment of Congress, it could not be used without substantial and material detriment to the interest of navigation. A withdrawal of the franchise might render property acquired on the faith of it, and to be used in connection with it, less valuable, but that was a risk which the Company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give. It was optional with the Company to accept or not what was granted; but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon.

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We are aware that this is a power which may be abused, but it is one Congress saw fit to reserve. For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the Legislature.

What has been done seems to have been with due regard to the rights of all concerned. The Constitution made it the duty of Congress to protect all commerce which extends beyond state lines against obstruction by or under the authority of the States. Two States have been applied to for leave to bridge an important national river. They gave the leave, but made it subject to the constitutional control of Congress. Congress, when applied to, assented to what was wanted, but, in express terms, reserved to itself the power to revoke what had been done, or require alterations to be made, in case experience proved that the structure which was to be put up substantially and materially interfered with navigation. Under this authority, work was at once begun. The next year in an Act making large appropriations for the improvement of rivers and harbors, passed July 11, 1870, ch. 240, sec. 5, 16 Stat. at L., 227, the Secretary of War was required to detail three engineers to examine all the bridges erected or in the process of erection across the Ohio and report to the next Congress whether, in their opinion, such bridges or any of them as constructed or proposed to be constructed did or would interfere with free and safe navigation; and if they did or would so interfere, to report what extent of space and elevation above water would be required to prevent obstruction, and an estimate of the cost of changing the bridges built, and in the process of building, so as to conform to what was recommended. At the next session, the Act was passed which required the Newport and Cincinnati Company to alter its bridge, and allowed this suit to be brought for the purpose of determining whether any liability for pecuniary damages had been incurred by the United States to the Company for what was done. In this way Congress recognized fully the obligation resting on every government, when it is guilty of a wrong, to make reparation. Exemption from suit does not necessarily imply exemption from liability. Here Congress gave the courts jurisdiction to determine whether a wrong had been done and, if so, to award compensation in money by the payment of the cost of what had been improperly required. In our opinion Congress did no more than it was authorized to do, and there is no liability resting on the United States to answer in damages.

[483]

It is next insisted that by the terms of the statute authorizing the suit the liability of the United States is established, if it shall be determined that the bridge, as far as it had progressed was "Constructed so as to substantially comply with the provisions of law relating thereto." We do not so understand the statute. The language is as follows: "Full jurisdiction is hereby conferred upon said court to determine: *first*, whether the bridge, according to the plans on which it has progressed, at the passage of this Act, has been constructed so as substantially to comply with the provisions of law relating thereto; and, *second*, the liability of the United States, if any there be, to the said Company, by reason of the changes by this Act required to be made, and if the said court shall determine that the United States is so liable, and that said

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bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures, etc."

The rule of damages has been fixed by the statute. As to that, the court has no discretion beyond ascertaining the excess of cost. But before damages can be given, it must appear both that the United States was, in law, liable, and that the bridge had been constructed in accordance with the requirements of the law, down to the time the change of plan was directed. That the liability of the United States was not made to depend entirely on the fact that the law in respect to the form of the structure had been complied with is apparent, because if such had been the intention of Congress it would have been entirely unnecessary to submit the second question for determination. But the second is as clearly submitted as the first. Damages are not to be given if either is found in favor of the United States. No matter whether the United States was, in law, liable or not, if the bridge had not been constructed so as substantially to comply with the law, there could be no recovery. That is expressly declared. If, however, it had been properly built, the determination of the question of legal liability became important, and that, in our opinion, depended entirely on the right of Congress, under the Constitution and laws of the United States, to require the change without making just compensation in money.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley**, dissenting:

I dissent from the judgment of the court in this case, and will briefly state my reasons. The [507] central reason is, that the bridge, as it stood, nearly completed when the Act of 1871 [16 Stat. at L., 572] directing it to be taken down or altered, was passed, was a lawful structure, and in the lawful possession of the appellants as their private property; and, being such, I think that Congress could not constitutionally require its demolition, or reconstruction, without providing for compensation to the owners. By virtue of its plenary power to regulate commerce among the several States, as well as with foreign Nations, Congress may undoubtedly require the removal of all nuisances and unlawful obstructions in the navigable rivers of the United States, without giving compensation to any persons who may be incidentally affected. It also has the power to improve the navigation of such rivers; but in making or authorizing improvements, other than the removal of unlawful obstructions, it cannot take private property without complying with that clause of the 5th Amendment to the Constitution which declares: "Nor shall private property be taken for public use without just compensation." This proposition would be conceded where property taken for that purpose consists of lands, houses, buildings or other structures standing on the natural banks of a river; but I think that it is equally true where erections are made on the margin of a river, or where a bridge is constructed across it, in accordance with the laws of the State and with the consent of Congress. Such structures are lawful and are private property, entitled to the constitutional protection. That which is lawful is not a nuisance, and cannot be prostrated or removed as such without compensation.

I should not have much difficulty in holding, if it were necessary to the decision of the case, that such structures made in conformity with the laws of the State, if not prohibited by any Act of Congress, and not materially interfering with navigation, would be equally lawful and entitled to the protection of the Constitution. There is a vast amount of property of this sort in this country. The wharves which have been extended below low water-mark, the flats covered by shallow water which have been reclaimed, and the many bridges which have been erected over navigable streams, are nearly all of this class. Navigation has rarely been materially interfered with in these works, the States themselves being deeply interested in preserving it [508] free from obstruction. It would be strange if Congress could destroy this species of property without any compensation whatever.

But the bridge in question had not only the sanction of the States of Kentucky and Ohio, which it was intended to connect, but it had also the sanction of an Act of Congress. If that of the States was not sufficient to make it a lawful structure, that of Congress, in addition, certainly made it so. I cannot yield to the argument that the reservation in the Joint Resolution of 1869 made the bridge any the less lawful than it would have been if no such reservation had been made. After authorizing the bridge to be erected in the manner it was, the Resolution went on to say: "That the said bridge, when completed in the manner specified in this Resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States;" then comes the reservation referred to, as follows: "But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this Resolution, or to direct the necessary modifications and alterations of said bridge." The power thus reserved was merely declaratory of the power which Congress would have had without reserving it; but there is no stipulation or condition that it might be exercised without providing for compensation to the proprietors of the bridge; and, inasmuch as the bridge became a lawful structure, was, in fact, expressly declared such by the Joint Resolution of 1869, it cannot be presumed that this reserved power was to be exercised in any other than the constitutional mode. Hence, when the Act of 1871 required the bridge to be taken down, and constructed on a different plan, if constructed at all, we should expect what we find was done, that provision would be made in the same law for ascertaining the damages to which the appellants would be put by the alteration, and for the payment thereof out of the Treasury of the United States. It is true, that the law required the tribunal to which the matter was referred to ascertain the liability of the United States, "if any there be;" thus qualifying the provision for compensation by a preliminary inquiry as to [509] the Government's liability. This inquiry was probably directed to be made from the fact that doubts may have existed in the minds of some

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members of the legislative body whether the reservation referred to did not exonerate the United States from any obligation to make compensation. In my opinion it did not. I think, therefore, that the appellants were entitled to a decree in their favor, and that the decree of the Circuit Court dismissing the bill should be reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field** dissenting:

I am not able to agree with the majority of the court in their judgment in this case, nor in the reasons assigned for it. Their opinion proceeds upon a theory of the power of Congress, over bridges crossing navigable waters, to which I cannot assent. Its power to authorize the construction of such bridges not being conferred in express terms by the Constitution, must, if it exist, be deduced from the power to regulate commerce with foreign Nations and among the several States. This latter power authorizes Congress to prescribe rules by which commerce in its various forms may be conducted between our people and those of other countries, and between the people of different States; and also to adopt measures to facilitate and increase it. When the Constitution was adopted, commerce with foreign Nations and even between the several States was carried on principally by means of vessels. Its regulation, therefore, required such control over our harbors, bays and navigable streams connecting them or different States, as might be necessary to keep navigation free from unnecessary obstructions; and might legitimately extend to making such improvements as would facilitate the passage of vessels, render their anchorage safe, and expedite the discharge of their cargoes and the landing of their passengers and crews. To this extent, its power over navigable waters goes, under the commercial clause; no further. Unless, therefore, the free navigation of the public waters is impeded by what a State may do or permit, Congress cannot interfere with its action. And what is meant by their free navigation I shall hereafter explain. The doctrine of a paramount power in Congress over bridges crossing navigable streams—either to authorize their construction, or regulate them, that is, control them when constructed—derives no support from its power to protect the free navigation of such streams. If a bridge, for example, built under the law of a State, should cross a navigable stream, at so high a point and in such a way as in no manner to obstruct its free navigation, Congress could not interfere with the structure. Its permission would not authorize the building, nor its command authorize the removal of the bridge. And while Congress may declare that bridges of particular height and dimensions shall not be deemed an obstruction to the free navigation of the streams, it cannot interfere with bridges of a different size and character, unless they prove to be an impediment to such navigation.

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Of course, should Congress undertake the construction of a road for the postal service, or other national purposes, it might authorize the erection of a bridge over navigable streams, to connect the road on opposite sides. But it is not of such works or of bridges connecting them that we are speaking; but of bridges built under the law of a State, and of the power which Congress has to interfere with and control them.

This view of the limits of the power of Congress will be more clearly apparent, if we consider it in connection with the construction of docks, wharves and piers. Some of our bays and harbors are miles in width. Such is the size of the Bays of New York and of San Francisco; and some of the streams upon which piers and wharves are built, like the Mississippi and the Hudson, are over a mile in width. The several States own the soils under tide-waters within their limits. Speaking on this subject, with reference to lands under the tide-waters of the Bay of San Francisco, this court said: "Upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tide-waters within her limits, passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign Nations or among the several States, the regulation of which was vested in the General Government." *Weber* v. *Harbor Comrs.*, 18 Wall., 57 [85 U. S., XXI., 798]. The same doctrine was previously asserted in *Pollard* v. *Hagan*, 3 How., 212; in *Martin* v. *Waddell*, 16 Pet., 367, and in *Mumford* v. *Wardwell*, 6 Wall., [491] 436 [73 U. S., XVIII., 761]; and subsequently in *McCready* v. *Virginia*, 94 U. S., 391 [XXIV., 248]. The State of California, exercising her right of disposition of such soils, granted in 1851 to the City of San Francisco a large tract of land covered by the tide-waters of the bay; and since then the tract has been filled up, and wharves, piers, streets and blocks of buildings of the most permanent and costly character have been constructed upon it. The bay being miles in width, its free navigation is in no way impeded by the new blocks of buildings and streets, where vessels once floated and cargoes were discharged.

Now, the control of Congress over the bay is as complete and unrestricted as over the navigable streams of the State. Could it, in the exercise of its commercial power, that is, in its control over navigation, direct the destruction of the wharves, the buildings and streets, which have been built where, in 1850, the tide-waters of the bay flowed? I doubt whether any jurist could be found who would hazard his reputation by giving an affirmative answer. And why not? Simply because, until the free navigation of the bay for purposes of commerce is impeded, Congress has no power to interfere with the buildings and wharves constructed.

There are wharves and piers constructed, under state authority, at New York City, where the waters of the Hudson once flowed. There are wharves and piers in all our bays and harbors which are built in their waters. But as these structures do not interfere with the free navigation of the river in the one case, nor of the bays and harbors in the other cases, no judge or jurist has ever ventured to assert a power in Congress to order their removal at its pleasure; and simply because the right of inter-

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ference on its part does not arise until the free navigation of the waters is obstructed. On what possible ground, then, can Congress order the removal of bridges built over navigable streams, under authority of the States, when they do not interfere with the free navigation of the streams? With the most careful consideration I can give to the subject I am unable to find any. To me it seems clear that no such arbitrary power exists.

[492] The power of the State over its internal commerce must also be considered in treating of this subject. While the Constitution vests in Congress the power to regulate commerce among the several States, it leaves with each the regulation of its internal commerce. "Comprehensive," says *Ch. J.* Marshall, "as the word 'among' is, it may be very properly restricted to that commerce which concerns more States than one," and "the completely internal commerce of a State, then, may be considered as reserved for the State itself." *Gibbons* v. *Ogden*, 9 Wheat., 195. The jurisdiction of the State over the navigable waters within its limits, so far as may be necessary for the regulation of its internal commerce, is as complete as the jurisdiction of Congress over them for the regulation of interstate or foreign commerce. On this subject we said, in *Mobile Co.* v. *Kimball:* "The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign Nations; and to promote the growth of that internal commerce, and insure its safety, they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation, as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the General Government. Legislation of the States for the purposes and within the limits mentioned, does not infringe upon the commercial power of Congress." [*Ante*, 240].

It follows, I think, from what has been said, that the position of the majority of the court, as to the paramount power of Congress over bridges crossing navigable streams, is not tenable. Congress cannot invade the rights of a State, nor can a State impede the exercise of the just powers of the Federal Government. The conclusion I draw is, that a bridge constructed by the authority of a State, if it does not interfere with the free navigation of the stream, is a lawful structure, and can neither be taken nor destroyed by Congress or by the State, except as other private property may be thus taken; that is, for public purposes upon making just compensation.

It must also be borne in mind that the power to regulate commerce with foreign Nations and among the several States, extends to such com-
[493] merce on land as well as to that on navigable waters. There are highways on land in every State, on which a far greater commerce, both interstate and foreign, is conducted, than that which is borne upon its navigable waters. Congress can require that this commerce shall be as free from unnecessary obstruction as that on navigable waters connecting two or more States or leading to the sea. There is nothing in the Constitution which in any respect distinguishes the regulation it may exercise in either case. Its power, in all its extent and with all its limitations, is the same in both. The fact that navigable waters are natural highways, and roads, railways and canals are of artificial construction, does not affect the power. That is one of regulation of interstate and foreign commerce, by whatever channels conducted. If bridges crossing natural highways cannot be constructed without the consent of Congress, because it is vested with the power to regulate commerce with foreign Nations and among the States, for like reason bridges cannot be constructed without such consent over artificial highways on land. The argument for the necessity of the consent in the one case is equally good in the other, and is equally unsound in both. In nearly every county of every State, bridges have been constructed under state authority over railways, the great highways of commerce in modern times, and it has never been suggested that the consent of Congress to their construction was at all necessary.

Nor do I find in the previous decisions of this court any recognition of a power in Congress to authorize the construction of bridges over navigable streams within or bordering on the States, in the sense that its permission will justify their construction, and that without it, such construction would be unlawful—excepting, of course, bridges which are parts of works undertaken for national purposes—nor of a power to regulate them; that is, to control them, after they are constructed. There are expressions in the opinions of the Judges in the *Wheeling Bridge Case*, in the 18th of Howard [59 U. S., XV., 435], that, under the power to regulate commerce, Congress may declare what shall and shall not be deemed in judgment of law an obstruction to navigation. But these expres- [494]
sions, in their generality, were not called for by the case before the court. That only called for a determination of the question whether a structure adjudged by the court to be unlawful, as an obstruction to the navigation of the river, could afterwards be legalized by Congress. The court held that it could be legalized, which amounted to no more than declaring that it should not thereafter be treated as interfering with the public right of navigation of the river, so far as that right was under the protection of Congress. This is a very different thing from asserting a power to declare that a structure, lawful when erected and in no way interfering with the navigation of the river, is an unlawful structure, removable without compensation to the owner. I cannot admit that there is any such arbitrary power under our Government. I find no warrant for it in the Constitution; on the contrary, all the guaranties which that instrument contains for the security of property negative its existence. Yet out of this assertion of a power to legalize a structure, which without such sanction would be deemed an obstruction to navigation, has grown up the doctrine of an independent power in Congress to authorize the construction of bridges over navigable streams without the permission of the States, and to control them when constructed. In this we are furnished with a striking illustration of the facility with which power is assumed from expressions, loosely or inadvertently used, apparently recognizing its existence. From the

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use of the word "assent" to the erection of a bridge over a navigable river, or the declaring of one already erected a lawful structure, the transition has been easy and natural to the assumption of an affirmative power in Congress to authorize, independently of the action of the States, the construction of such bridges, and to control them. From the authorities cited and the reasons assigned, it is evident that Congress possesses no such power. In the *Wheeling Bridge Case*, in the 18th of Howard, *Mr. Justice* Nelson, who delivered the prevailing opinion, said: "The bridge had been constructed under an Act of the Legislature of the State of Virginia; and it was admitted that Act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce." [59 U. S., XV., 436]. *Mr. Justice* McLean, while dissenting from the asserted power of Congress to [495] declare a bridge to be a lawful structure, which had been adjudged by the court to be a public nuisance as an obstruction to navigation, spoke with emphasis against the existence of any authority in Congress to construct bridges and, of course, to authorize their construction, and his views do not appear to have met with any dissent from the other Judges. "If," said he, "under the commercial power, Congress may make bridges over navigable waters, it would be difficult to find any limitation of such a power. Turnpike roads, railroads and canals might on the same principle be built by Congress. And if this be a constitutional power, it cannot be restricted or interfered with by any state regulation. So extravagant and absorbing a federal power as this has rarely, if ever, been claimed by anyone. It would, in a great degree, supersede the State Governments by the tremendous authority and patronage it would exercise. But if the power be found in the Constitution, no principle is perceived by which it can be practically restricted. This dilemma leads us to the conclusion that it is not a constitutional power."

Such, also, has been the uniform doctrine of the Supreme Courts of several States declared by judges, some of whom were justly distinguished for their learning and ability. Thus, in *People* v. *R. R. Co.*, in the Supreme Court of of New York, *Ch. J.* Savage, in delivering its opinion, said: "I think I may safely say that a power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. Such power certainly did exist in the State Legislatures, before the delegation of power to the Federal Government by the Federal Constitution. It is not pretended that such a power has been delegated to the General Government, or is conveyed under the power to regulate commerce and navigation; it remains, then, in the State Legislatures, or it exists nowhere. It does exist, because it has not been surrendered any farther than such surrender may be qualifiedly implied; that is, the power to erect bridges over navigable streams must be considered so far surrendered as may [496] be necessary for a free navigation upon those streams." 15 Wend., 131.

If weight is to be given to these authorities, and to the reasons on which they rest, it must follow that the sovereignty and jurisdiction of the States over their navigable waters, which were as absolute upon the adoption of the Constitution, as over their roads, still continue, except that they are to be so exercised as not to obstruct the free navigation of the waters, so far as such navigation may be required in the prosecution of interstate and foreign commerce. And by "free navigation" is not meant a navigation entirely clear of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is free, when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian States. In this country, the navigation of a river is deemed to be free, when it is kept open for vessels cleared of such physical obstructions as would retard their passage beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws; and such occasional tolls as may be levied to meet the expenses of improving its navigation. The delays attendant upon the necessary transit of persons and property, or the enforcement of quarantine and health laws, or the exaction in exceptional cases of tolls, are not deemed to be inconsistent with the free navigation of the river in the legal sense of those terms. Thus, bridges with draws of sufficient width for the passage of vessels, are allowed on rivers in Europe, like the Rhine, whose navigation is declared to be free. So, in this country, such bridges do not destroy the free character of the navigation, any more than ferries, though, like them, they may cause more or less delay to vessels. In *Palmer* v. *Comrs. of Cuyahoga Co.* [3 McLean, 226], application was made to the Circuit Court of the United States, sitting in Ohio, for an injunction to prevent the construction of a draw bridge over the Cuyahoga River, on the ground that it would obstruct the navigation of the river and injure the property of the plaintiff in its vicinity. It was founded upon the 4th article of the Ordinance of 1787 respecting the Northwestern Territory, which declares "That the navigable waters lead- [497] ing into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said Territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor." The court, refusing the injunction, said that this provision "Does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the Ordinance prohibit the construction of any work on the river, which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass, with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the Ordinance." And again; "A drawbridge across a navigable water is not an obstruction. As this could not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be

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only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the State to make the bridge."

In the *Wheeling Bridge Case* [59 U. S., XV., 435], the bridge was held to be an unlawful obstruction because it entirely prevented the passage of steam vessels with high chimneys; and the court ordered that it should be elevated in a manner and to an extent indicated, so as to afford a free passage for the steamers; or that some other plan should be adopted by a day designated which would relieve the navigation from obstruction. Upon a suggestion, that the obstruction to the navigation might be avoided by making a draw in the bridge, or in some other manner equally convenient to the public and less expensive than by elevating it, the matter was referred to an engineer; and upon his report, the company was allowed to make an attempt to obviate the obstruction by improving another channel of the river and constructing a draw in [498] the bridge over it. Some slight delay would be caused by the draw, and an increased distance would have to be run in passing the new channel; but the court did not consider these circumstances as constituting a material objection to the plan. See, also, Cooley, Const. Lim., pp. 591–594, and authorities there cited.

The considerations to which I have referred and the authorities cited lead to a ready solution of the questions raised by the case at bar.

The construction of a bridge over the Ohio River was authorized by the legislation of Kentucky and Ohio. The legislation of Kentucky, adopted in 1868, provided that the bridge "Should be so constructed as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize." The legislation of Ohio, adopted the same year, authorized the construction of a bridge "Either with a single span or with a draw," as the Company (incorporated for that purpose) might determine; but in either case, in order that said bridge might not obstruct the navigation of said river, the same should be built in accordance with the Act of Congress of July 14, 1862 [12 Stat. at L., 569], or of an Act that Congress might thereafter pass on the subject; which, of course, meant before the bridge was built. The only regulation of Congress to which the erection of the bridge was made subject by the States, was such as had been prescribed or might be prescribed previously to the execution of the work. The bridge was not surrendered to any further disposition or control of the General Government. The companies organized under the laws of the two States for the construction of the bridge were authorized to consolidate themselves into one company. They were consolidated under the name of the Newport and Cincinnati Bridge Company.

On the 3d of March, 1869 [15 Stat. at L., 347], Congress passed a Joint Resolution giving its consent to this Company to erect a bridge over the Ohio River from Cincinnati to Newport, provided it be built with an unbroken or continuous span of not less than four hundred feet in the clear from pier to pier, over the main channel of the river, and in all other respects in accordance with the conditions and limitations of an Act entitled "An Act to Establish Certain Post-Roads," approved July 14, 1862; and the Resolution declared that the bridge, when completed in the manner specified, should "be [499] deemed and taken to be a legal structure," and should be "A post-road for the transmission of the mails of the United States." It also had this clause: "*But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this Resolution, or to direct the necessary modifications and alterations of said bridge.*"

The Act of July 14, 1862, provided that any bridge erected under it might, at the option of the Company building the same, be constructed either as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans; and specified the width of the spans and the elevation of the bridge.

In March, 1869, the Company commenced the construction of a bridge across the river according to a plan, which met all the conditions imposed by the legislation of the States and of Congress, and the work was prosecuted until March, 1871, when it was nearly completed, the actual cost then incurred being about $807,000. The whole cost, when completed at contract prices, would have been about $1,110,000. On the 3d of March, of that year, while the Company was in the prosecution of the work, Congress passed an Act [16 Stat. at L., 572], declaring that it would be unlawful for the Company or any other person to proceed with the erection of the bridge without making various alterations, including a wider span and a higher elevation, which should be submitted to the Secretary of War for his approval.

The Company immediately suspended work, adopted a new plan, submitted it to the Secretary of War, obtained his approval, and then proceeded with the bridge and completed it. The additional work, and the necessary changes in that already done, required by the Act of Congress, caused an additional expenditure of over $300,000. The Act also provided that, in the event the Company made the changes, it should be lawful for it to file a bill in equity against the United States, in the Circuit Court for the Southern District of Ohio, which should have jurisdiction to determine: *first*, whether the bridge, according to the plans on which it had progressed at the passage of the Act, had been [500] constructed so as substantially to comply with the provisions of law relating thereto; and *second*, the liability of the United States, if any there were, to the Company, by reason of the changes required; and if the court should determine that the United States were so liable, and that the bridge was so being built, then the court should further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the bridge and its approaches, in excess of the cost of building the bridge and approaches according to the original plan. The court was further authorized and required to proceed therein to final decree as in other cases of equity.

Under this Act, the present bill was filed and it was clearly shown at the hearing that when the Act was passed the bridge had been constructed substantially in compliance with all the

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provisions of law in relation thereto; that so far as constructed it did not materially obstruct the navigation of the river, and would not have done so had it been completed according to the original plan. Yet the court below held, and this court sustains its ruling, that, for the enormous expenditures forced upon the Company the United States are in no way responsible. This court thus, in effect, decides that the power of Congress over all structures crossing navigable streams is absolute; and that it can change or remove them at its pleasure, without regard to their effect upon the free navigation of the streams, and without compensation to the owners.

I do not think that the assent of Congress to the erection of the bridge was at all essential to its character as a lawful structure. That depended upon the legislation of Kentucky and Ohio, and upon the contingency of the bridge not interfering with the free navigation of the river. The assent of Congress, as already stated, only removed all ground of complaint of the structure as interfering with the public right of navigation, so far as that right was under the protection of the Federal Government. No one could afterwards complain that the bridge, if built in conformity with the directions specified, constituted a public nuisance, because interrupting the free navigation of the river as secured under the laws of Congress, and proceed to obtain its abatement. [501] The authority of the States to build it, coupled with the assent of Congress, if constructed in the manner prescribed, placed the work, whilst in the process of erection and when completed, beyond the reach of legal proceedings for its abatement or modification. It could not, when completed, be taken for public purposes by the General Government, nor be materially changed in its form and structure whilst in the process of erection, under compulsion of the legislation of Congress, without compensation to its owners The legislative declaration, made when it was nearly completed, that its further construction would be unlawful without a change of plan, which necessitated very costly alterations, or an abandonment of the bridge, was a taking from its owners of a portion of their work as effectually as its absolute appropriation. If not, in the strict constitutional sense, a taking of private property for public uses, it was an enforced expenditure of labor and materials by the Company, not required by the work undertaken or the conditions on which assent to its construction had been given; and for such labor and materials the Government should, on every principle of justice, indemnify the Company. A legislative decree commanding such an expenditure is within the spirit, if not the letter, of the constitutional provisions which inhibit depriving one of his property without due process of law, and taking it from him without compensation. The wrong inflicted is as great in the one way as in the other. As the provisions were designed to secure the individual from the arbitrary spoliation of his property, their purpose could be readily evaded if a special Act could exact for the protection of his property an expenditure of money or labor, which was neither exacted when the property was acquired, nor permitted by the terms of its acquisition.

This view was taken by the Court of Appeals of Virginia, in *Crenshaw* v. *Slate River Co.*, reported in 6th Rand. [245]. There it was held that after a mill had been established and a dam erected according to a law granting to the mill owner the use of the water for grinding, a subsequent Act of the Legislature, which imposed on him the burden of erecting locks through his dam, keeping them in repair, and giving them attendance so as to admit the passage of [502] boats, and on his failure, vested in a company the power to abate the dam as a nuisance, without full indemnification and equivalent for the injury thus done to his vested rights, was contrary to the Constitution of the State, and void, as a taking of private property for a public use without compensation.

There are many ways of taking property other than by occupation or appropriation, which are within the constitutional inhibition. If its beneficial use and enjoyment are prevented under the sanction of law, it is taken from him as effectually as though the title were condemned. Such is the purport of the decision in *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166 [80 U. S., XX., 557], a decision which has attracted much attention from its enlarged views of the redress afforded by the constitutional provision for injuries to property effected under authority of law, which permanently and materially impair its value. It was there held that the backing of the water of a river in Wisconsin by a dam authorized by law, so as to overflow the land of an individual, thus destroying its usefulness to him, was a taking of the property within the meaning of the Constitution. *Mr. Justice* Miller, in delivering the opinion of the court, very justly observed that "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." [503]

It is not necessary, however, in order to charge the Government with the expenditures forced upon the Company, to rely upon this provision of the Constitution, further than to show the general spirit which should control the Government in its legislation affecting the property of individuals. There is a general principle of justice pervading our laws, and the laws of all free governments, which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure

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of money or labor or materials for the protection and preservation of his property, shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the Government as to those of individuals; and wherever suits can be brought in the tribunals of the country, such indemnity can be enforced. Here the Government waives exemption from suit which its sovereign character gives, and submits the question of its liability to the judgment of its tribunals, thus admitting a readiness to indemnify the owners of the bridge, if it has disregarded its pledge and dealt unfairly with them in the premises.

The Resolution of Congress giving its consent to the erection of the bridge specified its character and form, and the right to withdraw the consent or to direct necessary modifications and alterations of the bridge was reserved to be exercised only in case the free navigation of the river should at any time be substantially and materially obstructed by the bridge. The reservation clause is to be read as though written thus: "But Congress reserves the right to withdraw the assent hereby given (or to direct the necessary modifications and alterations of said bridge) in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this Resolution." The right to withdraw the assent or to direct alterations was thus made to depend upon the same contingency; and the Resolution amounts to a pledge, of the Government, that neither should be done unless the contingency happened. Congress said to the constructing Company in substance thus: "You are empowered by the [504] States of Kentucky and Ohio to build a bridge over the Ohio River, of certain height and dimensions, provided it be so constructed as not to obstruct the navigation of the river further than the present laws of the United States authorize, and in accordance with the Act of July 14, 1862. Now, we consent to the erection of the bridge; that is, we declare that, if constructed in the manner prescribed, it shall not be deemed an obstruction to the free navigation of the river; but we reserve the right to withdraw this assent or to direct alterations to the bridge, if hereafter the free navigation of the river should be substantially and materially obstructed by it."

The General Government, through Congress, thus bound itself not to interfere with the construction of the bridge, nor with the bridge when completed, except on the contingency of its proving a material obstruction to the free navigation of the river. Such contingency had not occurred when the Act directing the alterations was passed; it has never occurred. So the proofs in the case show and, independently of this circumstance, whether or not the contingency had occurred, was not a fact to be arbitrarily determined by the Legislature. It was to be ascertained judicially upon proofs and after hearing the parties, like any other disputed fact upon the establishment of which rights of property depend. This doctrine, as well as other positions advanced in this opinion, is well illustrated by the case of *Com.* v. *Proprs. of New Bedford Bridge*, 2 Gray, 339. There the Act chartering the corporation authorized the building over a navigable stream in Massachusetts of a toll-bridge with two suitable draws, which were to be at least thirty feet wide; one on the west side of the river in the channel way, and the other on the east side in the most suitable place there. A bridge with such draws was accordingly built. A subsequent Act of the Legislature required the corporation to make and maintain, in lieu of one of these two draws, a new draw of not less than sixty feet in width, the westerly abutment of which was to be eight feet further to the eastward than the westerly abutment of the existing draw. The bridge proprietors, not making the changes required, were indicted for obstructing the navigation of the river by their bridge. They justified under their Act of incorporation. In deciding upon their liability, the court held that the original Act of incorporation, when accepted, constituted a contract between them and the State, by the terms of which both parties were equally bound; that the proprietors could not, without [505] the consent of the Legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the Act; nor could the Legislature, without the assent of the proprietors, in any way affect or impair the original terms of the charter by annexing new conditions or imposing additional duties onerous in their nature or inconsistent with a reasonable construction of the contract; that, by its terms, the proprietors were to erect "suitable draws, which were to be not less than thirty feet wide;" and that the question whether the draws already made were suitable, that is, constructed so as not unreasonably or unnecessarily to obstruct or impede the navigation of the river, was not a question to be determined absolutely by the Legislature or by the proprietors, when disputed between the parties. "Like all other matters involving a controversy concerning public duty and private rights," said the court, "it is to be adjudged and settled in the regular tribunals where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice." The same doctrine is also well illustrated in the case of *Mayor of Baltimore* v. *R. R. Co.*, decided in the Circuit Court of the United States by the late *Mr. Justice* Grier. The charter of the Pittsburg and Connellsville Railroad Company, a corporation of Pennsylvania, contained the following provision, *viz.*: "If the said company shall at any time misuse or abuse any of the privileges herein granted, the Legislature may resume all and singular the rights and privileges hereby granted to such corporation." Under this clause the Legislature passed an Act, in 1864, revoking and resuming all the rights and privileges granted to the company, so far as it authorized the construction of a line southwardly or eastwardly from Connellsville. But the court held that when the right to revoke was to be exercised only in case the corporation should misuse or abuse its privileges, the fact of such misuse, if denied by the corporation, should be established by competent proceedings; and that an Act declaring a revocation without the establishment of such fact was unconstitutional. In giving its opinion [506] *Mr. Justice* Grier said: "If in the Act of Incorporation the Legislature retains the absolute and unconditional power of revocation for any

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or no reason; if it be so written in the bond, the party accepting a franchise on such conditions cannot complain if it be arbitrarily revoked; or if this contract be that the Legislature may repeal the Act whenever in its opinion the corporation has misused or abused its privileges, then the contract constitutes the Legislature the arbiter and judge of the existence of that fact. But the case before us comes within another category. The contract does not give an unconditional right to the Legislature to repudiate its contract, nor is the Legislature constituted the tribunal to adjudge the question of fact as to the misuse or abuse." 4 Am. Law Reg. (N. S.), 750.

A consciousness seems to have pervaded Congress that it was disregarding its pledge to the Company, when it directed the alterations which proved so expensive, before the contingency mentioned had happened; and that it might turn out that the bridge completed as designed would not substantially and materially obstruct the free navigation of the river; and that, in that case, it would be justly chargeable with the commission of an injury to the Company. For this reason, I think we may assume it intended that the court should award compensation to the owners for the alterations made, if, upon proof, it appeared that, so far as the bridge had been constructed, when they were required, the provisions of the law relating thereto had been substantially complied with; and it should also appear that if completed as originally designed, the bridge would not have substantially and materially obstructed the free navigation of the river. Congress did not intend that heavy expenditures should be imposed by its will upon the Company without at the same time offering, if they were illegally exacted, to re-imburse them. Congress intended to be just, and I cannot resist the conclusion, that the court, in its decision, has defeated its intentions.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Miller** dissenting:

I dissent from the decree of the court in this case, and as I cannot agree to all the grounds on which my brother Field dissents, I will state, [485] very briefly, the reasons which have seemed to me to require the reversal of the decree of the circuit court.

Congress gave its assent in the most solemn form, by the Joint Resolution of 1869, to the erection of a bridge over the Ohio River by the appellant Company, the character of which was described in the Resolution. It reserved the right to withdraw the assent thus given in case the free navigation of the river should at any time be substantially and materially obstructed by any bridge to be erected under the authority of this Resolution, or to direct necessary modifications and alterations of said bridge. The circuit court finds that, up to the 3d day of March, 1871, the Bridge Company had proceeded in the erection of their bridge, "In all respects constructing the same so as substantially to comply with the provisions of the law relating thereto."

On that day Congress passed the Act under which this suit is brought; and it is upon the construction of this Act in connection with the Joint Resolution of 1869 that the decision of this case must turn.

It will be observed that the Joint Resolution reserved to Congress a right to interfere and assert its power only in case the bridge of the appellants should at any time *substantially and materially* obstruct the free navigation of the river; and, in that event, the reservation was that Congress might withdraw the assent so given to the erection of the bridge, *or* direct the necessary modifications and alterations of said bridge. It is not necessary to inquire whether Congress could do both these things or not, for it did not, as I understand the language of the Act of March 3, 1871, withdraw or intend to withdraw its assent previously given.

It did exercise the alternative power given by the Joint Resolution, and "direct the necessary modifications and alterations of said bridge."

The legislation by which this is done is the 5th and last section of an Act making appropriations for the service of the Postoffice Department.

It is important to observe that it contains no declaration that the bridge, as it had been and was being constructed, would either partially or substantially obstruct the navigation of the [486] Ohio River, nor does this court base its decree on the existence of that fact. Nor do counsel in the argument before us insist that this was proved, or that it was a necessary condition to the exercise of the power which Congress assumed in passing the statute requiring alterations in construction of the bridge, costing over $200,000.

Why did not Congress declare as a reason for the exercise of this power that the bridge as originally authorized by it was or would be an obstruction to navigation? And why did it not content itself with making that declaration and withdrawing its assent, as it would then have a right to do?

The best answer to this question, the most reasonable one to be made, and the one most consistent with the evidence in this record, is, that either the fact did not exist, or was not so apparent to Congress that it was willing to found any action on it.

But Congress, with this view of that question, and entertaining also a just view of its powers and obligations as regards the appellants and their bridge, determined to exercise such power as it had for the purpose of changing the structure from a drawbridge, to a bridge so high above the water that no draw was necessary.

It did this; but in the same section which prescribed this change and forbid the Company to proceed in any other mode of construction, it provided equitable relief for the injury which this somewhat arbitrary act of power inflicted on the Bridge Company.

I repeat, that it was competent for Congress to have declared that the bridge, as it was in process of construction, had proved to be a substantial and material obstruction to the free navigation of the river, and for that reason the assent of Congress to its erection was withdrawn; or that it would be such obstruction unless certain modifications of the plan were made, which Congress could prescribe, and

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require them to be made. But it did neither. It based no action on the assumption that the bridge was or would be an obstruction to navigation; but it determined to change the bridge from a low bridge with a draw, to a high bridge without a draw. The difference in these two [487] are well known to everyone who has traveled over our western rivers, and I myself am familiar with no less than ten drawbridges across the Mississippi River built under Acts of Congress, which are not substantial or material obstructions to the navigation of that great river.

Congress, therefore, never intended to act on the reservation contained in the Joint Resolution. No reference is made to that Resolution in the Act of 1871 requiring this total change of plan.

Nothing is more reasonable, therefore, than that Congress, resorting to its high prerogative of requiring a structure which would not only be no *substantial* or *material* obstruction to navigation, words well understood, but one which would impose no delay in passing it nor interfere in the slightest possible manner with navigation, should see that equity and justice required compensation for the loss inflicted by this change.

It *did* see this and provided for the situation. Until the structure was completed, no one could tell the cost of the changes required. When completed, the safest tribunal,* as Congress thought, to determine this was a court. And that the court might not be restricted by the rigid rules of a court of law, it referred the matter to a court of equity, with instructions to proceed as in other cases in equity. It required the court to determine "The actual and necessary costs and expenditures reasonably required to be incurred in making the changes ordered," and it instructed the Secretary of the Treasury to pay the amount so found.

It required the court to ascertain, "First, whether the bridge, according to the plans on which it has progressed at the passage of this Act, has been constructed so as to substantially comply with provisions of law relating thereto." The court found that the bridge was in conformity to law, including, of course, the Joint Resolution giving the assent of Congress. "Second, the liability, if any there be, of the United States to said Company by reason of the changes by this Act required."

The whole argument of the opinion of the court is founded on the potentiality of this, "*if any there be.*" And the whole scheme and pur- [488] pose of the Joint Resolution; its assent with qualified power of withdrawal; the failure of Congress to declare the existence of the condition on which this right of withdrawal was to be exercised; the fact that the law required the court to find whether the appellants had proceeded according to law, and that the court found they had so proceeded; the great loss which appellants were compelled to bear, and the reference of the whole matter to a *court of equity*, are all ignored, that we may throw ourselves back on the general and absolute power of Congress, over navigable waters, to defeat this eminently just claim for losses, growing out of the exercise of that power. It is impossible for me to believe that Congress went through all this tedious legal machinery to have the court decide upon its *right* to exercise such a power without responsibility. It is not the habit of that body to refer intentionally the question of its constitutional power to the courts of the country.

Nor is such construction of the words "if any there be" necessary. There were two contingencies in which Congress might have acted, as it did, without incurring any just obligation to make compensation. One of these was that the bridge might not have been built in conformity to the terms of the Joint Resolution, and in that event the Company was in no condition to complain of the action of Congress requiring a change. The Act required this fact to be ascertained by the court, and it evidently meant that no damages should be awarded unless it was found that the law was complied with.

Congress might, also, while declining to ascertain for itself whether the bridge, as authorized, was likely to prove *a substantial and material* obstruction to navigation, have made compensation for the change they ordered to depend upon the existence or non-existence of that fact, and left it to the court to determine.

This court refuses to inquire into this latter question and, notwithstanding the fact, which the court was expressly required to find, is found in favor of appellants, proceeding on what I think is a fallacious view of the statute, namely; that Congress intended to refer to the court the question of its constitutional power to change the character of the bridge, it decides in favor of that power, and disregards the whole [489] structure of the two Acts on which the right to compensation is based.

I think Congress intended to waive that question, and in favor of justice and fair dealing to pay for the losses incurred under the very Act which gave the compensation, if it was found that the bridge, as far as it had progressed, was in conformity to law, and would not be a substantial and material obstruction to navigation if completed on that plan.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—126 Mass., 247.

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND of the STATE OF FLORIDA, *Appts.*, [527]

v.

CHARLES P. GREENOUGH, Admr. of FRANCIS VOSE, Deceased.

(See S. C., 15 Otto, 527-538.)

Appeal from decree for costs—payable out of a fund—expenses of trust—when recoverable—suit to preserve trust fund—payment of costs in—counsel fees and expenses.

*1 Whilst, in ordinary cases, an appeal does not lie from a decree in equity for costs only, yet it does lie when the costs are directed to be paid, not by a particular party, but out of a fund in the hands or under the control of the court.

2. A decree made by a Circuit Court of the United States, directing the payment of costs and expenses out of a fund in court to the complainant—the fund in the meantime remaining in the court in course

*Head notes by *Mr. Justice* BRADLEY.

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of administration—is *pro tanto* a final decree from which an appeal will lie to this court.

3. It is a general principle that a trust estate must bear the necessary expenses of its administration.

4. One jointly interested with others in a common fund and who in good faith maintains the necessary litigation to save it from waste and destruction, and secure its proper application, is entitled, in equity, to re-imbursement of his costs as between solicitor and client, either out of the fund itself or by proportional contribution from those who receive the benefit of the litigation.

5. Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who, in good faith, files a bill to secure the due application of the fund and succeeds in bringing it under the control of the court for the common benefit of the bondholders, is entitled to have his costs, counsel fees and necessary expenses of the litigation—that is to say, his costs, as between solicitor and client—paid out of the fund before its distribution.

6. Such a complainant, however, is not entitled to an allowance for his private expenses such as traveling fares and hotel bills; nor for his own time or personal services.

7. The practice of allowing large and extravagant counsel fees and commissions to trustees, complainants and receivers, and their counsel, to be paid out of trust funds under the control of the court, commented on and disapproved.

[No. 601.]

Argued Mar. 15, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

The case is stated by the court.

Messrs. **Charles W. Jones,** and *James M. Baker*, for appellants:

The right to costs is created by statute and wholly depends upon it, and does not become fixed until the termination of the suit. At common law, neither party recovered costs against the other. But before the enactment of any statute on the subject although costs were not given to either party, yet if the plaintiff did not prevail in his action, he was amerced for his false claim, which sum went to the King, and if he did prevail then the defendant was likewise amerced for his unjust detention of the plaintiff's right; but no indemnity was allowed to either party for the cost to which he had been subjected.

3 Bl., 399; Pars., Costs, 1.

Under any system of proceedings, the recovery of costs is a statutory right.

Rooney v. *2d Avenue R. R. Co.*, 18 N. Y., 369; *Parker* v. *Bigler*, 1 Fish., 285; see, also, *Day* v. *Woodworth*, 13 How., 372; *Abell* v. *Screech*, 10 Ves., 355.

It may be said that costs in equity are in the discretion of the court. But if this be so, this discretion is a sound one, to be exercised upon principle and with reference to the general rules of practice.

2 Story, 554.

It is a settled rule in this court, never to allow counsel on either side to be paid out of the fund in dispute.

Hauenstein v. *Lynham*, 100 U. S., 483 (XXV., 628); *Nuestra Señor de Regla Case*, 17 Wall., 29 (84 U. S., XXI., 596), *Philp* v. *Nock*, 17 Wall., 460 (84 U. S., XXI., 679); *National Bank* v. *Whitney*, 103 U. S., 104 (*ante*, 561); *Parks* v. *Booth*, 102 U. S., 106 (*ante*, 58); *Oelrichs* v. *Spain*, 15 Wall., 211 (82 U. S., XXI., 43).

Messrs. **Jefferson Chandler,** *J. B. C. Drew* and *C. D. Willard*, for appellee:

Only that part of the case which embraces the allowances made to complainant for costs, expenses and attorneys' fees, is brought to this court by appeal. This fragment of the case cannot be appealed in this detached form. If it come here at all, it must come as a part of the final decree.

The Palmyra, 10 Wheat., 502; 2 Dan. Ch. Pr., 1467, *Green* v. *Fisk*, 103 U. S., 519 (*ante*, 486); 2 Dan. Ch. Pr., 1489, *n.* 3.

The costs allowed in this case were not fixed by law or limited, but were allowed in the exercise of a sound discretion of the court. A matter within the discretion of the lower court, will not be examined into by this court.

Sheets v. *Selden*, 7 Wall., 421 (74 U. S., XIX., 168); *Canter* v. *Am. & Ocean Ins. Co.*, 3 Pet., 307; 2 Perry, Trusts, sec. 892; *Taylor* v. *Root*, 48 N. Y., 687.

No appeal lies from a mere decree respecting costs.

Canter v. *Am. & Ocean Ins. Co.*, 3 Pet., 307; *Elastic Fabric Co.* v. *Smith*, 100 U. S., 110 (XXV., 547); *Green* v. *Crockett*, 2 Dev. & B. (N. C.), Eq., 394.

No party is entitled to costs, except by special order of the court.

2 Perry, Trusts, 892; *Kreitz* v. *Frost*, 5 Abb. Pr. (N. S.), 277.

Courts of equity have unlimited discretion over costs in proceedings before them.

2 Perry, Trusts, sec. 893.

It is within the discretion of a court of equity to charge attorney's fees as costs in the case where the fund is in the custody of the court and such fees have been incurred, in the opinion of the court, to protect the fund.

Lyon v. *Foscue*, 60 Ala., 484; 3 Dan. Ch. Pr., 1683, 1585; *Turner* v. *Turner* (cited in *Hood* v. *Wilson*) 2 R. & M., 687; also, same report, p. 32; 2 Dan. Ch. Pr., 1567; 2 Dan. Ch. Pr., 1435.

Mr. Justice **Bradley** delivered the opinion of the court:

The question in this case is one of costs, expenses and allowances awarded to the complainant below out of a trust fund under the control of the court. Ordinarily, a decree will not be reviewed by this court on a question of costs, merely, in a suit in equity, although the court has entire control of the matter of costs, as well as the merits, when it has possession of the cause on appeal from the final decree. But [528] it was held by *Lord* Cottenham, in the case of *Angell* v. *Davis*, 4 Myl. & C., 360, that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund. *Lord* Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs, as where the costs are part of the specific relief prayed; and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits. But these suggestions have not met with subsequent approval; and in the case of *Taylor* v. *Dowlen*, L. R., 4 Ch. App., 697, the court declared that they were not disposed to extend the case of *Angell* v.

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Davis; and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund.

But these discussions in the English courts arose under a system in which appeals from interlocutory orders are allowed. We can only entertain an appeal from a final decree; and supposing the objection to the appeal on the ground of its being from a decree for costs only is untenable, as we think it is, then arises another question, whether the orders appealed from amount to a final decree.

The principal suit was commenced in 1870 by a bill filed by Francis Vose, a large holder of bonds of the Florida Railroad Company, on behalf of himself and the other bondholders, against Harrison Reed and others, Trustees of the Internal Improvement Fund of Florida, and against the former members of the same board, and against the board itself as a Corporation, and sundry other corporations alleged to be in complicity with them. The internal improvement fund consisted of ten or eleven millions of acres of land belonging to the State, including certain proceeds of sales of some of said lands, and was pledged for the payment of the interest accruing on said bonds and installments of a sinking fund, for meeting the principal, which were largely in arrear. The charge of the bill was to the effect that the Trustees were wasting and destroying the fund by making sales at nominal prices by the hundred thousand and even million of acres, and failed and [529] refused to provide for the payment of interest or sinking fund on the bonds; and the bill prayed that the fraudulent conveyances might be set aside, that the Trustees might be enjoined from selling more lands, and that a receiver might be appointed to take care of the fund

The litigation was carried on with great vigor and at much expense and, in fact, a large amount of the trust fund was secured and saved; the management of the fund was taken out of the hands of the Trustees; agents were appointed by the court to make sales of the land and made a large number of sales; a considerable amount of money was realized, and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful. In 1875 he filed a petition, setting forth these advances and the efforts made by him, and prayed an allowance out of the fund for his expenses and services. In December, 1876, an order was made by the court referring it to a master to ascertain: 1. What and by whom the necessary expenditures have been incurred in bringing the moneys already received into court. 2. What necessary expenditures have been made and by whom, in protecting the landed and sinking fund from which this money has been and will be realized. 3. What personal services have been rendered and by whom, in said work, and the value thereof. 4. What amount of same have been charged to Francis Vose by the receiver, instead of being paid out of the common fund in his hands.

Vose presented his account and vouchers before the master, and testimony was taken on the subject. In 1877 the master made a report, in which, amongst other things, he stated as follows:

"First. After consideration of the proofs as submitted to me, I find and report that the moneys which have already been received, whether upon account of the Internal Improvement Fund or of the sinking fund, have been brought into court at the instance and the suit and by the sole efforts of Francis Vose, the petitioner, through himself, his solicitors and his [530] agents, and by the instrumentality more directly and especially of his proceeding in equity against the Trustees of the Internal Improvement Fund *et al.*, as they appear in the records which are made evidence in this case."

The master further reported a statement of expenditures made by Vose, in the cause, and declared that they were necessary expenditures, being for fees of solicitors and counsel, costs of court, and sundry small incidental items for copying records and the like, the whole amounting to $34,192 62. He also stated and allowed sundry fees paid in maintaining other suits in New York, and on appeal to this court, attorneys' fees for resisting fraudulent coupons, and expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands, amounting in all to $19,745.68. He also reported in favor of an allowance to Vose for his personal services and expenditures, as follows:

"I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and the sinking funds; those services extending over a period of more than eleven years. By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained, and by his own vigilance and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money, which, from time to time, have been distributed by its orders.

I consider and report that the charge embraced in his itemized account, and numbered forty-two (42) for $25,000 principal, and $9,625 interest, is reasonable and just.

I also find that the charge in his itemized account, numbered forty-one (41) for personal expenditures of $15,003.35, is reasonable and just. Total $40,003.35."

The first of these items consisted of an allowance of $2,500 a year for ten years of personal services; the second was for railroad fares and hotel bills paid by the complainant.

The proceedings before the master were opposed; but, on a hearing upon the report and the evidence submitted therewith, the court confirmed it to the extent of $27,835.34, allowing generally the fees of the officers of the court, [531] and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client; at the same time disallowing certain fees paid to advisory counsel and other items not directly connected with the suit, and referring the remainder of the report for further evidence and hearing. In December, 1879, after additional evidence had been taken, a final order was made, allowing sundry expenses for looking after and reclaiming the

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trust lands, and also allowing for the personal expenses and services of Vose embraced in the two items before referred to; the total amount allowed being $60,131.96.

The appeal to this court is taken from these orders of the court below; and it is contended that they were illegal, because Vose was not before the court in the character of a trustee and, therefore, not entitled to re-imbursement of his expenses beyond taxable costs; and because the allowances were not lawful if he had been such trustee. The objections to the orders are not expressed in this precise form; but this is the substance of them.

The first question, however, is, whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are, certainly, a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal.

As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction of his debt, and cannot be regarded in the light of a trustee and, therefore, is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done, and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust*, and to have secured its proper application to their use. There is no doubt, from the evidence, that besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be re-imbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution. And such charge cannot be justly complained of by the Trustees of the Internal Improvement Fund, because, however fair may have been the conduct of the present Trustees, who were elected to their positions since the acts complained of were committed by their predecessors, those acts, as the event of the cause shows, furnished abundant ground for instituting the proceedings.

[532]

It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to re-imbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. Thus, in *Atty-Gen.* v. *Brewers' Co.*, 1 P. Wms., 376, *Lord Chancellor* Cowper allowed costs to the relators out of the improved rents which they received for the charity, "For that they had been serviceable to the charity, by easing them of the six hundred and twenty pounds debt which was claimed against them." In *Atty-Gen.* v. *Kerr*, 4 Beav., 297, it is conceded to be the general rule that the relator in a charity information, upon obtaining a decree, is entitled to his costs as between solicitor and client. In that case they were not allowed out of the general charity estate, but were charged upon the particular property recovered.

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The same rule was followed in *Atty-Gen.* v. *Old South Society*, 13 Allen, 474.

Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee bill. This difference is pointed out in the case, *In re Paschal*, 10 Wall., 483, 498 [77 U. S., XIX., 992, 996].

The same rule is applied to creditors' suits, where a fund has been realized by the diligence of the plaintiff. In England, where specialty creditors have a preference, a simple contract creditor who recovers a fund for the general benefit, is allowed his costs, as between party and party, out of the fund in preference to all other claims; and the balance of his costs, as between solicitor and client, are to be paid either out of the fund or *pro rata* by all the creditors who partake of the benefit of the suit. This was the judgment in *Stanton* v. *Hatfield*, 1 Keen, 358; followed in *Thompson* v. *Cooper*, 2 Coll., 87. In the latter case, *Vice-Chancellor* Knight Bruce said: "Having come in and proved, and obtained the benefit of the suit which was instituted on their behalf, as well as that of the plaintiff, it cannot be just that in such a suit—a suit instituted for the benefit of all the creditors—one alone should bear the burden, when others have the benefit." To the same purport, see, *Tootal* v. *Spicer*, 4 Sim., 510; *Larkins* v. *Paxton*, 2 Myl. & K., 320; *Barker* v. *Wardle*, 2

[534]

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Myl. & K., 818; and *Sutton* v. *Doggett*, 3 Beav., 9.

The rule that a party who recovers a fund for the common benefit of creditors, is entitled to have his costs and expenses paid out of the fund, prevails in bankruptcy cases. In *Worrall* v. *Harford*, 8 Ves., 4, *Lord* Eldon said: "The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied if not expressed." This rule has been followed by the District Courts of the United States. See a forcible opinion of *Judge* Bryan, in *Re Williams*, 2 Bk. Reg., 28, in the District Court of South Carolina; and the case of *O'Hara*, 8 Am. L. Reg. (N. S.), 113, in the Western District of Pennsylvania. In a case in Massachusetts before *Judge* Lowell, the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of *Judge* Lowell are so apposite, and seem to us so well considered, that we quote from his opinion. "A petition *in invitum*," says he, "to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may prove their debts. In this case, the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and, in most cases, though not in this, no single creditor nor any three or four of them have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if [535] they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts. * * * The strong equities of the petitioner's case are not difficult to discover; and the practice under the Act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee bill of 26 February, 1853, 10 Stat. at L., 161, which does not appear to sanction it and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee bill is, probably, intended to reach only taxable costs, commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims. * * * I have been referred to the record of a case in equity in the circuit court in which *Judge* Sprague, since the passage of the fee bill, ordered the counsel fees of all parties to be paid out of the fund; and *Judge* Kane adopted a like rule in *Ex parte Plitt*, 2 Wall., Jr., 453. These decisions and those in bankruptcy already cited, justify me in construing the statute in the way which the equities of the case so clearly demand."

The views here expressed with regard to the application of the fee bill to cases of this sort are, undoubtedly, correct. The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of 1853, sec. 1, 10 Stat. at L., 161; R. S., sec. 823. And the Act con- [536] tains nothing which can be fairly construed to deprive the court of chancery of its long established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

This court, in the case of *Cowdrey* v. *R. R. Co.*, 93 U. S., 352 [XXIII., 950] sustained an allowance of $5,000 for counsel fees to be paid to counsel out of the proceeds of a railroad mortgage, foreclosed in the Circuit Court for the District of Texas, being the amount agreed by the trustees to be paid for instituting proceedings which were discontinued by the intervention of the civil war. A new bill was afterwards filed by some of the bondholders, and the fund was brought into court, and the fee in question was directed to be paid by the receiver. We regarded the charge as a proper one to be paid out of the fund. Liberal allowances were also made by the circuit court in the same case for counsel fees and other charges incurred by the complainants in the cause, which were never brought to this court for review.

In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers and counsel as have sometimes been made, and which have justly excited severe criticism.

Still, a just respect for the eminent judges under whose direction many of these cases have been administered, would lead to the conclusion that allowances of this kind, if made with moderation, and a jealous regard to the rights

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of those who are interested in the fund, are not [537] only admissible, but agreeable to the principles of equity and justice.

The subject of allowances to be made to trustees *eo nomine* is very fully examined in the books. An exhaustive citation of both English and American authorities is to be found in the *notes* to the case of *Robinson* v. *Pett*, 2 White & T., L. Cas. Eq., 238, Am. ed., pp. 512-600; and see, Perry, Trusts, secs. 894, 910, 912.

It is unnecessary, however, to pursue the subject further. The conclusion to which we have come is that, under the circumstances of this case, the circuit court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case, by the appellants, that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made.

But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is. But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. The reasons which apply to his expenditures, incurred in carrying on the suit and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a cred- [538] itor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.

We are of opinion, therefore, that the allowance for these purposes was illegally made, *and that to this extent the orders should be reversed.* We refer to the allowance in the last order, of $15,003.85 for private expenses, and of $34,625 for personal services. As to those items, *the said last order will be reversed and, in all other respects, both of the orders appealed from will be affirmed.*

Mr. Justice **Miller**, dissenting:

While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely: the absorption of a property or a fund which comes into the control of a court, by making allowances for attorneys' fees and other expenses, pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney or incurred the costs, never had any interest in the property or fund in litigation.

This system of paying out of a man's property some one else engaged in the effort to wrest that property from him, can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than make my protest against the doctrine.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 155; 111 U. S., 699; 113 U. S., 127 124, 126.

ASA JOHNSON ET AL., *Appts.*, [539]
v.
FLUSHING AND NORTH SIDE RAILROAD COMPANY.

(See S. C., 15 Otto, 539-549.)

Void patent—omitted devices—re-issued patent.

1. Re-issued letters patent granted to Asa Johnson, dated April 16, 1872, for a new mode of fastening metallic coverings to buildings, are broader than the original patent and, consequently, void.
2. In the re-issued patent several of the devices essential to the combination described in the original patent are left out, and a separate claim made for the parts which remain, and to these parts a new and essential function is given, which they could not perform under the original patent.
3. Such re-issued patent is also void for want of novelty in the invention which was covered by the original patent.

[No. 245.]

Argued Mar. 27, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

Statement of the case by *Mr. Justice* **Woods:**

On May 19, 1857, an original patent was granted Asa Johnson, the inventor, and to William Hughes and Henry Link, his assignees, "for an improved mode of fastening sheet metal on roofs," etc.

The specification declared the invention to be "A new and useful mode of self adjusting fastenings for fastening metallic coverings to buildings, and in any and all other places where metals require fastening and their contraction and expansion demand accommodation."

(Appended to the specification are five figures illustrative thereof, which are referred to and described.)

The specification then proceeds as follows:

"In the operation of my invention, after sheeting the roof, if the boards do not exceed

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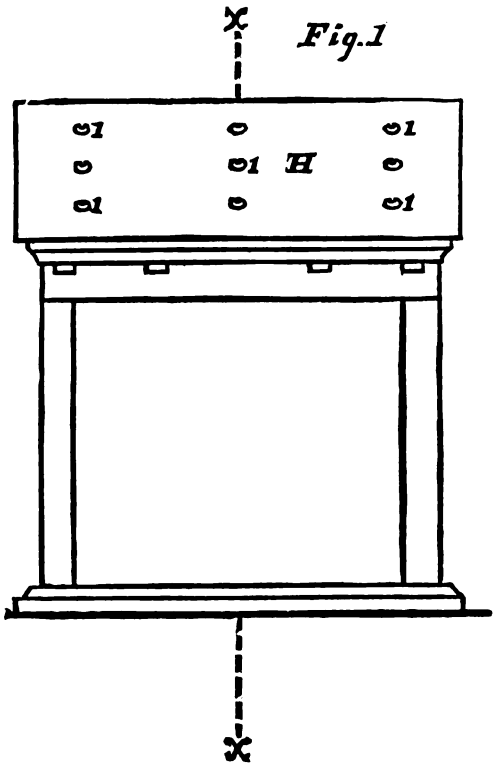

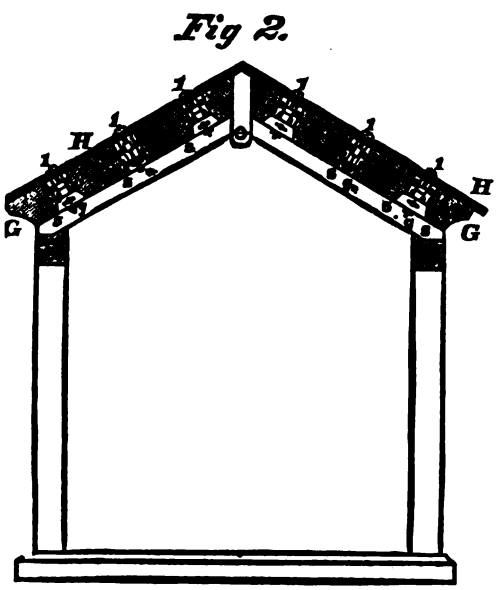

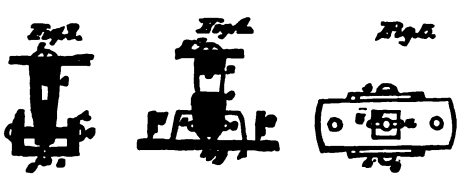

See 15 OTTO.

an inch in thickness, I bore a hole at the point where I wish to insert the stud, about the size as seen in vertical dotted lines in Fig. 2. The holes may be made larger or smaller to allow for contraction and expansion, so that the studs can move freely in any direction required. [540]

The bottom plate is then screwed firmly to the boards by the screws *S S*, seen in Figs. 2 and 4, and the screw 1 passes through the metallic covering into the stud 2, thus firmly fastening the covering K to the stud, as seen in Fig. 2.

It will be further seen that the cord 7 passes through the stud 2, Fig. 4, and then through the bottom plate, and is fastened together as at *g*, in said Fig., thus always keeping the stud in an erect position until attached to the metal.

If the covering contract on a line parallel with the connecting pin 8, the adjustable connecting rod 2 will move on it towards one of the flanges 4; when it expands it will move towards the opposite flange, thus moving towards the point of contraction, and from the point of expansion with this metallic covering.

The adjustable stud, in addition to its parallel and longitudinal movement, is capable of a diagonal movement, thus accommodating itself to any direction required by the metal contracting or expanding. [541]

I contemplate using them as general fasteners when it is necessary to allow for the contraction and expansion of the material used, not confining myself to buildings only. I may find, in using my adjustable fasteners, it necessary to make some of them, those that are in parallel lines with the flanges, to fit up close to the sides of the studs, as seen at 1, 1, in Fig. 2, allowing them to move in but one direction on the pin 8, which slides in the slots in the flanges 4, 4."

The claim was thus set forth:

"In the self adjusting fastener as described, for the purpose of attaching metallic coverings to buildings and accommodating itself to the contraction and expansion of the metal, and for fastening metals in all other places when the contraction and expansion demand accommodation, substantially as set forth, or any mechanical device equivalent thereto." [542]

At the expiration of the original term of the patent, fourteen years, an extension of seven years was granted to Johnson, who subsequently assigned a two third interest in his extended patent to his co-complainant, Thomas S. Sandford. Afterwards, on April 16, 1872, Johnson surrendered his original patent and took out a re-issue of that date.

The specification of his re-issue describes the invention generally as "A new and useful mode of self adjusting fastenings for fastening metallic coverings to buildings, and for use in any and all other places where metals require fastening, and their contraction and expansion require accommodation."

Then follows a reference to and description of the same five illustrative figures which form part of the specification of the original patent.

The specification then proceeds as follows:

"The principle of my invention consists in connecting the metal to be fastened with a bolt or pin arranged to slide in slotted bearings in the direction of expansion or contraction, said adjustable bolt and its bearings being combined with the materials to be fastened.

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I have found my adjustable fastener peculiarly useful in fastening metallic roofs to buildings, and I proceed to describe its construction and use.

In using my self adjusting fastener for fastening metallic roofs to buildings, I connect the sliding bolt or pin with the roof by means of a stud fastened to the same, and I form the side plates, which contain the bearings for the sliding bolt, in connection with and as flanges of a bottom plate, which is secured fast to the under side of the wooden sheathing of the building.

In the drawing, 1 indicates the screws for attaching the metallic roof to the stud, 2 is the stud, 3 is the adjusting bolt or pin, to which the metallic roof is connected by the stud and screw, said bolt passing through the stud 2 and through the slots of the side plates or [543] flanges; 4 4 are the side plates or flanges, provided with slots, which form the bearings of the adjusting bolts; 5 is a bottom plate, used as a convenient means of attaching the side plates to the wooden sheathing of the building; 6 6 are the slots in the side-plates in which the adjusting bolt slides; 7 is an India rubber cord which may be used in applying the adjustable fastener to buildings. It is connected with the stud by being passed through an opening in it. It then passes down on each side of the stud and through an opening in the bottom plate, where it is fastened, as indicated at *g* in the drawing, and is used for keeping the stud in an erect position until after the stud had been inserted through the sheathing from below, and until it is attached to the metal roof. Without some contrivance of this kind, it would be difficult in the position indicated to keep the stud in position while the connection was being made.

S S are screws for attaching the bottom plate, and with it the side plates, to the sheathing. G is the sheathing of the roof greatly enlarged in thickness in proportion, to illustrate the details of the connection of the adjustable fastener to buildings. H is the metallic roofing.

The method of using the invention in attaching metallic roofing to buildings is as follows: after sheathing the roof, a hole is bored in the sheathing, at the point where the adjustable fastener is to be used, of sufficient size to allow the connecting stud to move in the same with the expansion or contraction of the metallic roof. These holes receive the slotted flanges or side plates 4 4, and they are indicated in the drawing by the letter *a*. See, Fig. 2. They should be of the shape and size required by the extent and direction of the contraction and expansion to be allowed for. The flanges or side plates are inserted in the holes, and the bottom plate is then firmly secured to the boards or sheathing G by the screws *S S*, as seen in Fig. 2. Where the sheathing is sufficiently thick, a hole may be bored into it to receive the fastener from above. The side plates 4 and adjusting bolt 8 are thus connected with the building. The connection with the metallic roof is then effected by holding the stud in an erect position by means of the rubber cord, and attaching the stud to the roofing by means of the screw 1. Both the wooden sheathing and the metallic roof are thus connected to the self adjusting mechanism, consisting of the slotted side plates and the bolt which slides in them.

It is obvious that if the metal of the roofing contracts or expands in a line with the slots in the side plates that the bolt will adjust itself to [544] such contraction or expansion by sliding in the slots in the proper direction.

On the other hand, in cases where the line of contraction or expansion may be diagonal or at right angles to the line of the slots in the side-plates, the connecting stud is arranged to slide upon the adjusting bolt, as it is shown it may do in Figs. 2 and 3. Where, however, the movement is only sensible in the direction of the slots, the side plates are made to fit up close, as seen at Fig. 2 in the illustrations marked *, where the side plates or flanges are seen in cross-section, so that the only practical adjustability shall be in the direction of the slots.

I contemplate using my invention as a general fastener where it is necessary to allow for the contraction and expansion of the material used, not confining myself to buildings only."

The first claim of the re-issue was substantially identical with the one claim of the original patent. The second claim of the re-issue was as follows:

"I claim, in combination with the adjusting bolt and slotted side-plates, suitably connected to and combined with the materials to be fastened together for the purpose of accommodating the expansion and contraction of such materials with reference to each other, substantially as specified.'

The bill in this case was filed to restrain the defendant Railroad Company from infringing the second claim of the re-issued letters patent.

The infringement complained of was the use by the Railroad Company of what is commonly known as the fish plate joint for uniting the ends of railroad rails. It consists of two iron plates of proper shape and size to fit the "web," which is the upright portion of the rail between its head and base. The plates are fastened, one on each side of and near the ends of two abutting rails by means of bolts and nuts, the bolts passing through the corresponding holes formed in both the plates and rails. In order to permit the rails to expand and contract with the changes in temperature, their ends are not allowed to form a close joint, and the holes, either in the fish plates or in the rails, are made larger than the bolts and are elongated in the direction of the length of the rails. By these means the expansion and contraction of the rails is "compensated" without injury to the joint.

The defenses set up in the answer of the ap- [545] pellee were: the invalidity of the re-issue, because, as was alleged, the original patent was not lawfully surrendered, and the re-issue was not lawfully issued; and want of novelty in the invention covered by the second claim of the re-issue. The appellee also denied infringement.

The circuit court dismissed the bill, holding that the re-issued patent was void because it was not for the same invention as that described in the original patent.

The appeal of the complainants has brought the case to this court for review.

Messrs. T. Astley Atkins, Israel Minor, Jr., **Thomas Bracken** and **B. F. Butler**, for appellants.

Messrs. **Andrew McCallum** and **S. D. Law**, for appellees.

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Mr. Justice **Woods** delivered the opinion of the court:

The appellee insists that the invention covered by the second claim of the re-issued patent, of which infringement is charged, is neither described in the specification nor claimed in the claim of the original patent, and that the re-issue is, therefore, broader than the original patent and, consequently, void.

It takes but slight comparison of the original and re-issued patents to show that this contention of the appellee is well founded. The original patent was for a complicated contrivance, consisting of a number of old devices combined, and specially adapted to the fastening of metallic coverings to buildings, and for use in all other places where metals require fastening and their contraction and expansion require accommodation. To make the invention of any practical value for the purpose suggested in the specification to the original patent, and for use in the "other places" referred to, all the parts of the device therein described, except, perhaps, the rubber cord, which is only for temporary use in applying the device, are absolutely essential. Nowhere in the specification is it indicated or suggested that any part of the device described can be dispensed with. It is perfectly clear that the stud and bottom plate of the contrivance are absolutely necessary to the only specific use mentioned in the specification. If these are left out there is no connection between the two materials to be fastened together, namely: the metal roof and the wooden sheathing under it. As the declared purpose of the invention is the fastening of these two materials together, it is difficult to see how the parts of the device essential to the fastening can be discarded, and the invention still remain perfect and unchanged.

On recurring to the second claim of the re-issued patent, we find that the metal roof to be fastened, the stud, the bottom plate, and the screw which fastens the metal roof to the stud, are all eliminated from the invention, and there is nothing left but the adjusting bolt (8) and the slotted side plates (4 4). As thus left, it is impossible to apply in a practical manner the device to the fastening of sheet-iron to a roof, or the fastening of any sheet metal to anything whatever.

If the second claim of the re-issued patent, as insisted by appellants, covers the fish-plate joint used by the appellee, it must cover a combination of (1) the two materials to be fastened together; (2) two slotted side plates on opposite sides of the materials to be fastened, which serve as clamps to hold such materials in position; (3) the adjusting bolt. The claim is so interpreted by the expert witness of appellants. Under the original patent, the materials or things to be fastened together are the metallic covering of the roof and the under surface of the wooden sheathing on which it is laid. The slotted plates or flanges are fastened to the under side of the sheathing by the bottom plate, which connects the flanges, and they form a support for the adjusting bolt; but the slotted flanges do not embrace or clamp any part of the wooden sheathing or any part of the metallic covering of the roof, much less do they embrace or clamp at the same time the sheathing and the metallic covering, which are the things to be fastened together. But in the re-issued patent the slotted plates not only furnish bearings for the bolt, but perform a new and essential function, of furnishing a strong lateral support to the materials to be fastened together by clamping the same between them.

We find, therefore, that in the re-issued patent several of the devices essential to the combination described in the original patent are left out and a separate claim made for the parts which remain, and to these parts a new and essential function is given, which they could not perform under the original patent.

It is, therefore, perfectly clear that the second claim of the re-issued patent was not covered by the original patent. It describes another device, operating in a different way and for a different purpose.

Under the circumstances of this case there can, in our opinion, be but one conclusion: and that is, that the second claim of the re-issued patent is void. [547]

There was no error in the original patent caused by inadvertence, accident or mistake, which could have escaped the notice of the patentee and his associates for fifteen years. It is not open to dispute that the fish-plate joint, precisely such as the appellants claim is covered by their re-issued patent, was in general use during nearly the entire life of the original patent. Why did not the patentee earlier discover that all this use of the fish-plate joint was really an infringement on his patent and apply for a re-issue and assert his rights? He has rested supinely until the use of the fish-plate joint has become universal, and then, after a lapse of fifteen years, has attempted by a re-issue to extend his patent to cover it. We think it is perfectly clear that his original patent could not be fairly construed to embrace the device used by the appellee, which appellants insist is covered by their re-issue. If the re-issued patent covers it, it is broader than the original and is, therefore, void. *Giant Powder Co.* v. *Cal. Vigorit Powder Co.*, 6 Sawy., 508; *Powder Co.* v. *Powder Works*, 98 U.S., 126 [XXV., 77]; *Ball* v. *Langles* [*ante*, 104]; *James* v. *Campbell*, decided at the present Term [*ante*, 786].

Even if the patentee had the right to a re-issue if applied for in seasonable time, he has lost it by his laches and unreasonable delay. *Miller* v. *Brass Co.*, decided at the present Term [*ante*, 783].

The defense of want of novelty set up in the answer is, in our opinion, also sustained by the evidence. The testimony shows that the device of employing slotted plates and bolts, to allow of expansion and contraction caused by changes in temperature, was applied in the manufacture of locomotives long before the year 1843, the earliest date at which Johnson, the original patentee, claims to have conceived his invention. By this contrivance, the expansion and contraction of the boiler of the locomotive upon its [548] frame, caused by alternate heating and cooling, was accommodated. This device was in common use before the year 1843, and it much more nearly resembles the fish-plate joint used for uniting the iron rails of a railroad than it does the contrivance described in the original patent of Johnson.

Many other instances of the application of the principle of this device prior to the date of Johnson's original patent are shown by the evi-

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dence. Among these were the use by the Newcastle & Frenchtown Railroad Company, in 1837, of iron rails embodying substantially the present fish-plate joint, and the use of the same device by the Oswego & Syracuse Railroad Co. in 1848. In the first of these instances but one plate was used for each joint, and there was an oblong hole in one end only of every rail. In the second instance two plates were used to every joint, and the holes in both ends of the plates were oblong.

There are other instances of the use of this device for joining iron rails, which the record discloses. The evidence leaves no doubt upon our minds that the device now used by the appellee and which is alleged to be an infringement on appellants' patent, was well known and publicly used for several years before the application of Johnson for his original patent in 1857.

An attempt is made to elude the force of the testimony on the question of novelty by introducing evidence to show that Johnson, as early as the year 1843, made a small model of a device similar, as is claimed, to the present fish-plate joint, and also some drawings upon the fly-leaf of a book, of the same contrivance, and these it is claimed show that Johnson was the first inventor of the fish-plate joint, and that his patent, afterwards obtained in 1857, cut off the claims of intermediate inventors, if any such there were.

We have examined the model referred to and cannot see that it contains any suggestion of the fish-plate joint. It is simply an oblong strip of sheet iron, having its sides bent over so as to form flanges, and with four oblong holes in each flange corresponding with similar holes in the other, and a bolt to pass through the corresponding holes in the flanges. The model is a single piece of sheet iron, supposed to represent an iron rail. There is no suggestion that it is to be connected with any other rail, and there are no plates or bars with which to make the connection. If the model suggests anything, it is simply the use of a bolt in slotted holes, which, as the testimony in this case shows, was a device in common use in many ways long before the year 1843.

[549]

It is alleged that the model spoken of was made by Johnson when he was about twenty years of age. It does not appear that at this time he had ever seen an iron rail such as those to which a fish-plate joint can be applied, or that he had ever seen a railroad. According to Johnson's testimony, the model when finished was placed by him upon the plate under the eaves of a woodhouse, where it remained unseen by anyone for thirty-three years, until the spring of 1876, when he returned to the place where he had lived in 1843, and got the model for the purposes of this suit.

It is sufficient to say that the proof fails to show that Johnson, in 1843, or at any time before the fish-plate joint for uniting iron rails came into use, was the inventor of that device, or that he ever invented it at all. It was not described in his original patent, and he never set up any claim to it until the year 1872, when its use had become universal wherever railroads were constructed.

On both grounds, therefore, the invalidity of the re-issued patent and want of novelty in the invention which appellants contend was covered by the original patent, we are of opinion that the Circuit Court was right in dismissing the bill. *Its decision must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 147, 428; 107 U. S., 646; 111 U. S., 103; 112 U. S., 669; 10 Bias., 416.

SAMUEL B. GORDON, EDWARD W. FOSTER AND HENRY WATKINS, *Plfs. in Err.*, [553]

v.

JOHN G. BUTLER.

(See S. C., 15 Otto, 553-558.)

Fraudulent representations.

Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must, necessarily, be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce.

[No. 254.]

Argued Mar. 31, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. **Leslie W. Russell,** for plaintiffs in error:

It is a well known rule in the trial of causes and recognized by the Federal Courts, that conceding all the inferences which a jury could justifiably draw from the evidence, if it would be insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.

Pleasants v. *Fant*, 22 Wall., 122 (89 U. S., XXII., 788); *Bank of Washington* v. *Triplett*, 1 Pet., 25.

The argument is, that Foster and Watkins lied when they said that in their judgment the property was worth $48,000 or $26,000, because Peter Post and others say upon the witness stand that, in their judgment, enlightened by the commercial revulsion which transpired after the first opinion was given, the opinion of Foster and Watkins was incorrect. In *Ellis* v. *Andrews*, 56 N. Y., 88, the court decided that the dismissal of the complaint must be sustained, on the ground that a false statement as to the value of property, made by a vendor for the purpose of obtaining a higher price than he knows the property is worth, will not sustain an action for fraud by a purchaser, who contracted, relying upon the statement. The purchaser must rely upon his own judgment as to value. The same principle was substantially decided in *Oberlander* v. *Spiess*, 45 N. Y., 175; *Meyer* v. *Amidon* 45 N. Y., 169; see, also, Story, Eq., sec. 197; *n.* 1; *Parker* v. *Moulton*, 114 Mass., 99; *Holbrook* v. *Connor*, 60 Me., 578.

In *Holbrook* v. *Connor*, *supra*, the declaration was on the case for deceit, for fraud in the sale of land. The plaintiff alleged that he was induced to enter into a joint stock company, and to subscribe for and buy the lands in question, by the false and fraudulent representations of the defendant, the vendor; that the said lands had large deposits of oil in them and were of

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great value for the purpose of digging, boring for and manufacturing oil. It appeared that when the representations were made there was but one mill on the land in question; that other mills had been opened upon the lands in the neighborhood; that plaintiff understood, at the time the representations were made, that the lands had not been tested; that operations upon them might be unsuccessful; that he expected to suffer loss if he did not find oil, or if oil went down.

The court held that the representations were matters of opinion and that the trial court should have so pronounced from the evidence, without leaving the matter to the jury as a matter of fact, to determine whether the statement was understood as a matter of opinion or the representations of a fact.

In addition to the false assertion of a fact, the defendant in error must prove that the plaintiffs in error knew their statements to be false, and prove this affirmatively.

Marsh v. *Falker*, 40 N. Y., 566; *Wakeman* v. *Dalley*, 51 N.Y., 27; *Hubbell* v. *Meigs*, 50 N. Y., 480; *Nelson* v. *Luling*, 46 How. Pr., 355; *Lord* v. *Goddard*, 13 How., 210; *Pearson* v. *Howe*, 1 Allen, 207.

The learned Judge in the charge said: "If they were not acquainted sufficiently to fairly have an intelligent judgment, according to their judgment, it was false in that respect."

This is not the law of the State of New York, nor is it the law as announced by the Supreme Court of the United States.

Lord v. *Goddard*, *supra*; *Young* v. *Covell*, 8 Johns., 23.

Messrs. **Harry Bingham** and *A. X. Parker*, for defendant in error:

The representations in controversy were made in writing by two of the plaintiffs in error (Foster and Watkins), and used by the third (Gordon) to obtain from the defendant in error a loan of money upon the security of the property to which the representations related.

At the time of the negotiation for the loan, the defendant in error was entirely unacquainted with the property proposed as security for the loan, and by reason of the great distance of his residence therefrom, had no opportunity of inspecting the same, and no means of forming his own judgment as to the character, quality and value of the proposed security. Under such circumstances, no rule analogous to the rule of *caveat emptor* between buyer and seller could have any application. There is, also, this further fact, that would preclude the application of any such rule: the plaintiffs in error, Foster & Watkins, who made and subscribed the written representations, did not present themselves to the defendant in error as seeking to obtain a loan for themselves; but they presented themselves to him as disinterested third persons, well acquainted with the property upon which the other plaintiff in error, Gordon, was seeking to obtain the loan ostensibly for himself alone, it must be presumed the plaintiffs in error intended that the defendant in error should rely upon those representations, and that the defendant in error had the right to rely on such representations; and if they turned out to be willfully false, to hold the plaintiffs in error responsible therefor.

Ad. Torts, 1022; *Simar* v. *Canaday*, 53 N.Y., 298; *Miller* v. *Barber*, 66 N. Y., 558; *Smith* v. *Countryman*, 30 N. Y., 683; *Mead* v. *Bunn*, 32 N. Y., 275; *Van Epps* v. *Harrison*, 5 Hill, 63; *Sandford* v. *Handy*, 23 Wend., 260; *Culver* v. *Avery*, 7 Wend., 381; *Medbury* v. *Watson*, 6 Met., 246; *Page* v. *Bent*, 2 Met., 374; *Irving* v. *Thomas*, 18 Me., 418; *Savage* v. *Stephens*, 126 Mass., 207; *Teague* v. *Irwin*, 127 Mass., 217; *Paddock* v. *Fletcher*, 42 Vt., 389; *Adams* v. *Soule*, 33 Vt., 538; *Somers* v. *Richards*, 46 Vt., 170; *Coon* v. *Atwell*, 46 N. H., 510; *Smith* v. *Richards*, 13 Pet., 28; *Sherwood* v. *Salmon*, 5 Day, 439; *Dale* v. *Roosevelt*, 5 Johns. Ch., 174; *McClellan* v. *Scott*, 24 Wis., 81.

The plaintiffs in error, by this affirmation, assumed to have an acquaintanceship with the property in question, upon which they could base an intelligent judgment, and it is manifest that they intended by their affirmation to convey the impression that they had knowledge upon which an intelligent judgment could be founded, and that, according to that judgment, the property was worth the sums named in the certificate. Now, if the plaintiffs in error knew or believed that they had no such knowledge and no such judgment, then their affirmation was false and fraudulent, and they are liable to the defendant in error, so far as he relied upon it to his injury.

Bennett v. *Judson*, 21 N. Y., 238; *Hubbard* v. *Briggs*, 31 N.Y., 518; *Marsh* v. *Falker* (1 Hand), 40 N. Y., 562; *Craig* v. *Ward*, 3 Keyes (N. Y.), 387; *Meyer* v. *Amidon*, 45 N.Y., 169; *Oberlander* v. *Spiess*, 45 N. Y., 175; *Hubbell* v. *Meigs*, 50 N. Y., 480; *Wakeman* v. *Dalley*, 51 N. Y., 27; *Harding* v. *Randall*, 15 Me., 332; *Stone* v. *Denny*, 4 Met., 151; *Fisher* v. *Mellen*, 103 Mass., 503; *Litchfield* v. *Hutchinson*, 117 Mass., 195; *Cabot* v. *Christie*, 42 Vt., 121; *Stone* v. *Covell*, 29 Mich., 359.

The books are full of cases where actions have been maintained for false recommendations of the credit of traders, by persons thereby deceived. The present case is analogous to those and must rest upon the same legal principles. Those cases and the present both rest upon the ground that fraud, accompanied by damage, furnishes a good cause of action.

Pasley v. *Freeman*, 3 T. R., 51; *Upton* v. *Vail*, 6 Johns., 181; *Lord* v. *Colley*, 6 N. H., 99; *Zabriskie* v. *Smith*, 13 N. Y., 322; *Patten* v. *Gurney*, 17 Mass., 182; *Haycraft* v. *Creasy*, 2 East, 91; *Ewins* v. *Calhoun*, 7 Vt., 79; *Weeks* v. *Burton*, 7 Vt., 67.

Mr. Justice **Field** delivered the opinion of the court:

This was an action for alleged fraud upon the plaintiff, in obtaining from him a loan of $10,000 upon insufficient security. The facts of the case, so far as necessary to present the questions involved for our consideration, are briefly as follows:

Near the Town of Potsdam, in New York, there are sandstone quarries, situated on the west bank of Racket River. The land containing them, when the loan was made, was divided into lots, varying in size from seven to thirty-six acres. Previously to 1873, the quarries, although generally supposed to consist of stone, valuable for building and other purposes, had not been opened sufficiently to show their extent and value. A quarry similar in external

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appearance, situated on the river below and adjoining them, called the Parmeter quarry, had been worked for thirty or forty years, and furnished stone of a valuable quality in large [554] quantities. For some years prior to 1872, the defendant, Gordon, a resident of Potsdam, had been assiduously trying to get possession of the quarries, in the belief that on development they would prove valuable, like the Parmeter quarry. His letters to Butler, the plaintiff, written at the time, indicated a confident belief that a fortune was to be made out of them; and he invested in them whatever means he could raise.

The plaintiff, prior to 1872, had frequently visited Potsdam, where he became acquainted with Gordon, a lawyer in practice there, and often employed him professionally. During these visits he learned something of the quarries, and that Gordon desired to obtain possession of and develop them. In that year there was much correspondence between them on the subject. Gordon expressed a strong conviction that the stone would be very valuable and find a ready market, and stated what he had heard of the buildings on which it had been used, and of those for which it would probably be wanted. He desired to organize a stock company to work the quarries, and to have the plaintiff join in the enterprise. Failing to secure his co-operation and being advised by him that he had better work the quarries himself, Gordon applied for a loan for that purpose. After much correspondence and negotiation, the plaintiff promised to loan him $10,000, to be secured by mortgage on some of the lots, and advised him against investing a larger sum in them. The plaintiff, as is manifest from the correspondence, was fully aware at the time of the slightly developed condition of the property; but an estimate of its probable value was furnished by the following certificate obtained by Gordon from the defendants, Watkins and Foster, well known gentlemen of the place, and sent to him.

"Each of the undersigned hereby certifies that he is and has been for more than twenty years last past, a resident of Potsdam, St. Lawrence Co., New York, and acquainted with the sandstone quarries south of Potsdam Village, that he is acquainted with the quarry lots there owned by S. B. Gordon, and situate on the westerly shore of Racket River; that said lots are roughly represented on the annexed diagram; have on them the buildings, and in his best judg- [555] ment contain the quantity of land, and are worth the sums severally below cited, to wit:

No. 1—Falls Lot,	about 8 acres,	worth		$8,000
" 2—Orchard Lot,	" 4 "	"		5,000
" 3—Cox "	" 16 "	"		8,000
" 4—Hicks "	" 15 "	"		5,000
" 5 Meacham " house and barn,	" 7 "	"		5,000
" 6—Hale Lot,	" 10 "	"		1,000
" 7—Parmeter Lot 2 houses & barns,	" 17 "	"		8,000
8—Train Lot,	" 26 "	"		8,000
Total, 8 lots,	103			$48,000

Dated, Potsdam, Dec. 12, 1872.

H. WATKINS,
E. W. FOSTER."

No oral representations on the subject were made to the plaintiff by Watkins or Foster. Their connection with the loan consisted, merely, in furnishing this certificate at the request of Gordon. The loan was made on the first of the following January, and a mortgage taken as security for it upon four of the lots mentioned in the certificate, the aggregate value of which, as there stated, being $26,000. Watkins and Foster were at the time interested in the proposed enterprise; and their estimate of value was placed upon the lots, not as agricultural lands, but as lands containing sandstone quarries not yet opened.

After receiving the loan, Gordon proceeded to open the quarries, and his operations had not progressed far when the financial crisis of 1873 came, and in it his enterprise was engulfed. The work on the quarries was stopped, and the value of the property rapidly depreciated. The mortgage to the plaintiff contained a clause declaring that the whole amount of the loan should at once become due if the interest was not punctually paid. Taking advantage of this clause, he commenced proceedings to foreclose the mortgage, and pressed them to a decree under which the premises were sold and bid in by him for the sum of $1,500. He then commenced the present action against Gordon, who had obtained the loan, and Watkins and Foster, who had given the certificate as to the value [556] of the property, to recover damages for the loss sustained by him. In his complaint he alleges that these parties conspired to defraud him by obtaining the loan upon a false and fraudulent certificate as to the value of the property.

The defendants pleaded the general issue. On the trial, the plaintiff produced the correspondence, between him and Gordon, which resulted in the loan. He also offered the testimony of geologists, experts and laborers as to the probable character and value of the material in the quarries. The whole, including the correspondence, covers many pages of the record, but its substance and purport, so far as it is at all material, we have stated. When it was closed, the defendants requested the court to direct the jury to find for them on several grounds and, among others, that, upon the whole proof, no cause of action had been established against them. The court refused to give this direction, and an exception was taken. Testimony was then produced by the defendants and, after instructions from the court, the case was submitted to the jury, who found for the plaintiff.

We do not deem it important to comment upon this testimony nor to notice the rulings of the court upon matters which were objected to nor upon its instructions to the jury. It is enough to observe that if the testimony did not weaken, it did not strengthen the case against the defendants. The question then is, whether, upon the proof furnished by the plaintiff, a cause of action was established against the defendants; for, if not, the motion to direct the jury to find in their favor should have been granted. Upon this question we have no doubt. The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a false and fraudulent certificate of valuation of the property given as security for the loan. The certificate of Watkins and Foster is that, *in the best judgment* of each, the lots were worth the sums severally stated. To jus-

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tify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had knowledge, at the time, that the value of the property was materially less than their estimate. And, from the nature of [557] the property and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it, as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of the property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. How could an overestimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value.

The case of *Holbrook* v. *Connor*, which arose in the Supreme Court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the Supreme Court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. 60 Me., 578.

Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must, necessarily, [558] be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.

For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed and injury has followed from reliance on them, an action may lie. But to this class the present case does not belong. It falls within the class first mentioned.

It follows from these views, that the court below should have directed the jury, upon the close of the plaintiff's testimony, to find a verdict for the defendants; for, from the nature of the subject, in relation to which the certificate was given, the estimate of value was nothing more than a conjectural opinion, which, whether true or false, constituted no legal cause of complaint.

The judgment of the court below must, therefore, be reversed and the cause remanded for a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY, *Appt.*, [559]
v.
BOARD OF TRUSTEES of the TOWN OF CATLETTSBURG, KY.

(See S. C., "*Packet Company* v. *Catlettsburg*," 15 Otto, 559-565.)

Tax on tonnage—what is not—use of wharf—regulations—when valid.

1. Where the trustees of a town had a right to compensation for the use of an improved landing or wharf which they had made on a navigable river, it is no objection to the ordinance fixing the amount of such compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel; this is not a tax upon tonnage.
2. The penalties imposed for a refusal to obey the rules for places of landing, and the orders of the wharfmaster on that subject, are not taxes on tonnage.
3. A city or town, situated on navigable waters, may build and own a wharf suitable for vessels to land at, and exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce.
4. Appropriate regulations prescribing places for the landing of vessels and placing the matter under the control of a wharfmaster or other officer, whose duty it is to look after it, are valid and constitutional, and the States may prescribe them until Congress assumes to do so.
5. An oppressive abuse in the exercise of that power may present a case in which the proper court could give relief.

[No. 237.]

Submitted Mar. 22, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Mr. **David S. Hounshell**, for appellant.

No counsel appeared for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

NOTE.—*Wharves; right to construct; right to charge wharfage; lien for.* See *note to Ex parte* Easton, 95 U. S., XXIV., 373.

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This is an appeal from a decree of the Circuit Court for the District of Kentucky dismissing appellant's bill on demurrer.

The bill is very inartificially drawn, and the allegations very imperfectly present some of the questions which, by the brief of counsel, it is supposed to have raised.

It alleges the complainant to be a Corporation, owning a large number of steamboats engaged in the navigation of the Ohio River, and making frequent landings at the public wharf of the Town of Catlettsburg, on the Kentucky side of that river; that upon each of said landings they were subjected to an illegal tax proportioned to the tonnage of each of said boats, amounting between January 1, 1870, and April 30, 1877, to an aggregate sum of $5,092. Parts of the ordinance of the Town under which this tax was collected, and of the Statute of Kentucky supposed to authorize the ordinance, are set out in the bill. This ordinance is alleged to be void as being a duty of tonnage forbidden [560] by section 10 of the 1st article of the Constitution, and also a regulation of commerce.

It is then alleged that the taxes so imposed are excessive and beyond all reasonable charges for the use of the wharf by the boats of complainant, and that the amount already collected for the use of said wharf exceeds the cost of erection and preservation of the same.

An amended bill was also filed, which does not materially affect the matters in issue.

The 31st section of the Act of the Kentucky Legislature of January 28, 1868, incorporating the Town of Catlettsburg, authorizes the Board of Trustees "To erect, make and repair wharves and docks, and to regulate and fix the rate of wharfage thereat; to regulate the stationing or anchoring of vessels or boats or rafts within the town limits, and the depositing freight or lumber on the public wharves."

The ordinances of the Town complained of are the following, enacted February 23, 1871:

"The following rates are established as charges upon steamboats and other water-craft, landing at the public landing of Catlettsburg, Ky.: on transient steamboats, $1 for every landing; on the largest sized regular packets, over 100 tons, custom-house measure, $1 for each landing; and on all steamboats under 100 tons burthen, fifty cents for each landing; for all store-boats or trading-boats, $1 for each landing, and if they remain more than one day, fifty cents per day for each day they remain; and for each wharf-boat used for the purpose of wharfage and commission, $10 per month."

And another adopted by said Board of Trustees May 5, 1873, in the following words:

"That the public landing on the Ohio River, between Division and Main Streets, is hereby appointed and established as a steamboat landing, and all steamboats arriving at the Town of Catlettsburg shall land at the wharf situate as aforesaid between Division Street and Main Street, and at no other point within the corporate limits of the Town of Catlettsburg, except by the written consent of the wharfmaster of said Town;

That, for any violation of the foregoing section, the owners, controllers or masters of any boat so violating shall be jointly and severally liable to pay a fine of $10 for each offense, which may be recovered by warrant in the name of the Commonwealth of Kentucky, for the use of the [561] Board of Trustees of the Town of Catlettsburg.

It is hereby made the duty of the wharfmaster to enforce this ordinance, and to report and prosecute all violations thereof."

The prayer of the bill is for an injunction restraining the defendants from the collection of all taxes from orator's boats while landing at the natural and unimproved shore of the Ohio River, and at points other than the improved landing of the defendants, between Division and Main Streets, and from the collection of all excessive taxes while landing at *any* point within the corporate limits, and from the enforcement of the ordinance requiring them to land at the defendants' improved wharf between Division and Main Streets, and the original bill prayed a decree for the sums improperly exacted of complainant.

The court below held, on demurrer to the original bill, that there could be no recovery in this suit for the amount illegally exacted and paid, because an action at law was the appropriate and adequate remedy for that purpose, and in that the court was probably right.

If, however, the bill presents no ground for the injunction prayed, the prayer for recovery of a moneyed decree becomes immaterial.

The framer of the bill seems to have labored under a misapprehension of the nature of the transaction in calling the demands made of the complainant, taxes. We can see nothing in the ordinances intended to impose a tax upon anybody. The bill, as we have said, is not very clear in its statements of the manner in which this money was paid or collected. It must, however, have been paid for the use of defendants' wharf or improved landing-place, in which case it is complained of as an excessive charge; or it must have been paid as a penalty for landing at other points than between Division and Main Streets in violation of the ordinance. In neither case is there anything in the nature of a tax.

The effort of the pleader, undoubtedly, is to bring the case within the constitutional prohibition of a tax upon tonnage.

If, however, the Trustees of the Town had a right to compensation for the use of the im- [562] proved landing or wharf which they had made, it is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle, after the decisions we have made, to call this a tax upon tonnage. *Cannon* v. *New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417]; *Packet Co.* v. *St. Louis*, 100 U. S., 428 [XXV., 690]; *Packet Co.* v. *Keokuk*, 95 U. S., 80 [XXIV., 377]; *Guy* v. *Baltimore*, 100 U. S., 442 [XXV., 746].

Still less ground exists for holding that the penalties imposed for a refusal to obey the rules for places of landing and the orders of the wharfmaster on that subject, are taxes on tonnage.

Nor is there any room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and that this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce, see, cases above cited.

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There remains to be considered: the validity of the ordinance which forbids the landing of vessels, except by the permission of the wharfmaster, at any other point within the Town than between Division and Main Streets, and the question of excessive charges for the use of the wharf.

There can be no doubt that the rules which govern the landing and departure of vessels at points situated on navigable waters may seriously affect them in their business of navigation and transportation, and in some sense such rules are regulations of commerce.

On the other hand, the necessity is obvious of the existence in each port, where vessels as large as steamboats land at the shore and deposit their cargoes on the banks of navigable streams, of some authority to prescribe the places where this may be done, the time of doing it and the points at which they may discharge cargo, both as relates to the streets, shores, houses of the town, and other vessels landing at the same time.

The protection of the shore of the sea or bank of a river on which a town is situated, is a necessity to the town; and the washing and crumbling of the bank from the agitation of the waters, made by the landing of large steamers, demand that such regulations should exist.

[563] Small vessels, without steam, rafts, flat-boats, keel-boats, loaded to their very utmost capacity, and liable to be sunk by the waves which accompany the landing of large steamboats, have the same right to land at the shore that steamers have, and they have a right to protection against their powerful competitors for trade. This can best be secured by appropriate regulations prescribing places for the landing of each, and in some instances placing the matter under the control of a wharfmaster or other officer, whose duty it shall be to look after it.

Such rules and regulations and such an officer exist in every place where the number of the inhabitants or the amount of the water-borne commerce justifies or requires it. The necessity for the existence of this power cannot be doubted.

We are not aware that in any instance Congress has attempted to exercise it. If it be a regulation of commerce under the power conferred on Congress by the Constitution, that body has signally failed to provide any such regulation. It belongs, also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so. *Cooley* v. *Board of Wardens*, 12 How., 299; *Gilman* v. *Philadelphia*, 3 Wall., 727 [70 U. S., XVIII., 100]; *Crandall* v. *Nevada*, 6 Wall., 42 [73 U. S., XVIII., 746]; *Pound* v. *Turck*, 95 U. S., 462 [XXIV., 526].

There is, probably, not a city or large town in the United States, situated on a navigable water, where ordinances, rules and regulations like those of the Town of Catlettsburg are not made and imposed by authority derived from state legislation, and the long acquiescence in this exercise of the power, and its absolute necessity, are arguments almost conclusive in favor of its rightful existence.

We are of opinion that there is nothing in the ordinances of the Town of Catlettsburg complained of, authorized as they clearly are by the Statute of Kentucky, which is repugnant to the Constitution of the United States.

But while the authority to make such regulations may exist in the Trustees of that Town, it [564] must be conceded that an oppressive abuse in the exercise of that power may present a case in which the proper court could give relief. If, for instance, while forbidding all boats to land elsewhere than at a designated and limited part of the shore, that space was too small to permit the landing at the same time of vessels whose business required it; or if, having assumed the obligation of providing appropriate and sufficient wharf accommodations and forbidden boats to land at any other place, there was in fact no proper landing-place provided, a court would find some remedy for such oppressive and arbitrary conduct.

But nothing in this bill implies that the landing-place pointed out by the ordinance is insufficient in dimensions or wanting in proper means of accommodating the business of the vessels using it.

So, also, while the statute authorizes them to establish the rates of wharfage, if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city's wharf as to be oppressive and an abuse of the power thus conferred, the courts could in some way give appropriate relief, and it is this part of appellants' case which presents the only difficult question for our consideration.

We do not feel justified, however, on the allegations of this bill, in reversing the order of the circuit court, sustaining a demurrer to it, for several reasons.

In the first place, the bill is manifestly founded on the idea of the unconstitutionality of these ordinances, and an injunction is asked to restrain defendants from interfering with the landing anywhere within the city limits of appellants' boats, and in general from enforcing the obnoxious ordinances. There is, it is true, a prayer to restrain them from the collection of all *excessive taxes* while their boats are landing within the corporate limits; but what is excessive or what is reasonable is not shown and, as we have already said, the money collected is not taxes in any sense whatever.

In the next place the bill does not show how or why the sums paid for the use of the wharf, or for landing at other places is excessive. The one reason for so charging which is given is evidently fallacious, namely: that the Town has already raised enough money from the use of the wharf to pay for its construction and preservation.

The compensation which either the city or private owner of a wharf is entitled to receive is not to be based exclusively on the re-imbursement of the cost of the wharf, and no such criterion can govern in the matter.

The ordinance establishing these rates and penalties is given in the bill, and has been copied in the opinion, and it is by no means apparent that they are excessive. When it is considered that the wharf needs constant repair and care; that the compensation of a wharfmaster, who must be always ready to locate the vessels and collect the charges, is to be paid; and that the character and nature of the im-

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provement is not shown, it would seem that something more than characterizing those rates as excessive is needed to invoke the restraining power of a court of equity. It is not alleged that they are oppressive, or an abuse of the power confided to the Trustees. No statement is made of what would be reasonable in the premises and, consistently with the bill, the charge may be so little in excess of a just compensation as not to call for equitable relief.

There is no hindrance to trying this question in an action at law, where the verdict of a jury or the judgment of the court in one or two cases would establish what is reasonable under the circumstances, and this being once established by the appropriate tribunal, the court of equity could restrain the excess.

We concur with the Circuit Judge, that no such case of oppressive use or clear abuse of the power properly conferred on the Trustees in regard to wharfage charges, is alleged by this bill, as to justify the interposition of a court of equity.

The decree dismissing the bill, therefore, is affirmed.

True copy. Test:
James H. McKenney, Clerk, Supr. Court, U. S.

Cited—107 U. S., 698; 114 217, 631. U. S.,

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[566]

PACKING COMPANY CASES.

WILSON PACKING COMPANY, ARTHUR A. LIBBEY, ARCHIBALD MCNEIL and CHARLES P. LIBBEY, *Appts.*, *v.* CHICAGO PACKING & PROVISION COMPANY, B. P. HUTCHINSON, GEORGE N. HIGGINS, AUGUSTUS S. BURT, D. L. QUIRK and BENJAMIN F. MURPHY.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

WILSON PACKING COMPANY, ARTHUR A. LIBBEY ARCHIBALD MCNEIL and CHARLES P. LIBBEY, *Appts.*, *v.* ROBERT D. HUNTER, HENRY B. MERRILL HENRY L. NEWMAN and ST. LOUIS BEEF CANNING COMPANY.

SAME *v.* SAME.

Appeals from the Circuit Court of the United States for the Southern District of Illinois.

(See S. C., 15 Otto, 566-576.)

Void patent—invention—novelty.

1. Re-issued letters patent No. 6370 granted to William J. Wilson, April 6, 1875 for improvements in processes for preserving and packing cooked meat, are void for want of invention and for want of novelty.

2. In order that improvement may be invention, and entitled to protection as such, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art.

3. The first and third claims of re-issued letters patent to John A. Wilson for improvements in metalic cans for containing cooked meats, are void for want of novelty.

[Nos. 1180, 1190, 1191.]

Argued Mar. 30, 1882. Decided May 8, 1882.

Statement of the case by *Mr. Justice* **Woods:**

By stipulation of the parties these cases were argued together as one case.

The bills of complaint charged the defendants with the infringement of their several re-issued letters patent of the United States, of which the complainants were the assignees and owners.

Only two of these patents are relied on. These are: first, re-issued letters patent No. 6370, granted to William J. Wilson, dated April 6, 1875, upon an application filed April 2, 1875, "For improvements in processes for preserving and packing cooked meat;" and, second, re-issued letters patent No. 7928, granted to John A. Wilson, dated October 23, 1877, upon an application filed October 15, 1877, for "improvement in sheet-metal cases." The bills of complaint were dismissed on final hearing by the courts below, in which respectively the cases were tried, and the complainants have brought them to this court by appeal. The controversy relating to these patents will be separately stated and considered.

The original patent to William J. Wilson bore date March 31, 1874. The specification of this patent was as follows:

"Be it known that I, Wm. J. Wilson, of Chicago, in the County of Cook, and State of Illinois, have invented certain new and useful improvements in processes for preserving and packing cooked meats, and I do hereby declare that the following is a full, clear and exact description thereof: [567]

The nature of my invention consists in a process for packing cooked meats for transportation in a compressed form, *while heated with cooking*, into an air-tight package, so as to preserve the meat in its integrity and retain all the natural juices and nutritious qualities of the meat.

In carrying out my invention, the meat is first cooked thoroughly at a temperature of 212° Fahrenheit, so that all the bone and gristle can be removed, and the meat yet retain its natural grain and integrity. The meat is then in proper condition for eating, and is wholesome and palatable. A measured quantity of this cooked meat is then, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. The box or case is then closed, air-tight, upon the meat.

The meat is thus packed and compressed in its natural state; that is, without disintegration or desiccation, and it retains all the juices and nutritious qualities of the meat, the compression only removing the superfluous moisture. The meat thus put up is available at all times, even when cooking is impracticable, as it is already cooked before it is packed. It is more economical, as it is compressed and reduced in weight one half from the uncooked weight, being free from bone and gristle and put up in a compact, portable shape for transportation, rendering the usual expensive cooperage unneces-

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sary. Besides this, there is a great saving in the cost of transportation. A barrel containing two hundred pounds uncooked meat, weighs, gross, three hundred and twenty pounds, meat, salt, brine and barrel, while by my process it would weigh only one hundred and ten pounds, gross, making a saving in cost of freight alone of nearly two thirds.

The box or case may be made of wood or metal, or both combined, of any suitable form or shape, and of any desired dimensions."

The claim was thus stated:

"1. The within described process for packing cooked meats for transportation, by compressing the same into an air-tight package, so as to preserve the meat in its integrity, and retain all the natural juices and nutritious qualities of the meat, substantially as set forth. [568]

2. As a new article of merchandise, cooked meat put up in solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages as set forth."

The differences between the specification and claim of the re-issue and the original patents of William J. Wilson were these: *first*, in the omission from the second clause of the re-issue specification of the words "*while heated with cooking*," contained in the corresponding clause of the original specification; *second*, the insertion of the word "*preferably*" in the third clause of the re-issue specification before the words "*while yet warm with cooking*;" *third*, omitting from the first claim of his re-issue the words "*while heated with cooking*," contained in the first claim of the original patent. In all other respects the specification and claims of the original and re-issued patents are identical. Therefore, the original and re-issued patents of William J. Wilson are the same, except that the re-issue covers the process of packing the meat cold if preferred, while the original required that it should be packed while warm with cooking.

There is nothing in either the original or re-issued patent in regard to the boiling or in regard to any preliminary corning or curing of the meat.

While the causes were pending in the court below, and after the testimony in chief of the defendants had been taken, to wit: on October 26, 1880, the patentee and the complainants filed in the Patent Office a disclaimer disclaiming the word "preferably" where inserted in the specification of the re-issued patent, and also any process described and claimed by which meat is to be compressed into the packages in any other than a warm or heated condition.

On the same day the patentee and complainants filed another disclaimer, whereby they disclaimed any interpretation or legal construction of the words of the specification of the re-issued patent broader than is conveyed by the words, "The meat is first cooked thoroughly by boiling it in water, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity."

The effect of this disclaimer was to restore the claims of the re-issued patent to what they were in the original patent, except that the claim of the original patent is limited by the second disclaimer to the packing of meat cooked by boiling. As amended by these disclaimers the claims of the re-issued patent were as follows:

"*First*. The within described process, of packing, for transportation, meats cooked by boiling, by compressing the same while heated with [569] cooking into an air-tight package, so as to preserve the meat in its integrity and retain the natural juices and nutritious qualities of the same.

Second. As a new article of manufacture, meat cooked by boiling, put up while heated with cooking, so as to form a solid cake in the package in its natural state, without disintegration or desiccation, in hermetically sealed packages, as set forth."

It will be seen that the invention covered by the letters patent of William J. Wilson after the disclaimers was a process consisting of the following elements:

1. The thorough cooking of the meat by boiling in water at a temperature of 212° Fahrenheit, and the removing of the bone and gristle.

2. The pressing of the meat while warm with cooking into a box or case with sufficient force to remove the air and superfluous moisture, so as to make the meat form a solid cake.

3. The closing of the box or case, air-tight, upon the meat.

It also covered the product of this process as described in the second claim.

The defense set up was want of novelty, and it was averred that the process described in the re-issued letters patent of William J. Wilson was also described in prior English, French and American patents, which are specified, and was practiced by many persons whose names and residences are given, at various dates prior to the application of Wilson for his patent.

Messrs. **John N. Jewett,** *West & Bond*, and **William Henry Clifford,** for appellants.

Messrs. **Noble** *&* *Orrick* and **L. L. Coburn,** for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The patent does not specify what kind of box or case was required nor what kind of meat [571] was to be used in its processes, whether corned or fresh; nor in what manner or by what process it was to be compacted in the case or box, provided sufficient force was used to remove the air and all superfluous moisture and make the meat form a solid cake; nor the degree of warmth necessary in the meat when it was put in the case or box. Neither does it state the method by which the case was to be sealed up. It was simply required to be "closed, air-tight, upon the meat," the air having first been excluded from the case by cramming the latter full of meat.

The patent, therefore, apparently covers only the process of cooking meat by boiling and while it is still warm pressing it compactly in cases and sealing it up, air-tight.

The second disclaimer of Wilson is a substantial admission that his patent only covered the process in which the boiling of the meat was one of the elements; that is to say, anyone might pack cooked meats for transportation by compressing the same while heated with cooking into an air-tight, hermetically sealed package, so as to preserve the meat in its integrity

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and retain all its natural juices and nutritious qualities, substantially as set forth in the Wilson patent, and not infringe the patent, provided he did not cook the meat by boiling. If any other method of cooking the meat should be adopted, there would be no infringement.

The patentee and the complainants, it appears, were induced to make this disclaimer by the evidence introduced by the defendants in this case, especially the patent of A. S. Lyman, dated June 22, 1869, "For an improved mode of preparing and pressing roast meat in a condensed and concentrated form," and it amounts to an admission that they could not sustain the process covered by their patent, except as applied to boiled meats.

We are clearly of opinion that a change in the mode of cooking the meat from broiling, roasting or steaming to boiling, all the other parts of the process remaining unchanged, cannot be called invention, and entitle the party who suggests the change to a patent for the process. "All improvement is not invention, and entitled to protection as such. Thus, to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art." *Pearce* v. *Mulford* [*ante*, 93]; see, also. *Rubber-Tip Pencil Co.* v. *Howard*, 20 Wall., 498 [87 U. S., XXII., 410]; *Hotchkiss* v. *Greenwood*, 11 How., 248; *Stimpson* v. *Woodman*, 10 Wall., 117 [77 U. S., XIX., 866].

[572]

If meat cooked by roasting or steaming, and put up in a given mode, formed a valuable article of commerce, the cooking of the meat in other ways, as, for instance, by boiling, would naturally occur to anyone engaged in the business of packing such food for the market.

But we think there is nothing new in the process, covered by the patent under consideration. Clearly, all its separate elements are old and well known, and have been long used. This is not controverted. The evidence shows that the process of boiling meat, packing it while warm in cans and sealing it air-tight had long been used before the application of Wilson for his original patent. There is, it is true, much conflict in the evidence, but taken all together it leaves no doubt in our minds that the process of cooking meat, lobsters and other articles of food by boiling and compacting them in cans while warm from the cooking, and then sealing them up air-tight, was practiced in many places and many years before the application of Wilson for his patent.

Complainants, however, insist that there are two elements in their process which, taken in connection with the others above mentioned, form a combination never used before the date of Wilson's patent.

The first of these is the subjecting of the cases, after they are packed and sealed air-tight, to what is known as the Appert process. This consists of placing the cans, after they have been filled and sealed up, in a bath of hot water, and thereby heating them, after which they are removed and punctured, and the heated air and gases which have formed in the cans are allowed to escape, and the puncture is immediately closed by a drop of solder.

The contention is, that all this is made a part of the process covered by the Wilson patent, by the description of the new article of merchandise covered by the second claim of the patent as "cooked meat" "in hermetically sealed packages." It is insisted that "hermetically sealed packages" is a term which, among those dealing in canned goods, implies that the packages have been subjected to the Appert process.

[573]

We think that this is an unwarrantable stretch of the meaning of the second claim of the patent. The article of merchandise covered by the second claim is that produced by the process disclosed by the specification and first claim. The second claim expressly states that it covers cooked meat put up in solid form, etc., "in hermetically sealed packages, as set forth."

Recurring to the specification and first claim of the patent, we are not left in doubt about what the process of sealing the cases or cans hermetically is, which is set forth. The specification declares the invention to consist in a process for packing cooked meats into an air-tight package. The method of doing this is thus described; "A measured quantity of this cooked meat is, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case with sufficient force to remove the air and all superfluous moisture and make the meat form a solid cake. The box or case is then closed air-tight upon the meat." The process of hermetically sealing, as set forth, is simply to exclude the air from the case by filling it compactly with cooked meat still warm, so that the cover, when applied, will rest on the meat, and then closing the case by fitting on the cover, air-tight.

There is no suggestion here of anything further to be done to make the package a hermetically sealed one. The process described leaves it hermetically sealed. There is no hint that the Appert process is to be subsequently applied as a part of the process covered by the patent. On the contrary, that idea is excluded by the terms of the second claim, "hermetically sealed, as set forth."

It is further contended by the appellants that the process disclosed by the Wilson patent includes the cooking of the meat to be canned, by plunging it into water already heated to the boiling point: that is, the process of cooking is commenced by placing the meat in water already heated up to 212° degrees Fahrenheit. By this method of cooking it is said the meat is preserved in its integrity, and all its natural juices and nutritious qualities are retained.

We think that the plan of beginning this process of cooking, by putting the meat in water already heated to the boiling point, is not set forth in the specification or claims. The conditions prescribed by the specification, would just as well be filled by placing the meat in cold water and then heating the water to the boiling point, and allowing the meat to remain in it until cooked thoroughly. No person, on reading the specification, could extract the idea that there was any advantage to be gained by heating the water to the boiling point before placing the meat in it to be cooked, or that any such method was in the mind of the inventor. This part of complainant's process is clearly an afterthought, and not intended by the inventor to be covered by his patent when he applied for it. It is evident that the part of the process now under consideration is nowhere described in the

[574]

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specification in full, clear and exact terms, as required by law. On the contrary, it is not described at all.

The Appert process, and the cooking of meats by plunging them into water already heated to the boiling point, may be of great advantage to the canned meats put up by the complainants, and to these practices their alleged superiority to the products of other parties may be attributed. But the trouble with complainants' case is that these elements are not included in the process disclosed by the patent which they allege is infringed by the defendants.

Our conclusion is, therefore, that there is nothing new in the process described in the William J. Wilson patent. All the elements of the process are old. They are merely aggregated, and the aggregation brings out no new product, nor does it bring out any old product in a cheaper or otherwise more advantageous way. This disposes of the first claim of the patent under consideration. If that claim cannot stand, it follows that the second claim, which is for the product made by the employment of the process described in the first claim, is also invalid.

We are of opinion, therefore, that the patent to William J. Wilson, on which the complainants rely, is void for want of invention and for want of novelty in the process described therein.

We shall next consider that branch of the case which rests on the letters patent to John A. Wilson for improvements in metallic cans for containing cooked meats. The specification declares that the "Invention relates to hermetically sealed cans used in packing meats or other articles, and it consists in a pyramidal shaped can having rounded corners, and both ends slightly flaring to form shoulders against which the head or end pieces rest."

"*a* represents the body of my can made in the form of a truncated pyramid with rounded corners, and with any desired number of sides, though I prefer to make it with four sides. Both ends of the body are made slightly flaring so as to form interior shoulders of offsets *a*, against which the heads B and C are to rest. The edges of these heads are turned outward, as shown, *a*, *b*, and the flaring edge *d* of the end of the can is turned over the flange *b*, and the three thicknesses of metal pressed together by machinery, with or without solder, so as to make air-tight joints."

"In packing cooked meats it is done by means of a plunger through an aperture in the large head B, which opening is afterwards hermetically sealed by means of a cap or plate D.

The can is to be opened at the larger end at or near the shoulder *a* by means of a suitable can opener, so that when the can is reversed a slight tap on the smaller head *c* will cause the solidly packed meat to slide out in one piece, so as to be readily sliced as desired."

The claims which are in controversy in this case are the first and third, which are as follows:

"1. A can for packing food, hermetically sealed and constructed of pyramidal form, with rounded corners and offset ends to support the heads, said heads being secured as shown and described."

"3. An improved article of manufacture, solid meat compressed and secured within a pyramidal case or can, so that said can forms a solid mold for the meat, and permits its discharge as a solid cake, substantially as described."

The defenses set up to this branch of complainants' case are, that the devices covered by the patent are not new, and that the defendants do not infringe. [575]

The evidence clearly shows that none of the defendants use cans "with offset ends to support the heads, said heads being secured as shown and described" in the patent. The cans which they use are made by turning a flange of the head down over the outside of the shell of the can, and fastening the head in place with solder.

It also appears that this method of fastening the heads and bottoms of the cans was practiced before the date of Wilson's application for his patent by Gibbie and Perl as early as 1872. The method was also described in the fifth addition of the French patent of Emile Peltier, dated April 1, 1859.

All, therefore, that is left to consider is whether the shape of the can described in the John A. Wilson patent is new, and whether the defendants use it.

The shape of the can described in the patent is pyramidal, with round corners and with four or more sides.

It is admitted on the record, by counsel for complainants, that conical tin cans were made and used for canning alimentary substances, and sealed air-tight, prior to the date of the Wilson patents.

If it be conceded that the change of a conical can to a pyramidal can, with rounded corners involves invention, the complainants are met with distinct and unequivocal evidence that cans used for containing preserved food, and closed air-tight, having four or more sides and pyramidal in form, with rounded corners, were mentioned in the fifth addition to the patent of Emile Peltier, before referred to, and that the machinery for making them was therein described.

The cans used by the defendant the St. Louis Beef Packing Company, and by the defendants Robert D. Hunter and others, and the Chicago Packing and Provision Company, are all included in the descriptions of the Peltier patent. The defense of want of novelty set up by the defendants against the first claim of the patent of John A. Wilson must therefore prevail.

What has been said leaves nothing for the third claim of the John A. Wilson patent to rest on.

There is nothing new either in the shape or construction or material of his cans. There is abundant evidence in the record of the packing, long before the date of his patent, of cooked meat in cans, so that the can served as a mold for the meat, and the meat formed a solid cake. [576] The use of a pyramidal can, which was old, for the purpose of receiving the meat cake, which was also old, involved no invention.

The use of vessels with flaring sides, as receptacles and molds for edible substances, is as old as the art of cookery.

Our conclusion is that both the first and third claims of the John A. Wilson patent are void for want of novelty.

The result of the views expressed is, that the

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decrees of the court below dismissing the bills of complaint were right, and should be affirmed.

The case of *Wilson Packing Company* v. *William B. Clapp* [No. 252], appeal from the Circuit Court of the United States for the Northern District of Illinois, was argued at the same time with the cases disposed of in the foregoing opinion. The case involved the validity of both claims of the re-issued patent of William J. Wilson, and the first and third claims of the re-issued patent of John A. Wilson. Upon these questions the opinions of the Judges of the court were divided, and a decree dismissing the bill was thereupon entered in accordance with the opinion of the presiding Judge.

The views expressed by us in the foregoing cases dispose of this case also. We concur in the opinion of the presiding Judge of the Circuit Court, *and the decree of that court dismissing the bill must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[576] AUSTIN CORBIN ET AL., *Plffs. in Err.*,

v.

CATHARINE VAN BRUNT ET AL.

(See S. C., 15 Otto, 576-578.)

Removal of cause.

Where the whole case depends on the question of title between citizens of New York on one side and citizens of the same State, part of the defendants, on the other, the cause is not removable, if the case of the other defendants, citizens of other States, is a mere adjunct of the principal dispute, which cannot exist separately.

[No. 302.]

Submitted Apr. 28, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York.

The case is stated by the court.

Messrs. Winchester Britton, **Randall Hagner** and *B. F. Tracy*, for plaintiffs in error.

Messrs. **J. J. McElhone** and **Joseph J. McCammon**, for defendants in error.

[577] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This was a suit begun in a state court of New York by the Van Brunts, defendants in error, citizens of New York, against Corbin, Dow and Burnap, also citizens of New York, the New York and Manhattan Beach Railway Company, a New York Corporation, Keefer, a citizen of Ohio, and McKinnie, a citizen of Indiana, to recover the possession of certain lands, and damages for the detention thereof. The complaint alleges title in the Van Brunts, and an unlawful withholding of possession by all the defendants, who are now plaintiffs in error. Each of the defendants answered separately. The answer of Dow is a general denial of all the allegations of the complaint. The other defendants deny the title of the Van Brunts, and allege that the Railway Company is in possession. The Railway Company, Keefer, McKinne and Burnap, set up title and seisin in fee in the Company, and deny explicitly that either Keefer, McKinnie or Burnap is in possession. After the answers were all in, the defendants united in a petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of New York, which was the proper district, on the ground "That there is a controversy herein which is wholly between citizens of different States, and which can be fully determined as between them."

The suit having been docketed in the circuit court, the Van Brunts moved to remand. The motion was granted, and from the order to that effect this writ of error was brought.

The real controversy is about the right to the possession of the land in dispute. So far as the title is concerned, it is apparent from the pleadings that citizens of New York are the only parties interested. They occupy both sides of that part of the controversy. The citizen of Ohio and the citizen of Indiana claim for themselves neither title nor possession. It is true that, as the case stands, if the Van Brunts establish their title against the other defendants, and it appears that Keefer and McKinnie were actually in possession and wrongfully kept the rightful owners out, there may be a recovery against them, jointly with the Railway Company, of damages for the detention. But there can be none separately, because the Company admits a possession which, if the Van Brunts have title, cannot be maintained. There is neither in the complaint nor the answers any claim of separate [578] right, either to the possession or the property. The whole case depends on the question of title between the Van Brunts on one side and the New York defendants on the other. This controversy was not removable. That of the other defendants is a mere adjunct of the principal dispute. It cannot exist separately.

The case is, therefore, within the principle of the *Removal Cases*, 100 U. S., 457 [XXV., 593], decided after the order was made which is now under review. *Blake* v. *McKim* [*ante*, 563], and *Hyde* v. *Ruble* [*ante*, 823], decided at the present Term. In no just sense can it be said that the pleadings present separate controversies, such as admit of separate and distinct trials. If they do not, there could be no removal under the second clause of the Act of 1875, any more than under the first.

The order to remand is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited 104 Mass., 390.

Ex Parte:

SAMUEL FLOYD HOARD AND CEREDO [578] CEMETERY ASSOCIATION.

(See S. C., 15 Otto, 578-580.)

Mandamus—*when not issued.*

A *mandamus* cannot be used to compel a circuit

NOTE.—*Removal of causes under Act of 1875; citizenship.* See *note* to Removal Cases, 100 U. S., XXV., 593.

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court to remand a cause after it once has refused a motion to that effect.

[No. 10 Orig.]

Submitted Apr. 17, 1882. Decided May 8, 1882.

PETITION for *mandamus*.

The case is stated by the court.

Mr. **J. Holdsworth Gordon,** for petitioners.

Mr. **William J. Robertson,** for respondent.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Chesapeake and Ohio Railroad Company began a suit in a state court of West Virginia to appropriate lands for the use of its road. To this suit the present petitioners, with others, were parties. The Company, at a certain stage of the proceedings, filed a petition in the state court, under the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470], 1 Supp. R. S., 173, for the removal of the suit to the District Court of the United States for the District of West Virginia, having circuit court powers. After the petition was filed and security given according to the requirements of the law, a copy of the record of the suit in the state court was filed in the district court, and the case docketed there. This being done, the present petitioners moved the district court to remand the cause and strike it from the docket, as to them and each of them. The motion, having been argued and considered, was denied. The petitioners now ask this court for a writ of *mandamus* requiring the district court to grant their motion.

[579]

Before the Act of 1875, it was held, in *Ins. Co.* v. *Comstock*, 16 Wall., 270 [83 U. S., XXI., 498], followed in *R. R. Co.* v. *Wiswall*, 23 Wall., 508 [90 U. S., XXIII., 104], that if a circuit court refused to take jurisdiction of a suit which had been properly removed, the remedy was by *mandamus* from this court "to compel the circuit court to proceed to a final judgment or decree," and not by writ of error or appeal. This was on the authority of *Ex parte Bradstreet*, 7 Pet., 647, in which *Ch. J.* Marshall delivered the opinion. No case can be found, however, in which a *mandamus* has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or writ of error can be taken: and *Ch. J.* Marshall, in *Ex parte Bradstreet*, gave as the reason for allowing the *mandamus*, "That every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of $2,000," now, of course, $5,000. If the cause is retained, it may go to final judgment or decree, and the reason assigned for the *mandamus* in case of dismissal does not exist. If improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this Term in *R.R. Co.* v. *Koontz* [*ante*, 643]. It is of no importance that the value of the matter in dispute may be less than $5,000. Jurisdiction has been given to the circuit court to determine whether the cause is one that ought to be remanded. The Act of 1875 has given an appeal or writ of error to this court for the review of orders to remand, without regard to the amount involved. *Babbitt* v. *Clark* [*ante*, 507]. The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final. *Ex parte Detroit Ferry Co.*, decided at this Term [*ante*, 815]. It is an elementary principle that a *mandamus* cannot be used to perform the office of an appeal or a writ of error. *Ex parte Loring*, 94 U. S., 419 [XXIV., 165].

[580]

Without determining, therefore, whether the case was properly removed or not, the writ is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited 108 U. S., 567.

WEBSTER LOOM COMPANY, *Appt.*, [580]

v.

ELIAS S. HIGGINS ET AL.

(See S. C., 15 Otto, 580-599.)

Letters patent—rules applicable to—parol evidence may explain terms of—new combination of old devices patentable—drawings—models—practice.

*A specification in letters patent is sufficiently clear and descriptive, when expressed in terms intelligible to a person skilled in the art to which the invention belongs.

Evidence is admissible to show the meaning of terms used in a patent, as well as the state of the art, for the purpose of enabling the court or jury to understand it.

If an improvement of a well known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine; the patent is to be read as if the machine and its appendage were present or in the mind of the reader, and he, a person skilled in the art.

Query, whether the defense of insufficient description can be set up without alleging an intent to deceive the public?

A new combination of known devices, producing a new and useful result (as that of greatly increasing the effectiveness of a machine) is evidence of invention, and may be the subject of a patent.

Webster's improvement in looms for weaving pile fabrics, which consisted in such a new combination of known devices as to give to a loom the capacity of weaving fifty yards of carpet a day, when before it could only weave forty, held to be patentable, and his patent for the same, dated August 27, 1872, sustained.

Of two original inventors, the first will be entitled to a patent unless the other puts the invention into public use more than two years before the application for a patent.

An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it.

Though the defense of prior invention ought to be set out in the answer, yet if the omission to set it out is not objected to at the proper time in the court below, it cannot be objected to in the court.

[No. 267.]

Argued Apr. 6, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the Southern Districtof New York.

The case is stated by the court.

Messrs. **Edward N. Dickerson** and *Clarence A. Seward*, for appellant.

Messrs. **George Gifford** and **William M. Evarts,** for appellees.

*Head notes by *Mr. Justice* BRADLEY.

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Mr. Justice **Bradley** delivered the opinion of the court:

[581] The bill in this case was filed by the appellants to obtain relief for an alleged infringement by the defendants of certain letters patent for improvements in looms for weaving pile fabrics, etc., granted to one William Webster on the 27th day of August, 1872, and numbered 130961, to which the plaintiff deraigns title. The defenses set up in the answer are: 1st, a denial of infringement; 2d, a denial that Webster was the first inventor of what was patented to him, under which denial various prior letters patent are specified as containing the invention or material parts thereof, including a patent granted to Erastus B. Bigelow in March, 1849, re-issued in 1857, a patent granted to E. S. Higgins as assignee of William Weild in August, 1868, and a patent granted to E. K. Davis in February, 1869; 3d, that the invention was used by and known to E. K. Davis in the City of New York, and Thomas Crossley in New York and Bridgeport, Conn.; 4th, that the description in Webster's patent is obscure and not sufficient to enable one acquainted with the art to which it belongs to construct or use the loom therein attempted to be described; 5th, that there is no description in the patent, of the combination principally claimed and relied on. The answer also sets up an agreement between Webster and the defendants whereby they claim a right to use the alleged invention of Webster. Proofs being taken and the cause heard, the bill was dismissed by the circuit court, and the decree of dismissal is now here on appeal.

The patent, as before stated, is for improvements in looms for weaving pile fabrics, etc., and the nature and object of the invention are set forth in the specification as follows:

"The first part of my invention relates to the [582] combination and arrangement of the reciprocating or driving slide, sliding bar, withdrawing and inserting devices, and trough in such a manner that the trough shall be capable of oscillating between the points of withdrawal and insertion of the wire, the sliding bar receiving a horizontal motion at the same time that the pushing slide is being reciprocated on the trough by the driving slide. The advantage of this part of my invention is that a shuttle box, rigidly connected with the lay, may be used. The second part of my invention relates to the means for preventing the wire from bounding back from its position in the wire box, and consists in a spring attached to the inner end of the wire box, and fitting indentations or openings in the heads of the wires. The third part of my invention relates to the combination of the vibrating trough directly with the lay. The fourth part of my invention relates to a modification of the mechanism, and consists in having the oscillating trough and reciprocating slide pathway combined or made in one piece, and having the withdrawing and pushing devices combined or connected and reciprocated thereon by power applied directly thereto; the object of this part of my invention being to dispense with the driving slide and stationary slide pathway and sliding bar. The fifth part of my invention consists in the combination, with a lay having a rigid shuttle-box, of a pivoted vibrating wire trough, a reciprocating driving slide and latch, the latter being operated by the wire box to release the wire, and the slide and latch moving on the trough, all as set forth."

The specification then proceeds to describe the mechanism of the invention by a description and reference to drawings, which exhibit a front view of the improvement, a top view, a wire head, a sectional part and end view of the wire box, the oscillating trough connected to the shuttle box or lay of a loom, the same connected to the breast beam of a loom, etc., all which would be incomprehensible to a person unacquainted with looms for weaving pile fabrics, but very plain to one who understood their construction and operation at the date of the patent. A person skilled in the art of constructing or using such looms in their most advanced and improved form, such as those known as the Bigelow loom and the Weild loom, and having one actually before him or in his mind would readily appreciate the meaning of the terms and the character of the improvement described.

In weaving piled fabrics, such for example as Brussels carpet, the pile or loop is formed by [583] inserting a wire alternately with the filling between the threads of the warp, immediately under the woollen or worsted threads, and afterwards withdrawing it from the web of cloth. At first, these wires were inserted and withdrawn by hand, by the aid of an assistant, which made the process a very slow one, so that only a few yards could be woven in a day on a single loom. The first great improvement was introduced about 1840–50 by Erastus B. Bigelow, of Massachusetts, who invented a mechanical apparatus attached to the side of the loom which automatically inserted the wires in the shed, or opening between the warps, and withdrew them from the web. About a dozen wires were used, and after they had all been inserted, the device invented by Bigelow would vibrate forward and seize the head of the first wire, withdraw it from the web, and then vibrate back to the shed, and at the proper moment insert it; and so it would go on to operate as long as the loom was kept in motion. Its various motions were given and timed by means of cams of proper size and shape placed in connection with the principal movements of the loom itself. This attachment to pile fabric looms became generally known as the wire movement; and by its aid twenty-five yards a day could be woven on a single loom without the aid of any assistant. It is seldom that such a complete revolution in one of the useful arts is made at a single jump. Improvements, however, have been made on Bigelow's invention. Amongst others, one William Weild, of Manchester, England, in or about the year 1855 effected a decided improvement, which after being perfected by succeeding improvements enabled him to weave thirty or forty yards a day on a single loom. The means by which this was accomplished, was the placing of a horizontal trough, or grooved bar, called a wire trough or wire bar, for the wire to rest on when drawn out of the web and thrust into the shed. In Bigelow's loom the wire simply rested on a fork placed close to the loom; and when it was fully drawn out by the clamp or dog's head, which seized it for that purpose, being slender and flexible, it would sag in the middle and, if driven

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rapidly into the shed, the forward end would spring upward and get entangled in the upper warp threads. This rendered a slow movement necessary, which impeded the rapidity of [584] the work. By giving it a trough, or grooved bar, to lie in and keeping it straight as was done by Weild, a quicker motion could be given to it, and a much larger amount of work could be done in the same time. The only difficulty in the way of operating with the trough as arranged by Weild was, that a certain part of the apparatus, called a pusher, which was a cross-bar or yoke, extending across and connecting the breast beam and the wire bar, and which was employed to push the wire into the shed, extended so far back towards the lathe or lay which carries the reed and shuttle box, as to come in contact with it and interfere with its motion. Weild obviated this difficulty by sawing off (so to speak) the outer end of the lay containing the shuttle box, which being thus detached from the rest of the lay could be separately kept back whilst the reed was driving up the filling, and was thus prevented from striking the wire trough and pusher. But, of course, this detached portion of the lay required additional cam work and complicated the machinery. There was also another matter that interfered with the perfect efficiency of Weild's loom. The pusher, after the wire was drawn out by a hook attached, did not seize the head of the wire, but simply pushed it forward into the shed. If this was done with too rapid a motion, the impetus given to the wire would throw it forward too far in case the loom had to be suddenly stopped on account of a broken thread or other cause. This made it necessary to work the loom more slowly than the other operations required.

This seems to have been about the state of the art when Webster began to devote his attention to the improvements which he claims to have invented, and which it is clearly shown, whether invented by him or some one else, resulted in giving to a loom the capacity of weaving fifty yards a day. The Bigelow looms were well known and in extensive use. The Weild looms were also well known. Some improvements, not necessary to notice, had also been made on both. Webster's first conception of his invention occurred, and his original drawing was made in the winter of 1865-66; but he did not apply for his patent until June 21, 1870; and it was not issued until August 27, 1872. Prior to that time the defendants, who had a large establishment in the City of New York, and were using Bigelow's loom under a license, [585] had procured the control of Weild's patents in this country and had applied Weild's improvements, with some modifications made by E. K. Davis, to a large number of their Bigelow looms. Davis was their head machinist, and in 1868 he obtained a patent for an improvment on Weild's loom, by which, instead of detaching the whole outer end of the lay, he only detached the shuttle box and caused it to slide back on the lay so as to make room for the wire trough. He also adopted, instead of the wire trough, a pair of parallel bars between which to move the wire, the latter resting on a pin between the bars, near to the loom. The loom itself was old. Every part of it was familiar to every loom manufacturer and to every weaver. Its lathe, its treddles, its breast beam, its shuttle boxes and shuttle slide were as well known to all those concerned in the weaving of pile fabrics as the plough or the cultivator is to the farmer. The wire motion had also become well known. Its mode of attachment to the loom; the means of giving motion to its different parts; the parts themselves; the vibrating wire support, whether a fork or a trough, and whether pivoted to the breast beam or to a post or to the frame or floor; the reciprocating driving slide, the dog's head for holding, and the pusher for driving the wires; the wire box that kept the wires in place; the rigid lathe, the lathe whose outer end was detached, and the lathe with a detached shuttle-box; all these things were as well known as the alphabet to all those skilled in the art of pile weaving, as it then stood. With this mass of previous knowledge and nomenclature in their minds, as we must suppose it to have been; the language, the explanations, the drawings and the claims of Webster's patent must have been perfectly intelligible to them. When an astronomer reports that a comet is to be seen with the telescope in the constellation of Auriga, in so many degrees of declination, and so many hours and minutes of right ascension, it is all Greek to the unskilled in science; but other astronomers will instantly direct their telescopes to the very point in the heavens where the stranger has made his entrance into our system. They understand the language of their brother scientist. If a mechanical engineer in- [586] vents an improvement on any of the appendages of a steam-engine, such as the valve gear, the condenser, the steam-chest, the walking beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal machine. These are already familiar to others skilled in that kind of machinery. He may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings.

Applying these remarks to the specification before us and recurring to the extract already made, setting forth the nature and object of the invention, it is easy to conceive that its meaning may be plain to those for whose use it is intended. They know at once what is meant by the terms, "reciprocating or driving slide," "sliding bar," "withdrawing and inserting devices," "trough," "wire," "wire box," "lay," etc., etc. They also understand the movements referred to, and the objects to be attained by each device.

In like manner, if we follow the specification in its description of the invention in detail, with the references to the drawings and the closing summary of the patentee's claims, the same method of interpretation will be applicable. And as it cannot be expected that the court will possess the requisite knowledge for this purpose, it becomes necessary that it should avail itself of the light furnished by the evidence to enable it to understand the terms used in the patent and the devices and operations described or alluded to therein. This evidence, of which the record in this case furnishes an

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abundance, being resorted to, we have no difficulty in comprehending the patent or the nature of the invention therein described.

A great deal of testimony was introduced by the defendants, to show that the patentee had failed to describe his invention in such full, clear and exact terms as to enable persons skilled in the art to construct and use it. It seems to us that the attempt has failed. When the question is, whether a thing can be done or not, it is always easy to find persons ready to show how not to do it. But it stands confessed [587] that the thing has been done; that is to say, the contrivance which Webster claims in his patent has been applied and very successfully so, to pile fabric looms and, as the appellants' counsel well remarks, no one except Webster has ever appeared to claim a patent for doing it. If the thing could not be understood without the exercise of inventive power, it is a little strange that it should have been so easily adapted to the looms on which it has been used and produced such striking results.

It is worthy of remark, in this connection, that the defendants, in their answer, state it as a fact that, prior to the alleged invention of Webster, looms containing lays having shuttle boxes rigidly attached were publicly known and described in certain English patents, which they specify; and that all the other parts and elements mentioned in the fifth claim of Webster's patent (being the claim relied on) were described in another English patent of one Birkbeck; and they aver and insist, as will be more fully noticed hereafter, that the application and use of the two things together, that is, the parts described in Birkbeck's patent, with the rigid lay and shuttle box described in the other patents, were obvious and required no invention; and that, therefore, the alleged invention of Webster was well known and constituted a part of the known state of the art. This averment in the answer, which of course is sworn to, does not seem to tally very well with the allegation that Webster has failed to point out, in his patent, how to use and apply his invention, and that it requires further invention to use and apply it.

The appellants, indeed, have raised the question whether evidence to show that the invention is not described in the patent in such full, clear and exact terms as to enable a person skilled in the art to construct and use it, is admissible, unless the defense is specially set up in connection with a charge that the description in the patent was made defective for the purpose of deceiving the public. The 26th section of the Act of 1870 [16 Stat. at L., 201], under which the patent in question was issued, declares, "That, before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the commissioner, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise and exact terms as [588] to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected to make, construct, compound and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery." Such a specification must be filed before the inventor shall receive a patent, the law says: and the appellants' counsel argues that if it is the duty of the commissioner to see that such a specification as the law requires is filed before granting a patent, not only is the patent when issued, proof that he has done so, but his decision on the point cannot be questioned except in the manner allowed by the law; else, instead of one tribunal for deciding a matter on which conflicting testimony can always be found, we shall have as many tribunals as there are courts and juries called upon to try patent causes. On turning to the section which provides for certain defenses that may be made to an action for infringement, we find it declared "That, in an action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters: first, that, for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect;" then follows a statement of other special matters. In view of this specific defense allowed by the statute, in reference to a defective specification, it is argued that no other is admissible under that head; and reference is made to some decisions under the former statutes bearing on that subject, namely: *Whittemore* v. *Cutter*, 1 Gall., 434; *Lowell* v. *Lewis*, 1 Mason [182]; *Gray* v. *James*, Pet. C. C., 394; *Grant* v. *Raymond*, 6 Pet., 218; this court, in the last case, holding contrary to the decisions of *Judges* Story and Livingston in the other cases, that it was not necessary to aver a fraudulent intent unless the defendant desired [589] to avoid the patent; a result which was provided for in the Law of 1793 [1 Stat. at L., 318]. The court held that the plea of insufficient description was good as a defense without alleging a fraudulent intent, but not good as a ground for avoiding the patent. The Laws of 1836 [5 Stat. at L., 117] and 1870 [16 Stat at L., 199] omitted the clause for annulling the patent, but still retained, in the definition of the defense allowed to be set up, the qualification of fraudulent intent. Counsel argues that, as the law now stands, the plea of insufficient description cannot be made unless made with that qualification; because the only purpose it has, under the present law, is that of a defense to the action, and it still requires the allegation of fraudulent intent to deceive the public.

There is plausibility in this argument, and if it were necessary to the decision of this case, it might give us some embarrassment. But as we are satisfied that the terms of the patent are sufficiently clear and full in the description of the invention, we make no decision on the point.

Turning now to the invention claimed by Webster, and described in the patent under consideration, we find that, although it produced a great improvement in the art of weaving pile fabrics, yet as actually exhibited in conception and

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accomplishment it seems simple. The thing to be done was to combine the advantages of Bigelow's rigid lathe devested of some of its defects, and his constant command of the wire, with Weild's trough or wire bar for supporting the wire. This, Webster or, if not Webster, some other person, effected by the devices and mechanism described in the patent. Stated in brief as therein set forth, aided by the explanatory testimony before referred to, the problem was solved by substituting for Weild's pusher, a latch which rides on the wire bar or trough, without projecting beyond it, and which receives a reciprocating motion backward and forward on the bar, either by being connected with a driving slide moving on the breast beam, or by being directly connected with an upright reciprocating lever. The latch, when the end of the wire bar next to the loom oscillates or vibrates to the front of the wire box, drops upon a wire head into a nick or notch made therein, [590] and withdraws the wire into the trough, and then, when the latter oscillates back to the shed, without releasing its hold of the wire head, drives the wire into the shed, and is then lifted out of the notch by striking the edge of the wire box, sloped up for that purpose, and releases the wire; and then oscillates forward again to seize another wire; and so on. The lathe, in the meantime, works backward and forward without meeting any obstruction, and without any detachment or separation of its parts. Very little modification had to be made in the cams, and the whole apparatus or wire movement, as it is called, seems more simple than it was before, either in Bigelow's or Weild's loom. This contrivance, when actually applied to the looms, worked to perfection and enabled the weaver to drive his loom to its utmost capacity.

The patent points out and the drawings illustrate various ways of arranging the wire bar and the reciprocating slide which carries the latch. Thus, the outer end of the wire bar having to be pivoted to some center for its oscillating motion, it is shown that it may be pivoted to the outer end of the lay or shuttle box, or to the outer end of the breast beam, or to a vertical shaft or post; all these devices except the first being in common use in the Bigelow or Weild looms, and being mechanical equivalents of each other. So it is shown that the pushing slide, which carries the latch and rides on the wire bar like a saddle, may be operated either by being connected with a driving slide on the extension of the breast beam by means of a cross bar passing through a mortise in the driving slide, or by being directly connected with the arm or lever producing the reciprocating movement.

The patent has five claims, only the fifth of which is relied on in this case, which is as follows:

"In combination, the lay and its rigid shuttle box, the pivoted vibrating wire trough, the reciprocating driving slide, and the latch moving thereon, the latter being operated by the wire box, the combination being and operating substantially as described."

With the explanation of the invention already given, the meaning of this claim is quite obvious. If any explanation of it is needed, it can be readily derived from the body of the specification. The combination contains five elements: 1, the rigid lay and shuttle box; 2, the pivoted oscillating or vibrating trough; 3, the reciprocating slide riding on the trough; 4, the latch for taking and holding the wire; 5, the operation or lifting of the latch by striking the wire [591] box.

Nothing further is necessary to be said in order to dispose of the defense which was strenuously urged, and to which the court below attached much importance, that the specification was insufficient in its description of the invention sought to be patented, and failed to show any means of applying it to existing looms; and that independent invention would have to be exercised to make it a practical working apparatus as an attachment of such looms. We shall, therefore, dismiss that branch of the argument.

It is further argued, however, that supposing the devices to be sufficiently described, they do not show any invention; and that the combination set forth in the fifth claim is a mere aggregation of old devices, already well known and, therefore, it is not patentable.. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed, one which would occur to any mechanic skilled in the art. But it is plain, from the evidence and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value and to bring it into notice. Who *was* the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to anyone, that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was, certainly, a new and useful result to make a loom produce fifty yards a day, when it never before had pro- [592] duced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.

The next contention of the defendants, which we shall consider, is their allegation that Webster was not the first and original inventor of the thing patented, but that he was anticipated therein by E. K. Davis.

On this point, we think it very clearly made out, though we shall not go into much detail in commenting upon the evidence, that the whole substance of the invention was conceived by Webster, and exhibited by him in a drawing as early as the winter of 1865-6, long before Davis entertained any idea of it. The original of this drawing is in existence and was produced in evidence, and is well authenticated. It exhibits

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the rigid lay; the wire trough pivoted in two different positions, on a post near the extremity of the breast beam, and to an arm projecting from the extremity of the lay; the driving or pushing slide, riding on the trough, with a projection indicating the latch or other device for operating the wire; and even the cams to give the requisite movements. It also shows the wire box, and the position of the end of the trough in relation thereto, the same as exhibited in the patent. In March, 1868, Webster exhibited this drawing to Davis and others, and explained it to them as representing a lay having a rigid shuttle box, a driving slide and latch moving upon a vibrating trough, the latch being operated by the wire box. Davis was about that time engaged in making an improvement on the Wield loom before referred to, with a sliding shuttle box, and parallel bars instead of a trough for the wire to slide between, and a pin for it to rest on. In July, 1868, he applied for a patent for this improvement, and obtained a patent in February, 1869. In that year Webster sent drawings to Weild in England, to get out a patent for his invention in that country; but Weild declined to undertake it. These drawings show the entire invention in detail. In November, 1869, Webster having heard that the defendants were going to alter their Bigelow [593] looms to Weild looms, sought an interview with them in order to induce them to adopt his improvement. He met one of the defendants and showed his original drawing, but without result. In April, 1870, he had another interview with them, and also with Davis at their carpet works in New York. He exhibited his original drawing and the drawings which he had prepared for England. Davis advised the defendants that Webster's plan was no improvement on the Weild loom. He was evidently anxious that they should adopt his improvement for which he had already got a patent. Further interviews took place but the defendants declined to adopt Webster's improvement, and adopted Davis' in part; so much of it, at least, as the sliding shuttle box. It is clear from the facts that up to this time Davis did not pretend to be the inventor of Webster's arrangement. But in the spring of 1870, Davis commenced to make a new loom, which he did not get into complete operation until the latter part of 1871. This is called the Sterling loom, and was made for the defendants. When completed, it had in it the improvement claimed by Webster and shown in his patent. At what time this particular form was adopted is not shown.

It is contended by the defendants that Davis had conceived the idea of using a rigid lathe with his wire bar in the early part of 1868, and that, in the model which he prepared at that time for obtaining his patent, he exhibited the same latch devised by Webster, and operated in the same way by contact with the wire box; and that he showed to the witness Crossley, by pinning his sliding shuttle box fast to the lay, how it could be used with a rigid lay and shuttle box. Then, why did he not claim the whole device when Webster exhibited it to him? Why did he advise the defendants that Webster's arrangement was no improvement on Weild's? But, if it were true that he did show these things in his model, and had he shown a trough instead of parallel bars; and if it were true that he regarded the idea as anything more than a possibility; and that he did, in fact, contemplate it as a perfected and practicable arrangement, so as to amount to invention, the question would still remain whether he or Webster was the first inventor. Both may have been original inventors, but only one of them could be the first. If Davis had put the invention into practical form and operation more than two years before Webster applied for his patent, then the patent would be void by reason of prior use. [594] But the evidence is conclusive that he never undertook to put it into practical form until he made the Sterling loom, which was only commenced in 1870. Webster's application for his patent was made in June, 1870. Though this was proved without objection and substantially conceded, the defendants say that it does not appear what the application was nor how much it was altered before the patent was issued. This argument cannot avail, for the application is a public record, the contents of which the defendants and all others are presumed to know; and since they had it in their power to produce it and did not, it must be presumed that it would not have served their purpose, but corresponded with the patent. The defense of prior use for two years, therefore, is not sustained; and the question comes back to simple priority of invention. Conceding that Davis was an original inventor, the earliest point of time that he can be regarded as such was in the spring of 1868. But Webster had invented it before that time and had made a drawing of it which, in March, 1868, he exhibited and explained to Davis. An invention relating to machinery may be exhibited either in a drawing or in a model, so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it. There is no doubt that Davis understood Webster's drawing; and he did not then claim that the invention belonged to himself.

The evidence relating to loom No. 50 leads in the same direction. This was a loom of the defendants which they commenced to alter in the latter part of 1870. Davis was not employed to make the alterations on this loom. According to Webster's testimony, which must, of course, from his relation to the case, be received with caution, but which seems to be corroborated by subsequent circumstances, Davis informed Webster at the latter's house, on Christmas Day, 1870, that loom 50 had been taken down to be changed to what they had seen and explained to them in the office, referring to Webster's previous explanation of his drawings; and that he, Davis, had told Higgins that if he took that loom down and changed it to what they had [595] seen Webster have, and explained in the office, it would be a Webster wire motion. In April, Webster called, as he says, at the defendant's store, and saw N. D. Higgins, and they talked about this loom, and Webster claimed it as his invention, and told Higgins that he (Higgins) had seen the drawing of it at his house and mill. It is not seriously denied that this loom was made susbtantially on Webster's plan.

Another circumstance seems to us as having much weight in this connection. It was found that the loom No. 50, and the Sterling loom, when completed in 1871 worked with wonderful success; sometimes as many as sixty yards being

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woven on one loom in ten hours. If Davis was the inventor of the wire motion applied to these looms, why did he never apply for a patent for it? He was already a patentee of a different and inferior apparatus. He knew all about the method of going about to get a patent. He belonged to a profession which is generally alive to the advantages of a patent-right. On the hypothesis of his being the real inventor his conduct is inexplicable.

There is a great deal of evidence *pro* and *con* to which we have not adverted. It must suffice to say that we are satisfied, from the examination we have given to it, that Webster is entitled to the claim of being the first inventor.

The appellant's counsel has raised the question whether the defense of prior invention can be set up under the answer, which does not state it in the manner required by the statute. It denies, generally, it is true, that Webster was the original and first inventor of the improvement claimed in the patent; and specifies certain letters patent issued in this country and in England in which it is alleged that the said invention, or material and substantial parts thereof, was described before any invention made by Webster, which is sufficient foundation for adducing such patents in evidence; but it does not give the name and residence of any person alleged to have invented the thing patented prior to Webster; it only states that it was used by and known to Davis. It is possible that this objection to the evidence would have been available if it had been taken in season. But we are not referred to anything to show that it was taken in the court below or before the examiner, when the witnesses were examined. In [596] *Roemer* v. *Simon*, 95 U. S., 220 [XXIV., 386], we held that the failure to interpose such objection before the final hearing is a waiver of the required notice in an equity suit.

It remains to consider the question of infringement. The defendants deny that they infringe the fifth claim of the patent, which is relied on by the complainants.

At the commencement of the cause, when a preliminary injunction was applied for, the defendants put in affidavits contesting the charge of infringement, but upon a very different ground from that on which the defense is now based. Then they relied on a non-user of the last element of the combination; the operation of the latch by contact with the wire box; now they rely on a different construction of the third element (the reciprocating driving slide) from that given to it by the complainants. They say that they do not use that element, construed as they construe it. The position originally taken is abandoned.

Nevertheless, it will throw light on the subject to see what the defendants said on the occasion referred to. It will at least bring their present position to the test of a first judgment formed by themselves at a time when it was very much to their interest to find discrepancies between what they used and what the patent contained. Two affidavits were put in by the defendants at that time, one made by both the defendants jointly, and one by their superintendent, Mr. Duckworth. A previous suit brought on Webster's patent against the New Brunswick Carpet Company, in which the defendants or, at least, their machinist, Davis, had taken much interest, had just terminated in a decree sustaining the patent, rendered by *Judge* Nixon in the Circuit Court for the District of New Jersey. The defendants in their affidavit dated June 24, 1874, say: "That at the time defendants procured the looms referred to in the affidavits on the part of complainants in this suit, and used thereon tops of wire boxes, as cams, to disengage the latches from shoulders on the heads of the wires, they did not know or suppose that Wm. Webster, or anyone else except themselves and E. K. Davis, had a pa- [597] tent covering any part, or combination of parts, contained in said looms. * * * The Sterling loom, the No. 50 loom and the three other Bigelow looms, mentioned in the affidavits on the part of the complainants, were all procured and put in operation with the tops of the wire boxes, as cams to disengage the latches from the wire heads, a long time prior to the issuing of the Webster patent, on which this suit is brought, and before defendants knew that said Webster had applied for said patent. The first that said defendants knew or supposed that there was anything in any of said looms covered by letters patent granted to said Webster was during the progress of this suit against the New Brunswick Carpet Co., referred to in said affidavits; and while the testimony was being taken therein, when they heard that a claim of that kind was being made, and on further inquiry were informed that said Webster would probably sustain his right to the combination mentioned in the fifth claim of his patent, on which said suit was pending, and that the use of the top of the wire box as a cam to disengage the latch from the shoulders of the wire heads was one of the elements or parts of that combination. After consulting counsel on the subject, they concluded that to avoid any question of doubt on that subject they would have all their looms which contained such tops to the wire boxes altered by having such tops entirely removed, and having other provision made for operating the wires. They, accordingly, had such alterations made, which were all completed by the middle of May, 1874, since which time they have not had any looms, or used any looms, employing the top of the wire box as a cam to disengage a latch from the wire head, or for opening a latch to disengage from a wire head, or to support a latch away from, or out of contact with, the wire heads in its journey from one end of the box to the other, or to permit a latch to descend and catch a wire head in any way, or for any other purpose. That they have not since the time of said alterations used, in any loom or looms, the top of a wire box to lift or support, or to in any way operate or participate in the operation of a latch, and that they do not expect to use any such top of a wire box hereafter, but intend not to do so."

The fact that this mode of resisting the charge of infringement is now abandoned, furnishes [598] very fair presumptive evidence of two things: first, that the substituted device for operating the latch was a mere equivalent of the wire box in that regard; and, secondly, that the construction of the fifth claim on which they now take their stand could not have been a very obvious one.

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That construction is, that the third element in the combination of the fifth claim of Webster's patent, and which is there called "the reciprocating driving slide," refers, not to the slide which rides upon the trough or wire bar and carries the latch (which they do use), but to the slide which rides upon the breast beam and communicates the reciprocating motion to the other (which they do not use). It is undoubtedly true, that in the body of the specification, where the patentee is describing the joint use of these slides, he does designate the slide on the breast beam as the reciprocating or driving slide, and that on the trough as the withdraw and pushing slide. But it is apparent that both of these slides are, in fact, reciprocating and driving slides. The one on the trough has a reciprocating motion and drives the wire into the lay. And when, as the patent points out, the other slide is not used, that is to say: when the slide on the trough is directly connected with the motive power, or device, which gives the reciprocating motion, it takes the place of both. The specification states this in so many words. It says: "Fig. 4 represents a modification of the invention. The withdrawing and pushing slide B^1 in this case becomes the driving slide." Again; "Figure 7 represents a side view of the driving slide B^1, its pin B^2, to which power is applied, and the withdrawing and transfer latch C and pusher C^1 attached to the slide." These figures relate to that form of the invention in which the slide on the breast beam is not used.

Now if we examine the language of the claim, it seems to us that all doubt as to its meaning is removed. It reads thus: "In combination, the lay and its rigid shuttle box, the pivoted wire trough, *the reciprocating driving slide, and the latch moving thereon*, the latter being operated by the wire box, etc." Obviously the reciprocating driving slide here referred to is that slide on which the latch moves, and that is the slide [599] which rides on the trough, and which is the only slide used in one modification of the invention. It can hardly be supposed that the patentee intended to make the other slide, which he showed could, at any time, be dispensed with, an indispensable element in his claim. It would have rendered the claim a practical nullity. The important thing was the slide which rides on the trough.

The argument of the defendants' counsel on this subject is very ingenious and plausible; but we are forced to the conviction that the slide intended in the combination is that which is indispensable to the operation of the apparatus. And this must have been the conviction of the defendants themselves, as well as of their counsel, when they made the affidavit before referred to.

In conclusion, our judgment is, that Webster invented the combination described in the fifth claim of the patent; that the invention is sufficiently described in the specification to meet the requirements of the law; that it was not anticipated by any prior patent or invention; that it was never in public use or on sale for more than two years before the patent was applied for; and that the defendants have infringed it.

The decree of the Circuit Court must be reversed and the cause remanded, with instructions to enter a decree in favor of the complainants and to take such further proceedings as law and justice may require.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Blatchford** did not sit in this case, and took no part in its decision.

Cited—110 U. S., 208.

CITY OF NEW ORLEANS, *Appt.*, [600]
v.
JOHN A. MORRIS ET AL.

(See S. C., 15 Otto, 600-604.)

Valid statute—action in equity.

1. A state statute, which authorizes a city to sell its waterworks (which were not liable to judicial sale for debts of the city) for stock of a corporation, and declares that such stock shall not be liable to seizure for the debts of the city, is not void under the U. S. Constitution, as impairing the obligation of existing contracts against the city.
2. The city may maintain an action in equity to prevent the sale of such stock on execution against it.

[No. 284.]
Argued Apr. 18, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **E. Howard McCaleb,** *E. H. Farrar, Samuel P. Blanc* and *Philip Phillips*, for appellant.

Messrs. John H. Kennard, **John A. Campbell, W. W. Howe,** *Albert Voorhies, J. P. Hornor & Henry B. Kelly*, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court for the District of Louisiana, dismissing appellant's bill.

The case was heard on a plea of the defendants, which being held to be good, the bill was dismissed.

The substance of the bill is, that the defendants having several judgments on the law side of the circuit court, had caused executions issued on these judgments to be levied upon shares of the stock of the New Orleans Waterworks Company, and the marshal had advertised them for sale, and was about to sell them to the highest bidder. That prior to March 31, 1877, the City was the sole and absolute owner of the waterworks now owned and held by the corporation known as the New Orleans Waterworks Company. That, on that day the Legislature of New Orleans enacted a law creating that corporation, with a capital of $2,000,000. Of this sum the corporation, as soon as organized, was to "Issue to the City of New Orleans stock to the amount of $606,600, full paid and not subject to assessment, and in addition thereto one similar share for every $100 of waterworks bonds which the City has taken up heretofore and extinguished by payment, exchange, or otherwise; and that the residue of said cap- [601] ital stock shall be reserved for the benefit of all

NOTE.—*Laws changing exemption from execution; constitutionality of.* See *note* to Gunn v. Barry, 23 U. S., XXI., 212.

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holders of waterworks bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this Act."

The bonds here referred to were those issued by the City while sole owner of the waterworks, in aid of their construction and extension.

The 7th section of this Act reads as follows: "*Be it further enacted*, That the stock owned by the City of New Orleans in said waterworks company shall not be liable to seizure for the debts of said City."

It was under this statute and especially under the section just recited that the City invoked the restraining power of the court to prevent the sale of its stock in the company.

To this bill the defendants interposed a plea to the effect that, so far as the provision of the statute, exempting the stock of the City in the waterworks company from sale under execution, relates to their judgments, it is void by the provisions of the Constitution of Louisiana and of the United States, which forbid the enactment of laws impairing the obligation of contracts; and in their plea they show that the obligations on which their judgments were obtained against the City were existing contracts before the passage of the Act of 1877.

As we have already said, the court held this plea good, refused the injunction and dismissed the bill.

The first point raised in argument here which requires our attention is that, whether the court below was right or wrong in its decision of the case on its merits, the bill must still be dismissed for want of equity, on the ground that there is ample remedy at law by a motion to the court to compel the marshal to release his levy on the stock, because not liable to be sold on the execution.

It will be observed that no such objection was made to the bill in the court below, and although one of the defendants filed a general demurrer to the bill which might have raised it, he afterwards withdrew his demurrer and joined in the plea on which the case was decided.

This plea was a defense on the merits of the case, and was to be held good or bad on precisely the same principles, whether pleaded to [602] a declaration at law or a bill in chancery. We should under such circumstances have great hesitation to permit the party who had, by tendering this issue, waived the question of the special jurisdiction of the court in equity, to raise that point for the first time in this court on appeal.

We are of opinion, however, that the bill does show on its face a sufficient ground of equitable jurisdiction in the allegations found in the bill sustained by the provisions of the statute, which creates a trust in favor of the holders of the old waterworks bonds of the City, and of other creditors of the City, which is not shown in any way to have been released or discharged.

Notwithstanding, therefore, the opinion of this court in the case of *Van Norden* v. *Morton*, 99 U. S., 378 [XXV., 453], that in the ordinary case of a wrongful levy of an execution on property not subject to be seized under it, the proper remedy is by motion to the court to have the levy discharged, we think there is in this bill other sufficient grounds for the equitable jurisdiction of the court.

The question to be decided on the merits is, shortly, this: is a statute of a State Legislature which, in the Act authorizing a city to convert its ownership of a large and valuable property, held for the use of the public, such as this, into the shares of a joint stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, an impairment of the obligation of existing contracts within the meaning of the Constitution?

The learned counsel, in the oral argument and in the brief, substantially concedes that the waterworks themselves, in the hands of the City, were not liable to be sold for the debts of the City. And if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the City, of such public utility and necessity, that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the City.

There is nothing in the nature of this legislation which directly impairs the obligation of the City's contract with the appellees. The courts recognized the binding force of those contracts by rendering judgments against the City after the passage of the Act complained of, just as [603] they would before, and there is no pretense but that the moral or legal obligation of the City to pay those judgments remains undiminished.

The force of the argument for holding the statute void, rests on certain decisions of this and other courts in regard to laws which attempted to exempt from the liability to seizure under execution property which, at the time the contract was made, was by law so liable to be seized and sold in enforcement of the contract. The cases of most importance so relied on are: *Green* v. *Biddle*, 8 Wheat., 1; *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Hayward*, 2 How., 608.

But these cases do not go so far as the argument in this case requires. Indeed, they fall far short of it. They simply hold that an Act of the Legislature, passed after a contract is made, which withdraws property then liable to be seized and sold, in enforcement of that contract, from the power of the courts to seize and sell it, impairs the obligation of the contract. But it has never been held, so far as we are advised, that a statute dealing with property *not* subject to sale for enforcement of the contract, cannot, in providing for a change of the form of the title by which the debtor holds it, continue the exemption from forced sale of that which represents in the hands of the same owner the property so exempt. That is the case before us.

The waterworks were not liable to execution for judgments against the City. The Legislature intended to change the form of the City's ownership of that property into that of shares of the capital stock of a company, of which it was at first to be sole owner. These shares represented the waterworks of the City. They represented nothing else. The City owned the shares, and the Legislature continued in this property, in the hands of the City as shares of stock, the same exemption which belonged to the property represented by these shares. In doing this no right of the creditors, at the time they made their contract or the passage of the Act, was impaired. No property to which they then had a right to look for payment of their

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debt, or as a means of enforcing their contract, has been withdrawn from the force of its obligation. They are placed by this law in no worse condition than they were before.

They were not obstructed or impaired in the exercise of any remedy which they had when [604] the contract was made. Nothing subject to their debt—not by way of lien, for such debts created no lien—but subject to execution after it might be issued, was withdrawn from that subjection. The shares were evidence of title in property which had never been liable to execution, and the statute continued this exemption in the ownership of these shares so long as it remained in the City.

But it is said that a creditor has, by his contract, the same right to enforce its performance out of property acquired after his debt is created as he had against that which the debtor owned when the contract was made. In a general sense there can be no doubt of the truth of this proposition But there are two answers to it in the present case In the first place, the property in question is not other and different property from that held and owned by the City at the time of the contract, and which was then exempt from execution. It has only changed the form and evidence of ownership. The shares represent in the hands of the City the same interest which it had before in the waterworks.

In the next place, the City was not situated as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The City could not have sold this property as the law stood. It could not have put it into a joint stock company without the aid of a new law. The Legislature, in authorizing the change in the form of the ownership of the waterworks, could, since it injured nobody and invaded no one's rights, say, as to the City, whether it be called new property or not, that such ownership should continue exempt from execution.

As the City was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of appellees, the Legislature impaired no obligation of the City in declaring the stock thus acquired exempt from liability for debts.

We are of opinion, therefore, that the plea of defendants was bad; *and the decree of the Circuit Court is, therefore, reversed, with directions to overrule the plea, and for such further proceedings as are not inconsistent with this opinion.*

True copy. Test.

James H. McKenney, Clerk, Sup. Court, U.S.

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[605] JOSEPH H. OGLESBY ET AL., *Plffs. in Err.*,

v.

HENRY Y. ATTRILL.

(See S. C., 15 Otto, 605-611.)

Acts of corporation—compromise.

1. Courts will not examine into the affairs of a corporation to determine the expediency of its action or the motives for it, when the action itself is lawful.

2. A compromise has the effect of a judgment in a settlement of claims. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally.

[No. 299.]

Argued Apr. 28, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

Statement of the case by *Mr. Justice* **Field**:

The petition of the plaintiff alleges that he had become the sole owner of all the capital stock of the Crescent City Gas-Light Company, a corporation created by an Act of the Legislature of Louisiana, approved April 20, 1870; that the stock was divided into 30,000 shares, of $100 each; that, in March, 1875, he entered into negotiations with the New Orleans Gas Company, another corporation created under the laws of that State, for an amalgamation of the two companies, pursuant to an Act of the Legislature of the previous year; that the negotiations resulted in an agreement for amalgamation between the two companies through their responsible boards of directors; that the agreement was ratified by the requisite number of stockholders on the 9th of April following; that on the ensuing day the agreement was deposited with the Secretary of State, as required by law; that, under the agreement, the consolidated company retained the name of the New Orleans Gas-Light Company, and its full paid stock was divided into 37,500 shares, of $100 each, of which 12,500 shares were allotted to the plaintiff as owner of all the stock of the Crescent City Gas-Light Company, and the residue, 25,000 shares, were allotted to the owners of the stock of the original New Orleans Gas-Light Company.

The petition further alleges that on the 10th of April, 1875, about the time of the consummation of the agreement of consolidation, the defendants, Oglesby and Cassard, the former representing himself as entitled to 3,550 shares, and the latter to 1,150 shares, of the stock of the Crescent City Gas-Light Company, united with one Hernandez in a letter addressed to the President of the New Orleans Gas-Light Company, which was as follows: [606]

"NEW ORLEANS, April 10th, 1875.

JAMES JACKSON, *President Gas Company.*

By the newspapers we noticed that you are about to make an adjustment of your contest with the Crescent City Gas Company. We, the undersigned, hereby notify you that, at the commencement of the litigation with your company, we were the owners of the shares in the Crescent City Gas Company attached to our undersigned names; that we were defrauded of said stock by the fraud and machinations of the officers of said company; and that we intend to prosecute our claim to the same, and hereby notify you that any compromise or adjustment you may make with the said Crescent City Gas Company will be subject to our rights, to the extent above

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NOTE.—*Compromise of a disputed claim binding; payment of less sum for greater.*

When the claim settled is not a money demand, or if so, is unliquidated, or, if liquidated, is doubtful in fact or in law, any sum, no matter how small, given and received in satisfaction of the demand, will extinguish it. Warren v. Skinner, 20 Conn., 559; Pierce v. Pierce, 25 Barb., 243; Brooks v. Moore, 67 Barb., 393; McDaniels v. Lapham, 21 Vt., 222; McCall v. Nave, 52 Miss., 494; Donohue v. Woodbury, 6 Cush.,

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stated, and that legal proceedings will be instituted to enforce our said rights.

J. H. OGLESBY, 3,550 shares.
JULES CASSARD, 1,150 do.
J. HERNANDEZ, 400 do."

The petition avers that this letter was written with the malicious intent to embarrass the plaintiff in the exercise of his rights under the agreement to consolidate; that the claim made was groundless; that, on the 7th of April, 1873, the directors of the Crescent City Gas-Light Company had levied an assessment on the stock of the Company of one and one half per cent; and, under it, the defendant, Oglesby was bound to pay $6,075, as owner of 4,050 shares, and the defendant Cassard was bound to pay $1,725, as owner of 1,150 shares; that they refused to pay this assessment, and on the 6th of May, 1873, instituted suit in conjunction with other shareholders to enjoin the directors from proceeding to enforce its payment, and set up as grounds therefor "frauds and machinations of the officers of the said company;" that, on the 14th of that month, the company brought suits against Oglesby and Cassard to enforce payment of the assessment; and that, on the following day, May 15, Cassard transferred his shares to one Phipps, and on the 22d of the month Oglesby transferred to him 3,550 shares of his stock and disposed of the residue to other parties; that these transfers were made in settlement and compromise of the rights of the respective parties, in pursuance of which an indorsement was made on them to the effect that the company assented thereto, although only fifty cents per [607] share had been paid, and released Oglesby and Cassard from all past, present and future assessments thereon; and that, thereupon, the respective suits were dismissed, those by the company against Cassard and Oglesby, and the one by them against the company.

The petition further avers that the notification above mentioned has operated to impair the absolute control of the plaintiff of a large amount of stock in the consolidated company; and that the claim set up by the defendants throws a cloud over the title of a large portion of the shares allotted to him, and, from the nature of the claim, causes a confusion which impairs and depreciates the value of the entire number of his shares to his damage of $200,000. He, therefore, prays that the defendants may be severally cited, and after due proceedings, be condemned *in solido* to pay to him that sum, with interest and costs.

The petition was filed in the Fourth District Court of the Parish of Orleans, of Louisiana, but, on application of the defendants, was removed to the Circuit Court of the United States. They then filed an answer, and a petition in reconvention, making what is termed a reconventional demand or counter claim. The substance of this petition is, that the assessment levied upon the stock of the Crescent City Gas-Light Company was unnecessary; that the directors of the company had made no arrangement to purchase property or to build gas works, or to lay pipes for gas, and had no serious design of doing so; that the charter of the New Orleans Gas-Light Company of 1835 contained a provision authorizing a sale of its gas works to the City of New Orleans; and that the defendants and other corporators of the Crescent City Gas-Light Company "Had in contemplation an arrangement so beneficial to the City of New Orleans that they had no doubt they would be able to buy from it the pipes, gas works and other property" which it might thus acquire, and that it was the design and object of the corporators to wait "until time should develop whether they could purchase from the City of New Orleans or should be compelled to build for themselves;" that the directors were put into office through the influence of the plaintiff, and were completely under his control; that the assessment levied was instigated [608]

148; U. S. v. Child, 79 U. S., XX., 360; Ogborn v. Hoffman, 52 Ind., 439.

A compromise of a civil process, or of a private injury, is binding. Stonington v. Powers, 37 Conn., 439; Pilkington v. Green, 2 Bos. & P., 151.

An agreement by a debtor transferring certain specific property for the use of his creditors, signed by the creditors, whereby they accept the property in full of their demands, is a valid discharge of such demands. Murray v. Snow, 37 Iowa, 410; Bartlett v. Rogers, 3 Sawy. C. C., 62; Therasson v. Peterson, 4 Abb. Ct. App. Dec., 296; S. C., 2 Keyes, 636; McCreary v. McCreary, 5 Gill & J., 147.

A written agreement between a firm and its creditors, to receive a certain per cent of their claims in full, is valid, although not under seal. Pierce v. Jones, 8 S. C., 273; S. C., 28 Am. Rep., 288.

A judgment confessed by one member of a firm for a firm debt is a satisfaction. Frisbie v. Larned, 21 Wend., 450; Eckford v. DeKay, 26 Wend., 29.

A mutual agreement to discontinue cross actions of false imprisonment is a good accord and satisfaction. Foster v. Trull, 12 Johns., 456.

The compromise of doubtful claims is a good consideration to support a contract. Fisher v. May, 2 Bibb, 448; S. C., 5 Am. Dec., 626; Chahoon v. Hollenback, 16 Serg. & R., 425; S. C., 16 Am. Dec., 587; Stapleton v. Stapleton, 1 Atk., 10; Peirce v. N. O. Building Co., 9 La., 397; S. C., 29 Am. Dec., 448; Weed v. Terry, 2 Doug. (Mich.), 344; S. C., 45 Am. Dec., 257; Van Dyke v. Davis, 2 Mich., 144; Buchoz v. Walker, 19 Mich., 224; Barlow v. Ocean Ins. Co., 4 Met., 270; Pitkin v. Noyes, 48 N. H., 294; S. C., 2 Am. Rep., 218; 1 Pars. Cont., 364; Chitty, Cont., sec. 42 and *note* 1; Longridge v. Dowille, 5 B. & Ald., 117; Crowther v. Farrer, 15 A. & E. (N. S.), 677; Fleming v. Ramsay, 46 Pa. St., 252; Tuttle v. Tuttle, 12 Met., 551; Parker v. Way, 15 N. H., 45; Burnham v. Dunn, 36 N. H., 560; Gates v. Shatts, 7 Mich., 127; Crans v. Hunter, 28 N. Y., 389.

The compromise of a doubtful claim will not be set aside, except for fraud, concealment or imposition. Mills v. Lee, 6 T. B. Mon., 91; S. C., 17 Am. Dec., 118; Allis v. Billings, 2 Cush., 26.

Compromise of a doubtful right, without such deceit as would vitiate any other contract, is binding, although parties are ignorant of their rights. Hoge v. Hoge, 1 Watts, 163; S. C., 26 Am. Dec., 52; Trigg v. Read, 5 Humph., 529; S. C., 42 Am. Dec., 447.

Compromises, settling family disputes and putting an end to litigation of doubtful rights, are upheld. Farnsworth v. Dinsmore, 2 Swan, 42; Reynolds v. Brandon, 3 Heisk., 606; Trigg v. Read, 5 Humph., 443; S. C., 42 Am. Dec., 444.

Where a party is bound to pay a certain sum, there is no consideration, in contemplation of law, for a promise that a less sum shall be received in satisfaction. Obendorf v. Un. Bk. of Balt., 31 Md., 126; S. C., 1 Am. Rep., 31; Perkins v. Lockwood, 100 Mass., 249; S. C., 1 Am. Rep., 103; Harriman v. Harriman, 12 Gray, 341; Lincoln v. Bassett, 23 Pick., 154; Geiser v. Kershner, 4 Gill & J., 305; Wilkinson v. Byers, 1 A. & E., 106; Fitch v. Sutton, 5 East, 230; Cotton v. Godwin, 7 Mees. & W., 147; Bunge v. Koop, 48 N. Y., 225; S. C., 8 Am. Rep., 546; Pinnel's Case, 5 Rep., 117; Cumber v. Wane, Str., 426; Down v. Hatcher, 10 A. & E., 121; Watkinson v. Inglesby, 5 Johns., 386; Dederick v. Leman, 9 Johns., 333; Seymour v. Minturn, 17 Johns., 169; Robbins v. Alexander, 11 How. Pr., 100; Ryan v. Ward, 48 N. Y., 204; Wheeler v. Wheeler, 11 Vt., 60; Bailey v. Day, 26 Me., 88; Hinckley v. Arey, 27 Me., 362; see, also, *note* to Clarke v. White, 34 U. S. (12 Pet.), 178.

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by him to induce the stockholders to part with their stock, and to enable him to purchase it for a mere nominal sum; that the plaintiff and the directors confederated together to make the assessment to carry out this scheme, although they agreed among themselves that no assessment of their stock should be made; and that they used the process of the courts to compel the defendants to submit to their arbitrary and unnecessary exactions.

The defendants admit that suits were brought against them to enforce the payment of the assessment levied on the shares held by them, and that they made the compromise stated in the petition; but allege that, inasmuch as the assessment levied and others threatened involved the payment of enormous sums, and inasmuch as they had reason to believe that neither of them would derive any benefit therefrom, they were compelled to make the compromise to prevent their ruin; and that the agreement to surrender their stock in consideration of being released from liability for the assessment, and the dismissal of the suits against them, were made in ignorance of the fact that Phipps, to whom they transferred their stock, was an agent of the plaintiff to combine with the other directors to compel the stockholders to sacrifice their stock; and that they did not know at the time, nor until within six months past, of the conspiracy between the plaintiff and the other directors as above charged, and but for "said error of fact," they would have defended the suits brought against them, and would not have surrendered their stock; and that they have ascertained within six months that the plaintiff and other capitalists at the North had furnished Phipps and others with the means to buy up the stock so soon as it could be forced on the market by the proceedings of the directors.

The defendants then allege that each share of the Crescent City Gas-Light Company is worth not less than $100; that they are severally entitled to the stock which they respectively owned as mentioned; that they were illegally and cunningly deprived of it by the plaintiff, who has converted it to his own use; and that he is accountable to each of them for its value, namely, [609] to the defendant Oglesby for $355,000, and to the defendant Cassard for $115,000; and to pay said amounts they pray that he may be condemned.

To this reconventional demand the plaintiff excepted, on the ground that it was prescribed by one year, and also on the ground that it disclosed no cause of action against the plaintiff. The court overruled the exceptions, and the case was tried by a jury, who found against the claim of the plaintiff and that the reconventional demand should be dismissed. The case comes here on a writ of error taken by the defendants. The plaintiff abides by the judgment entered on the verdict.

Messrs. **Richard DeGray,** *Charles B. Singleton, Richard H. Browne* and **Henry B. Kelly,** for plaintiff in error.

Messrs. **Thomas J. Semmes, S. T. Wallis** and *C. Gibson,* for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

We do not deem it necessary to consider the rulings of the court upon the admission of evidence, nor the instructions given to the jury, nor those refused. The affirmance of the judgment may be rested on the compromise made between the defendants—the petitioners in reconvention—and the company, assuming that in its absence the petition in reconvention discloses a cause of action against the plaintiff below. They allege that a fraud was practiced on them by the directors of the company at his instigation; that he joined in a conspiracy to get possession of their stock at a nominal price; and that, in order to carry out this scheme, an assessment was levied which was unnecessary for any immediate purpose of the company, and that others were threatened. But they do not allege that the assessment was in excess of the powers of the directors, nor that it would have been unnecessary if the company had intended at the time to purchase or build gas works required for its business, or to raise money for other corporate purposes; but that under the circumstances then existing it would have been good policy to wait for future proceedings on the part of the City of New Orleans. As to the [610] wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful. *Bailey* v. *R. Co.*, 12 Beav., 439.

The supposed fraudulent intentions of the officers in levying the assessment which are now alleged as grounds for treating it as invalid were urged by the defendants as reasons for enjoining its enforcement in the suit they instituted; and any claims arising from that cause were covered by the compromise admitted in the pleadings. A compromise, by the Code of Louisiana, is defined to be "An agreement between two or more persons, who for promoting or putting an end to a law suit, adjust their differences by mutual consent, in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing," (art. 3071); and has, between the interested parties, a force equal to the authority of a thing adjudged. It cannot be attacked on account of any error in law or any lesion. Art. 3075.

The suits between the defendants and the Crescent City Company involved the validity of the assessment which they, on account "of frauds and machinations of the officers," sought to enjoin, whilst the company sought to enforce its payment. The compromise concluded embraced the dismissal of the several suits—of those brought against the defendants, and the one brought by them against the company—the transfer of their stock and their release from present and future assessments thereon. There is no averment that it was induced by any false representations of the plaintiff or of the directors; or that the assessment was not a genuine one; or that the agreement of the directors that no assessment should be levied on their stock was carried into effect; or that there was any concealment of the affairs of the company; and of the value of the stock the defend-

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ants were as competent to judge as any others in the market. Their ignorance that its purchase by Phipps was made for the plaintiff does not, in any respect, affect the character of the [611] transaction. It was of no moment to them who became the purchaser, nor did they so regard it, for the transfers of their stock were made in blank. The compromise stands, therefore, as a judgment, making a settlement of the very matters now set up as grounds of complaint in the petition in reconvention, that is, "the frauds and machinations of the officers of the company" in levying the assessment. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly between the company and the defendants, it protects from further suit those who advised equally with those who levied the assessment; participants in whatever wrong was committed, if any there were, as well as principals; abettors as well as doers of it. No allegations of fraud in addition to those made at the settlement, can prevent the compromise from having effect as a judgment thereon. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. *Adle* v. *Prudhomme*, 16 La Ann., 343. In the face of the compromise, the reconventional demand cannot be sustained.

Judgment affirmed.

True copy. Test.

James H. McKenney, Clerk, Sup. Court, U. S.

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[614] L. M. LINCOLN, LIVINGSTON CROUSE AND ISAAC CROUSE, Heirs at Law of W. W. CROUSE, Deceased, ET AL., *Plffs. in Err.*,

v.

IRA G FRENCH.

(See S. C., 15 Otto, 614-618.)

Estate of trustee—presumptions—right of possession.

1. When the purpose is answered for which the legal estate is conveyed to a trustee, the presumption of a reconveyance by him is not a conclusive one, but is open, upon a trial, to rebuttal.
2. Presumptions are indulged to supply the place of facts. they are never allowed against ascertained and established facts.
3. Where the trustees never reconveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right of possession.

[No. 265.]

Argued Apr. 3, 4, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the District of California.

Statement of the case by *Mr. Justice* **Field:**

This was an action for the possession of a tract of land containing 320 acres, situated in the Town of Sutter, County of Sacramento, and State of California The complaint is in the usual form for the recovery of land under the system of procedure which obtains in California. As originally filed in November, 1866 it embraced thirty-one defendants; but by amendments to the pleadings and other causes the number has since been reduced to seven. Various defenses were set up by them, which it is not necessary to state to understand the questions to be considered. It is enough to say that they were sufficient to put in issue the title of the plaintiff and his right of possession.

The case was first tried in 1867, before a jury, by whom a general verdict was rendered for the defendants, upon which judgment was entered in their favor. The question on the trial, upon which the case turned, related to the validity of a deed of the sheriff of the county, executed to one of the defendants upon a sale of the property for taxes. The circuit court held the deed valid, and instructed the jury to find for the defendants. The case being brought here, the judgment was reversed and the cause remanded for a new trial, this court holding that the sale was invalid, as the sheriff had not conformed to provisions of the statute, in that he offered the whole property to the highest bidder, instead of selling the smallest quantity which any purchaser would take and pay the judgment rendered for the taxes and costs. *French* v. *Edwards*, 13 Wall., 506 [80 U. S., XX., 702].

The case was again tried in 1872, this time by the court, without the intervention of a jury, upon the stipulation of the parties. The court found as facts, that, on the first of March, 1862, [615] Robert H. Vance was the owner in fee of the lands in controversy, and on that day conveyed the same to the plaintiff, Ira G. French; and that, on the 9th of January, 1863, French and Vance, with several others, joined in a deed conveying the lands to Edward Martin and Francis E. Lynch, upon trust to sell the same in lots of such size and for such prices as should be directed by a committee of four persons, or a majority thereof, to be selected in a manner indicated; and to distribute the proceeds of the sales immediately upon their receipt, in specified proportions, to the several grantors, and to a certain railroad company, thereafter to be organized, to construct and maintain a railroad connecting the Town of Sutter with the Sacramento Valley railroad, the portion of this company to be paid when the connecting road was completed. The deed provided that no conveyance should be made by the trustees until the railroad was commenced in good faith, and that the deed of trust itself should be void, if the proposed railroad was not built within one year from its date, unless the iron for the same should be lost or detained on its transit; in which case the time for completing the road was to be extended to two years instead of one year.

The court also found as facts that the contemplated railroad company was never incorporated; that the proposed road was never commenced; and that the defendants, who appeared in the action, were, at its commencement, in the exclusive adverse possession of the premises; and as conclusions of law, (1) that the plaintiff, French, acquired title in fee to the premises in controversy by the deed from Vance on the first of March, 1862; and (2) that his title was conveyed by the deed to Martin and Lynch on the 9th of January, 1863; and did not revest on failure of the conditions mentioned in the deed, without a re-entry for condition broken, or other act manifesting an intention to avoid the deed on that ground; but remained in the trustees at the commencement of the action; and that, therefore, the defendants were entitled to judgment in their favor. Judgment being

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entered, the case was again brought to this court, and was again reversed on the ground that a reconveyance from the trustees to French should have been presumed by the court below, from the lapse of time after the deed of trust was made, and from the fact that the con-
[616] ditions upon which the trust was to be executed had never arisen, and had become impossible.

The case was tried a third time, in October, 1878, before the court without a jury. Among other things, the court found the same facts which it found on the second trial, as to the execution of the trust-deed to Martin & Lynch; the non-incorporation of the contemplated railroad company mentioned in it; and the non-construction of the proposed railroad; and the further fact that the trustees never executed any instrument reconveying or purporting to reconvey to the plaintiff any part of the premises covered by the trust-deed, either before or after this action was commenced. But construing the decision of this court as indicating that the presumption of reconveyance, arising from the facts stated, was indisputable and conclusive, it held that the presumption could not be overthrown by evidence that no such reconveyance was actually executed. It accordingly found that the title was in the plaintiff from the presumed reconveyance from the trustees, and gave judgment in his favor. To review this judgment the case is again brought to this court.

Messrs. John H. McKune, A. T. Britton and **Jonas H. McGowan,** for plaintiffs in error.

Messrs. John Reynolds and **Sherman O. Houghton,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

In giving its decision when the case was last here, this court was led into an error in the statement of a fact. [*French* v. *Edwards*, XXII., 535.] It says in its opinion, that the action was begun in November, 1872, more than eight years after the time limited when the trust-deed to Martin & Lynch was to lose its efficacy, when, in reality, it was commenced in November, 1866, less than three years after the time mentioned, within which the road was to be completed. Although the duty to reconvey arose when by the terms of the trust-deed the time had passed within which the work was to be done, and the conditions upon which the trust was to be executed had become impossible, a reconveyance was to be presumed only in the absence of proof to the contrary. Like other presumptions it was sufficient to control
[617] the decision of the court if no rebutting testimony was produced. But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown.

While in its opinion the court, speaking through *Mr. Justice* Swayne, expressed itself as being clear that the case, as then presented, was one in which a presumption of reconveyance was to be indulged, and quoted, with approbation, the language of Sir William Grant in such cases, that "What ought to have been done should be presumed to have been done," and that "when the purpose is answered for which the legal estate is conveyed, it ought to be reconveyed," it added: "If it had been one of the facts found by the court below that the title was still in the trustees, the case would have presented a different aspect. It is stated only as a conclusion of law arising upon the facts found." It is plain, therefore, that this court only considered that the conclusion of law of the lower court, that the title was still in the trustees, was not warranted by the facts found, and that the case would have been differently decided had what was thus stated as a conclusion of law been one of those facts. It was not the intention of this court to hold that the presumption was a conclusive one, not open upon a retrial to rebuttal, because it was considered to properly arise upon the facts then presented by the record. When the case went back upon our decision for further proceedings—which, this being an action at law, were necessarily those of a new trial—the fact as to a reconveyance was open to proof, and was not to be taken as conclusively established from the force of the presumption that it had been made. Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.

The fact having been established, against the presumption mentioned, that the trustees never reconveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right of possession. Judgment [618]
should, therefore, have been ordered for the defendants. *It follows that the judgment of the Circuit Court must be reversed and the cause remanded, with directions to enter judgment in their favor; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 165.

BRIDGE, BEACH & COMPANY, *Appts.*, [618]
v.
EXCELSIOR MANUFACTURING COMPANY, G. F. FILLEY, President, ET AL.

(See S. C., 15 Otto, 618, 619.)

Extent of patent.

A patentee is only entitled to the precise device which he has described and claimed in his patent.

[No. 224.]

Argued Mar. 14, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Mr. **Robert H. Parkinson,** for appellants.

Mr. **Samuel S. Boyd,** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This case arises upon a bill in equity, founded upon certain letters patent dated July 18, 1876, and numbered 180,001, granted to one Esek Bussey for an improvement in cooking-stoves. The appellants as assignees of the patentee sue the defendants for alleged infringement, and pray an injunction, an account of profits, and an assessment of damages. The defendants filed an answer, denying infringement, and alleging the patent to be invalid by reason of certain

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prior patents and public use of the alleged invention prior to the invention of Bussey. The patent relates to an oven shelf placed on a level with the bottom of the oven when the door is open, and outside of the oven, to serve as a shelf for pans and other vessels to rest on, when drawn out of or shoved into the oven. The claim of [619] the patent is not for the shelf, as that is admitted to be old, but for an automatic device for raising the shelf upright and inclosing it within the door, when the latter is closed, and letting it down to a horizontal position, when the door is opened. The device is a cam attached to the door, which passes under the edge of the shelf and gradually raises it to a nearly perpendicular position as the door shuts. The shelf falls back of its own weight when the door opens, resting on the cam. The claim of the patent is as follows:

"What I claim, and desire to secure by letters patent, is:

In combination with a stove oven, a hinged shelf, fitted to fall outward and down automatically when the oven door is opened, and to be raised up by closing the oven door, adapted to operate upon it for that purpose substantially in the manner and for the purposes herein set forth."

The defendants made and sold stoves containing oven shelves constructed and operated as described in letters patent granted to E. C. Little and D. H. Nation, dated July 9, 1878, and numbered 205,754. This shelf also has an automatic movement, being raised when the door shuts, and lowered when it opens. But the device by which this is accomplished is different from that of Bussey. A cam or arm is used on the door, it is true; but it does not operate under the shelf, but upon a projection attached to the upper side of it, so arranged in relation to the arm on the door as to raise and lower the shelf. Both devices operate upon the same principle precisely as that which has been used for a long time in raising and lowering a carriage step by shutting and opening the door, and in other contrivances by which the same general effect is produced. Cam movements, and others of like character, producing simultaneous operations according to the needs of the case, such as opening valves in a steam-engine as the piston ascends and descends, and a thousand other things, are in such common use, that it requires but very little invention to adapt them to a particular case, like the one under consideration. We think, with the court below, that the patentee, if entitled to anything, is only entitled to the precise device which he has described and claimed in his patent; and as the defendants use a different device, they are not guilty of infringement.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[620] UNITED STATES, *Appt.*,

v.

WILLIAM SMITH.

(See S. C., 15 Otto, 620-622.)

Limitation of actions.

The right of a paymaster in the army to relief for public money stolen from him, is barred by the Statute of Limitations of six years. Sec. 1069 Rev. Stat.

[No. 287.]

Argued Apr. 27, 1882. Decided May. 8, 1882.

APPEAL from the Court of Claims.

The claimant in this case was, in June, 1869, and at the time of the commencement of this action paymaster in the army. On the 25th of the month named, while traveling to pay troops, the claimant lost from a railroad train in motion near Bryan, Texas, a package of money containing $500. The loss was occasioned by the accidental falling of the claimant's purse, and was without fault or negligence on the part of the claimant, who was transporting the money in the manner in which paymasters' funds are ordinarily transported in like circumstances, and exercising reasonable diligence in the care of the same. The claimant reported the loss through his superior officer to the Paymaster-General. The Paymaster-General returned his papers to claimant, stating that there were only two tribunals competent to give him relief, Congress and the Court of Claims, and that in rendering his official accounts the claimant must carry the amount as part of "balance on hand to be accounted for." The claimant accordingly carried the amount of the lost funds on his account as money in his possession, noting, however, on his accounts current the fact of the loss.

July 13, 1871, the Paymaster-General ordered claimant to transfer to his chief paymaster the balance of the appropriation of the last fiscal year that remained in his hands, including the sum claimed to have been lost. The Paymaster-General stated that this order would not prejudice any claim that the claimant might thereafter present for relief to the Court of Claims. Claimant obeyed this order. The loss of $500 has not been allowed to the claimant by the proper accounting officers of the Treasury, as a credit in the settlement of his accounts.

The Court of Claims decided *pro forma*, for the purpose of an appeal as conclusions of law, that the claimant was entitled to a decree directing the proper accounting officers of the Treasury to allow to the claimant, as a credit in the settlement of his accounts, for funds lost at Bryan, Texas, June 25, 1869, the amount of $500.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for appellant.

Messrs. Sanborn & Charles King and **George A. King,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This was an action in the Court of Claims under the 3d clause of section 1059 and section 1062 of the Revised Statutes, to establish a right to relief for money stolen from claimant as paymaster in the army. The case turned in the court below, as it does here, on the question of the applicability of the Statute of Limitations as found in section 1069, and claimant relies upon the opinion of this court in *U. S.* v. *Clark*, 96 U. S., 37 [XXIV., 696].

The case before us differs materially from the one there decided. In that case the United States were suing Clark in a court of general jurisdiction on his bond to recover the sum

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stolen from him by a robbery, which he had refused to pay and had never paid or accounted for, and he sued in the Court of Claims to establish that set-off. In the present case the sum in controversy had been paid by the claimant to the proper officer, and the United States had no claim on him for it and no right of action against him on that account. If the United States, in any action brought against Smith on his official bond, should include the sum now in controversy, it would be a perfect answer to the demand that Clark had paid it to his chief paymaster under order of Paymaster-General Brice, their common superior.

And if Smith should, in his account with the [621] Government, fall behind, so that a balance as large as the sum now in controversy was due, and there had been a change of sureties on the bond, those who were sureties when this payment was made could insist on that sum being applied to their exoneration *pro tanto*.

Nor does it appear that there was any balance of money of the Government in the hands of Smith at the time he brought suit or when he obtained judgment, on which it could be applied as a credit.

It is, therefore, a case in which the judgment amounts to a recovery of the sum once paid by claimant, and as the statute gives no authority to make this effectual by repayment out of the Treasury, it is to be collected by permitting him to retain it out of a future balance in his hands.

In *Clark's Case* the money had never been paid by him to the Treasury, nor did it appear that there had been any final refusal by the accounting officers of the Treasury to allow the claim.

The reasons why this court held that the Statute of Limitations which applies to actions in general in the Court of Claims, of six years, did not apply to Clark's action, have direct relation to the differences we have noticed between that case and this. The court there said that until the accounting officers had refused to allow the claim in his accounts there was no occasion to establish it in the Court of Claims. There being no denial of his right, the Statute did not run. This was founded on the conditions of the officer's bond to pay when demanded.

It sufficiently appears in this case that claimant's right was authoritatively denied when he was ordered by the Paymaster-General to pay the money, and that then was the proper time to apply for the protection of the Court of Claims by asking its decree that he should be credited on his account with that sum.

The court in *Clark's Case* gave as another reason why the Statute did not apply, that, so long as the United States could sue for this money and did not do so, the right of claimant to this defense to that action could not be barred by the Statute of Limitations. And as Clark was then sued for that money by the Government in a court where the defense could not be tried, but where it would not be barred by the limitation, [622] if the court had had jurisdiction to hear the defense, it was not barred in the only court which had jurisdiction to establish the defense.

In the present case, the money having been paid by the officer he was liable to no action by the Government to recover it.

It cannot be permitted that, the initiative in regard to a judicial determination of his right remaining solely with him, he can claim to be free from the law of limitation governing actions in that court as long as he chooses. Nor can he, without regard to the Statute of Limitations, proceed to obtain a judgment which is in effect for the repayment of money had and received to his use by the Government.

We think the action in this case is barred by the Statute of Limitations, *and the judgment of the Court of Claims is reversed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[626]

THOMAS P. LEATHERS AND MARY W. MEEHA, Widow of ANTHONY PAULY, Deceased, Claimants of the STEAMBOAT NATCHEZ, etc., *Appts.*,

v.

HOPKINS C. BLESSING.

(See S. C., 15 Otto, 626-630.)

Vessel engaged in navigation—marine torts.

1. A vessel just arrived from a voyage, with a cargo to be discharged at the place where she is moored, is still a vessel occupied in the business of navigation, and subject to admiralty jurisdiction.

2. The term "tort," when used in reference to admiralty jurisdiction, is not confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.

[No. 300.]

Submitted Apr. 28, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **John G. Carlisle** and *C. B. Singleton*, for appellants.

Messrs. Durant & **Hornor** and *Bentinck Egan*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the respondents in a suit in admiralty *in personam* from the decree therein. Leathers was the master of the steamboat Natchez, and he and the other respondent were the owners of that vessel. The suit was brought in the district court to recover damages for personal injuries received by Blessing, the libelant, on board of that vessel, and he had a decree in that court against the respondents *in personam*, and as owners of the vessel, and *in solido*, for $5,758.50, with five per cent interest from judicial demand till paid, and costs of suit. The respondents appealed to the circuit court. That court found the following facts: "1. That on the 26th day of December, A. D. 1873, the defendant therein, Thomas P. Leathers, was the master, and he and Mary Meeha, wife of Anthony Pauly, were the owners of the steamboat Natchez. 2. That about 1 o'clock P. M. of said day the said steamboat Natchez was lying at the wharf on the Mississippi, near the foot of Canal Street, in the City of New Orleans, securely moored to said wharf, and with at least one of her gang-planks out and resting on the shore, which afforded ingress and egress between the lower deck of said steamboat and the

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[627] wharf. 3. That, on the day and at the hour above mentioned the said steamboat had recently arrived at the Port of New Orleans from a trip up the Mississippi River, having on board a large number of bales of cotton, and that the trip of said steamboat was completed, but her cargo was still to be discharged. 4. That a part of said cargo of cotton was stowed on the forward deck several tiers high, and a passage way was left from the end of the gang-plank to the foot of the stairs. This passage way was covered with bales of cotton piled on the bridging, and persons on shore who desired to go to the cabin or office of the steamboat could only do so by going along this passage way to the stairs, and up the stairs to the cabin and office. 5. That, after the landing of said boat, and after her gang-plank had been run ashore, so that persons could go from shore to said steamboat, the libelant went aboard of said steamboat, along said gang-plank, with the purpose of going up into her cabin or to her office. 6. That the master and officers of said steamboat were accustomed to permit persons expecting to find on said steam boat freight consigned to them, as soon as she had landed and her gang-plank was out, to go aboard of her to examine the manifest or transact any other business with her master or officers. 7. That the libelant had business on said steamboat when he went aboard of her as aforesaid; he was expecting a consignment of cotton seed by said steamboat, and went aboard to ascertain whether it had arrived. 8. That, when libelant was going through said passage way, and when near the foot of the stairs, on his way to the cabin or office of said steamboat, a bale of cotton fell from the upper part of said passage way against and upon the leg and ankle of libelant, causing a compound fracture of the bones of his ankle and leg. 9. That said bale of cotton was carelessly and negligently stowed, and was left in such a position that it was liable to fall upon persons going along said passage way to the foot of the stairs of said steamboat, and its position was known to the master of said steamboat. 10. That libelant was in no manner negligent or in fault, whereby he contributed to his said injury. 11. That the fracture of libelant's leg and ankle was such as to render amputation of his leg necessary, and his leg had to be and was amputated in consequence of the in-
[628] jury sustained by him as aforesaid. 12. That, at the time of his injury aforesaid, the libelant was 38 years of age, and was earning in his business, which was buying cotton seed, as agent for the Louisiana Oil Company, the sum of $750 per year. 13. That, at the time of said injury, the libelant was in good health, with a good character for sobriety and integrity. 14. That, in consequence of the injury sustained by him as aforesaid, the costs and expenses incurred by libelant for treatment, surgical services, and in and about his care and cure, amounted to the sum of $1,707.50. 15. That the other damage resulting to libelant from said injury, consequent upon loss of time and the permanent disability caused by the loss of his leg, amounted to the sum of $4,000." As a conclusion of law from the foregoing facts, the court found that the libelant ought to recover from the respondents the aggregate amount of said costs, expenses and damage, with interest thereon, as additional damage, from the date of judicial demand, and it gave a decree in favor of libelant against the respondents for the said sum of $5,707.50, with interest at the rate of 5 *per centum per annum* from the date of judicial demand till paid, and costs of suit. From that decree this appeal was taken by the respondents.

The only question raised by the appellants is as to whether the suit was one of admiralty jurisdiction in the district court. They maintain that jurisdiction of the case belonged exclusively to a court of common law. Attention is directed to the facts that the circuit court did not find that the libelant was an officer, seaman, passenger or freighter, or that he had any connection with the vessel or any business upon her or about her, except that when he went on board of her he was expecting a consignment of cotton seed by her, and went on board to ascertain whether such consignment had arrived; and that the vessel had fully completed her voyage and was securely moored at the wharf at the time the accident occurred. It is urged that the case is one of an injury received by a person not connected with the vessel or her navigation, through the carelessness or neglect of another person, and that the fact that the person guilty of negligence was at the time in control of a vessel [629]
which had been previously engaged in navigating waters within the jurisdiction of the admiralty courts of the United States, cannot give jurisdiction to such courts.

Although a suit might have been brought in a common law court for the cause of action sued on here, the district court, sitting in admiralty, had jurisdiction of this suit. The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf and that she had communication with the shore by a gang-plank, did not make her a part of the land or deprive her of the character of a water-borne vessel.

The findings state that the master and officers of the vessel were accustomed to permit persons expecting to find on the vessel freight consigned to them, as soon as she had landed and her gang-plank was out, to go on board of her to examine the manifest or transact any other business with her master or officers; that the libelant had business on her, when he went on board of her under the circumstances set forth in the findings; that he was expecting a consignment of cotton seed by her; and that he went on board to ascertain whether it had arrived. These findings show that not only did the libelant go on board for a purpose proper in itself, so far as he was concerned, but that he went substantially on the invitation of those in control of the vessel. It is not found that he knew of the custom referred to, but it is found that he was acting in accordance with such custom, and it is not found that he did not know of such custom. With the added fact that his business was that of buying cotton seed, it is properly to be inferred that he went on board to inquire whether the vessel had brought the cotton seed which he was expecting, because he knew of

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such custom. This makes the case one of invitation to the libelant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circumstances, the relation of the [630] master and of his co-owner, through him, to the libelant, was such as to create a duty on them to see that the libelant was not injured by the negligence of the master. On the facts found there was a breach of that duty by the negligence of the master, constituting a maritime tort, of which the district court had jurisdiction in this suit. Not only does the jurisdiction of courts of admiralty in matters of tort depend entirely on locality, but since the case of *Waring* v. *Clarke*, 5 How., 441, 464, the exception of *infra corpus comitatus* is not allowed to prevail. Nor is the term "tort," when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. *Phila. W. & B. R. R. Co.* v. *Phila. & H. de G. Steam Towboat Co.*, 23 How., 209, 214, 215 [64 U. S., XVI., 433, 435].

The decree of the Circuit Court is affirmed, with costs and interest on the principal sum of $5,707.50 decreed by the Circuit Court, to be computed at the rate of 5 per cent per annum from the date of judicial demand in the District Court, till paid.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[630] THE STEAMBOAT POTOMAC, JAMES A. BATCHELOR ET AL., Claimants, *Appts.*
v.
JOHN W. CANNON.

(See S. C., 15 Otto, 630-636.)

Damages for collision—recovery by insurers.

*1. Upon a libel in admiralty for a collision, the libelant may be allowed damages for the loss of the use of his vessel while laid up to repair the injuries thereby suffered; and if at the time of the collision she was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be otherwise satisfactorily ascertained, the average of the net profits of her trips for the season may be adopted as the measure of the allowance.

2. A vessel being insured on two thirds of her valuation by valued policies, by which, in case the insurers should pay any loss, the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for account of the insurers, if requested, and that they should be entitled to such proportion of the damages recovered as the amount insured bore to the valuation in the policies, the assured filed a libel in admiralty against another vessel for damages suffered by a collision. The insurers paid the libelant two thirds of that damage, and released and assigned to the owners of the libeled vessel all their right in any damages growing out of the collision. It appearing that the collision was owing to the fault of both vessels, the libelant could recover only half of the damages sued for. *Held*, that one third of the sum paid by the insurers must be deducted from the amount to be recovered.

[No. 222.]

Argued Mar. 9, 1882. Decided May 8, 1882.

*Head notes by *Mr. Justice* GRAY.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **Timothy D. Lincoln**, for appellant.

Messrs. Benninck Egan, **William Wirt Howe** and *John H. Kennard*, for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

This is a libel in admiralty for collision, filed [631] by the owner of the steamboat Robert E. Lee against the steamboat Potomac. In the district court, and in the circuit court on appeal, both vessels were found to have been in fault, and therefore, according to the settled rule in admiralty, affirmed and established by this court in *The Catharine*, 17 How., 170 [58 U. S., XV., 238], the amount of the damages to each vessel, being $19,411.27 to The Robert E. Lee, and $7,330.52 to The Potomac, was equally divided between the two. The circuit court having found and stated the facts, and stated its conclusions of law, its finding of the facts is conclusive, and the questions of law so stated upon the record are open for revision in this court upon appeal, without any bill of exceptions. Stat. February 16, 1875, 18 Stat. at L., 315; *The Francis Wright* [*ante*, 1100]; *The S. C. Tryon* [*ante*, 1026].

Both the questions of law presented by the record relate to the amount of the damages that the libelant is entitled to recover.

One question is as to the sum to be allowed for the detention of his vessel while repairing the injuries suffered by the collision. The rules of law governing this question are well settled, and the only difficulty is in applying them to the peculiar facts of the case.

In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When [632] there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is upon the libelant to prove the extent of the damages actually sustained by him. *Williamson* v. *Barrett*, 13 How., 101; *Sturgis* v. *Clough*, 1 Wall., 269 [68 U. S., XVII., 580]; *The Cayuga*, 2 Ben., 125; *S. C.*, 7 Blatchf., 385; *S. C.*, 14 Wall., 270 [81 U. S., XX., 828]; *The Gazelle*, 2 W. Rob., 279; *S. C.*, 3 Notes of Cases, 75; *The Clarence*, 3 W. Rob., 283; *S. C.*, 7 Notes of Cases, 579.

The report of the commissioner, which was approved in this respect by both courts below, states that The Robert E. Lee was engaged in a certain, permanent and lucrative trade, making weekly trips on the Mississippi River between New Orleans and Vicksburg and intermediate ports; and states one item of the damage to her thus: "Demurrage allowed for loss of three trips in her established trade, being the profits which, according to the average of her whole business for the season, she would have realized on said trips, $7,178.48." The reason

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given by the circuit court for allowing such profits, instead of the charter value of the vessel during the time of her detention, was that "Being engaged in a regular, established line, and being peculiarly fitted for that line, her charter value could not be satisfactorily ascertained; and other vessels which could be procured to supply her place were not equally fitted for the service." The commissioner's report and the deposition of the clerk of the boat, which was made part of that report, show that the amount allowed was ascertained by taking the average of the profits of the trips performed by her within six and a half months next before the collision, deducting only the expenses as ascertained at the end of each trip, and deducting nothing for insurance or for wear and tear or for necessary repairs at the end of the season. But as the clerk testified that she was in no need of repair at the time of the collision, and there was neither suggestion nor evidence before the commissioner that the premiums of insurance were lessened while she was laid up [633] for repairs, a majority of the court is of opinion that it cannot be said as matter of law, that the sum allowed for her detention was excessive.

The only other question argued at the bar is, whether certain sums paid to the libelant by underwriters on his vessel should be deducted from the damages which he is entitled to recover in this suit. The determination of this question depends upon the effect of the following facts:

At the time of the collision, The Robert E. Lee was insured in various sums, amounting to $50,000 in all, against perils of the sea, river and fire, by concurrent policies in different insurance companies, each of which valued her at $75,000, and contained this provision: "Whenever this company shall pay any loss, the assured agrees to assign over to said company all right to recover satisfaction therefor from any other person or persons, town or other corporation, or the United States Government, or to prosecute therefor at the charge and for account of the company, if requested. And the said company shall be entitled to such proportion of said damages recovered as the amount insured by them bears to the valuation of said vessel."

The insurance companies paid to the libelant in the aggregate, for the loss sustained by his vessel by the collision, the sum of $7,429.52, which was arrived at by assuming the damage to her at $14,847.34, including about $2,000 for wages and expenses during her detention, instead of profits lost, then deducting one third of the repairs, new for old, amounting to $3,203.06, and charging the assured with one third of the balance, as his portion of the risk assumed, not covered by the insurance.

After the filing of this libel in the district court, the insurance companies executed and delivered to the claimants an instrument in writing, by which, after reciting the collision, the payment of the insurance money, and that they had never authorized the bringing or prosecution of this suit, and desired no suit brought on their account, they released, discharged and set over to the owners and master of The Potomac "Any and all right which they have in and to any damage or claim of damage if any there be, whether legal or equitable, growing out of the said collision, and authorize them to use the same by way of defense or otherwise, in and to the said suit." [634] There was no evidence that the insurance companies had ever authorized this suit to be brought, or that the claimants had paid any consideration for the release and assignment.

The claimants, under apt allegations in their answer and cross libel, contended that the amount so paid by the insurance companies should be deducted from the libelant's damages before bringing them into account with him. The district court so held, and deducted the whole of that amount from the moiety of the damages to The Robert E. Lee which the libelant was entitled to recover against The Potomac. The circuit court, on the other hand, held that no part of that amount should be deducted. This court is of opinion that neither of these decisions was correct.

The mere payment of a loss by the insurer does not indeed afford any defense, in whole or in part, to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured. But upon familiar principles, often recognized by this court, the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrong-doer, or other party responsible for the loss, and may enforce this right by action at common law in the name of the assured, or, when the case admits of proceeding in equity or admiralty, by suit in his own name. *Hall* v. *R. R. Co.*, 13 Wall., 367 [80 U. S., XX., 594]; *Comegys* v. *Vasse*, 1 Pet., 193; *Fretz* v. *Bull*, 12 How., 466; *The Monticello*, 17 How., 152 [58 U. S., XV., 68]; *Garrison* v. *Ins. Co.*, 19 How., 312 [60 U. S., XV., 656]; see, also, *The Sarah Ann*, 2 Sum., 206; *The Ann C. Pratt*, 1 Curtis, 340; *Clark* v. *Wilson*, 103 Mass., 219; *Yates* v. *Whyte*, 5 Scott, 640; *S. C.*, 4 Bing. (N. C.), 272; *S. C.*, 1 Arnold, 85; *Simpson* v. *Thompson*, 3 App. Cas., 279.

This right of the insurer is not contingent upon the loss having been total, or upon its having been followed by an abandonment, but rests upon the ground that his contract is in the nature of a contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to his right of action against them. Phil. Ins., sec. 1723; *Hall* v. *R. R. Co.*, 13 Wall., 371 [80 U.S., XX., 596]; *White* v. *Dobinson*, 14 Sim., 273; *Quebec Ass. Co.* v. *St. Louis*, 7 Moore (P. C.), 286; *Dickenson* v. *Jardine*, L. R. 3 C. P., 639, 644; *Simpson* v. *Thompson*, 3 App. Cas., 284, 293; *Darrell* v. *Tibbitts*, 5 Q. B. D., 560. [635]

By the express terms of each of the policies upon The Robert E. Lee, the insurers, upon payment of a loss, were entitled to demand from the assured an assignment of his right to recover damages against The Potomac for the loss so paid for, or to bring suit for such damages in his name, and to hold to their own use such proportion of those damages as the amount insured bore to the valuation of The Robert E. Lee in the policy. And that valuation is conclusive in respect of all rights and obligations arising upon the policy of insurance. *Ins. Asso.* v. *Armstrong*, L. R. 5 Q. B., 244.

The amount which, by the effect of the contract of insurance, and of the payment of a loss under it, the insurers had the right to recover

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to their own use from The Potomac and her owners, they had the right to release and assign, if they saw fit, to those owners. The claim of the latter to a deduction on this account from the damages to be recovered against them does not arise out of any right of their own, but out of the right so derived from the insurers. The circuit court, therefore, erred in holding that no part of this amount should be deducted from the libelant's damages.

But the insures are entitled only to damages to be recovered for an injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation in the policies. As the amount insured was only two thirds of the valuation, leaving the owner to stand his own insurer for the remaining third, and as the damages to be recovered in this suit are for the injury to his whole interest, whether insured or uninsured, it is quite clear that the insurers had no right to more than two thirds of the damages so recovered.

Besides, the insurance applied to all injuries caused to the insured vessel by collision, whether the collision was owing to unavoidable accident, or to negligence on the part of the other vessel, or to negligence of the master and crew [636] of the vessel insured. Phil. Ins., secs. 1049, 1099; *Ins. Co.* v. *Sherwood*, 14 How., 351. The insurers therefore, within the limit of their policies, were responsible to the assured for the entire damage to his vessel, and not merely for the moiety thereof which, because of the fault on her part as well as on the part of the other vessel, was all that he could recover against the latter; and the sum paid to him by the insurers is equally applicable to that portion of the damage for which he cannot recover against the other vessel and her owners, as to that portion for which he can so recover.

The necessary consequence is that only one half of two thirds, or one third, of the sum paid to the libelant by the insurers, can be treated as paid on account of the damages which he can recover in this suit and, therefore, under the claim made in the answer and at the argument, that third only can be deducted from those damages.

The result is, that the decree of the Circuit Court, awarding to the libelant the sum of $6,040.37, being one half of the excess of the damages sustained by The Robert E. Lee over the damages sustained by The Potomac, must be reversed in so far as to deduct from that sum the sum of $2,476.51, being one third of the sum paid to him by the insurance companies, and must in other respects be affirmed; and it is so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[636] JOSEPH E. VENABLE ET AL., Doing Business under the Firm Name and Style of VENABLE & SON, *Plffs. in Err.*,

v.

GEORGE S. RICHARDS, Collector of INTERNAL REVENUE.

(See S. C., 15 Otto, 636-640.)

Removal of actions—tax on snuff.

*1. Section 643 of the Revised Statutes, providing for removal from State Courts of civil suits against revenue officers, is not superseded by the Act of March 3, 1875.

2. The tax on snuff is thirty-two cents per pound. Granulated tobacco, whatever it may be, was not snuff, within the meaning of the statute.

[No. 295.]

Argued Apr. 28, 1882. Decided May 8. 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The case is stated by the court.

Mr. **William P. Burwell,** for plaintiffs in error.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for defendants in error.

Mr. Justice **Harlan** delivered the opinion of [637] the court:

Section 643 of the Revised Statutes provides, among other things, for the removal into the Circuit Court of the United States for the proper district, upon petition by defendant to that court, without bond and without reference to the amount in dispute, of any civil suit or criminal prosecution, "Commenced in any State Court against an officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title or authority claimed by such officer or other person under such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of such revenue law." Similar provisions are to be found in the Act of July 13, 1866, reducing internal taxation, and for other purposes, and in the Act of March 2, 1833, providing for the collection of duties on imports. 14 Stat. at L., 171, sec. 67; 4 Stat. at L., 633, sec. 3.

The present suit, commenced in one of the courts of the Commonwealth of Virginia and thence removed, in the mode prescribed by the above section, into the Circuit Court of the United States for the Eastern District of Virginia, is clearly embraced by the terms of that section. Its object is to recover from the defendant, Richards, certain sums, aggregating more than $5,000, which, it is alleged, he, as a Collector of Internal Revenue, illegally exacted and collected, *as taxes*, upon snuff manufactured by the plaintiffs, Venable & Son. The court below denied a motion to remand the cause to the State Court. Its action, in that particular, is now assailed, upon the assumption that the Act of March 3, 1875 [18 Stat. at L., 470], determining the jurisdiction of the Circuit Courts of the United States and regulating the removal of causes from the State Courts, superseded section 643 of the Revised Statutes, at least as to all cases removable under the Act of 1875. The present suit is, undoubtedly, one arising under the laws of the United States, and as the matter in dispute, exclusive of costs, exceeds the sum of $500, it could, consistently with the language of the Act of 1875, have been removed before or at the Term at which it could have been first tried, upon petition filed in the State Court, accompanied by the required bond. But it does [638] not follow that a removal of suits, described in section 643 of the Revised Statutes, could not be effected in some other mode than that defined

*Head notes by *Mr. Justice* HARLAN.

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in the Act of 1875. The latter statute, neither in terms nor by necessary implication, abrogates previous laws providing for the removal of causes from the State Courts into the courts of the Union. It repeals only such Acts and parts of Acts as are in conflict with its provisions. We fail to perceive any necessary conflict between the two statutes. Section 643 provides for the removal of both civil and criminal prosecutions of a limited class, arising under the laws of the United States, without regard to the amount involved, while the Act of 1875 provides for the removal of all civil suits arising under the laws of the United States, where the matter in dispute exceeds the sum or value of $500. Certainly so much of the former as relates to criminal prosecutions is unaffected by the Act of 1875. And the same thing may be said of civil suits, of the class described in section 643, where the matter in dispute, exclusive of costs, is less than the sum of $500. But looking at the policy which underlies all the legislation providing for the removal from State Courts of civil suits against officers, appointed under or acting by authority of any revenue law of the United States, we cannot suppose that Congress intended to deny to such officers, when sued for amounts exceeding $500, exclusive of costs, the benefit of the liberal provisions which are confessedly accorded to them when sued for less than that sum. "If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly as the case may be." *State* v. *Stoll*, 17 Wall., 431 [84 U.S., XXI., 654]. We are of opinion that effect will be given to the intention of Congress by holding, as we now do, that section 643 of the Revised Statutes, not being in conflict with the Act of 1875, is in full force as to all cases embraced by its terms; and, consequently, that the Act of 1875, so far as it embraces suits arising under the laws of the United States, does not preclude a removal of a suit, of the class defined in section 643, in the mode prescribed by that section.

This brings us to a consideration of the case upon its merits. The amounts which plaintiffs claim were illegally exacted as taxes upon snuff manufactured by them were paid from August, [639] 1872, to May, 1875, both inclusive. They were assessed, upon snuff, at the rate of 32 cents per pound for the whole period, and their contention is, that that was in excess of the rate established by law.

We are of opinion that the snuff manufactured by plaintiffs was taxable at the rate of thirty-two cents per pound. A careful examination of section 61 of the Act of July 20, 1868, section 31 of the Act of June 6, 1872, section 3368 of the Revised Statutes, and section 2 of the Act of March 3, 1875, will show that during the period in question the tax upon snuff, of all descriptions, when prepared for use, and manufactured of tobacco or any substitute of tobacco, was thirty-two cents per pound. 15 Stat. at L., 152; 17 Stat. at L., 249; Rev. Stat., sec. 3368; 18 Stat. at L., 339. The only basis for a different construction of the statutes exists in the fact that the Act of June 6, 1872, substituted for the third and fourth paragraphs of section 61 of the Act of July 20, 1868, a single paragraph which, among other things, prescribes a tax of twenty cents per pound upon *granulated tobacco*. The substituted paragraph was carried into the Revised Statutes, and is the second paragraph of section 3368. The conclusion attempted to be drawn from these facts has no foundation whatever upon which to rest. The Act of 1872 left untouched the same paragraph of section 61 of the Act of 1868, which expressly provided that "Upon tobacco and *snuff* which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes:

"On snuff manufactured of tobacco or any substitute of tobacco, ground, dry, damp, pickled, scented or otherwise, of all descriptions, when prepared for use, a tax of thirty-two cents per pound. And snuff flour, when sold or removed for use or consumption, shall be taxed as snuff, and shall be put up in packages and stamped in the same manner as snuff."

And this provision was reproduced in section 3368 of the Revised Statutes, of which the paragraph, prescribing a tax of twenty cents on granulated tobacco, is, also, a part. The plaintiffs concede that the article which was taxed in their hands was commonly known as snuff, but they insist that snuff is granulated tobacco within the meaning of the Act of 1872, and of the Revised Statutes. If so, it results that while granulated tobacco was subject, since the passage of the Act of 1872, and up to March 3, 1875, to a tax of twenty cents per pound and, by the Act of the latter date, to twenty-four cents per [640] pound, there was in force, during the same period, another provision specifically taxing snuff, manufactured of tobacco or any substitute for tobacco, of all descriptions, at the rate of thirty-two cents per pound. Any such construction of the statute is inadmissible. The bill of exceptions stated that there was no evidence to show that the term "snuff" was synonymous with "granulated tobacco," and that while the plaintiffs' witnesses knew what was meant by "snuff," they did not know what "granulated tobacco" was, in the trade in Virginia, nor what the statute meant by that phrase. It will not, therefore, be expected that this court will judicially know what granulated tobacco is, or in what respect, if in any, it resembles snuff. All that we decide is, that the article manufactured of tobacco or any substitute for tobacco, known in the trade and prepared for use as snuff, is, within the meaning of the statute, snuff upon which, when sold or removed for consumption or use, was imposed, during the period in question, a tax of thirty-two cents per pound.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CLARK W. UPTON, Assignee in Bankruptcy [640] of the GREAT WESTERN INSURANCE COMPANY, *Plff. in Err.*,

v.

DANIEL McLAUGHLIN.

(See S. C., 15 Otto, 640-646.)

Actions by assignee in bankruptcy—Statute of Limitations—bar by—point not taken in court below.

1. Section 5057 of the Revised Statutes does not

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impose an absolute limit of two years after the appointment of the assignee in bankruptcy, to his right of action in respect to transactions which occurred before such appointment, and there is no want of power in the court to entertain a suit after such two years have elapsed.

2. It is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by a statute of limitation, to raise the point for the first time in an appellate court.

3. The Supreme Court of Wyoming Territory has power under its code to reverse a judgment of the district court.

[No. 261.]

Submitted Apr. 3, 1882. Decided May 8, 1882.

IN ERROR to the Supreme Court of the Territory of Wyoming.

The case is stated by the court.

Messrs. **Homer Cook** and *Edward P. Johnson*, for plaintiff in error.

Mr. **William R. Steele,** for defendant in error.

[641]

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought in the District Court of the First Judicial District of the Territory of Wyoming, in and for Laramie County, by the assignee in bankruptcy of the Great Western Insurance Company, to recover from Daniel McLaughlin the sum of $800, with interest at 12 per cent, from the 15th day of August, 1872, as the amount due and unpaid on a subscription for ten shares of the capital stock of the company, owned by McLaughlin. The company was a corporation of the State of Illinois. In February, 1872, it was adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, and on the 11th of April, 1872, the plaintiff was appointed its assignee, and an assignment of all its property was executed to him. On the 5th of July, 1872, the bankruptcy court made an order that the entire amount unpaid of the capital stock of the company be paid to the assignee on or before the 15th of August, 1872, at his office in Chicago and that, in default, thereof, the assignee proceed to collect the same. The amount claimed in this suit is 80 per cent, on $1,000, being on ten shares of $100 each. The suit was commenced by a petition filed April 8th, 1876. McLaughlin put in an answer setting up four several defenses. The fourth defense set up, as a cause of action against the company, and as a set-off to the plaintiff's claim, that the company, before it was adjudged bankrupt, was indebted to the defendant on a balance due upon an account, in a specified sum, which was still due, and for which sum the defendant prayed judgment against the plaintiff. The plaintiff demurred, by one demurrer, to the second, third and fourth defenses. The district court overruled the demurrer as to the second and third defenses, and sustained it as to the fourth defense. To such ruling against the defendant, he excepted. The case was tried by a jury, and a verdict was rendered finding for the plaintiff and assessing his damages at $1,008. Thereupon a judgment was entered that the assignee recover from McLaughlin $1,008 and the costs [642] of the action. McLaughlin, by a petition, in error to the Supreme Court of the Territory, alleging thirty-two several errors made by the district court, prayed for a reversal of the judgment. The Supreme Court entered a judgment that the judgment of the district court must be reversed and held for naught, and then stating that "The court, further proceeding to render such judgment as the said district court ought to have rendered, find that said court had no jurisdiction of said cause," and that it should have rendered judgment in favor of McLaughlin and against the assignee, and that judgment be rendered in favor of McLaughlin and against the assignee, and that McLaughlin recover from the assignee $59.25 costs, and that such judgment be remanded to the district court for execution, and that a special mandate be sent to said court therefor. The assignee has brought the case into this court by a writ of error to the Supreme Court of Wyoming Territory.

The grounds on which that court proceeded in holding that the district court had no jurisdiction, and in reversing the judgment of that court, are shown by its opinion, which is found in the record. The opinion proceeds upon the view that, because of the provisions of section 5057 of the Revised Statutes of the United States, the district court had no jurisdiction of the suit. That section is as follows: "No suit, either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." The view taken in the opinion is, that this statute is not a statute merely limiting the remedy, but imposes an absolute limit; that, after two years, the assignee can neither sue nor be sued, but his office, for the purpose of commencing any suit, must be regarded as having expired; that no court has power to admit him to a *status* within the court; and that such want of power is want of jurisdiction. The opinion cites the opinion of this court delivered by *Mr. Justice* Miller, in *Bailey* v. *Glover*, 21 Wall., 342 [88 U. S., XXII., 636] and interprets it as holding that the statute (then sec. 2 of the Act of March 2, 1867, 14 Stat. at L., 518) is an absolute jurisdictional limitation, and thus as an adjudication of the question, furnishing the rule which [643] governs this case. This is an entire misconception of the decision in *Bailey* v. *Glover*. That decision established the contrary proposition. It was a suit in equity, in which the assignee in bankruptcy, more than three years after the date of his appointment, filed a bill against three relatives of the bankrupt, to set aside conveyances made to them, by the bankrupt, of all his estate, in fraud of his creditors. It alleged that the bankrupt and the defendants kept secret their fraudulent acts, whereby the assignee and the creditors were prevented from obtaining any sufficient knowledge or information thereof until within two years before the filing of the bill. The defendants demurred to the bill, on the ground that the suit was not brought within two years from the appointment of the assignee. The demurrer was sustained by the circuit court. The plaintiff appealed to this court. The report of the case shows that the defendants contended here that the case was not one of an ordinary statute of

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limitation, but that the statute was imperative and admitted of no exceptions as to any tribunal. If such contention had been regarded by this court as correct, the decision of the circuit court would necessarily have been affirmed. But this court held that the statute in question was a statute of limitation, and one of such a character as not to set up an absolute bar of two years, from the mere lapse of that time, but to require the application to it of the principle that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud, which is the foundation of the suit; and when the fraud has been concealed, or is of such a character as to conceal itself the statute does not begin to run until the fraud is discovered by or becomes known to the party suing or those in privity with him. On this view, this court reversed the decree below. This was a plain decision that the statute in question does not impose an absolute limit of two years after the appointment of the assignee, in respect to transactions which occurred before such appointment, and that there is no want of power in the court to entertain a suit after such two years have elapsed. This view was recognized and applied by this court in *Gifford* v. *Helms*, 98 U. S., 248 [XXV., 57], although there it was held that, on the facts, the assignee's right of action commenced at the time of his appointment. It is, therefore, clear, that no support for the decision below is to be drawn [644] from the case of *Bailey* v. *Glover*. The question is not to be treated as one of power or jurisdiction, but as one dependent on the principles applicable to statutes of limitation generally.

This being so, the record shows that no question as to the application of the statute to the case was raised in the District Court of the Territory by the defendant, either in pleading or on the trial or before judgment. It is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by a statute of limitation, to raise the point for the first time in an appellate court. This principle is always applied to questions which are not questions of jurisdiction. *Storm* v. *U. S.*, 94 U. S., 76, 81 [XXIV., 42, 44].

It is, however, contended by the defendant that the question of the bar by the Statute was presented in the Supreme Court of the Territory by the record from the district court, because the petition did not state facts sufficient to constitute a cause of action, and could have been demurred to for that cause. Section 85 of the Code of Civil Procedure of the Territory of Wyoming provides that the defendant may demur to the petition when it appears upon its face, either that the court has no jurisdiction or that the petition does not state facts sufficient to constitute a cause of action. Section 87 provides that the objection to the jurisdiction of the court, and the objection that the petition does not state the facts sufficient to constitute a cause of action, shall not be deemed to be waived by not taking them by either demurrer or answer. It is contended that a petition which shows upon its face that the cause of action is barred by a statute of limitation, is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defense of a bar, by a statute of limitation, to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so barred, and thus as not stating facts sufficient to constitute a cause of action.

The petition in this case sets out facts which [645] show that the cause of action sued on, accrued to the assignee more than two years before the bringing of the suit. Assuming the suit to be such a suit as is mentioned in section 5057, it is held by the Supreme Court of Wyoming, *Bonnifield* v. *Price*, 1 Wy., 172, that the rule is well established in that Territory, that where from the face of the petition it is apparent, without any further showing, that the claim is barred by a statute of limitation, a defendant may take advantage of such bar by a special demurrer to the petition. The same rule prevails in Ohio; *Sturges* v. *Burton*, 8 Ohio St., 215; *McKinney* v. *McKinney*, *Id.*, 423; and in Kansas; *Zane* v. *Zane*, 5 Kan., 134; and in Nebraska; *Peters* v. *Dunnells*, 5 Neb., 460. The rule is founded on the view that in such a case the petition does not state facts sufficient to constitute a cause of action. But if, in the court of original jurisdiction, the defense of a statute of limitation is not raised by either demurrer or answer, and is not brought to the attention of the court which tries the cause, by some objection taken in a proper manner, before judgment, it cannot, under section 87 of the Code of Wyoming, be raised for the first time in an appellate court. The effect of that section is only to permit the defendant to make the objection after demurrer or answer and before judgment. Under such a statutory provision it has been held that the objection may first be made at the trial, and even after the evidence is all in; *Coffin* v. *Reynolds*, 37 N. Y., 640; *Zane* v. *Zane*, 5 Kan., 134; and that it may be made by stating it distinctly as a ground of objection to the introduction of evidence. *Zane* v. *Zane*, *ubi supra*. But unless it appeared by the record which was before the Supreme Court of Wyoming in this case, that the objection had been taken in some proper manner in the district court, the Supreme Court could not notice it. That court has power (Code, sec. 513) to reverse a judgment of the district court for errors appearing on the record, and the petition in error (sec. 514) must set forth the errors complained of. Neither in the bill of exceptions, nor in the twenty-eight errors specified in the motion for a new trial in the district court, nor in the thirty-two errors specified in the petition in error, is there any allusion to the Statute of Limitation.

The defendant contends that as the district court sustained the demurrer to the fourth defense in the answer, and the defendant excepted [646] to the ruling, the question as to whether the petition was sufficient as a pleading was thereby brought up, because the district court ought to have given judgment against the party which committed the first fault in pleading. But we are of opinion that the record must show that the question as to whether it appeared by the petition that the action was barred by the Statute was distinctly presented to and raised before the district court. This does not appear, as before stated.

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The defendant also contends that various objections and exceptions taken by him to the admission of evidence, and to instructions to the jury, and various grounds of error stated in the motion for a new trial, raised the question referred to. It is sufficient to say, that the objections to the admission of evidence merely state that the evidence is incompetent, immaterial and irrelevant, without suggesting the question of the Statute of Limitation; and that the exceptions to the instructions to the jury and the grounds of error set forth in the motion for a new trial make no allusion to that question, nor is there any allusion to it in the record sent from the district court. Under such circumstances, the question cannot be raised in the appellate court. *Mays* v. *Fritton*, 20 Wall., 414 [87 U. S., XXII., 389], and cases there cited; *Beaver* v. *Taylor*, 93 U. S., 46 [XXIII., 797]; *Wheeler* v. *Sedgwick*, 94 U. S., 1 [XXIV., 31].

Because the Supreme Court of Wyoming held that the district court had no jurisdiction of this suit, it did not examine any of the questions raised by the defendant in the bill of exceptions taken by him. As it improperly reversed the judgment of the district court, *its judgment must be reversed;* and as it passed on no other question but the jurisdiction of the district court, the case must, under the provisions of sections 701 and 702 of the Revised Statutes, be remanded to it, with directions to hear and determine the questions raised by the petition in error, and to take such further proceedings as may be in conformity with law and not inconsistent with the opinion of this court.

True copy. Test,
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 187; 111 U. S., 191; 134 Mass., 22.

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[646] CLARK W. UPTON, Assignee in Bankruptcy of the GREAT WESTERN INSURANCE COMPANY, *Plff. in Err.*,

v.

THOMAS A. KENT.

(See S. C., 15 Otto, 646, 647.)

Upton v. McLaughlin, *ante*, followed.

[No. 260.]

Submitted Apr. 3, 1882. Decided May 8, 1882.

IN ERROR to the Supreme Court of the Territory of Wyoming.

The case is sufficiently stated by the court.

Messrs. **Homer Cook** and *Edward P. Johnson*, for plaintiff in error.

Messrs. **Shellabarger & Wilson** and *W. W. Corlett*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

The facts shown by the record in this case are essentially the same as those in the case of the same plaintiff against McLaughlin, No. 261 [*ante*, 1197], and no question is presented in this case which was not presented in that. The decision in that case requires that the judgment of the Supreme Court of the Territory be reversed and that the case be remanded to it, with directions to hear and determine the questions raised by the petition in error, and to take such further proceedings as may be in conformity with law and not inconsistent with the opinion of this court in No. 261.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte: [647]

ROBERT BOYD, *Petitioner.*

(See S. C., 15 Otto, 647-658.)

Proceedings supplementary to execution in the Federal Courts—New York Code—power of Congress.

1. Proceedings supplementary to execution, provided by the laws of New York, are a remedy in common law causes to reach the property of the judgment debtor allowed in actions at law in the courts of the United States, by section 916 of the Revised Statutes of the United States.

2. The application of this provision of the New York Code to the courts of the United States is not in conflict with the provisions of article III., section 2 of the Constitution of the United States.

3. The power of Congress under the Constitution, as well as that of the courts of the United States acting under its authority, extends to the adoption of the laws of the several States, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to all proceedings thereupon.

[No. 17, Orig.]

Argued Apr. 26, 1882. Decided May 8, 1882.

PETITION for writ of *habeas corpus.*

The case is stated by the court.

Mr. **Roger M. Sherman**, for petitioner.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, *contra.*

Mr. Justice **Matthews** delivered the opinion of the court:

It is made to appear, by this application, that a judgment was recovered in the Circuit Court for the Southern District of New York, in favor of the United States against Robert Boyd, the petitioner, and Francis O'Rourke, on which execution was issued and returned unsatisfied, except in the sum of $200, leaving due thereon $8,128.92. It was thereupon ordered by the court, on motion of the plaintiff's attorney, that the matter be referred to Joseph M. Deuel, Esq., a commissioner of the court, "To examine the said Robert Boyd and Francis O'Rourke, and take answers on oath concerning their property, and to reduce such answers and examination to writing; and also to examine on oath concerning such property, such witnesses as may be offered by the respective parties, and reduce such examination to writing, and report such answers and examination, and all his proceedings under [648] and by virtue of this order to this court with all convenient speed, and the said Deuel is hereby appointed a referee in this action for the purpose aforesaid. And it is further ordered that the said Robert Boyd and Francis O'Rourke do appear before the said referee at his office in the Postoffice building, New York City, on the 22d day of May, 1879, at eleven o'clock A. M., to answer before said referee concerning their property as aforesaid; and for that purpose to appear before the referee, from time to time, as he shall direct and appoint."

The petitioner moved the court to vacate this

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order, for illegality, which motion the court denied; and being required to submit to the examination, the petitioner refused to take an oath to testify under said order, whereupon, on motion of the attorney for the United States, the circuit court ordered that he be attached and committed to the custody of the marshal, as punishment for a contempt of the court in so refusing to be sworn. From that imprisonment the petitioner seeks to be discharged, and to that end prays for a writ of *habeas corpus*.

The grounds, on which the right to this relief is predicated, are set forth in his petition as follows:

"Your petitioner is informed and believes that proceedings supplementary to execution, wherein your petitioner is restrained of his liberty, are not, by the laws of the State of New York, a remedy in common law causes to reach the property of the judgment debtor allowed in actions at law in the courts of the United States by section 916 of the Revised Statutes of the United States; but, on the contrary, that these proceedings are, by the laws of the State of New York, prescribed as part of a code to abolish common law causes, as such, and to amalgamate and indiscriminate common law causes and suits in equity, and to confer upon the courts of that State, indifferently, in the same action powers in actions at law and in equity. Your petitioner is informed and believes that the application of this provision of that Code to the courts of the United States is not authorized by any Act of Congress, and is in conflict with the provisions of article III., section 2, of the Constitution of the United States, which preserves and establishes the distinction between relief at law and in equity. Your petitioner, therefore, avers and charges that the said circuit court was and is wholly [649] without jurisdiction in the premises, and that, therefore, all its proceedings therein are null and void."

The material portions of the present Statutes of New York referred to, and which were in force at the time of the adoption of the Revised Statutes of the United States, are as follows:

"Proceedings Supplementary to Execution.

Sec. 292. (1) When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, * * * is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court * * * requiring such judgment debtor to appear and answer concerning his property, before such judge at a time and place specified in the order, within the county to which the execution was issued. * * *

(3) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

* * * * * *

(5) No person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Sec. 295. Witnesses may be required to appear and testify, in any proceedings under this chapter, in the same manner as upon the trial of an issue.

Sec. 296. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath.

Sec. 297. The judge may order any property [650] of the judgment debtor, not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. * * * * *

Sec. 298. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section 244*. But before the appointment of such receiver the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the court of the county where the judgment roll in the action * * * is filed; and the said clerk shall record the order in a book to be kept. * * * A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded. * * * But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor, sought to be affected by such order is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

Sec. 299. If it appear that a person, or corporation, alleged to have property of a judgment debtor or indebted to him, claims an interest in the property adverse to him or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, but the judge may,

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by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action and prosecute the same to judgment and execution; but such order may [651] be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

Sec. 300. The judge may, in his discretion, order a reference to a referee agreed, upon by the parties or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Sec. 302. (1) If any person, party or witness, disobey an order of the judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. (2) And in all cases of commitment under this chapter * * * the person committed may, in case of inability to perform the act required or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him or the court in which the judgment was rendered, on such terms as may be just."

Section 916 of the Revised Statutes, which repeats, in this respect, the provisions of section 6 of the Act of June 1, 1872 [17 Stat. at L., 196], "to further the administration of justice," is as follows: "The party recovering a judgment in any common law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court, and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This provision of the Revised Statutes merely embodies and extends the principle contained in the 14th section of the Judiciary Act of 1789, 1 Stat. at L., 81, which, with the subsequent legislation of Congress in furtherance of it, has been repeatedly the subject of consideration in this court. *Palmer* v. *Allen*, 7 Cranch, 550; *Wayman* v. *Southard*, 10 Wheat., 1; *Bank* v. *Halstead*, 10 Wheat., 51; *Boyle* v. *Zacharie*, 6 Pet., 654; *Beers* v. *Haughton*, 9 Pet., 355; *Ross* v. *Duval*, 13 Pet., 57; *U. S.* v. *Knight*, 14 Pet., 312; *Duncan* v. *Darst*, 1 How., 304; *McCracken* v. *Hayward*, 2 How., 611; *Homer* v. *Brown*, 16 How., 363.

[652] It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several States; not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to *all proceedings thereupon;* as in *Beers* v. *Haughton*, *supra*, where it was held to include proceedings on the part of the judgment debtor, for his exoneration under insolvent laws of the State from imprisonment under a *ca. sa.*, and the consequent discharge from liability of the special bail.

It is contended, however, on behalf of the present petitioner, that the proceedings under which he has been committed to the custody of the marshal and restrained of his liberty, in their origin and nature are of equitable jurisdiction exclusively, as distinguished from proceedings at common law, which, by the prohibitions of the Constitution of the United States, Congress cannot lawfully authorize the courts of the United States to administer except by bill in chancery.

The jurisdiction of the courts of chancery in New York, exercised prior to the adoption of its present Code, which authorized a discovery of assets from a judgment debtor in aid of an execution, was statutory. It was conferred and defined by sections 88 and 89 of title II., article II., 2 Rev. Stats. of New York, 173, 174. It was therein provided, that "Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money or thing in action due to him or held in trust for him; and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by or the fund so held in trust has proceeded from some person other than the defendant himself. The court shall have power to [653] compel such discovery and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment out of any personal property, money or things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery; whether the same were originally liable to be taken in execution at law or not."

It is said in argument by Mr. B. F. Butler, in *Mitchell* v. *Bunch*, 2 Paige, 606 (22 Am. Dec., 671), that these provisions of the Revised Statutes were passed in affirmance of the doctrine of *Hadden* v. *Spader*, 20 Johns., 554. That case, however, did not go upon any idea that a bill in equity would lie against a judgment debtor for a general discovery of assets, but merely upon the ground of a jurisdiction to discover and apply equitable assets, specifically described; the question being, as it was put by Woodworth, *J.*, "Whether a debtor, who has placed his funds in the hands of a trustee, where they cannot be reached by an execution at law, can put his creditor at defiance and enjoy the benefit of these funds, which ought to be appropriated to the payment of his debts."

This case was preceded by the decisions of *Chancellor* Kent in *Hendricks* v. *Robinson*, 2 Johns. Ch., 283; *Brinkerhoff* v. *Brown*, 4 Johns. Ch., 671; and *McDermutt* v. *Strong*, 4 Johns. Ch., 687.

In *Hendricks* v. *Robinson*, *supra*, the Chancellor said: "I have no doubt that this court can and ought to lend its aid, whenever that aid becomes requisite to enforce a judgment at law, by compelling a discovery and account, either as against the debtor or as against any third

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person who may have possessed himself of the debtor's property and placed it beyond the reach of an execution at law. The preliminary step which seems to be required is that the judgment creditor should have made an experiment at law, and bound the property, by actually suing out execution;" citing *Angell* v. *Draper*, 1 Vern., 399; *Lord* Nottingham cited in [*Balch* v. *Wastall*] 1 P. Wms., 445; *Stilemen* v. *Ashdown*, 2 Atk., 477; *Shirly* v. *Watts*, 3 Atk., 200.

In *Brinkerhoff* v. *Brown*, *supra*, he said that it was the settled rule in chancery that the plaintiffs must show that they have taken out execution at law and pursued it to every available extent against the property before they can resort to that court for relief; that the presumption is, that the court which renders judgment is competent to enforce it; that, "If he seeks [654] aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a legal preference or lien upon the chattels." The opinion cites the case of *Taylor* v. *Hill*, 1 Eq. Cas. Abr., 132, *pl.* 15, before *Lord* King in 1705, where the bill having been filed *before execution* for discovery of particular specified effects of the judgment debtor in the hands of a third person, a demurrer was allowed; but the Chancellor said it would not lie against the debtor himself, nor against a third person, to have a general discovery. And in *McDermutt* v. *Strong*, *supra*, the Chancellor said: "I regard the law to be clearly settled, that before a judgment creditor can come here for aid against the goods and chattels of his debtor, or against any equitable interest which he may have therein, he must first take out execution and cause it to be levied or returned, so as to show thereby that his remedy at law fails, and that he has also acquired by that act of diligence a legal preference to the debtor's interest."

It is quite apparent from this review of the decisions upon the point in New York, prior to the adoption of the provisions of the Revised Statutes of that State on the subject, that the latter gave a much more extensive remedy than was supposed to exist by virtue of the customary jurisdiction of the chancery court, particularly in requiring, when sought, from a judgment debtor a general discovery of assets, legal and equitable, for the purpose of enabling the judgment creditor to apply them to the payment of his judgment.

In *Mitchell* v. *Bunch*, *supra*, *Chancellor* Walworth seemed to regard the jurisdiction of chancery, independent of the statute, as equally extensive, and refers to the case of *Edgell* v. *Haywood*, 3 Atk., 352, decided by *Lord* Chancellor Hardwicke in 1746, as a direct authority in support of the bill in the case before him, and as a decision which had never been questioned; but the case before *Lord* Hardwicke was not that of a bill for general discovery, but for a discovery in respect to assets alleged to be in the hands of the co-defendant as executor, applicable to the payment of a legacy which belonged to the judgment debtor under a will, and which the [655] complainant was entitled to have appropriated to the payment of his judgment, by virtue of the provisions of the Act of 10 Geo. II., ch. 26, for the relief of insolvent debtors, under which the debtor's person had been discharged, as an insolvent, from liability to be taken in execution. The right to the remedy in equity in that case was put distinctly upon the ground that the method by which the judgment creditor might have reached the property of his debtor, by proceeding at law against his person, having been taken away by the statute, the choses in action were equitable assets which a court of chancery would appropriate to the benefit of his creditors.

Mr. Hare, in his treatise on Discovery, ch. 5, sec. 3, p. 84, ed. 1876, states that "There are some early cases which appear opposed to the rule which has been stated in the preceding sections, that a discovery will only be given to be used as evidence at a trial," but adds that "the cases which are cited in support of a jurisdiction of this nature seem to be chiefly bills for relief, raising a different and substantive equity." He refers, however, to *Mountford* v. *Taylor*, 6 Ves., Jr., 788, as a case where *Lord* Eldon seems to have acted upon the doctrine of a general right of the creditor to a discovery, in order to make his judgment available, in consequence of the admission of its correctness by counsel. That was the case of a bill by judgment creditors, who had sued out *elegits* for a discovery of freehold estates, charging that the defendant, upon his election as a member of Parliament, previously to the judgment, gave in his qualification, and that, if the estates composing it were conveyed away since, it was without consideration. The *Lord Chancellor* remarked on the hearing that he was not quite clear that such a bill must not allege that at a given time the defendant was seised of given lands (not simply suggesting, as a fishing bill, that at some time or other he had some land); and that he conveyed those lands away fraudulently to put them out of the reach of this creditor. Afterwards he overruled the demurrer, saying: "But the bill charges that the defendant delivered in a schedule of the particulars of his estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence that he has lands liable to execution, as they may be unquestionably. Upon that I think he must answer."

It thus appears that the proceeding in aid of execution, in its present form in New York, as [656] well as that in which it was administered under the Revised Statutes by the court of chancery, was a statutory process and did not form any part of that jurisdiction in equity, which, as vested in the courts of the United States, by the Constitution, is assumed to be inalienable. And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure as whether it can in anywise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether, by the adoption of that instrument, all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it.

The conclusion will be not less clear, however, if we concede that the proceeding in question belongs historically, as to its form, to the administration of chancery courts. If we regard its nature, it will be perceived that it is, so far as it relates merely to the discovery of the

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debtor's assets, a collateral and auxiliary remedy. If the discovery results in ascertaining the existence of property, subject to levy under execution, then the remedy at law is perfectly restored. Or if, by lawful power over the person of the debtor, he may be compelled by a court of law to apply his property to the payment of his creditor's claim, the satisfaction is complete. If, on the other hand, other parties with adverse claims are revealed, or obstacles to the pursuit of the legal rights of the judgment creditor are brought to light, or the interests to be subjected are not cognizable at law, or the equities require to be marshaled, it may be that relief can only then be had in a court of equity, where all parties can be made to appear, all conflicting claims adjudicated, and the complete remedy molded to fit the circumstances of the case.

But here we have nothing to do with any question but that of discovery. The only relief sought is, knowledge of property belonging to the debtor, applicable, either at law or in equity, to the payment of the creditor's judgment. What shall be done, after that knowledge has been acquired, is to be determined upon the circumstances as they may then appear, and cannot now be considered. For the proceeding for discovery is distinct and entirely separable from the subsequent relief, if any shall then be sought. [657]

Now, it is of the essence of the jurisdiction of courts of equity, in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction, in the words of Story, Eq. Jur., sec. 1495, that, "Courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is, of itself, competent to grant the same relief; for in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending." It follows, then, that although at one time courts of equity would entertain bills of discovery, in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged, by competent authority to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds or other documents, important as instruments of evidence, when the court of law, in which the suit is pending, is authorized by summary proceedings to enforce the same right.

But even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore exercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems. No one has ever questioned the authority of Congress to make parties to a suit competent witnesses; or to confer upon courts of law power to compel the production of books and papers, because discovery was an ancient head of equitable jurisdiction. It is the very office of the principle of equity to supply defects in the law, and it is not to be regarded as anomalous that the technical law should, in the course of its necessary development, incorporate into its own organization, improvements in procedure, first introduced as equitable remedies. It is this very capacity of parallel growth that constitutes and perpetuates the harmonious co-existence of the two departments of our jurisprudence. Its history furnishes many examples and illustrations of this tendency and of its results. [658]

And certainly there is nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate, as a proceeding at law, under the orders of the court, where the record of the judgment remains and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right; and may be located, by legislative authority, to meet the requirements of judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect those distinctions may be supposed to be recognized in the Constitution, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently as an instrument of justice in the hands of courts of whatever description.

The application for the writ of habeas corpus *is, accordingly, denied.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 497; 114 U. S., 661.

AMOSKEAG NATIONAL BANK, *Plff. in Err.*, [667]
v.
TOWN OF OTTAWA.

AUGUSTUS T. POST, *Plff. in Err.*,
v.
BOARD OF SUPERVISORS OF KENDALL COUNTY.

(See S. C., 15 Otto, 667-671.)

Existence of statute law, a question for the court —state decisions—effect of in Federal Courts—journals of Legislature as evidence.

*1. Whether a seeming Act of the Legislature is or is not a law, is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.

*Head notes by *Mr. Justice* GRAY.

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2. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.

3. An Act of the Legislature of a State, which has been held by its highest court not to be a statute of that State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence between different parties, to be a law of the State, although referred to in later statutes of the State as an existing law, and assumed to be such in earlier cases in the state court, in which its validity was not and by the settled practice of that court could not be controverted.

4. The Act of the General Assembly of Illinois of February 18, 1857, purporting to authorize the issue of certain municipal bonds, is of no force or effect, by reason of its not appearing by the legislative journals to have been passed as required by the Constitution of 1848.

5. Under the Statute of Illinois of February 12, 1849, copies of the original daily journals kept by the clerks of each House of the Legislature, made by persons contracted with or employed for the purpose, in well bound books furnished by the Secretary of State, and afterwards deposited and kept in his office, are official records, copies, of which, certified by him, are competent evidence.

6. The printed journals of either House of a Legislature, published in obedience to law, are competent evidence of its proceedings.

[Nos. 235, 249.]

Argued Apr. 21, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The cases are stated by the court.

Messrs. **Sanford B. Perry, George S. Eldredge,** *Milton Hay* and **David T. Littler,** for plaintiff in error.

Messrs. **Philip Phillips** and **T. Lyle Dickey,** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

[668] These actions are brought upon municipal bonds purporting to have been issued under an Act of the General Assembly of Illinois of February 18, 1857. The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at October Term 1876, and the principles then affirmed must control the present decision. See, *S. Ottawa* v. *Perkins*, and *Supervisors of Kendall Co.* v. *Post*, 94 U. S., 260 [XXIV., 154]. Those principles may be summed up as follows:

First. By the law of the State of Illinois, as often declared by the Supreme Court of that State, before as well as after the execution of the bonds in suit, the provisions of the Constitution of 1848, requiring each House of the Legislature to keep and publish a journal of its proceedings and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each House, are not merely directory; but if the journals, being produced or proved, fail to show that an Act has been passed in the mode prescribed by the Constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the Executive, is overthrown, and the Act is void.

Second. Whether a seeming Act of the Legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.

Third. The construction uniformly given to the Constitution of a State by its highest court [669] is binding on the courts of the United States as a rule of decision.

Fourth. An Act of the Legislature of a State, which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the State.

Fifth. That which is not a law can give no validity to bonds purporting to be issued under it, even if the hands of those who take them for value and in the belief that they have been lawfully issued.

It was accordingly held that the Act of the General Assembly of Illinois of February 18, 1857, under which the bonds in suit were issued, having been adjudged by the Supreme Court of that State in 1870, in the cases of *Ryan* v. *Lynch*, 68 Ill., 160, and *Miller* v. *Goodwin*, 70 Ill., 659, upon proof that the journals did not show it to have been enacted in conformity with the requirements of the Constitution, to have never become a law and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States.

The weight of those decisions as authoritative expositions of the Constitution of the State is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. *Elmwood* v. *Marcy*, 92 U. S., 289 [XXIII., 710]; *E. Oakland* v. *Skinner*, 94 U.S., 255 [XXIV., 125].

Nor is it of any importance that the Act of 1857 had been assumed to be an existing law in *Dunnovan* v. *Green*, 57 Ill., 63, and in *Ypres* v. *Batavia*, 61 Ill., 99; for in each of those cases the validity of the statute was not controverted, and by the established practice of that court no evidence of the contents of the journals could be considered on appeal, which had not been produced and made part of the case in the court below. *R. R. Co.* v. *Wren*, 43 Ill., 77; *Bedard* v. *Hall*, 44 Ill., 91; *Grob* v. *Cushman*, 45 Ill., 119; see, also, *People* v. *De Wolf*, 62 Ill., 253, 256; *Binz* v. *Weber*, 81 Ill., 288, 291.

The copies of the journals, certified by the Secretary of State, and the printed journals, published in obedience to law, are both competent evidence of the proceedings in the Legislature.

By virtue of the Statute of Illinois of February 12, 1849,* the copies of the original daily

NOTE.—*Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws; power of state courts to construe their own statutes.* See *note* to Jackson v. Lamphire, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions, except when specially authorized to by statute. See *note* to Commercial Bk. v. Buckingham, 46 U. S. (5 How.), 317.

* By the Constitution of Illinois of 1848, art. 3, sec. 30, "The General Assembly shall provide by law that the copying, printing, binding and distributing the [670] laws and journals shall be let by contract to the lowest bidder."

By the Statute of January 16, 1836, in force at the time of the adoption of that Constitution, the journal of each House of the General Assembly was required to be "kept in well bound volumes;" the clerks of each House were required to furnish daily to the public printer "a copy of the journal kept by them respectively," and after the final adjournment to "deposit the original journals kept by them respectively, with the Secretary of State;" and the Secretary of State was required to "superintend the printing of the journals." Statutes of Illinois of 1839, p. 551; Revised Statutes of Illinois of 1845, ch. 34, sec. 3.

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journals kept by the clerks of the two Houses, made by persons contracted with or employed for the purpose as authorized and directed by that Act (though not sworn public officers), in well bound books furnished by the Secretary of State pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which, certified by him, are admissible upon settled rules of evidence, as well as by the decision of the Supreme Court of Illinois in *Miller* v. *Goodwin*, above cited; and neither the competency nor the effect of such copies is impaired by the loss or destruction of the daily journals or minutes.

The remark of the Judge delivering the opinion in *R. R. Co.* v. *Wren*, 43 Ill., 79, "We are not aware of any law which makes the printed journal evidence of the contents of the original," was but *obiter dictum*, for the case was decided upon the ground that no copy whatever of the journal had been made part of the case before the court, and is in conflict with the general current of decision in that court and in this. *People* v. *Campbell*, 3 Gilman, 466; *Prescott* v. *Trustees of Ill. & M. Canal*, 19 Ill., 324; *Happel* v. *Brethauer*, 70 Ill., 166; *Watkins* v. *Holman*, [671] 16 Pet., 25, 55, 56; *Bryan* v. *Forsyth*, 19 How. 334 [60 U. S., XV., 674]; *Gregg* v. *Forsyth*, 24 How., 179 [65 U. S., XVI., 731].

For these reasons, the Act of February 18, 1857, under which all the bonds in suit purport to have been issued, must be held to be of no force or effect, and the plaintiffs can maintain no action on the bonds. Upon the attempt made at the argument to support their validity in the first case under the Statute of March 6, 1867, and in the second case under the Statute of November 6, 1849, it is enough to say that there is nothing in the record to show that either of those statutes was ever complied with by the defendant in issuing the bonds, or relied on by the plaintiff in purchasing them.

Judgments affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—92 N. Y., 139; 65 How. Pr., 65.

By the Statute of February 12, 1849, the Secretary of State was required before the meeting of the General Assembly to publish an advertisement "inviting proposals for copying the laws, joint resolutions, and journals of the General Assembly," and to "give the contract to the lowest competent responsible bidder," and was also required "to furnish a well bound book, in which the journals shall be copied," and, in case the person contracting for the copying should fail to perform his contract, to cause the same to be done by some competent person. 2 Statutes of Illinois (Scates, ed.), p. 734.

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[671]

JAMES W. HARVEY ET AL., *Appts.*, *v.* UNITED STATES.

(See S. C., 15 Otto, 671-691.)

Contract, what constitutes—jurisdiction of Court of Claims—findings of fact—review of facts.

1. A written bid to perform work for the Government in connection with the advertisement for proposals by the United States and the acceptance of that bid, constitutes the contract between the parties.

2. Under the Act of August 14, 1876, ch. 279, the Court of Claims had power to reform the contract in question in the action according to the principles of equity, and then render judgment upon it as reformed.

3. The rule in regard to findings of fact by the Court of Claims, has no reference to a case of equity jurisdiction conferred in a special case by a special Act.

4. In such a case, where an appeal lies and is taken under section 707 of the Revised Statutes, this court must review the facts and the law, as in other cases in equity, appealed from other courts.

[No. 16.]

Argued Apr. 27, 1882. Decided May 8, 1882.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **Enoch Totten,** for appellants.

Messrs. **Samuel F. Phillips,** *Solicitor-Gen.*, and *Asst. Atty-Gen.* **Simons,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court: [672]

On the 12th of May, 1869, General Rodman, in command of the United States Arsenal at Rock Island, Illinois, caused to be published the following advertisement, in pursuance of law:

"*Proposals for Bridge Masonry.*

Sealed proposals will be received at this arsenal up to 10 o'clock A. M., on the 25th day of May, 1869, for the construction of the piers and abutments of the railroad and wagon road bridge to be built to connect the island of Rock Island with the City of Davenport. It is proposed to build, say, five common piers; one draw-pier, and two abutments. The stone and cement required for the work will be furnished on railroad cars, on arsenal switch, near the island end of the proposed bridge, and the sand required for the cement will be furnished by the United States at or near the same point. All the masonry must be of the best quality of bridge masonry; the stones in each course must be well banded, and each course well secured by dowels to the course below under cutwater and at lower end of piers; and the foundation courses must be fairly bedded and well secured to the rock bed of the river, the work as it progresses being subject to the inspection and approval of the commanding officer of the arsenal, or such other officer or person as may be designated by proper authority. Detailed information with regard to the general form and dimensions of the piers and abutments, and a profile of bed of river, can be obtained by personal application at the arsenal. The total amount of masonry is estimated at about 10,000 cubic yards. All the piers and abutments will be required to be completed prior to the first day of December, 1869. Parties making bids will state the price per cubic yard of solid masonry at which they are willing to complete the work, the United States furnishing the stone, cement and sand, as above stipulated, and nothing more. They will also make a bid stating separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing the stone, cement and sand, as above, and the price at which they will agree to put in the necessary coffer-dams with their protections. Proposals will be indorsed 'Proposals for Bridge

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Masonry,' and addressed to the undersigned. The United States reserves the right to reject any bid not deemed satisfactory.

T. J. RODMAN,
Lt. Col. and Bvt. Brig. Gen. U. S. A., Commanding."

[673] The appellants put in the following proposal:

"ROCK ISLAND, May 25th, 1869.

We propose to build the masonry of piers and abutments of the Rock Island bridge, as per annexed advertisement:

Small piers and abutments, per yard, -	$11 00
Draw-pier, per yard, - - - -	13 00

HARVEY & LIVESEY,
Madison, Wisconsin."

The only other proposal put in was one by Reynolds, Saulpaugh & Co., as follows:

"ROCK ISLAND, ILL., May 25th, 1869.

Brig-Gen'l, T. J. RODMAN, *Com'd'g Rock Island Arsenal.*

SIR: We respectfully propose to build your piers and abutments for the rail and wagon road bridge between the island of Rock Island and the City of Davenport, in accordance with the terms of your advertisement of May 12, 1869, at prices as follows:

Solid masonry at $19.10 per cubic yard in the work complete, the United States furnishing the stone, cement and sand, as stipulated, and nothing more. This price is based on 10,000 cubic yards of masonry in the work when completed. Or, as per your second plan, at prices as follows:

Solid masonry at $12.70 per cubic yard in the work complete, the United States furnishing the stone, cement and sand, as above, and build the coffer-dams at prices as follows:

For pier No. 1,	dam 18 feet high,	-	$	7,800
For " 2,	" 15 "	- -		34,900
For " 3,	" 13 "	-		6,000
For " 4, 5 & 6,	12 "	- -		15,000
				$63,700

The above prices for dams includes the protections to the same, complete.

Respectfully yours,
REYNOLDS, SAULPAUGH & CO."

The bid of the appellants was accepted. A contract was then drawn by a clerk of General Rodman's. A rough draft of it was submitted to the appellants and, on their returning it as satisfactory, the engrossed copies were prepared for signature, and the contracts were [674] executed and interchanged, bearing date June 1, 1869. The following are the provisions of the contract which are material to this case: "The parties of the first part do hereby contract and engage with the said United States to construct the piers and abutments for the new rail and wagon bridge, to be built to connect the island of Rock Island with the City of Davenport, in accordance with such plans and specifications as may be fixed by proper authority acting for the United States; the United States to furnish stone, cement, sand and all necessary templets required for the work, and nothing more; the stone and cement to be delivered in cars at the government switch on the island, near the site of the work. * * The character of the work to be daily inspected as it progresses, by such officer or other person as the commanding officer of the Rock Island arsenal, or other authority appointed by the United States, may designate; such inspector to have full authority to give any directions with regard to the character or manner of conducting the work. The whole work to be completed, prior to the first day of December next, provided, that the stone shall be delivered at the rate of 2,000 cubic yards per month; and, in case of any failure on the part of the United States to deliver this amount of stone, then the work to be completed as soon after the first day of December next as practicable. * * Payment in such funds as the Treasury Department may provide, at the rate of thirteen (13) dollars per cubic yard for all masonry in the draw-pier, and at the rate of eleven (11) dollars per cubic yard for all other masonry. * * * It is further stipulated and agreed, that if any default shall be made by the parties of the first part in the performance of their work specified in this contract, of the quality and at the times and places therein provided, that then, in that case, the United States shall have the right to take entire and exclusive charge of the work, and to complete it in accordance with the conditions prescribed by this contract, charging us with the entire cost of completing it, and crediting us with the amount per cubic yard heretofore stipulated to be paid us for the completing of the work."

On the 14th of December, 1870, the appellants filed a petition in the Court of Claims praying a judgment against the United States for $200,400. The petition set forth that the contract was one for doing the masonry work in and about the construction of the piers and [675] abutments; that proposals were invited for said work, and also separate proposals for putting in the necessary coffer-dams and their protections; but the petitioners bid only for said masonry work in the construction of said piers and abutments; and that their bid, being the lowest one for said masonry work, was accepted, and the contract was awarded thereon. The petition made the following claims, by items, against the United States: 1. For damages incurred by reason of the unreasonable delay caused by defendants from June 7, 1869, to September 4, 1869, $25,000; 2. For putting in coffer-dams and protections, for pumping the water therefrom and for preparing the beds for the piers and abutments, $75,000; 3. For loss of profits incurred by the unlawful reduction of the dimensions of the piers and abutments, $33,600; 4. For increase in the cost of the work, by having been compelled to do it in cold weather, $15,000; 5. For constructing 4,400 cubic yards of masonry, at, say, $12 per yard, $52,800; 6. For loss caused by neglect of defendants to furnish materials and locate piers and abutments, whereby the plaintiffs, their workmen and tools, were kept idle, $15,000; 7. For loss of machinery, vessels and tools, caused by the ejectment of the plaintiffs from the work, $25,000; 8. For dressing coping and corners of abutments, and dressing noses of piers under water, not required by contract, $5,000. This made a total of $246,400, on which $46,000 was credited as paid, leaving a balance of $200,400. The petition contained allegations bearing upon each one of the eight items claimed, but it is not necessary here to refer to any but those in respect to items 2 and 3, which allegations were as follows: "That, about the 13th day of Sep-

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tember, 1869, the United States having furnished materials sufficient to commence the construction of said piers and abutments, the petitioners requested the agent of the defendants to put in or cause to be put in the necessary coffer-dams and to pump the water therefrom, and prepare beds for said piers and abutments, to enable petitioners to proceed with the performance of their contract. But the United States refused to put in such coffer-dams and pump the water therefrom, and refused to prepare said beds, pretending that petitioners were bound, under said contract, to put in said coffer-dams. [676] The petitioners thereupon protested against such wrongful construction of said contract, but, at the special request of the defendants, and relying upon the good faith of the United States, they undertook to and did put in the necessary coffer-dams and protections, and pump the water therefrom, and did prepare the beds for said piers and abutments. That the labor and materials expended in putting in said coffer-dams and protections, and pumping water and preparing beds as aforesaid, was reasonably worth and they are entitled to recover for the same from the United States, the sum of $75,000. That they were informed by the United States, prior to the making of said proposal, that the draw-pier would be four hundred and seventy-four feet long and fifty-six feet wide; and that the five common piers would be each seventy-four feet long and fourteen feet wide; and that, with the abutments, there would not be less than ten thousand cubic yards of masonry work, and that petitioners based their estimates for said work upon such information, and made their said proposal in the belief that said piers and abutments would be constructed according to such dimensions. But they allege that the defendants, on or about the 22d day of July, 1869, transferred the supervision of said work from the Ordnance Bureau to the Bureau of Engineers, and that the petitioners, although they were at all times ready and anxious to proceed with said work, were kept waiting from the 7th day of June, 1869, until September 7, 1869, as aforesaid; and that, on or about the said 7th day of September, 1869, the defendants marked out the location for one pier and one abutment only, and wrongfully reduced the dimensions of all the said piers and abutments, so that, instead of measuring ten thousand cubic yards, they measured only about six thousand five hundred; and that, by reason of said reduction, by said defendants, in the dimensions of said piers and abutments, the petitioners have been damaged in the full sum of $33,600."

Subsequently, the petitioners amended their petition as to item 5, so as to make it read as follows: "For handling, cutting, preparing and setting stone for and in the piers and abutments, $82,000." The United States, by answer, denied every allegation in the petition, and set up a counter claim for $33,681.35, alleging that, under the contract, the petitioners being in default, the United States took charge of the work and completed it, and charged the peti- [677] tioners with the entire cost of completing it, $142,457.17, and credited them with the amount per cubic yard stipulated in the contract to be paid them for completing the work, $108,775.82, leaving a balance due to the United States from the petitioners of $33,681.35.

Proofs were taken and the case was heard by the Court of Claims. It awarded to the petitioners $20,068 in respect of items 1 and 6. As to item 2, the court found that it was necessary, in order to the laying of the abutments and piers, that a coffer-dam should be built for each abutment and pier, and the water pumped out of it, and the bed of the river prepared for laying the masonry of the abutment or pier thereon; that without such coffer-dams it was impracticable to construct any of the abutments or piers; that the petitioners, on the 13th of September, 1869, requested the United States to forthwith construct the requisite coffer-dams, exhaust the water therefrom, and prepare the bed for the piers and abutments where necessary for the commencement of the work; that the United States, on the next day, refused so to do on the ground that, under the contract, it was the business of the petitioners to do the work; that on the next day the petitioners protested against such refusal and notified the United States that they should proceed at once to build the dams, pump the water therefrom, and prepare the beds, and should hold the United States for the payment of the costs and expenses of the same; that, on the next day, General Warren, in charge of the construction of the bridge, consented, in order not to delay the work, to its going on until the matter could be referred to the Attorney-General of the United States; but stated that in such consent it must be considered that nothing was admitted in favor of the claim of the petitioners to their interpretation of the contract; that immediately upon such refusal of the United States, the petitioners proceeded to build the requisite coffer-dams; and that all that was required in that respect while the work was in their hands was done by them. But the court found, as a conclusion of law, that the contract did not require the United States, but required the petitioners to do the work named in item 2. As to item 3, the [678] court found that about the 17th of July, 1869, General Rodman was relieved from the charge of the construction of the bridge by General Warren, of the corps of engineers; that General Warren, on the 22d of August, 1869, caused notice to be given to the petitioners that the position of the abutment and first pier of the bridge, on the Iowa side, was determined and marked, ready for them to commence their construction; that, when proposals were so invited by advertisement General Rodman had prepared certain plans of the bridge, intended to show the general forms and dimensions of the piers and abutments, and a profile of the bed of the river, that those plans were seen and inspected by the petitioners before they sent in their said proposal; that the dimensions of the piers of the bridge which were fixed upon on the 22d of August, 1869, and those which were, after that date, from time to time fixed upon, were less than the dimensions indicated in the plans prepared by General Rodman and shown to the petitioners before they made their said proposal; but that there was no reduction of the sizes which were fixed upon on the last named day, nor was there any reduction of the sizes thereafter adopted. The court found, however, as a conclusion of law, that the reduction made in the dimensions of the piers and abutments of the bridge, as originally projected,

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was not, by the legal construction of the contract, wrongful to the petitioners. As to item 4, the court found that the petitioners were not subjected to any increase in the cost of the work by having been compelled to do it in cold weather. The court also found, that on the 6th of October, 1870, the petitioners were notified in writing by the officer in charge of the work on the bridge, that, in consequence of complaints which had reached the chief of engineers of the United States Army, of the tardy progress of the work on the masonry of the bridge, the said [679] officer had been required to take suitable and efficient measures to expedite the work and that, in view of that requirement, he would take the work as it stood and carry it on under the provision of the contract which contemplated such a change; that on the next day the petitioners, in writing, refused to give up the work, whereupon, on that day, the said officer notified them, in writing, that he would on the next day take possession of the work for the Government, which he did, against the assent and protest of the petitioners; and that thenceforward the work was prosecuted by the officers of the Government. In regard to item 5, as amended, the court found that the petitioners, before their ejectment from the work, had done work upon and for the bridge, under the contract, to the amount of $76,844.47, and had been paid on account of said work, $54,105.98; leaving due to them, under item 5, $22,238.49. As to item 7, the court found that the petitioners did not sustain any damage by reason of the idleness of their tools, machinery and vessels, after October 8, 1870, which they would not have sustained had they on that day completed their work under the contract, or which was not incident to the termination at any time of their work under the contract. As to item 8, the court found that the petitioners were paid in full for all the extra work they did on or about the abutments and piers of the bridge. The court awarded to the petitioners $42,306.49, being $20,068 on account of items 1 and 6, and $22,238.49 on account of item 5, and rejected their claims under items 2, 3, 4, 7 and 8.

The opinion of the Court of Claims, in deciding the case, is found in [*Harvey* v. *U. S.*] 8 Ct. of Claims, 501. From that it appears that, in regard to item 2, the court held that neither the advertisement nor the bid could be invoked to interpret the contract; and that the proper construction of the contract was that it was the duty of the petitioners to build the coffer-dams, pump the water therefrom, and prepare the bed of the river for the piers and abutments which they were bound to construct. In regard to item 3, the court held that, under the contract, the officer in charge had the power to make the alterations in the dimensions of the piers which made the profits to the petitioners less.

The Court of Claims having no equitable jurisdiction to reform a contract, the petitioners acquiesced in the decision made, so far as not [680] to take an appeal to this court and to receive payment from the United States of the amount of the judgment for $42,306.49, but they applied to Congress and procured the passage of an Act approved August 14, 1876, 19 Stat. at L., 490, which provides as follows: "That the claim of James W. Harvey and James Livesey for alleged labor done and materials furnished under their contract with the United States for the building of the masonry work for the piers and abutments of the bridge across the Mississippi River from Rock Island to Davenport, Iowa, bearing date June first, eighteen hundred and sixty-nine, be, and the same is hereby referred to the Court of Claims, for hearing and adjudication; and to that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the accounts between said claimants and the United States, as a court of equity jurisdiction; and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said Government may require."

On the 30th of August, 1876, the petitioners filed in the Court of Claims a petition, which recites the former proceedings, and the judgment, and its payment, and the contents of the said Act of Congress, and then proceeds as follows: "The plaintiffs allege that there is still justly due to them from the United States a large sum of money for damages and for work and materials and, in addition to the charges made in the aforesaid original petition, they say that connected with the pivot pier of said bridge there were large walls of stone masonry and crib work, connecting the upper and lower rests of the pivot pier with the pivot thereof, which were constructed mainly of irregular or rip-rap masonry, and that, to finish the abutment on the Iowa shore, wing walls, constructed of 'rip-rap' masonry, were necessary, all of which was a part of the plaintiffs' work under the contract; that, this work being cheap and easily done, the officers in charge of said work in behalf of the United States refused to permit the plaintiffs to do it, and employed laborers and constructed the same for the United States, and thus unjustly and unlawfully deprived the plaintiffs of large profits, which they otherwise would have made. They allege that they could have made, on the said work, the sum of $51,000 in profits. The plaintiffs aver that there is justly and equitably due to them from the United States, on account of the premises, and in addition to the amount [681] already paid to them, the sum of $239,600, with interest, according to the following specifications, to wit: 1. For labor done, and materials furnished by the plaintiffs, in constructing the coffer-dams, and in performing the work necessarily connected therewith, and preliminary to the masonry work for said piers and abutments, $75,000; 2. For loss and damages resulting to the claimants in consequence of the reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract, $33,600; 3. For loss of machinery, vessels and tools, caused by taking from the plaintiffs the work under their contract, $25,000; 4. For extra work, dressing coping and corners of abutments, and dressing noses of piers under water (this work not being required by the contract), $5,000; 5. For the profits they could have made had they been permitted to build the cross walls and crib work connecting the upper and lower rests with the pivot (part of the contract), $48,000; 6. For profits they might have made had they been permitted to construct the wing walls for the Iowa shore abutment; these walls

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were 'rip-rap,' and a part of the work under the contract, out of which liberal profits could have been made; the agents of the United States performed the work, $3,000; 7. For profits they might have made had they been permitted to complete the work according to the intention of the parties and the terms of the contract, in addition to the foregoing charges, $50,000; 8. For interest on the amount found due to the claimants on an equitable adjustment of accounts between the parties, from October 6, 1870, until the date of the judgment of this court, at the rate of 6 *per centum per annum*. The petitioners therefore claim judgment against the United States for the sum of $239,600, with interest thereon at six *per centum per annum;* and they pray the court to reform the said contract, if the same be necessary, so as to make the same conform to the intention of the parties and to be in consonance with justice and equity, and for such other and further or general relief as in justice and right they may be entitled to have." The United States demurred to this petition on the ground that it did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer and gave leave to the petitioners to amend the petition. [*Harvey* v. *U. S.*] 12 Ct. of Claims, 141. One of the grounds on which the court proceeded was, that so far as the demands covered by the new petition are legal demands, under the contract, enforceable in a suit at law founded on the contract, such demands cannot, under the special Act of Congress, come under the cognizance of the court. This view is, in our judgment, correct. The court further held, that there were no averments in the petition showing a title to equitable relief founded on the view that the written contract did not set forth the true agreement, and no facts alleged showing a right to recover on the reformed agreement. It was held that the court was to proceed simply "as a court of equity jurisdiction," and that the accounts which it could adjust and the relief which it could give must be limited to matters which, because of its inability to sit as a court of equity, it could not and did not before determine.

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A comparison of the new petition with the first petition shows that items 1, 2, 3 and 4 in the new petition are severally reproductions of items 2, 3, 7 and 8 of the first petition; that items 5, 6, 7 and 8 in the new petition are entirely new; and that items 1, 4, 5 and 6 in the first petition are not reproduced in the new petition, an award having been made in the judgment in respect of items 1, 5 and 6 in the first petition, and item 4 therein being abandoned.

The petitioners proceeded, under the leave granted, to amend their petition in equity, by adding thereto the following allegations: "The contract mentioned in the original petition in this cause was intended to carry out and execute the specifications and agreements contained in a certain advertisement or invitation for proposals for constructing the piers and abutments of the said bridge, published by the defendants, and in a bid made in pursuance thereof by the plaintiffs. The agents of the United States, by said advertisement, requested the persons bidding in pursuance thereof to state: (1) the price per cubic yard of solid masonry at which they were willing to complete the work; (2) the price per cubic yard of solid masonry at which they were willing to build the piers and abutments; and (3) the price at which they were willing to put in the necessary coffer-dams and protections. The said invitation for proposals also apprised the bidders that detailed information as to the general form and dimensions of the piers and abutments, and a profile of the bed of the river, would be exhibited to them at the arsenal. In pursuance of that part of the said invitation which referred to the work of building the solid masonry of the piers and abutments, and after having first obtained from the defendants' agents detailed information touching the form and dimensions of the proposed piers and abutments, and after having examined the profile of the bed of the river exhibited by the defendants, the plaintiffs, on the 25th day of May, 1869, submitted to the proper officers of the United States a proposal in writing, whereby they offered to build (only) the masonry of the said piers and abutments, upon the terms following, to wit: the small piers and abutments at and for the sum of $11 per yard, and the draw-pier at and for the sum of $13 per yard. The said proposal was accepted by the defendants, and the said contract, in the original petition described, was prepared in the office of the agent of the United States, by a clerk therein employed, but, in consequence of accident and mistake, the said contract was so drawn as to depart from the intention of the parties, and from the terms and specifications in said invitation and proposal contained. Instead of requiring the plaintiffs to perform the labor and furnish the materials contemplated by the said invitation and proposal, and in the manner specified therein, the language employed in said contract inequitably required the plaintiffs 'to construct the said piers and abutments in accordance with such plans and specifications as may (might) be fixed by proper authority acting for the United States.' The plaintiffs did not discover the peculiar language of the said contract until long after the work had been in progress, nor did they ever believe that they were bound by said contract to do any more work or furnish any more materials, or that they were obliged to perform the work in any other manner than as specified and contemplated in the said invitation and proposal, until the judgment of this court compelled them to submit to said construction. When the officers of the defendants first claimed for the said contract the strict construction aforesaid, the plaintiffs protested, and refused to proceed any further with the work, but the said officers, by promises (which they never kept), induced the plaintiffs to go on, notwithstanding the dispute, and they accordingly did proceed; and they were required by the agents of the United States to construct the coffer-dams and do all other work and furnish all other materials preliminary to building the solid masonry for said piers and abutments, and to construct said piers and abutments on very materially different plans and in different localities from those contemplated by the parties at the time of making said proposal, and said piers and abutments so built were, in consequence of the alterations in the form and locality thereof, much more expensive to the plaintiffs, for which no allowance has ever been made to them. Through the error and mistake aforesaid, the defendants were given an unfair and

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unconscionable advantage over the plaintiffs, and have obtained the materials, labor and skill of the plaintiffs, of great value, and have paid nothing for them. The labor performed and the materials furnished by the plaintiffs for the United States, in putting in said coffer-dams and furnishing the other materials and performing the other work preliminary to building the masonry of said piers and abutments, were reasonably worth the sum of $75,000; and the work done and materials furnished by them for the United States in and about the masonry of said piers and abutments were reasonably worth, in consequence of the change of locality and of plans and specifications unlawfully made by the defendants under the erroneous provisions of said contract, the sum of $33,600, over and above the sums which the plaintiffs have already been paid therefor. The plaintiffs, therefore, pray that the said contract may be so reformed as to correspond with the intention of the parties, and that they may be paid for the labor and materials by them performed and furnished upon the said bridge. They further pray that they may have such other and further relief, and be paid such other and further sums of money, as may be agreeable to equity and good conscience, and as the provisions of said Act of Congress may authorize and require."

By leave of the court, the petitioners filed a second amendment to the petition in equity, [685] stating as follows, in addition to what was contained in said petition and the first amendment thereto: "First. By the terms of the advertisement inviting proposals, the proposal of the plaintiffs, and the acceptance thereof by the defendants, as alleged in the original petition herein and the amendment thereto, a preliminary agreement was made between the plaintiffs and the defendants, by which the plaintiffs agreed to build the masonry work of the piers and abutments of the said bridge at Rock Island, for the prices stated in the said original petition and the amendment thereto, and according to certain plans showing the general form and dimensions of the piers and abutments and their locations in the river, and according to a profile showing the bed of the river at the place where the work was to be done, which plans and profile were, before the making of the proposal, exhibited by the defendants to the plaintiffs, and were by them inspected, to enable them to prepare their estimates for making their said proposal. And the United States thereby agreed to furnish the stone, cement and sand for said masonry, and also to erect and put in the necessary coffer-dams, with their protections, and to perform the preliminary work necessary to enable the plaintiffs to build the said masonry work according to their said proposal and according to said general plans, and at the location in the river indicated by said plans and profile. Second. For the purpose and with the intent and design of carrying into effect said agreement thus made as aforesaid, a formal contract was prepared by officers of the United States, which was afterwards signed and delivered by both parties; but by accident and mistake, the said contract did not conform to the terms of said previous agreement, nor to the intention of the parties. The said contract was, by such accident and mistake, so drawn as to impose upon the plaintiffs the burden and expense of constructing and putting in the necessary coffer-dams with their protections, and of performing the preliminary work connected therewith, instead of requiring the United States to put in said coffer-dams and perform said preliminary work, as had been previously agreed upon, and as was intended by the parties. The cost of constructing and putting in said coffer-dams with their protections and doing the preliminary work connected therewith, was as great if not greater than the cost of building the masonry [686] work; and in consequence of the said accident and mistake, the United States obtained an unconscionable advantage over the defendants, and compelled them to do work and furnish materials which they never intended to do, and for one half the compensation the said work and materials were really worth. And the said contract, through accident and mistake, was so drawn as to require the plaintiffs to build the said piers and abutments in accordance with such plans and specifications as might be fixed by the officers of the United States, instead of requiring the United States to provide plans, and the plaintiffs to do their work, according to the general plans and profile exhibited to the plaintiffs, as aforesaid and at the location in the river agreed upon, as was the intention of the parties and as had been previously agreed upon by the parties. And the defendants, through said accident and mistake, have obtained an inequitable and unconscionable advantage over the plaintiffs and, in the construction of the said bridge, changed its locality further down the river and into deep water, and reduced the dimensions of the piers and abutments as prescribed by said original plans, in such a manner as to preserve the cut-stone or expensive portion of the work, and to greatly reduce the quantity of rough, inexpensive work, through which alone profit could be derived by the plaintiffs, and thereby inflicted great injury upon the plaintiffs. The petitioners submit to the court that they are entitled to have said contract reformed, so as to make it conform to the intention and to the agreement of the parties, as expressed in the said invitation for proposals and the bid of the plaintiffs submitted in response thereto, and the acceptance thereof by the defendants, and to have the same judgment and relief as to the said coffer-dams and the work of constructing the piers and abutments as if the said formal contract had conformed to the said preliminary agreement and had contained the necessary provisions requiring the defendants to construct and put in the necessary coffer-dams and to perform the preliminary work connected therewith, and so as to conform in all things in reference to the construction of the said bridge and piers and abutments, to the said original and general plans of said bridge, and to the profile of said river bed, and to the location thereby indicated. And the petitioners claim such other and further relief in [687] the premises as their case may require, and as may be authorized by the terms of the said Act of Congress passed for their relief."

The United States, by answer, denied all the allegations of the petition and the amendments. The evidence in the first case was used as evidence in the second case, and no new evidence was taken. The court entered a general finding in favor of the defendants and dismissed

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the petition. From the decree of dismissal, the petitioners have appealed to this court.

The reasons assigned for that decree are contained in the opinion of the Court of Claims, which is a part of the record, and is also reported in [*Harvey* v. *U. S.*], 13 Ct. of Claims, 322. The court says, that because of the decision on the demurrer it regards the present proceedings as relating only to the claims for the cost of the coffer-dams and for the loss of profits resulting from the reduction of the dimensions of the piers and abutments, being items 1 and 2 in the new petition. In regard to item 1, the decision is that the petitioners have not shown that the written contract does not express the intent of both parties as to the coffer-dams; and that even if the court were satisfied that the petitioners executed the contract in mistake of their rights, there is no evidence that the defendants shared the mistake. In regard to item 2, the decision is that the court would be disposed to regard the case, on the facts, as one for equitable interposition for the purpose of further inquiry and the ascertainment of the rights of the parties in equity, if it had jurisdiction; but that the statute does not authorize it to entertain those considerations, because in these proceedings it can hear and determine only claims for labor done and materials furnished by the plaintiffs under their contract with the defendants.

In regard to the coffer-dams, it seems clear to us that the ruling of the Court of Claims was erroneous. The advertisement begins by inviting proposals for the construction of the piers and abutments of the bridge. Standing alone this would involve proposals to make coffer-dams and do and furnish everything else necessary to finished work. But this is qualified by what follows. The advertisement goes on to [688] say that parties making bids will state: (1) the price per cubic yard of solid masonry at which they are willing "to complete the work," the United States furnishing the stone, cement and sand, "and nothing more." "To complete the work" there means, to construct the piers and abutments complete, including the making of coffer-dams and doing and furnishing everything necessary for completed work, except furnishing store, cement and sand, the United States furnishing those and furnishing nothing more. Then parties making bids are "also" to make a bid stating (2) separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing stone, cement and sand; and "also" to make a bid stating (3) separately the price at which they will agree to put in the necessary coffer-dams, with their protections. Here are three distinct classes of bids: bid 1 for the whole work, including all that is embraced in the work specified in bids 2 and 3; bid 2 for a part of the whole work specified in bid 1 and excluding what is embraced in bid 3; and bid 3 for another part of the whole work specified in bid 1 and excluding what is embraced in bid 2. There is no implication in the advertisement, from the use of the word "also" or from any other language, that a bidder could not make bid 2 or bid 3 unless he likewise put in a bid for bid 1; or that he could not bid for the specified parts of the work unless he should bid for the whole complete. The appellants did not make a bid for the work complete or say in their bid that they were willing to complete the work. They bid, only under bid 2. They stated separately, in their bid, the price per yard at which they would build the masonry of the piers and abutments. They excluded bid 3 and the coffer-dams and they excluded bid 1 and the coffer-dams in it. This is quite enough to determine the question. The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam work. *Garfielde* v. *U. S.*, 93 U.S., 242 [XXIII., 779]; *Ins. Co.* v. *Hearne*, 20 Wall., 494 [87 U.S., XXII., 398]. The written contract, in [689] that respect, was intended by both parties to be, merely, a reduction to form of the statement as to work and prices contained in the bid. If the formal contract is susceptible of a different construction, to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the Government were under a mistake. It is shown that the work of making and putting in the coffer-dams and doing whatever else was necessary, in connection with them, before the laying of the masonry could be commenced, was so expensive as to make it impossible that the prices named in the bid of the appellants could have covered that expense and the laying of the masonry also. There is no evidence to show that the parties intended to alter the terms of the bid as to work and prices. There are other considerations dwelt upon in the dissenting opinion of *Judge* Nott in the Court of Claims, and to which it is necessary only to refer, which enforce the conclusion thus reached. One of those considerations is, the terms of the only other bid, as showing by the prices therein named for bid 1, bid 2, and bid 3, each separately, that the appellants could not have been bidding for the work complete. The evidence on the point in question on the part of the appellants is largely in documents, while that relied on by the United States is oral, and some of it consists of recollections of conversations with the appellants, who are debarred by statute from being witnesses in their own behalf. We are of opinion that, by the actual contract between the parties, the appellants were not to do any of the work covered by the claim made by them under item 1 of the petition herein, and that the written contract must be reformed accordingly.

We are also of opinion that the Court of Claims placed too limited a construction upon the special Act of Congress. The Act speaks of the claim of the appellants as a claim "For alleged labor done and materials furnished under their contract with the United States for the building of the masonry work for the piers and abutments of the bridge," giving the date of the contract. The Court of Claims had rejected item 2 in the first case because the formal written contract required the petitioners to do the work named in it. It had rejected item 3 because that contract gave the Government power to reduce the dimensions of the piers and abutments. It was to obtain equitable relief in re- [690] spect to those two items that the appellants applied to Congress. Their claim had been made in the eight items embraced in their petition in the first case. It had been made as a claim un-

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der their contract. It cannot be properly inferred, unless there is language necessarily leading to a contrary conclusion, that the claim referred to the Court of Claims by the Act is to embrace less than what was embraced in items 2 and 3 in the first case, although item 3 is made out as for "loss of profits." The Act refers "the claim" "under the contract," for hearing and adjudication; and jurisdiction is conferred on the court to proceed in the adjustment of "the accounts" between the persons making the claim and the United States, as a court of equity jurisdiction. The court had decided that it could not take cognizance of item 3 because it was not a court of equity jurisdiction and, therefore, could not proceed to adjust the accounts any further than it had adjusted them. One object of the Act was to remedy this defect. There is nothing in the use of the words "for alleged labor done and materials furnished" or of the words "to that end" which can limit or control the scope of the Act, as above explained. That scope is still further shown by the enactment that the court "May, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said Government may require." The words "for alleged labor done and materials furnished" are, in view of the language of the entire Act, not words of limitation but words of description. The court is authorized to adjust "the accounts" between the parties, so far as they were not legal demands, and so far as they were equitable demands, unadjusted or unadjudicated, growing out of the contract, as a court of equity and, for that purpose, to reform the contract, according to the principles of equity, and then render judgment upon it as reformed. This power of the Court of Claims, under the Act, extends to reforming the contract in respect to permitting the officers of the United States to materially vary the plans for the piers so as to essentially change the obligations of the parties.

As to items 3 and 4 in the new petition, which are the same as items 7 and 8 in the former case, not only were they legal demands but they were adjudicated upon fully in that case and cannot [691] be reopened. As to items 5, 6 and 7 in the new petition, they cannot, in view of the principles laid down in this opinion, be considered by the Court of Claims. The question of interest, under item 8, remains for that court to consider.

It is contended on the part of the United States that this court cannot, under its rules, hear this appeal, because there is not, in the record, any finding by the Court of Claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts. But the rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special Act; and, in such a case, where an appeal lies and is taken to this court, under section 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts.

The judgment and decree of the Court of Claims is reversed and the case is remanded to that court, with directions to proceed in it according to law and in conformity with the opinion of this court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 244.

Ex Parte: [696]

JOHN A. MASON.

(See S. C., 15 Otto, 696-701.)

Habeas corpus *to review courts-martial—assault upon prisoner, by soldier—extent of punishment.*

1. If this court may issue a writ of *habeas corpus* to review the judgments of courts-martial (upon which question this court withholds its decision), there can be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court could, under the law, pronounce.

2. An assault by a soldier on duty, with intent to kill a prisoner confined in a jail over which he was standing guard, is a military offense, and where the proper steps were not taken to have him proceeded against by the civil authorities, the court-martial had jurisdiction to try him.

3. When the act charged is actually a crime against society which is punishable by imprisonment in the penitentiary, a court-martial is authorized to inflict that kind of punishment, and in addition to such imprisonment, it may subject the offender to a dishonorable discharge from the army and a forfeiture of his pay and allowances.

[No. 16, Orig.]

Argued Apr. 26, 1882. Decided May 8, 1882.

PETITION for writs of *habeas corpus* and *certiorari.*

The case is stated by the court.

Mr. **James M. Lyddy,** for petitioner.

Mr. **Asa Bird Gardner,** for respondent.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a petition for a writ of *habeas corpus* to release Mason, the petitioner, from confine- [697] ment in the Albany penitentiary under a sentence by a general court-martial. The facts are these:

Mason was a sergeant in Battery B of the Second Regiment of Artillery, in the Army of the United States. He was tried by a general court-martial on the charge of violating the 62d Article of War, in that "Having been ordered with his battery from Washington Barracks for guard duty at the United States Jail, in the City of Washington, D. C., and having arrived at said jail for said duty," he "did thereupon, with intent to kill Charles J. Guiteau, a prisoner then confined under the authority of the United States in said jail, willfully and maliciously discharge his musket, loaded with ball cartridge, at said Guiteau through a window of said jail into a cell then occupied by the said Guiteau." Upon a trial duly had he was found guilty of the charge according to the specification, and sentenced "To be dishonorably discharged from the service of the United States, with the loss of all pay and allowances * * * due and to become due to him, and then to be confined at hard labor in such penitentiary as the proper authorities may direct, for eight years." The Albany Penitentiary was designated in due

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form as the place of confinement under this sentence.

A question which presents itself at the outset is whether this court has jurisdiction to issue such a writ as is asked, inasmuch as it has no power to review the judgments of courts-martial. Upon this question there is not entire unanimity of opinion among the members of the court, and we purposely withhold any decision at this time in respect to it. We all agree, however, that if a writ might issue there could be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court could, under the law, pronounce.

The 62d Article of War, under which Mason was tried, is as follows:

"All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison or a field officers' court-martial according to the nature and degree of the offense, and punished at the discretion of the court." [698]

The offense charged in this case was clearly one to the prejudice of good order and military discipline.

The offender was a soldier in the Army of the United States. As such, according to the specifications of the charge made against him, he was ordered on guard duty at the United States jail, in Washington and, while on duty, he willfully and maliciously discharged his musket, with intent to kill a prisoner confined in the jail, under the authority of the United States. The *gravamen* of the military offense is, that while standing guard as a soldier over a jail in which a prisoner was confined, the accused willfully and maliciously attempted to kill the prisoner. Shooting, with intent to kill, is a civil crime, but shooting by a soldier of the army standing guard over a prison, with intent to kill a prisoner confined therein, is not only a crime against society, but an atrocious breach of military discipline. While the prisoner who was shot at was not himself connected with the military service, the soldier who fired the shot was on military duty at the time, and the shooting was in direct violation of the orders under which he was acting. It follows that the crime charged and for which the trial was had was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard.

In our opinion, the 58th and 59th Articles of War have no application to the case. The 58th is as follows:

"In time of war, insurrection or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory or district in which such offense may have been committed."

The object and purpose of this article were elaborately considered in *Coleman* v. *Tennessee*, 97 U. S., 509 [XXIV., 1118]. As it is to operate only in time of war, it neither adds to nor takes from the powers which courts-martial have under the 62d Article in time of peace. [699]

Artice 59 is as follows:

"When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."

It is not pretended that any application was ever made under this Article for the surrender of Mason to the civil authorities for trial. So far as appears, the person injured by the offense committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial, he can be again tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction.

It is objected that the sentence is in excess of what the law allows. The 97th Article of War is as follows:

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory or district in which such offense may be committed, or by the common law, as the same exists in such State, Territory or district, subject such convict to such imprisonment." [700]

Under this Article, when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true, when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear, a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in

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a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged. The 62d Article provides that the offender, when convicted, shall be punished at the discretion of the court, and the 97th Article does no more than prohibit the court from sentencing to imprisonment in a penitentiary in cases where, if the trial had been had for the same act in the civil courts, that could not be done.

It is also claimed that the sentence is in excess of the jurisdiction of the court, because in addition to imprisonment in the penitentiary for the full term allowed by the laws of the District of Columbia for the offense of an assault with intent to kill, it subjects the offender to a dishonorable discharge from the army and a forfeiture of his pay and allowances. As has already been said, under the 62d Article the punishment is to be at the discretion of the court. The 97th Article only limits this discretion as to imprisonment in the penitentiary, and it has been nowhere provided that the punishment may not in other respects be greater than the civil courts could inflict.

"Cases arising in the land or naval forces" are expressly excepted from the operation of the Fifth Amendment of the Constitution, which [701] provides that "No person shall be held to answer a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The limitation as to "actual service in time of war or public danger" relates only to the militia. *Dynes* v. *Hoover*. 20 How., 65 [61 U. S., XV., 838].

It follows that the rule must be discharged; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[703] VERNON K. STEVENSON ET AL., *Appts*.

v.

TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

(See S. C., 15 Otto, 703-709.)

Purchaser at execution sale, priority of—creditor's lien.

1. In Texas, the purchaser at a judicial sale on execution acquires a title superior to that of a prior mortgagee where, at the time of the levy of the execution, the plaintiff in the execution had no notice of the prior mortgage which was then unrecorded.
2. The lien acquired by a creditor without notice, by the judgment and levy of execution, is superior to the unrecorded mortgage, and a purchaser under the execution, with notice, is entitled to all the rights of the creditor.

[No. 23.]

Argued Apr. 17, 1882. Decided May 8, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

The case is stated by the court.

Messrs. **William S. Herndon, Anthony Q. Keasbey,** for appellants.

Messrs. **Walter D. Davidge, James Lowndes** and *John C. Brown*, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

In the view which we have taken of this case, it becomes necessary to decide but a single question. The facts necessary to its determination may be summed up, as follows:

The Texas and Pacific Railway Company is a Corporation created by Acts of Congress, for the [704] purpose of constructing, maintaining and operating a line of railway, from a point at or near Marshall, in Harrison County, Texas, by way of El Paso, to the Pacific Ocean. By the terms of its charter, it was authorized to purchase the stock, land grants, franchises and appurtenances of, and consolidate on such terms as might be agreed on, with any railroad companies, theretofore chartered by congressional, state or territorial authority, on the route prescribed, but not with any competing company; and thereupon all such interests and rights should vest in the Texas and Pacific Railway Company, the latter assuming any indebtedness of such companies, as they might agree, and the consolidation and purchase not impairing any lien which might exist thereon.

The Southern Pacific Railroad Company was a corporation of the State of Texas, and being thereunto duly authorized, became consolidated with the Texas and Pacific Railway Company, on March 21, 1872, the latter becoming thereby the purchaser, in consideration of $3,000,000 paid to the former, of all its property, rights and franchises.

The Southern Pacific Railroad Company, which made this sale to and became consolidated with the Texas and Pacific Railway Company, was the successor in law of the Texas Western Railroad Company, in the following manner:

The original company was chartered in 1852 to construct a railroad from a suitable point on the eastern boundary of the State, to El Paso on the Rio Grande.

In 1856, its name was changed by the Legislature of Texas, to that of the Southern Pacific Railroad Company.

Prior to September, 1859, this company had completed twenty-five miles of road, west from Marshall, and had earned, it is claimed, about 256,000 acres of land, granted to it by the State, but having become insolvent, it was sold under execution upon a judgment at law, on September 6, 1859, to R. V. Richardson.

This sale to Richardson was made under the provisions of the 5th section of the Act of February 7, 1853, Paschal's Digest. article 4912, which is as follows:

"The road-bed, track, franchise and chartered rights and privileges of any railroad company in this State, shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the [705] same; but the said road-bed, track, franchise and chartered powers and privileges shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or

NOTE.—*Judgments, to what extent a lien on land.* See *note* to Savage v. Best, 44 U. S. (3 How.), 111.

Lien of judgments, how suspended or lost; territorial extent of. See *note* to Rankin v. Scott, 25 U. S. (12 Wheat.), 177.

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purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue of the general laws of the State; and the said purchaser or purchasers, and their associates, shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent, as if they were the original corporators of said company; and shall have power to construct, complete, equip, and work the road, upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of this State."

As authorized by this law, Richardson and his associates re-organized the Southern Pacific Railroad Company by the creation of a new capital stock, the largest part of which was subscribed and owned by Richardson himself and Jeptha Fowlkes, and the election of a board of directors and officers, as provided by their by-laws, on October 3, 1859.

On August 25, 1860, the Southern Pacific Railroad Company, as thus re-organized, executed two mortgages to R. V. Richardson and Vernon K. Stevenson as trustees, which were acknowledged September 10, and proved in New York before a Texas commissioner September 12, 1860.

One of these mortgages was to secure a proposed issue of bonds, to the amount of $25,000,000, for purposes of construction and other necessary expenses, payable January 1, 1883, with interest at the rate of 7 per cent per annum, and covered all the property of the company, including its land grant from the State. The other covers one million acres of the land grant, to be selected by the company for sale, to meet the accruing interest on the same bonds.

These mortgages were recorded in Harrison County, Texas, on March 1, 1861.

The complainants claim to be holders for value of about two hundred of the bonds secured by these mortgages, out of about three hundred and fifty, which was the whole number issued, and their bills were filed for the foreclosure of the mortgages, and the sale of the mortgaged [706] property, for the payment of the amount due on account of the bonds and accrued interest.

Against the lien of these mortgages the appellee, the Texas and Pacific Railway Company, claims a paramount title. This title rests, primarily, upon a judicial sale of the same property and rights, then vested in the Southern Pacific Railroad Company, as it existed under the Richardson re-organization. The sale was made by the sheriff of Harrison County, Texas, on September 3, 1861, to H. S. Fulkerson, of the whole road and franchises of the Company, as an entirety, under the provisions of article 4912, Paschal's Digest, *supra*, upon executions levied under four judgments at law, as follows:

1. Judgment in favor of J. W. Saunders, April 6, 1859, for $300.09 and costs, $74.00, in all $374.09, upon which was credited before sale $277, leaving due a balance of $97.09. Execution was levied under this judgment August 9, 1860.

2. Judgment in favor of Henry Wickland, September 26, 1860, for $3,500 and costs. Execution issued and levied July 11, 1861.

3. Judgment in favor of Amelia Swanson, October 27, 1860, for $2,480.50 and costs. Execution issued November 22, 1860; levied January 3, 1861.

4. Judgment in favor of J. B. Williamson, October, 23, 1860, for $1,000 and costs. Execution issued November 23, 1860; levied January 3, 1861.

The purchase money at the sheriff's sale to Fulkerson was $7,500, which was just enough to satisfy the executions.

It will be observed that of these judgments the first alone was recovered prior to the date of the execution and delivery of the mortgages, but all of them were recovered, and executions issued upon the first, third and fourth and levied before March 1, 1861, the date of the record of the mortgages.

There is no claim and no proof that at the time of the levy of these executions the plaintiffs in the judgments had any notice of the existence of the then unrecorded mortgages to Richardson and Stevenson; and it is conclusively established as the law of Texas that the purchaser at such sale acquires a title superior to that of such mortgagees.

Article 4988, Paschal's Digest, reads as follows: "All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance, or for a term of years; and deeds of settlement upon marriage, whether land, slaves, money, or other personal thing, shall be settled or covenanted to be left or paid, at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and lodged with the clerk, to be recorded according to the directions of this Act; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall nevertheless be valid and binding." [707]

And article 4994, Paschal's Digest, provides that "Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this Act mentioned, which shall be acknowledged, proved or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid, as to all subsequent purchasers from the time when such instrument shall be so acknowledged, proved or certified, and delivered to such clerk to be recorded, and from that time only."

These statutory provisions were construed by the Supreme Court of Texas in the case of *Grace* v. *Wade*, 45 Tex., 522. In that case the only question was, "Whether a vendee of land, who claims title by an unrecorded deed or bond, for title; or the purchaser, with notice of such deed or bond at execution sale on a judgment against the vendor, where the creditor has no notice of the title or claim of the vendee, at the date of the levy of the execution, has the better title?" The court affirmed the two propositions, that the lien acquired by a creditor without notice by the judgment and levy of execution is superior to the unrecorded deed of the vendee, and that a purchaser under the execution, with notice, is en-

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titled to all the rights of the creditor. The court said: "Now, if the unrecorded instrument cannot take effect, but is void as to creditors, it is [708] absurd to say that the creditor's lien does not bind the land to which it applies, or that it cannot be enforced by the sale of the land so bound by it for the payment of the debt, just as if no such instrument existed. And it would be equally as absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the land sold in open market, when once secured, can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satisfaction and discharge of his demand, except by becoming himself the purchaser."

The case of *Price* v. *Cole*, 35 Tex., 461, to the contrary, is directly overruled, the court saying: "We conclude by saying, that while the judgment in *Price* v. *Cole* [35 Tex., 461], is not warranted by the previous decisions in our own courts or elsewhere, and must therefore be overruled, we adhere to and sustain the doctrine to be deduced from the case of *Ayres* v. *Duprey*, 27 Tex., 593, that one who purchases at sheriff's sale may claim protection under the statute as a purchaser, even when the judgment creditor himself is not, as creditor, within its protection, and *vice versa*. While he cannot bring himself within its provisions in the character of a purchaser, he or others subrogated to his rights may be entitled to its protection as creditor."

This decision has been followed and approved in *Grimes* v. *Hobson*, 46 Tex., 416; *Catlin* v. *Bennett*, 47 Tex., 165; and *Mainwarring* v. *Templeman*, 51 Tex., 205, and we adopt it, as the law of Texas, applicable to and governing the present case.

It follows that the legal title of the Texas and Pacific Railway Company, derived through its purchase from and consolidation with the Southern Pacific Railroad Company, which duly succeeded to the title of Fulkerson, is superior to that of the mortgages under and through which the appellants claim as holders of the bonds. It is urged, however, on behalf of the appellants, that the circumstances of the execution sale to Fulkerson were such as to fasten upon him a constructive trust in their favor as creditors of the Company; but, in our opinion, if that were conceded, there is no ground apparent on the record upon which that equity could be successfully asserted against the Texas [709] and Pacific Railway Company, a purchaser for valuable consideration, having notice, it may be, of the existence of the mortgages, to Richardson and Stevenson, but without notice of any facts which in equity would subordinate to them the rights acquired by the sheriff's sale to Fulkerson.

For these reasons the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[718] BENJAMIN F. FLANDERS, Deputy-General Agent of the TREASURY DEPARTMENT OF THE UNITED STATES, *Plff. in Err.*,

v.

ABRAHAM B. SEELYE.

(See S. C., 15 Otto, 718-727.)

Louisiana law of warranty—presumption.

1. In Louisiana, under the Civil Code, the neglect of a person sued in failing to call in his warrantor to defend the suit, has no other effect, in a suit afterwards brought by such person against his warrantor, than to cause the warranty to cease, on proof, in the latter suit, that the warrantor had sufficient grounds or means of defense to have obtained a judgment in his favor, of which he could not avail himself for want of having been called on.

2. The existence of the defense being proved, the presumption is that it would have been proved and availed of, in the former suit, by the warrantor, if he had been called in warranty or been notified of the bringing of the suit.

[No. 258.]

Submitted Apr. 3, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.* for plaintiff in error.

Mr. **H. N. Ogden,** for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought in the Sixth District [719] Court for the Parish of Orleans, in the State of Louisiana, by Seelye, the defendant in error, against Flanders, the plaintiff in error, in November 1871, and was removed by *certiorari*, before issue joined, into the Circuit Court for the District of Louisiana. In his petition, filed in the state court, Seelye claimed to recover from Flanders the sum of $6,233.61. with legal interest from judicial demand. The grounds of the claim, as set forth in the petition, were, that, in March, 1866, 178 bales of cotton were delivered at the pickery of the firm of Seelye & Atwood, in New Orleans, of which firm Seelye was a member, under the instructions of Flanders, who was at that time acting supervisor and special agent of the Treasury Department of the United States; that the firm received from Flanders, at the same time, a written order to pay the charges on the cotton, amounting to $5,907.45; that the firm, in obedience to those instructions, received the cotton and paid the charges; that, in April, 1866, the firm received an order from one Burbridge, supervisor and special agent of the Treasury Department of the United States, directing them to deliver said cotton to one Harrison, but to retain the charges and expenses on said cotton; that, in obedience to said order, the firm delivered the cotton to Harrison, and received from him the amount of charges originally paid by them and their own charges for storage of the cotton, being in all $6,063.81; that the amount was paid by Harrison under protest, and he subsequently sued Seelye and another person, as composing the firm, and recovered a judgment against them in the Circuit Court of the United States, for $4,661.45, with interest from June, 1866, to July, 1871, and costs, making in all $5,891.44; that that sum was paid by Seelye to Harrison in satisfaction

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of that judgment; that he also paid as costs of court in that suit $92, and for counsel fees in defending the suit $250; and that these sums, with the amount of the judgment, make the $6,233.61. The petition alleges that all that Seelye so did in the premises, and all that he was so finally compelled to pay, was the direct result of the written orders received by the firm from Flanders, and claims that Flanders is bound to re- [720] imburse to him the entire amount so paid, either in direct obedience to his orders or as the necessary result of that obedience. In January, 1872, Flanders filed exceptions in the circuit court to the petition, which were overruled by the court in April, 1872. These exceptions raised the questions that Seelye had no right of action alone, and that the court had no jurisdiction. After the overruling of these exceptions, Flanders filed a pleading combining exceptions with an answer. The exceptions related to the defenses of prescription and want of jurisdiction. The answer set up that when Seelye received the cotton from Flanders and paid the charges, he knew that Flanders had taken the cotton in his said official capacity, acting under the Act of Congress approved March 12, 1863, 12 Stat. at L., 820; that the charges directed by Flanders to be paid were a legal charge on the cotton under the provisions of said Act; that they were refunded by Harrison to the firm as an admitted claim; that Harrison then brought the said suit to recover back the amount he had so allowed and paid; that the defendants in said suit set up in their answer therein that they received the cotton from Flanders, acting as such special agent, and paid by his orders the charges thereon, and the same were lawful charges thereon, and were acquiesced in by Harrison and re-imbursed to them; that after judgment in the suit the defendants in it sued out a writ of error to this court, which writ they failed to prosecute, and it was therefore, dismissed by this court in December, 1870; that in July, 1871, they voluntarily paid the judgment; that the defense set up in the suit was, if founded in fact, a good and valid one, and their neglect to prosecute it cannot be allowed to operate to the prejudice of Flanders; that the circuit court had no jurisdiction in the suit; that Seelye lost all recourse against Flanders, if any he ever had, by reason of his failure to plead to the jurisdiction of the circuit court in the suit, and because of his failure to prosecute said writ of error; and that Flanders is not responsible for the costs incurred by Seelye in the suit or for his counsel fees therein. The answer concluded with these words: "And for all such matters and things in plaintiff's petition contained as are not herein replied to, respondent for answer pleads the general issue, and prays to be hence dis- [721] missed with costs." The suit was tried by a jury in the circuit court in April 1873. On the 19th of March, 1874, the court set aside the verdict and granted a new trial. On the 27th of March, 1874, an exception was filed, alleging, as a peremptory exception to the petition and the action, that the allegations in the petition, if true, as pleaded, are insufficient in law to entitle the plaintiff to any recovery against the defendant, "For the same do not disclose any cause of action in behalf of said plaintiff against said defendant." The suit remained in this condition for nearly five years when, in January 1879, the defendant pleaded all applicable prescriptions as a peremptory exception. Then the parties filed a written stipulation agreeing to waive the intervention of a jury, and submitting the cause to the court "upon the issues of fact as well as of law." The findings and the judgment of the circuit court, are embraced in one paper. It states that the court, "Having heard the evidence and the arguments of counsel, overrules all the exceptions taken by defendant to the plaintiff's petition." It then specially finds the facts, and awards judgment to the plaintiff for $6,233.61, with interest and costs. It also grants a certificate of probable cause, for the seizure of the cotton and for all the doings of Flanders in the premises, as deputy general agent of the Treasury Department of the United States, and directs that no execution shall issue on the judgment. There is no bill of exceptions in the record. As the findings are special, the review by this court may extend to the determination of the sufficiency of the facts found to support the judgment.

The following facts were found by the circuit court, only those being stated here which are material in the view we take of the case, although some others were found: the 178 bales of cotton were seized while in the possession of Harrison, under color of the Act of March 12, 1863, 12 Stat. at L., 820, by an assistant special agent of the Treasury Department of the United States. The cotton was shipped from Shreveport, consigned to one Burbridge, supervising special agent of the Treasury Department, at New Orleans, subject to charges and freight amounting to $5,907.45. Seelye's firm received the cotton from a steamboat and gave a receipt for it, which stated that they held it subject to [722] the order of the Collector of the Port of New Orleans. The firm paid said amount of freight and charges to the steamboat, on an order signed by Flanders, as deputy general agent, reading thus: "Seelye & Atwood's press will pay the within charges and hold the amount against the cotton." This was in March, 1866. On the 18th of April, 1866, Flanders, as such deputy general agent of the Treasury Department, issued an order to Burbridge, as such supervising special agent, directing him to release the cotton to Harrison, on his giving a bond in $25,000, to save harmless the Government of the United States for seizure, detention or damage. On the same day Harrison executed his bond in that amount, in which he bound himself to save harmless the seizing agent and all other agents and officers of the Treasury Department, and also the Government of the United States, on account of the seizure and detention of the cotton and on account of any damages they might sustain by reason of said seizure. On the next day Burbridge issued an order, directing Seelye & Atwood to deliver the cotton to Harrison, on his paying all proper and legitimate charges, including the charges for transportation to Shreveport. The firm delivered the cotton to Harrison on the 23d of April, and he then paid them the $5,907.45, claimed as charges on the cotton, and they gave him a receipt for it, which stated that he reserved "All rights or claims not relinquished under order of the treasury agent who released said cotton to him." Shortly afterwards Harrison sued the

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firm in a court of the State to recover back the amount so paid by him. The firm removed the suit into the Circuit Court of the United States, and filed their answer averring that they received the cotton by order of Flanders, special agent of the Treasury Department, and by his order paid the charges on the same, which were re-imbursed to them by Harrison on the delivery of the cotton, and that the same were lawful charges on the cotton, acquiesced in and paid by Harrison on the delivery of the cotton, and further pleading a general denial. In February, 1868, a final judgment was rendered, in favor of Harrison against the firm, for $4,661.45, from which the firm sued out a writ of error to this court, which was dismissed, with costs, by this court, for want of prosecution, in December, 1870. In July, 1871, Seelye paid, out of [723] his individual means, to Harrison, $5,891.44, in full satisfaction of said judgment and costs. In defending the suit Seelye paid, from his individual means, $92 costs and $250 counsel fees.

As grounds for reversing the judgment below, the counsel for the plaintiff in error contends, in his brief, that there is nothing to show that Harrison could have regained the cotton except upon the very conditions which he accepted, namely: that he would receive it at New Orleans and would defray all charges connected with its having been carried thither; that except the redelivery of the cotton, the record shows nothing to defeat the presumption, arising from the time and place of the seizure, that the cotton was properly captured and might have been held; that the judgment obtained by Harrison was *res inter alios*, as against Flanders; that Seelye cannot recover in this suit without showing that he could not have successfully resisted the suit by Harrison; that the agreement of Harrison to hold the United States harmless on account of the seizure, required him to repay to the United States any money which they had already paid upon that account, as well as any which they might thereafter pay because of obligations then existing; that the question, in its present form, is not affected by the fact that Harrison paid Seelye without waiting for the United States to pay Seelye and then demand repayment from Harrison; that, in point of right, Harrison, by paying Seelye, paid his own debt; that his accepting from Burbridge an order for the cotton, on paying all proper and legitimate charges, including the charges for transportation to Shreveport, is a contemporaneous interpretation of what was meant by saving the United States and their agents harmless; that, originally, Seelye & Atwood might have recovered from the United States or, perhaps, from Flanders, for the freight and charges paid on the order of Flanders, but the acceptance of payment from Harrison, who acted in the matter substantially as an agent of the United States, ended the original obligation; and that no subsequent transaction between Harrison and Seelye, whether voluntary or involuntary on the part of Seelye, could revive such obligation, or impose any new duty in the premises on either the United States or Flanders.

It is manifest that the judgment rendered [724] against Flanders in the present suit is founded on the fact that Harrison recovered his judgment against the firm, and that Seelye paid to Harrison the amount of that judgment, and also paid the expenses of defending the suit in which the judgment was recovered. The petition shows this, and so do the findings and judgment. The amount claimed by Seelye in the petition and the amount recovered by him, is the exact amount of the Harrison judgment recovered July 13, 1871, and of the costs and counsel fees paid by Seelye. Prior to the bringing of the suit by Harrison, the firm had been fully re-imbursed by Harrison for the charges which they had paid and incurred on the order of Flanders. Although the judgment in that suit, and the payment by Seelye of its amount and of the expenses attendant on the defense of the suit, are the sole ground of the claim made in the present suit and the sole foundation of the judgment recovered in it, yet Flanders was neither a party nor a privy to the suit brought by Harrison, and it is not alleged in the petition nor found as a fact by the circuit court, that Flanders, or the Government of the United States or any officer or agent of the government, had any notice of the bringing or pendency of the suit brought by Harrison, or any opportunity to assume or control or take part in its defense. The recovery in the present suit is, by the operation of the certificate of probable cause granted by the circuit court, under section 989 of the Revised Statutes, made substantially a recovery against the government, to be paid out of the Treasury. All relationship between Seelye and his firm on one side, and the government and its agents and officers on the other side, ceased entirely when the firm was re-imbursed by Harrison and the cotton was delivered to Harrison. The firm held the cotton, by authority of Flanders, as security for the charges which they paid by his order, and they held it as security also for their storage charges. They parted with the cotton because all their claims against it were re-imbursed; and with the closing of that transaction their agency and that of Seelye as representing the government, or Flanders, in any capacity, in connection with the transaction, entirely ceased. Neither the firm nor Seelye had any such representative capacity in defending the suit brought by Harrison. There is not, in the petition, any allegation of any fact which tends to show that the [725] government or Flanders is bound by the judgment in the suit brought by Harrison, nor is any such fact stated in the findings made by the circuit court. The petition merely alleges that all that Seelye did, and all that he was compelled to pay, was the direct result of the orders of Flanders, and that Flanders is bound to re-imburse to him the amount so paid either in direct obedience to his orders or as the necessary result of that obedience. The payment of the Harrison judgment was, however, in no proper sense, the result of any obedience to any order of Flanders. Not only is there not in the special findings any finding of any facts which tend to make the Harrison judgment of any binding or probative force as against Flanders, as a party or a privy to it; but the finding in regard to the Harrison bond is conclusive to show that no judgment in favor of Harrison against Seelye & Atwood can be used to aid in establishing the present claim against Flanders and the government, unless it appears affirmatively that they had notice of the Harrison suit and an opportunity to defend it. The answer of Flanders in the present suit alleges that the charges which

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he directed Seelye & Atwood to pay were legal charges on the cotton under the Act of Congress referred to, and that they were refunded to them by Harrison, "as an admitted claim." It also alleges, that Seelye & Atwood, in their answer in the Harrison suit, averred that the charges which they paid were lawful charges on the cotton and were acquiesced in by Harrison and reimbursed to them. Proof of such admission of and acquiescence in the claim, by Harrison, was, therefore, admissible, and was made by proving that Harrison gave at the time the bond referred to. In view of the provisions of that bond, it is difficult to see why, as against Flanders, Harrison is not debarred from saying that he did not admit and acquiesce in the lawfulness and propriety of the charges which he paid to Seelye & Atwood. His bond was given to save harmless the government and the agents of the Treasury Department, "On account of the seizure and detention of said cotton, and on account of any damages they might sustain by reason of said seizure." The charges re-imbursed to Seelye & Atwood by Harrison grew directly out of the seizure and detention of the cotton, and any [726] amount which might be paid on the recovery in the present suit would be covered by the terms of the bond. The bond covers not merely damages for taking and keeping the cotton, but the agreement is to hold the government and Flanders harmless on account of the seizure and detention. This covers the expenses attending the removal and keeping of the cotton. The Act of 1863 expressly makes the expenses of transporting and disposing of captured property a charge upon its proceeds even where a claimant establishes a right to such proceeds. In any event, therefore, before the recovery by Harrison against Seelye & Atwood can be made the foundation of a cause of action or a recovery by Seelye against Flanders, it must appear that he had a fair opportunity to set up, as against such recovery by Harrison, the said matters of defense to his claim. Proving, in the present suit, the giving of the bond by Harrison was proving that Flanders had a good defense to the suit brought by Harrison against Seelye. Such proof, having been given, must be regarded as having been properly given, under the answer. It was proof of the admission by Harrison of the claim of Seelye & Atwood, as is alleged in the answer. It does not appear that Flanders had any notice of the Harrison suit, or any opportunity to make therein the defense referred to. It was necessary that it should so appear, the existence of such defense being established. It is not for Flanders to show that he had no notice, by proving a negative.

Our attention has been called to the provisions of articles 378, 379, 382 and 388 of the Code of Practice of Louisiana, as having a bearing on this case. They are as follows: "Art. 378. The obligation which one contracts to defend another in some action which may be instituted against him is termed *warranty*. The one who has contracted this obligation is called the warrantor." "Art. 379. * * * Personal warranty is that which takes place in personal actions; it arises from the obligation which one has contracted to pay the whole or a part of a debt, due by another to a third person." "Art. 382. The defendant wishing to call one in warranty, may, in his answer, pray the court to decree against his warrantor the same judgment which may be rendered against him on the principal action; such prayer will be considered as a demand in warranty." "Art. 388. The defendant, though [727] he has not called his warrantor to defend the suit brought against him, does not lose on that account his action in warranty, unless the warrantor prove that he had means for defending the action, which were not used owing to the defendant having failed to call him in warranty, or having neglected to apprise him of the suit having been brought." In *Sterling* v. *Fusilier*, 7 Mart. (La.), 442, the Supreme Court of Louisiana, in reference to provisions of the Civil Code like those just cited, says, that the neglect of a person sued in failing to call in his warrantor to defend the suit, has no other effect, in a suit afterwards brought by such person against his warrantor, than to cause the warranty to cease, on proof, in the latter suit, that the warrantor had sufficient grounds or means of defense to have obtained a judgment in his favor of which he could not avail himself for want of having been called on; and that that species of defense must be pleaded and proved. Assuming that Flanders was still a warrantor to Seelye & Atwood when the suit by Harrison against that firm was brought, we are of opinion, for the reasons before stated, that it appears in this case that Flanders had a sufficient defense to have obtained a judgment in his favor if he had been called in warranty in the Harrison suit, or been notified of the bringing of that suit, and that he could not avail himself of that defense in the Harrison suit, for the reason that he was not called in warranty or notified of the bringing of that suit. That defense is not only proved in this suit but is sufficiently pleaded, as is before shown. There is nothing in article 388 of the Code which requires Flanders to prove anything more than he has proved in this suit. The existence of the defense being proved, the presumption is that it would have been proved and availed of, in the Harrison suit, by Flanders, if he had been called in warranty or been notified of the bringing of the suit, and it is then for the plaintiff in this suit to rebut such presumption, which has not been done.

We are of opinion that the judgment of the Circuit Court must be reversed and the cause be remanded to that court, with directions to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Field**, *Mr. Justice* **Bradley** and *Mr. Justice* **Woods.**

COUNTY COURT OF RALLS COUNTY [733]
AND the JUDGES Thereof, *Plffs. in Errr.*,
v.
UNITED STATES, *ex rel.* JOSEPH M. DOUGLASS.

(See S. C., 15 Otto, 732-739.)

Defenses to judgment—authority to levy tax—invalid laws—second levy.

1. In a suit to require, by *mandamus*, a county court to pay the amount due on a judgment against

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the court out of moneys in its treasury, or, if that could not be done, to raise the necessary means by a special tax, defenses cannot be set up which relate to the validity of the coupons on which the judgment had been obtained, as obligations of the county.

2. When authority is granted to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, it has the power to levy taxes sufficient to meet such debt at maturity, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention.

3. Laws passed since the securities were issued, taking away from the county court the power to levy taxes necessary to meet their payment, are invalid; and the circuit court has authority by *mandamus* to require the county court to do all that the law, when the securities were issued, required it to do, to raise the means to pay the judgment.

4. The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defense to such suit.

[No. 277.]

Argued Apr. 13, 1882. Decided May 8, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Mr. **John H. Overall,** for defendant in error.

Mr. **Henry A. Cunningham,** for plaintiffs in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 29 of the Act to incorporate the St. Louis and Keokuk Railroad Company, approved February 16, 1857, is as follows:

[734] "It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company; and it may invest its funds in the stock of said company and issue the bonds of said county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive the dividends."

Under this authority the County Court of Ralls County subscribed $200,000 to the stock of the company and, during the years 1870 and 1871, issued bonds of the county to pay the subscription. Default having been made in the payment of coupons for interest attached to some of these bonds, Douglass, the relator, brought suit against the county, in the Circuit Court of the United States for the Eastern District of Missouri, for their recovery and, on the 16th of October, 1878, obtained judgment for $17,158.43. That judgment was affirmed here at the present Term in the case of *Ralls Co.* v. *Douglass* [*ante*, 957].

After the judgment was rendered in the circuit court, the present suit was begun to require the County Court, by *mandamus*, to pay the amount due out of moneys in the treasury of the county; or, if that could not be done, to raise the necessary means by the levy of a special tax. In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defenses, it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company and, as such, entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri in *State* v. *Rainey*, 12 Cent. L. J., 587 [74 Mo., 229], and the principle on which the decision rests is elementary.

The present suit is in the nature of an execution, and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defenses that can be considered are those which may be presented in the proper course of judicial pro- [735] cedure against the collection of valid coupons, executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt.

This brings us to consider what may be done to enforce the judgment. The County Court insists that its power of taxation is limited to the levy of an annual tax of one half of one per cent on the taxable property in the county, and that as this tax has always been levied at the times provided by law, the duty of the court in the premises has been fully performed. The relator, on the contrary, claims that the limit of one half of one per cent only applies to taxes to defray the general expenses of the county, and that if the fund produced in this way is not sufficient to enable the county to pay his judgment, an additional tax must be levied and collected specifically for that purpose. This presents the real controversy we have to settle.

When the charter of the St. Louis and Keokuk Railroad Company was granted; when the subscription was made to its stock by the County Court, and when the bonds to pay the subscription were put out, there were limitations on the powers of the County Court for the levy of taxes to defray the expenses of the county which confined the tax for a year to one half of one per cent or less. The question we have to consider is not whether this power has been reduced below that limit, but whether the limit is applicable to the obligation of the county created under the authority of the particular charter now in question.

It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is nec- [736] essarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation. This general doctrine has been so many times announced, that it cannot be necessary now to do more than

NOTE.—Mandamus *to compel city, town or county to levy tax to pay bonds or interest on bonds.* See *note* to The Mayor v. U. S., 76 U. S., XIX., 704.

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refer to *Loan Asso.* v. *Topeka*, 20 Wall., 655 [87 U. S., XXII., 455], where the opinion was given through *Mr. Justice* Miller, and *U. S.* v. *New Orleans*, 98 U. S., 381 [XXV., 225], in which *Mr. Justice* Field, speaking for the entire court, went elaborately over the whole subject. In *U. S.* v. *Macon Co.*, 99 U. S., 589 [XXV., 332], there was a special limitation on the power to tax coupled with the authority to contract, and because the Legislature saw fit to say how much of a tax in addition to that otherwise provided might be levied to meet the new and extraordinary obligation which was contemplated, it was held that a prohibition against anything more was necessarily to be inferred.

In the present case there is no such special limitation. The defense rests entirely on the power to tax to "defray the expenses of the county," which it has always been the policy of the State to restrict. The County Court was, however, not only authorized to issue bonds, but to "take proper steps to protect the interest *and credit* of the county." It would seem as though nothing more was needed. As the commercial credit of the county, in respect to its negotiable bonds, could only be protected under ordinary circumstances by the prompt payment of both principal and interest, at maturity, and there is nothing to show that payment was to be made in any other way than through taxation, it necessarily follows that power to tax to meet the payment was one of the essential elements of the power to protect the credit. If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other. Here it seems to have been understood by the Legislature that the ordinary taxes might not be enough to enable the county to meet the extraordinary obligation that was to be incurred, [737] and so without placing any restriction on the amount to be raised, the County Court was expressly empowered to do *all* that was necessary to protect the credit of the county. We cannot agree to the position taken by the counsel for the plaintiff in error, that this power was exhausted when the bonds were issued to pay the subscription. The faith of the county pledged by the subscription was kept when the bonds were put out, but only by transferring the credit to be protected from the subscription to the bonds. The subscription was paid by the bonds, but the obligation to pay the bonds, principal and interest, when they matured, was legally substituted.

We have been referred to many instances in which statutes were passed authorizing special taxes to pay bonds which had long before been issued under original authority like that contained in the present charter, but this does not, in our opinion, change the case. Such legislation seems to have been procured out of abundant caution, but in none of the numerous cases in the Missouri reports, to which our attention has been directed, is it anywhere said that the requisite tax could not have been levied but for such legislation. In *State* v. *Dallas Co.*, 72 Mo., 330, and some other cases before, it was held that such a provision as that contained in the charter of the St. Louis and Keokuk Railroad Company, now under consideration, was repealable, but none of the Judges whose decisions have been published intimate, even, that if there had been no repeal there could not be a tax. It has been many times decided that county courts in Missouri, while acting as the governing bodies of their counties, which are nothing more than political subdivisions of the State, have no implied powers. Authority must be conferred on them by law to act, or they cannot act at all. This is not peculiar to the county officials of Missouri. The same principle applies to all municipal organizations in all the States, and in this respect it matters but little whether the organization exists as a full corporation or a *quasi* corporation. The point is that all such organizations for local government, by whatever name they may be called, have only such powers as the Legislatures of their respective States see fit to delegate to them. But all powers that are delegated may be exercised, in any proper way and at all proper times.

This makes it unnecessary to consider whether [738] the power of taxation given by the general railroad laws, in force when these bonds were made, can be invoked in aid of the relator. It is enough that we find sufficient power in the charter of the company itself, without looking elsewhere. We ought, perhaps, to say, however that the remark in the opinion in *U. S.* v. *Macon Co.*, 99 U. S., 591 [XXV., 333], to the effect that the power of taxation granted by the general railroad law was confined to subscriptions authorized by those laws, should be construed as made in a case where a special limitation on the power to tax was contained in the charter which authorized the issue of the bonds then in question, and that it was only necessary to decide that the railroad laws did not enlarge that power. The language there used may be broader than on further consideration we shall be willing to agree to. That case is authority on this point only to the extent it was necessary then to decide.

It follows from this that all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well settled rule of decision in this court, the circuit court had authority, by *mandamus*, to require the County Court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent. The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defense to this suit. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county and not the creditors. The writ as issued was properly in the alternative to pay from the money already raised, or levy a tax to raise more. It will be time enough to consider whether the command of the writ that the court *cause the tax to be collected* is in excess of the requirements of the law, when the Justices of the court are called on to show why they have not obeyed the order. The same may be said of the order to draw the warrant on the treasurer. As at present informed we see no

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[739] irregularity in anything that has been done.

The judgment of the Circuit Court is affirmed and the cause remanded, with leave to the court to make such changes in the order originally entered as may have become necessary by reason of the time that has elapsed since the writ of error was brought.

County Court of Ralls County and the Judges thereof, Plffs. in Err., v. *United States, ex rel. Charles L. George.* No. 278.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

This judgment is affirmed on the authority of *County Court of Ralls County* v. *United States, ex rel. Douglass*, just decided, from which it cannot be distinguished. The cause remanded, with an order like that in No. 277.

County Court of Lincoln County and the Judges thereof, Plffs. in Err., v. *United States, ex rel. Vespasian Warner.* No. 279.

Same v. *United States, ex rel. Henry C. McPike.* No. 280.

Same v. *United States ex rel. Joseph M. Douglass.* No. 281.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These cases differ only from that of *County Court of Ralls County* v. *United States, ex rel. Douglass*, just decided [*ante*, 1220] in one particular. Here the bonds were not actually delivered until after the statute requiring registration went into effect, though they were in the hands of the agent for delivery before. It is contended that on this account no special tax can be levied for their payment, notwithstanding the judgment that has been recovered upon them. In our opinion, this is a defense that cannot be taken advantage of after judgment. As has been said in the *Ralls County Case*, it was conclusively settled by the judgment, which this proceeding is to carry into execution, that the coupons sued on were binding obligations of the county, duly created under the authority of law, and as such are entitled to payment out of any fund that can lawfully be created for that purpose.

The judgments are affirmed and the several causes remanded, with orders like that in No. 277.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 122.

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[751] MADAME CELESTINE CARITE ET AL.,
Appts.,
v.
MADAME FÉLICITÉ TROTOT.

(See S. C., 15 Otto, 751-765.)

Louisiana Code as to mortgage sales—Two Third Act—valid conveyance—judgment of separation—insolvency—Parish Court.

1. By the Civil Code of Louisiana, the seizure and sale, by virtue of executory process under a mortgage, are not affected by the existence of subsequent mortgages, the owners of which are not made parties to the proceeding.

2. The security of the latter, in that event, is transferred to the proceeds of the sale, and their protection consists in the requirement that no sale shall take place for less than two thirds of the value of the mortgaged property, as appraised for that purpose.

3. A mortgagee had the right to subject to judicial sale the property, held as security for his debt, and become its purchaser at two thirds of its appraised value, and convey it to the mortgagor's wife, and the mortgagor's creditors are not thereby injured.

4. A Louisiana judgment of separation of property, obtained by a wife, unattended by publication, is not *ipso facto* void, nor is it void because no execution was issued on the judgment where there was no recovery of moneys, except costs, adjudged against the husband.

5. That the husband was in embarrassed circumstances and insolvent, was sufficient ground for a decree of separation of property by the Code of that State.

6. The Parish Court had jurisdiction to entertain a suit for separation of property.

[No. 276.]

Argued Apr. 12, 1882. Decided May 3, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **Thomas J. Semmes**, for appellants.

Messrs. **Joseph P. Hornor** and **W. S. Benedict**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

[752] This is a bill in equity filed by the appellee to foreclose a mortgage and for the sale of the mortgaged property, consisting principally of a sugar plantation with its improvements, in Louisiana. The property originally belonged to Jean Baptiste Clement, a citizen of France, who, and also his agent and attorney in fact, Antoine C. Tremoulet, by whom he was represented in the transactions in question, are parties to the suit, and appellants, with Madame Celestine Carite and her children. Clement, through Tremoulet, sold the property September 22, 1869, to the firm of Copponex & Co., composed of Copponex, Moulor & Carite, the husband of Madame Celestine Carite, for $55,000, of which $10,000 was paid in cash; $6,764 was an incumbrance in favor of the Citizens' Bank of Louisiana, assumed by the purchasers; and the remainder, evidenced by their four promissory notes for $9,559 each, payable respectively, September 1, 1870, 1871, 1872 and 1873, with interest at 8 per cent per annum, amounting to $38,236, was secured by mortgage upon the premises.

On January 11, 1871, Copponex sold his interest in the firm business and this property to his partners for $10,000 cash, they assuming the debts of the partnership, and on December 30, 1872, Moulor sold his interest to Carite for $55,000, in addition to the assumption by the latter of the incumbrance in favor of the Citizens' Bank, amounting then to $5,573, and three unpaid notes of $9,559 each, with interest, still due to Tremoulet as agent for Clement. For the purchase money, agreed to be paid to Moulor, Carite gave eleven promissory notes of $5,000 each, three payable in one year from date, two in two years, two in three years, two in four years, and two in five years, secured by mortgage upon the plantation.

The appellee claims to be the holder and

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owner of five of these notes, the first three and the second two, bearing interest at the rate of 8 per cent per annum, which being overdue [753] and unpaid, she claims the right to foreclose the mortgage given by Carite to Moulor, and sell the mortgaged premises for the payment of the amount due thereon; and that her mortgage and the debt secured thereby is the first and best lien upon the mortgaged premises, except what may still appear to be due to the Citizens' Bank.

As the grounds of this priority, she alleges that on February 10, 1873, Casimir Carite, conspiring with his wife, Madame Celestine Carite, and Tremoulet, induced the latter to institute proceedings, by executory process, in the name of Clement, in the Circuit Court of the United States for the District of Louisiana, upon the mortgage and notes given by Copponex & Co., for the seizure and sale of the mortgaged premises, and caused the same to be sold to Tremoulet for a price less than the amount due to the Citizens' Bank, and the amount claimed to be due to Clement, and the title was conveyed to him accordingly; that said proceedings and sale were simulated and fraudulent, the possession of Casimir Carite not being disturbed thereby, and the object being to defraud the appellee and his other creditors; and that, in point of fact, the debt originally due from Copponex & Co. to Clement, secured by the mortgage to the latter, was at the date of said proceedings and sale, paid and extinguished; that, in further prosecution of the same conspiracy and fraud, Casimir Carite induced and caused his wife, on February 13, 1873, to file a petition in the Parish Court of St. James, in Louisiana, representing that she was married to Casimir Carite on April 23, 1863, and that there existed between them a community of acquests and gains, which allegations it is admitted were true; but further setting forth that her husband had become hopelessly involved in debt, which, it is alleged, was false, and prayed for a judgment of separation of property from her husband; that a pretended defense was made by Casimir Carite to his wife's petition, on which judgment was rendered in favor of the wife, separating her in property from him, and dissolving the community of acquests and gains theretofore existing between them; that this proceeding was fraudulent and void, because it was voluntary and by consent, because the wife had no claim against the husband and alleged none, and assigned no reason, in law, why such separation should be decreed, because there was no derangement of the affairs of the husband, and no allegation that the wife could conduct the business of the plantation better than [754] her husband, the latter in point of fact having conducted the same after said decree, as before; and because said judgment was never published as required by law, nor ever executed in any manner by the issue of any writ of execution; that, in further pursuance of said conspiracy and fraud, Tremoulet, on May 22, 1873, pretending to act as agent for Clement, made a pretended sale to Madame Celestine Carite of the said plantation and property for a sum sufficient to cover the amount alleged to be due to Clement, although that debt or a large part of it had previously been satisfied and extinguished.

The prayer of the bill was that the proceedings under which Tremoulet purchased the premises for Clement, the decree of separation of property from her husband on behalf of Madame Carite, and the sale and conveyance to her of the plantation by Clement, be adjudged to be void and be set aside, and that the complainants' mortgage and debt be charged as the first lien on the same, and be satisfied by a sale thereof for that purpose.

The final decree of the circuit court was substantially in accordance with the prayer of the bill, declaring that the sale to Tremoulet for Clement, and by him to Madame Carite, be set aside and annulled as simulated and illegal; that the judgment of separation of property between Madame Carite and her husband is null and void for want of publication; that the plantation and property be recognized as belonging to the community formerly subsisting between Carite and his wife, as it did before said simulated sales were made; and that the plaintiff below had established the mortgage under which she claims, as a valid and subsisting lien upon the property to secure the sum of $25,000, with interest at the rate of 8 per cent per annum from December 30, 1872, for which, if not paid within sixty days, it was ordered that the premises be sold.

The object of the present appeal is to review this decree.

The first question it presents relates to the validity and effect of the judicial proceedings taken by Tremoulet, which resulted in the sale of the property to Clement.

Against its validity it is asserted in the bill of the appellee that the debt to Clement, at the time of the sale, had been extinguished, and that the proceeding, therefore, was a mere pretext and cover for an intended fraud. But the evidence leaves no doubt that this was an unfounded suspicion. It is abundantly established [755] by the proof that, at the time of the sale, there was still due on account of the debt to the Citizens' Bank, assumed by Carite, $5,573, and that two of the notes for $9,559 each, on one of which interest was running from January 15, 1873, and on the other from its date, September 1, 1869, were overdue and unpaid; and that another note of the same series, and of the same amount, was held by Tremoulet for Clement, falling due September 1, 1873; the whole amounting to $34,895.40.

The proceeding itself, though summary, was familiar in practice in such cases, and strictly according to the law of Louisiana, and if not voidable on other grounds, had the effect to vest in Clement an absolute title to the property, free of all subsequent incumbrances. It was executory process which is authorized (Code of Practice, art. 732) "When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor;" which is the case (art. 733) "When it is passed before a notary public or other officer fulfilling the same functions in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage." By article 3,360, C. C., it is declared "That the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already acquired to another creditor;" so that a seizure and sale, by virtue

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of executory process under a mortgage, is not affected by the existence of subsequent mortgages, the owners of which are not made parties to the proceeding. The security of the latter, in that event, is transferred to the proceeds of the sale, and their protection consists in the requirement that no sale shall take place for less than two thirds of the value of the mortgaged property, as appraised for that purpose. This effect is expressly declared by Code of Practice, articles 707, 708. *Hart* v. *Foley*, 1 Rob. (La.), 882. It follows, therefore, that unless the judicial sale to Clement is a nullity, the mortgage lien of the appellee is itself extinct, though the mortgage debt will survive as a personal obligation.

It is contended, however, by the appellee, that this sale to Clement was void, as a fraud [756] upon her rights as a creditor of Carite, because taken in connection with the subsequent sale to Madame Carite, it was intended to defeat the claims of the creditors of Carite, and to place this property beyond their reach.

The circumstances attending the transaction are these: Carite was, undoubtedly, insolvent. Two of the notes, held by Tremoulet for Clement, had become due, and remained unpaid. He was in arrears on account of interest. He was embarrassed by other debts, for which he was pressed, so as seriously to threaten the uninterrupted prosecution of the business of the plantation. The notes were placed by Tremoulet in the hands of an attorney for collection. The necessary formal preliminary demand of payment was made. A negotiation was begun by Carite for an extension of time, the latter suggesting that he could make such an arrangement with all his creditors. Tremoulet told him he had no desire to acquire the property, as he represented Clement, who resided in France, and who did not wish a sugar plantation, and would not know what to do with one if he had it; but that he would feel obliged to act upon his matured notes if the consequence of non-action was to be the seizure of the mortgaged property by other creditors, and the consequent diminution of the security. The upshot was a promise by Tremoulet to Carite to abstain from a seizure under the mortgage until Carite should have time to arrange with his creditors, provided no seizure was made by other parties.

What efforts Carite made to obtain from other creditors the desired indulgence do not appear, but if any were made they did not succeed. On February 7, 1878, Tremoulet, in a letter to Clement, reported that, by an arrangement with Carite, the latter would make no objection to the sale and seizure of the immovables, and would rather facilitate the execution thereof, on condition that Tremoulet would oblige himself, buying them in Clement's name, to resell the same to his wife, from whom he was separated in property, at a price that would cover all that was due to Clement, including interest, costs and attorney's fees, provided that nobody should put in a higher bid than that amount, the accrued interest to be paid in cash. The terms, he added, were not then fixed, but might be [757] soon, and said that he should not be too exacting, knowing that Carite continues the plantation at his own expense; that everything predicted a good crop and, notwithstanding the depreciation in the value of real estate, the plantation was adequate security for the mortgage to Clement.

On February 10, 1878, Neal and McIntyre, citizens of Kentucky, commenced a proceeding in the circuit court for the sequestration of ten mules on the plantation, on which they claimed to have a lien and privilege as vendors, for the unpaid purchase money, amounting to $2,150, and a writ was accordingly issued, directed to the marshal, and requiring him to seize and take possession of them.

On the same day, in consequence of this proceeding, Tremoulet caused executory process to issue in behalf of Clement, and seized the mortgaged property, including the mules sought to be subjected to their writ by Neal and McIntyre, which were claimed as subject to the Clement mortgage, because they had become immovables by destination. The plantation and property were taken into possession by the marshal, though, Carite was permitted to remain for the purpose of attending to the growing crop, and was advertised for sale. Mr. Edward D. White, Tremoulet's attorney, testified as follows:

"During the seizure and before the sale quite a number of the creditors of Moulor, Coppenex & Co. and Carite called on me. To all of them I stated exactly what had been said to Carite; that is, that the seizure of the property had been provoked by the threatened removal of the immovables by destination; that the property was not desired by the plaintiff; that he had no intention of bidding on it beyond the amount of his claim, with costs and charges; that Carite had been told if he could successfully arrange with his creditors, indulgence would be given and proceedings stopped."

On March 3, Tremoulet reported by letter to Clement, the fact of seizure and that the property was advertised for sale, saying: "I am waiting for Mr. Carite to make our arrangements for the sale that I shall make to his wife." The sale was had on April 5, and on April 10, Tremoulet reported that fact by letter to his principal, saying: "In case the plantation would have brought wherewith to cover your debt, capital and interest, it was understood that I would not buy the same in, but would receive [758] the amount due you. * * * Now, I am awaiting Mr. Carite to sell the plantation back to his wife on the terms agreed upon. It is well understood that you shall have to bear no costs, the sale having been made only for the purpose of relieving the plantation from the embarrassments in which Moulor had placed it." He then proceeds to explain the reasons for the resale as proposed, and said: "Another important reason is, that I could not do you justice in charging myself with the administration of this property at the distance where I am." * * * "In one word, I preferred in your own interest to resell the plantation, taking all possible precautions, rather than to work the same for your account, notwithstanding the fine prospect of the present crop." On May 26 he reports the conclusion of his negotiations with Madame Carite and the resale to her, giving the details of the purchase. He says: "I have been obliged to accept from Mrs. Carite a smaller amount than the amount agreed upon in order to make the sale of the immovables, and this in your interest; it was preferable to accept these terms than to keep the plantation and work the same for your

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account, at the present price of labor. In case I should have refused to effect an understanding with Mrs. Carite, I would not have found a purchaser that would have taken the plantation on the same terms."

We see nothing in the circumstances of the case, as disclosed, in this record, to impeach the good faith or affect the validity of this transaction. Clement had the unquestionable right to subject the property, held as security for his debt to judicial sale and become its purchaser at two thirds of its appraised value. No one was wronged by such a procedure, although it had the effect to disappoint every other creditor. The sale was open and public, and there is no suggestion of any attempt to prevent the property from bringing the best price. Every subsequent incumbrancer had the right and the opportunity to bid upon it and, if he chose, to buy it for himself. If he neglected or declined to do so, it must be assumed that he made his decision in the pursuit of his own interests. The title acquired by Clement was indefeasible and absolute. No right of redemption remained and it was clothed with no trust. He could dispose of it at his [759] own will. If he chose so to do, he was entirely free to convey it, on any consideration he approved, to Madame Carite; as much so, if she was legally capable of receiving title, as to any other person. And what he could lawfully do with the property, after it had become his own, he could agree to do in advance. In all this there is nothing whatever that touches the right of any creditor of Carite. It is a lawful end, pursued by lawful means; and if any loss has accrued to others, by reason of it, it is because the property was not sufficient to pay all for which it had been pledged, or because those interested in the security voluntarily sacrificed their own interests. In neither event is there ground for complaint against others. The course of Tremoulet seems to have been dictated, as it was justified, by a wise regard to the interests of his absent principal. It was a mere measure of self-protection, to disembarrass the property of debt, to protect it against disorganization and waste, justly apprehended as the result of seizures by subsequent mortgages and lienholders, or which might have accrued, if Carite, driven to that necessity, had surrendered it to the delays and expenses of administration and sale, in a court of bankruptcy. We cannot perceive, in the acquisition and disposition of the title by Clement, either an intention or a tendency to impede or defeat the just rights of the appellee, or any other of the creditors of Carite.

It is further contended, however, by the appellee, that the decree of separation of property between Carite and his wife is void; that the latter having no capacity, therefore, to receive and hold the title to this plantation as separate property, it inured to the community as before, and was replaced subject to the previously existing liens in their order. It is not conceded that this consequence would result if it should be adjudged that the community had not been interrupted, for it is claimed that the sale to Clement having necessarily destroyed the lien of all subsequent incumbrances, a conveyance to Carite himself, although it would have made the property liable to the pre-existing debts of the community, it could be subjected only by process, open to general creditors by means of judgment and levy under executions. However this may be, we proceed to examine the grounds on which it is urged that the decree of separation of property rendered on the petition of Madame [760] Carite should be annulled.

The first of these, and the one on which the circuit court based its decree, is that the judgment was never advertised, in violation of article 2429, C. C., which provides that:

"The separation of property obtained by the wife must be published three times in the public newspapers, at the farthest within three months after the judgment which ordered the same."

The fact that no such publication was made is not denied, but its omission, it is insisted, does not avoid the judgment. And such is the construction put upon this article by the Supreme Court of Louisiana. In *Turnbull* v. *Davis*, 1 Mart. (L. N. S.), 568, that court said:

"It is true that, by law, publication of a separation of property between husband and wife is expressly required; but the pain of nullity is not denounced against a neglect of such publication. It is not a prohibitive regulation, which might, in some instances, imply nullity. We are, therefore, of opinion that a judgment of separation, unattended by publication, is not *ipso facto* void; but if such laches afford any ground for annulling and declaring it inefficient, it can only be decreed on showing fraud and injury to third parties as a consequence of omitting the publication. In the present case, there is no positive testimony that the defendants have suffered injury, resulting from the neglect to publish the decree of separation; nor can such injury be legally presumed from the whole tenor of the evidence."

The authority of this case was recognized and the decision followed in *Raiford* v. *Thorn*, 15 La. Ann., 83, decided in 1860.

We have examined the cases of *Spires* v. *McKelvy*, 23 La. Ann., 571; *Levistones* v. *Brady*, 11 La. Ann., 697; *Bostwick* v. *Gasquet*, 11 La., 537; and *Heyman* v. *Sheriff, etc.*, 27 La. Ann., 195, to which we have been referred by counsel for the appellee, and do not find in them anything which overrules the decisions cited above, or that is inconsistent with them.

It is next objected that the judgment of separation of property is null, because in violation of article 2428, Civil Code, it was not executed. That article reads as follows:

"The separation of property, although decreed by a court of justice, is null if it has not been executed by the payment of the rights and claims of the wife, made to appear by an au- [761] thentic act, as far as the estate of the husband can reach them, or at least by a *bona fide* non-interrupted suit to obtain payment."

It will be observed that the language of this article differs from that of article 2429, just considered, in expressly denouncing nullity as a consequence of non-compliance with its requirements. But the nature of the execution must have relation to the nature of the judgment, and the terms of the article manifestly refer to cases where the judgment involves the transfer of property or the payment of money, and not the mere question of the future *status* of the wife, and her right, independent of her husband, separately to acquire property in her own right. This is the view taken by the Supreme Court of

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Louisiana in the case of *Jones* v. *Morgan*, 6 La. Ann., 632, in which it is said that "The article of the Code requiring execution to issue within a limited time after the decree of separation, under a pain of nullity, is only applicable to cases in which there is a judgment against the husband for a sum of money. This precaution is, no doubt, intended for the protection of those with whom the husband is in the habit of dealing. But, in this case, the object of the action was not to recover moneys of the wife; it was simply to put an end to the community and then to secure to the wife and her children the future earnings she might derive from her untiring industry."

In such a case the intent and effect of the judgment is merely to confer a right upon the wife to act, in respect to her future acquisitions, the fruits of her own industry, and the savings of her own economy, separate from her husband, as though she were *sole;* and the right becomes fixed and vested by its actual exercise. *Holmes* v. *Barbin*, 18 La. Ann., 474.

This is what is meant by what the Supreme Court of Louisiana say in *Muse* v. *Yarborough*, 11 La., 583, that "It is not the mere judgment of separation which renders the parties separate of property. The judgment recognizes the necessity for separation and judicially authorizes it; but if not followed by a *bona fide* execution, it produces no effects, even between the parties."

It is only when the judgment of separation of property is founded on a cause, which results [762] in the establishment of some claim against the husband's estate susceptible of execution, by some authentic act, or by judicial process to enforce it, that a neglect or failure to insist upon its execution is deemed conclusive evidence that it is the intention of the parties not to dissolve the community. The law in such cases for the protection of creditors, otherwise liable to be misled, annuls the unexecuted judgment of separation. *Handy* v. *Sterling*, 1 La. Ann., 308; *Longino* v. *Blackstone*, 4 La. Ann.. 513; *Succession of Hearing*, 28 La. Ann., 151.

The costs of the suit, which Carite was condemned to pay, can hardly be considered any part of the judgment of separation of property, of which execution is required, and hence the failure to attempt their collection cannot affect its validity. In all other respects, Madame Carite assumed and exercised the right conferred upon her by the judgment, dissolving the community between her husband and herself, by the very transaction in question, acquiring the title by purchase from the owner, of a plantation, which she has since administered, not less in the lifetime of her husband than after his death, so far as the record discloses, in her own name and right, and has thus, in the meaning of the law, executed the judgment of separation.

It is next objected that this judgment is void for want of any legal ground to justify it. The grounds on which it was prayed for, in the wife's petition, are thus stated:

"Petitioner further represents that, owing to a series of crushing misfortunes, her husband, who was heretofore possessed of considerable means and property, has lately become hopelessly involved in debt, for the satisfaction of which all his property is now being attached, seized and disposed of by his numerous creditors. That all of her husband's property will not be sufficient to pay and satisfy the enormous debt which is due by him. That, in consequence of the above recited circumstances, petitioner fears and believes that the earnings of her separate industry may be seized by her husband's creditors and thus be lost to herself and children; for which reasons petitioner is desirous of being separated in property from her said husband."

This petition was filed February 13, 1878. This was after the writ of sequestration issued by Neal and McIntyre had been executed, and [763] after the seizure made by Tremoulet under his executory process in behalf of Clement.

Article 2425, Civil Code, which it is alleged regulates this proceeding, reads as follows:

"The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

An authoritative construction of this article is found in *Wolf* v. *Lowry*. 10 La. Ann., 273. The court there say: "In *Davock* v. *Darcy*, 6 Rob. (La), 342, it was held that the right of the wife to a separation of property was not limited to the cases mentioned in article 2399 (now 2425) of the Code, and that she might obtain a separation of property when the habits and circumstances of her husband rendered it necessary to preserve for her family the earnings from her industry or talents. The same question was afterwards decided in the case of *Penn* v. *Crockett*, 7 La. Ann., 348, when the right of the wife, which had been made the basis of the action of separation of property, was the value of a slave which had been given to the wife during marriage, and had been alienated by the husband. The court re-affirmed the former decision and held that in case of the derangement of the husband's affairs, this was sufficient to authorize a judgment of separation of property in favor of the wife. After these repeated decisions we must consider the law as settled, the question being one of the construction of statutory laws, involving no fundamental principles."

This doctrine, that a claim for money or property on the part of the wife, is not necessary to support a judgment of separation, was re-affirmed in *Mock* v. *Kennedy*, 11 La. Ann., 527, where the court say: "It is sufficient for a married woman to prove that she had the skill and industry to earn a separate livelihood, which she had exercised, whether as a seamstress, teacher, milliner, or (as in the case at the bar) a shopkeeper, is not material; she is entitled, under the humane spirit of our jurisprudence, upon proof of this fact, accompanied by proof of the insolvent condition of her husband's affairs, to call upon the court, by a judgment of separa- [764] tion, to protect the fruits and earnings of her separate industry from being squandered by her husband or seized by his creditors."

In *Webb* v. *Bell*, 24 La. Ann, 75, a judgment of separation, on appeal, was affirmed, notwithstanding the petition of the wife was opposed by the husband, on the ground that there was neither allegation nor proof that the plaintiff had, at the time of the institution of the suit, a separate trade or industry of any kind from

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which she was deriving revenue or means inuring to her own benefit. The sole ground of the judgment was the embarrassed circumstances of the husband's affairs. The court said: "The purpose sought by separation of property and dissolution of community in this case seems to be to enable the wife, by the use of her own limited means and those she might obtain through her relatives, to earn for herself and child a support, without having her earnings fall into the community."

The same point was expressly decided in *Meyer* v. *Smith*, 24 La. Ann., 153, where the only allegation in the petition, on which the judgment was based, was that, "Owing to the insolvency of her husband, it becomes necessary for the preservation of her acquisitions, the education, maintenance and support of herself and family, that a dissolution of the community, etc., be decreed."

It is also objected to the judgment of separation that it was by consent and, therefore, null, as equivalent to a voluntary separation, made void by article 2427, Civil Code, and that it is not supported by evidence.

Both these objections are met by the case of *Powlis* v. *Cook*, 28 La Ann., 546. In that case, as in this, the husband consented that the case might be fixed and tried, but, as the court then said, "that did not make it a consent judgment." And as to the proof of the husband's insolvency, the court then say, what may be adopted here, it "is manifest from this litigation, if not otherwise shown."

It is also urged that the Parish Court had no jurisdiction to entertain a suit for separation of property. No adjudication to this effect by the Supreme Court of Louisiana is referred to by counsel; while, on the contrary, it is tacitly assumed to exist, in the case of *Willis* v. *Ward*, 30 La. Ann., 1282. Article 87 of the Constitution of the State, of 1868, then in force, prescribes that Parish Courts "Shall have exclusive jurisdiction in original suits in all cases where the amount in dispute exceeds one hundred dollars and does not exceed five hundred dollars." The only limitation of the jurisdiction is as to the amount of money involved in the controversy, and has no relation to the question, where the suit is not prosecuted for the recovery of money or money's worth.

[765]

It is finally urged that the property in controversy belongs to the community, notwithstanding the judgment of separation. But, on the admission of the validity of the sale to Clement, and of the judgment of separation of property, it is impossible to maintain this position; for, on that supposition, Clement had the right to dispose of the title to Madame Carite, precisely as to any other person capable of purchasing. The sale was made on credit, except as to the small sum of $1,243.73, and it does not help the contention of the counsel for the appellee on this point to admit what he says: "That every cent that Mrs. Carite has paid on account of the purchase of the plantation was simply a part of the profits of the plantation itself;" because it is not claimed that any portion of those profits accrued prior to the time when all the interest which Carite, or any of his creditors subsequent in right to Clement, ever had in the property, had been devested by the sale to him. Consequently, it is fully shown that the community had no claim to any of the consideration paid by Madame Carite for her purchase.

Upon these grounds, the Circuit Court should have dismissed the bill of the appellee for want of equity, and for this error *the decree is reversed and the cause remanded, with directions to render a decree dismissing the bill; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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